

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

JANUARY 18, 2005

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, DC 20001, pursuant to notice, at 10:00 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 A. MANN II	Board Member, NCPC

ZONING COMMISSION MEMBERS PRESENT:

GREGORY JEFFRIES	Commissioner
ANTHONY HOOD	Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Zoning Specialist
JOHN NYARKU	Office of Zoning

D.C. OFFICE OF ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ

This transcript constitutes the minutes from the Public Hearing held on January 18, 2005.

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ADVISORY NEIGHBORHOOD COMMISSION 2A

APPEAL NO. 17249 - ANC-2A:257

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P R O C E E D I N G S

Time: 10:00 a.m.

CHAIRPERSON GRIFFIS: Let me call to order our 18 January '05 Public Hearing of the Board of Zoning Adjustment for the District of Columbia. My name is Geoff Griffis. I am Chairperson. Joining me today is the Vice Chair, Ms. Miller; also our esteemed colleague, Mr. Etherly is on his way out and will be joining us. Representing the National Capital Planning Commission is Mr. Mann, and representing the Zoning Commission this morning is Mr. Jeffries.

As I indicated earlier, but for everyone's information, copies of today's agenda are available for you. They are located on the wall where you entered into the hearing room. You can pick it up and see where you are on our chronology.

Of course, it is very important to understand that all proceedings before the Board of Zoning Adjustment are recorded. As I have indicated, we are creating an official transcript from the court reporter who is sitting to my right. We are also being broadcast live from the Office of Zoning.

So to that, of course, I would ask for those people that are just joining us and those that were here to turn off cellphones and beepers so you

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1 don't disrupt people giving testimony and our
2 transmission.

3 Also, very important, when coming forward
4 to speak to the Board, if you are planning on giving
5 testimony, you will need to fill out two witness
6 cards. Witness cards are available at the table where
7 you entered into and also on the table in front of us
8 where you will be giving your testimony. Those two
9 cards go to the recorder prior to coming forward, so
10 that we can, obviously, give you credit and spell your
11 name correctly on the official transcript.

12 The order of procedure for special
13 exceptions and variances: First, we hear from the
14 applicant, the presentation of their case. Second, we
15 will hear from any government agencies attendant to
16 the application, such as the Office of Planning or
17 Department of Transportation.

18 Third, we will hear from the Advisory
19 Neighborhood Commission. Fourth, we will hear from
20 persons or parties in support of the application.
21 Fifth would be persons or parties in opposition to any
22 application, and sixth, finally we will have closing
23 remarks or rebuttal witnesses by the applicant.

24 Cross-examination of witnesses is
25 permitted by the applicant and parties within a case.

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1 The ANC within which the property is located is
2 automatically a part in the case and, therefore, will
3 be able to conduct cross-examination. Nothing
4 prohibits this Board from putting reasonable
5 restrictions on any cross-examination, and I will get
6 into that in detail, if needed, as we go forward.

7 The record will be closed at the
8 conclusion of each case and hearing, except for any
9 material that this Board requests, and we will be very
10 specific as to what is to be submitted and when it is
11 to be submitted into the Office of Zoning.

12 It is an important aspect to understand.
13 What we are creating before us today is the official
14 record. That official record is what the Board will
15 deliberate on and decide on. Therefore, anything that
16 you want us to know should be in the record in writing
17 or should be given in testimony today.

18 We will not, obviously, research or go
19 beyond the scope of what we are looking at or
20 presented with today. So it is very important that
21 you get it on the record or/and that you submit the
22 information that this Board requires and requests and
23 at the time that we require it to be submitted.

24 The Sunshine Act requires that this Board
25 conducts its public hearings in the open and before

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1 the public. This Board may enter into executive
2 session, both during or after a hearing on a case, and
3 that would be for deliberating on a case or reviewing
4 the record. It would also be in accordance with the
5 Sunshine Act and our rules, regulations and
6 procedures.

7 The Board will now, I believe, consider
8 any preliminary matters. Actually, no. What I am
9 going to ask is, if anyone is here thinking about
10 testifying or is prepared to give testimony, I am
11 going to ask you to stand and give your attention to
12 Ms. Bailey who I introduced earlier, and I will say a
13 very good morning again to. She is going to
14 administer the oath. If you wouldn't mind, please
15 stand.

16 MS. BAILEY: Please raise your right hand.

17 (WITNESSES SWORN.)

18 CHAIRPERSON GRIFFIS: Good. Thank you all
19 very much. Now I think we can consider any
20 preliminary matters. Preliminary matters are those
21 which relate to whether a case will or should be heard
22 today, such as requests for postponements,
23 continuances or withdrawals, or whether and adequate
24 notice has been provided.

25 If you are not prepared to go forward with

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1 a case that is on our schedule this morning or you
2 believe that the Board should not go forward with a
3 case on its schedule this morning, I would ask that
4 you come forward and have a seat at the table as an
5 indication of having a preliminary matter.

6 Let me say a very good morning to you, Ms.
7 Bailey, again and ask if you are aware of any
8 preliminary matters for the Board.

9 MS. BAILEY: Mr. Chairman, good morning,
10 and to everyone good morning. I apologize for my
11 raspy voice.

12 There is, and the gentleman is seated at
13 the table, Application Number 17272. This is a
14 representative for Clarence E. Kettler, and I
15 understand that he does have a request for a
16 postponement.

17 CHAIRPERSON GRIFFIS: Excellent. Thank
18 you. If you wouldn't mind, turn your microphone on
19 and just state your name and address for the record.

20 MR. SCALA: Josh Scala, 555 12th Street.

21 CHAIRPERSON GRIFFIS: A very good morning.
22 And you, sir?

23 MR. STRAUSS: Paul Strauss, Mr. Griffis.
24 I represent Mr. Kettler's brand new nextdoor neighbor,
25 Mr. Scala's office.

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1 CHAIRPERSON GRIFFIS: Brand new?

2 MR. STRAUSS: He closed on the property
3 just last week.

4 CHAIRPERSON GRIFFIS: Oh, I see. Okay.
5 And the preliminary matter is?

6 MR. SCALA: We are requesting a
7 continuance at the request of the neighbor who, I
8 understand, has not had time for --

9 CHAIRPERSON GRIFFIS: Mr. Strauss?

10 MR. STRAUSS: That is correct. Mr. Stein
11 is here. He would like some time to discuss the
12 matter with his neighbor, perhaps work out -- At the
13 time this application went forward, he was not the
14 property owner, but as of this point he is the
15 property owner, and --

16 CHAIRPERSON GRIFFIS: Interesting. What
17 is the issue?

18 MR. STRAUSS: He has some concerns. This
19 thing, if it goes forward, would have a potential
20 adverse impact on his property but, in the interest of
21 being a good neighbor and wanting to develop a
22 reasonable relationship with the man who lives
23 nextdoor, would like an opportunity to discuss and see
24 if some things can be worked out.

25 CHAIRPERSON GRIFFIS: Good. We are all

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1 about neighborly interests and getting along.

2 You have no difficulty with continuing
3 that?

4 MR. SCALA: No.

5 CHAIRPERSON GRIFFIS: Are you prepared to
6 go forward today?

7 MR. SCALA: We are, but we have no problem
8 with continuing it. That's fine.

9 CHAIRPERSON GRIFFIS: Okay. I have one
10 concern. Of course, this does somewhat disrupt the
11 Board's schedule in terms of, boy, we were really
12 getting excited about getting a lot accomplished this
13 morning. But being that there's some discussion that
14 needs to have happened, I have no objection to
15 continuing this, and we can set a new date for it,
16 unless others object strongly, in which case we will
17 call it right now and make them do it. No, okay.
18 Very well.

19 MR. STRAUSS: We appreciate it. Let me
20 just say that, obviously, with the holiday yesterday
21 and the unfortunate circumstances of Friday, we were
22 unable to bring this to the Board's attention prior to
23 today.

24 CHAIRPERSON GRIFFIS: Well, now would be
25 when we would take it up anyway. So here it is.

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1 Ms. Bailey, do we have a date?

2 MS. BAILEY: March 22, Mr. Chairman.

3 CHAIRPERSON GRIFFIS: The 22nd in the
4 morning?

5 MS. BAILEY: Yes.

6 CHAIRPERSON GRIFFIS: Oh, I don't know --
7 Are we scheduled on the 22nd? That date won't work.
8 29 March? Any difficulty with that?

9 MR. SCALA: No problem.

10 MR. STRAUSS: I ask the Board's indulgence
11 while my client consults his calendar.

12 That would be fine, Mr. Griffis. We thank
13 the Board for its consideration.

14 CHAIRPERSON GRIFFIS: Excellent. During
15 the morning hearing. Our hearings start at 9:30,
16 normally. Good. We will see you on the 29th.
17 Hopefully, everything will work out fine. Let's make
18 sure there is enough communication, show some
19 drawings, and then, you know, maybe bring muffins in
20 on the 29th, and we'll get through this.

21 MR. STRAUSS: Thank you very much.

22 CHAIRPERSON GRIFFIS: Homemade is what we
23 would expect. Excellent, in which case let's go to
24 the next -- first case in the morning.

25 MS. BAILEY: Application Number 17270 of

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1 Thomas and Kathryn Toggas, pursuant to 11 DCMR 3104.1,
2 for a special exception to allow an addition to an
3 existing single family detached dwelling under Section
4 223, not meeting the side yard requirements in the R-
5 1-B District at premises 3112 Legation Street, N.W.,
6 Square 2293, Lot 835.

7 Mr. Chairman, two quick things, please.
8 The dwelling is a single family detached unit, and
9 there are four requests for party status in opposition
10 to this application, sir.

11 CHAIRPERSON GRIFFIS: Good. Thank you
12 very much. The Board is aware of the fact that there
13 are four parties requesting. Let me just quickly go
14 through the Scott White party request. Are they
15 present? Let's see a hand. Yes? Excellent. Also
16 Moseley? Indeed. Now I have misplaced my other two.
17 How about that? Do we have Dempsey? Indeed. And we
18 have Kelly. Excellent.

19 Board members, let's pick up the first.
20 Let's start with Moseley application, indicating as
21 they are going through that they have serious concern
22 that, if this was approved, that it might set a
23 precedent for future projects in surrounding homes in
24 the area.

25 Actually, let me step back for a quick

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1 moment. Obviously, we have four requests for party
2 status. I want to make sure that everyone is aware of
3 what actual party status means in a case.

4 There are two ways of which one
5 participates in every case before the Board of Zoning
6 Adjustment. This is a public process. There is
7 nothing that we have that could prohibit anybody from
8 coming to speak to the Board, such as a person. A
9 person would provide testimony, and you would be
10 allotted the time that I will set, and we will hear
11 your full testimony.

12 If you are actually granted party status,
13 which is a fairly high threshold to get through, you
14 are a full participant in the case. You are a
15 participant equal with the applicant. So we are going
16 to be asking you to come forward and present an entire
17 case. You are going to be afforded the opportunity to
18 cross-examine witnesses, and you are also going to be
19 saddled with the responsibility of additional
20 information that the Board would require.

21 We often require from applicants any sort
22 of draft findings of facts, conclusions. Sometimes
23 there are legal issues that will need to be briefed.
24 We would require that of all parties in the case.

25 Let me ask just by a show of hands, of

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1 those four requests, is there any of those requests
2 that would actually like to present testimony as a
3 person as opposed to being a party, just come in as a
4 person, basically withdrawing your application for
5 party status, and I will call you up as a person? I
6 see.

7 So we do have four requests for party
8 status, since there was no indication of a withdrawal.

9 The last question on request for party
10 status is, to me, the most critical. That says:
11 Explain how a person's interests will be more
12 significantly, distinctly, or uniquely affected in
13 character or kind by the proposed zoning action than
14 that of other persons in the general public.

15 Board members, let's look right into the
16 first then. I would take up the application of
17 Moseley, party status. It is indicating that they are
18 concerned that this would actually set a precedent and
19 thereby open it up to everybody putting additions on
20 their houses without any sort of review or approval.

21 Frankly, I don't see this rising to any
22 level of being uniquely impacted. I also think that
23 it, in fact, may not be a correct assumption that one
24 special exception would set a precedent, thereby
25 allowing all others in the surrounding area to be

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1 granted or not have to or required to come in for
2 review and approval.

3 Therefore, I would move denial of the
4 party status to the Moseley request at this time, and
5 ask for a second.

6 BOARD MEMBER MANN: Second.

7 CHAIRPERSON GRIFFIS: Thank you, Mr. Mann.

8 Is there further deliberation on it?

9 BOARD MEMBER MANN: I'd just like to say,
10 this sort of thing seems pretty speculative to me. I
11 mean, it opens up, hypothetically, any number of
12 things that could happen down the road that may or may
13 not happen as a consequence of this proposed addition.

14 CHAIRPERSON GRIFFIS: Excellent. I
15 appreciate that, and I think it should be stated, the
16 fact that every application, whether special exception
17 or variance, stands on its own before this Board, and
18 each is taken individually.

19 The requirements for a special exception
20 and a variance will have to be met by each applicant,
21 and there is not necessarily any precedential value
22 with one being granted or not.

23 BOARD MEMBER ETHERLY: Mr. Chair, I would
24 also agree, and would also perhaps like to suggest
25 that, as you noted in your introduction regarding the

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1 party status question, that for this particular party
2 request there would still be the opportunity to
3 provide testimony at the appropriate time during the
4 case, as just testimony in opposition. So that would
5 still be an avenue open for an opportunity to air
6 comments.

7 CHAIRPERSON GRIFFIS: Well said, and that
8 is exactly right. Others?

9 VICE CHAIRPERSON MILLER: I would concur,
10 and I would just say, the regulation that applies here
11 is 3106.3 that talks about considering requests for
12 party status and that the person's interest be more
13 significantly, distinctly or uniquely affected in
14 character or kind by the proposed zoning relief than
15 those of other persons in the general public.

16 I appreciate that they are making the
17 argument that, you know, since they live on this
18 block, that their interests are more affected in
19 character or kind than the whole general public, but I
20 don't think that this regulation really goes to just a
21 concern about precedent on the block, and I think that
22 their concerns can be addressed by their testimony.
23 There is not a need for everyone concerned about
24 precedent to come in and be able to cross-examine the
25 applicant and participate as full party status.

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1 CHAIRPERSON GRIFFIS: Good. Others? We
2 have a motion before us. It has been seconded.

3 VICE CHAIRPERSON MILLER: It's been
4 seconded?

5 CHAIRPERSON GRIFFIS: Yes, it was
6 seconded. I would ask for all those in favor to
7 signify by saying Aye. Opposed?

8 Let's move ahead then. We have the
9 request for party status application from Scott White.
10 Also, I would go to move for denial of the party
11 status application. I would ask for a second.

12 COMMISSIONER JEFFRIES: Second.

13 CHAIRPERSON GRIFFIS: Thank you. In the
14 same vein, as Ms. Miller has pointed to the strict
15 regulation citing, I go to the application that
16 actually people get, Question 6 which relates exactly
17 to the section that has been cited: How significantly
18 and distinctly or uniquely?

19 Mr. Mann's words were well spoken in terms
20 of it's speculative, the concern, and the concern in
21 this request is also that they worry that allowing
22 this special exception might encourage others to add
23 on in this fashion.

24 We are here to hear evidence specifically
25 on a special exception case on a specific piece of

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1 property, and I don't see anything arising in this
2 request that goes to the details of that application.

3 Others? Not hearing any other need for deliberation
4 on this, we have a motion before us. It has been
5 seconded. I would ask for all those in favor to
6 signify by saying Aye. And opposed? Thank you.

7 MS. BAILEY: Mr. Chairman, just so staff
8 can be clear, would you please clarify for me who made
9 the motion and who seconded?

10 CHAIRPERSON GRIFFIS: Now you are calling
11 on my memory. I made the motion. Mr. Mann seconded.

12 MS. BAILEY: Thank you, sir.

13 CHAIRPERSON GRIFFIS: Certainly. Very
14 well, let's move on to Dempsey, Dempsey party status
15 application or request. In noting this, I would in
16 the same fashion move, but to approve the request for
17 party status -- Actually, I am going to table that for
18 a quick moment.

19 I note that the applicant is at the table.

20 If I could have the representative introduce himself
21 for the record.

22 MR. BROWN: Good morning, Mr. Chair.
23 Patrick Brown from Greenstein DeLorme & Luchs on
24 behalf of the applicant.

25 CHAIRPERSON GRIFFIS: Thank you, Mr.

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1 Brown. I imagine, but let me confirm, that you have
2 seen Exhibit Number 25, which is a request for party
3 status by Dempsey. Have you seen this?

4 MR. BROWN: Yes, I have. To make it
5 simple for the Board, I have no objections to their
6 party status.

7 CHAIRPERSON GRIFFIS: Okay. Then let's
8 proceed. I would move approval of request for party
9 status for the Dempsey household, and ask for a
10 second.

11 VICE CHAIRPERSON MILLER: Second.

12 CHAIRPERSON GRIFFIS: Thank you, Ms.
13 Miller. In this application it is fairly clear what
14 the issues are, and it goes directly to the specific
15 application and specifically to the special exception
16 under 223. They are the closest abutting neighbor,
17 and they have concern over the light, air and privacy,
18 critical aspects of the 223 which is why we are here
19 for this application. Others? Further deliberation
20 on the motion?

21 If not, we have a motion before us. It
22 has been seconded. I would ask for all those in favor
23 to signify by saying Aye. Opposed? Very well.

24 Let's move on to Kelly. Mr. Brown,
25 comments?

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1 MR. BROWN: I have no objections, but I
2 think, given the location and the distance from the
3 property, that they come perilously close to not
4 meeting the test. So I would note that for the
5 record.

6 CHAIRPERSON GRIFFIS: Okay. It is,
7 obviously, noted, as you just said it. Let's go then,
8 Board members, to the application. Again, I would
9 move approval of party status for the Kelly household
10 and ask for a second.

11 VICE CHAIRPERSON MILLER: Second.

12 CHAIRPERSON GRIFFIS: Thank you, Ms.
13 Miller. Again, although I think it is to be seen, the
14 case presentation, I think it does rise to the level
15 of party status based on the fact that, although they
16 are not the direct abutting, they have similar issues
17 to that of Dempsey which was just afforded party
18 status.

19 We, obviously, need to show a uniqueness
20 to each granting of party status, and I think that the
21 aspect of the location of the Kelly property is
22 significantly different than the Dempsey's, and so it
23 may well rise to different issues and aspects and,
24 therefore, an undue caution. I think it is
25 appropriate that we grant the party status to this

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1 request. So, others?

2 If there is no further deliberation, then
3 we have a motion before. It has been seconded. I
4 would ask for all in favor to signify by saying Aye.
5 Opposed? Abstaining?

6 Very well. We have two parties in this
7 case in opposition. Is there anything else,
8 preliminary matters, Ms. Bailey, that you are aware of
9 now that we should take up outside of those two that
10 you listed?

11 MS. BAILEY: No, Mr. Chairman.

12 CHAIRPERSON GRIFFIS: Excellent. Then
13 let's move right ahead. Is the applicant ready to
14 proceed?

15 MR. BROWN: Yes, we are, Mr. Chair.

16 CHAIRPERSON GRIFFIS: Let's go.

17 MR. BROWN: Again, Patrick Brown from
18 Greenstein DeLorme & Luchs. With me from my office is
19 Stephanie Baldwin and also the applicant, Kathryn
20 Toggas. Mr. Toggas is here behind us. We also hope
21 to have Mr. Gary Wilson from Moisture Protection
22 Technologies here later. We are awaiting his arrival,
23 but we do have written documents from him, as well as
24 others.

25 With that, I would like to, one, draw the

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1 Board's attention to the Office of Planning report
2 which, with one minor exception, I could have not done
3 a better job writing in support of this application.

4 It is important to, one, note the scope of
5 the review. This is a special exception, and note the
6 specific criteria, and then also the very low standard
7 established for the various criteria -- the words not
8 unduly objectionable, not substantially objectionable.

9 So that it depends how you look at it.

10 The bar is fairly low. It is not any
11 objection or any condition. It's "unduly" or
12 "substantially."

13 Again, going beyond that, I think a point
14 that was raised in the Office of Planning report is
15 critical for the review of this case. Originally, the
16 case was filed as a special exception having to do
17 with only one side yard, the side yard abutting the
18 alley. Subsequently -- and I don't think it's ever
19 been, other than the OP report, ever been officially
20 expanded to include the side of the property abutting
21 the Dempseys, but certainly in the Office of Planning
22 report they indicate that, by virtue of the demolition
23 of the preexisting den that had a 5.01 foot side yard,
24 that the grandfathering on that side yard, which under
25 405.8 was lost.

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1 I take exception to that characterization.
2 The den was removed as provided under 2001.4, the
3 nonconforming provisions which allow in the event of a
4 casualty or act of God, and we have testimony and
5 documentation to the effect that the den was removed
6 based on damage from Hurricane Isabel as well as lead
7 contamination that made the structure unsafe
8 structurally, as well as from an environmental
9 standpoint, to the point where the Toggas children
10 were testing for elevated levels of lead. So that it
11 posed an imminent structural as well as environmental
12 health hazard, in which case the demolition of the
13 property was not intended to relinquish grandfather
14 rights for that side yard and was under the casualty
15 provisions allowed to be rebuilt.

16 So that having been the case -- and we
17 will provide the documentation in a moment -- it would
18 limit the scope of the special exception to the alley
19 side of the property and not involve the Dempsey side
20 of the property, which again would allow the Board to
21 narrow the focus of its inquiry and the focus of the
22 testimony here before you. I think that should help
23 focus the Board.

24 I would like to, with Ms. Baldwin's help,
25 introduce a report from Moisture Protection

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1 Technologies dated September 25, '03 indicating the
2 damage to the west side of the den room on the west
3 side of the house, with the conclusion that, in our
4 professional opinion, that structure cannot be
5 cleaned, repaired, to be a safe dwelling. The
6 environmental and structural damage is too far gone to
7 save this den room, which would indicate, in
8 conjunction with also the lead testing of the blood of
9 the 17-month-old son of the Toggases, indicating
10 elevated lead both on this occasion and subsequent
11 occasions to the point where the city made inquiry
12 through the Department of Health.

13 I would introduce those two reports
14 indicating the casualty nature.

15 CHAIRPERSON GRIFFIS: And you are putting
16 those in now. Is that correct?

17 MR. BROWN: Yes, I am.

18 CHAIRPERSON GRIFFIS: Have the parties
19 been given copies of those documents?

20 MR. BROWN: Mr. Chair and members, while
21 we circulate the documents, the question has been
22 raised that this demolition occurred without the
23 proper permitting. That appears to be the case, and
24 the permitting process for demolition and other things
25 should always be followed. But it doesn't change the

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1 underlying fact of --

2 CHAIRPERSON GRIFFIS: Is that a zoning
3 issue?

4 MR. BROWN: No, but it is going to be
5 raised by the parties.

6 CHAIRPERSON GRIFFIS: I understand.

7 MR. BROWN: I would just like to -- and I
8 think you perhaps have beat me to the punch. It is
9 not relevant to this Board's inquiry about whether and
10 in fact there was a casualty sufficient to not
11 relinquish the grandfather rights and allow them to
12 rebuild the nonconforming side yard to its preexisting
13 condition, which is 5.01 feet, which complies with the
14 zoning regulations at 405.8.

15 CHAIRPERSON GRIFFIS: Okay. Good. Ms.
16 Miller?

17 VICE CHAIRPERSON MILLER: Mr Brown, I just
18 wanted to ask you: It looks like this report was
19 written in September of '03, and I'm wondering, did
20 you provide it to the ANC, and why are you providing
21 this information now as opposed to earlier, since it
22 goes to a specific issue in the special exception
23 case?

24 MR. BROWN: And I was only retained a week
25 ago, a week ago Monday. So I was not involved in the

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1 earlier stages of this case. In my view, examining
2 all the documents that were provided to me, it is
3 clearly relevant and being provided now.

4 I would have typically provided it in a
5 prehearing statement, but again I wasn't counsel at
6 the time. So my apologies, but it is relevant. I
7 don't believe it was presented to the ANC at the time
8 of their meeting, nor was the lead testing results.

9 CHAIRPERSON GRIFFIS: Is the ANC
10 represented today? Were they provided a copy of this
11 submission? Where did she go? She is making copies.

12 MR. BROWN: And Ms. Toggas has clarified
13 it. At the time that these events were occurring
14 prior to the issuance of the OP report, the den side,
15 the side abutting the Dempseys, was not --

16 CHAIRPERSON GRIFFIS: I'm sorry to
17 interrupt you. Can you send one back to the ANC?
18 There's a couple of people representing.

19 MR. BROWN: The side yard facing the
20 Dempseys which, in my view, is entitled to be rebuilt,
21 was not in play, that it was strictly as it was filed
22 originally, and OP points this out in their report,
23 strictly a special exception case having to do with
24 the side yard abutting the alley.

25 So it wasn't an issue, but it clearly now

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1 has been raised as an issue and raised as an issue as
2 a result of the Dempsey's becoming parties.

3 VICE CHAIRPERSON MILLER: And were the
4 Dempsey's given a copy of this report?

5 MR. BROWN: They have been now.

6 VICE CHAIRPERSON MILLER: Just now? Okay.

7 CHAIRPERSON GRIFFIS: We are on equal
8 footing. We all just got it. Okay, let's go ahead.

9 MR. BROWN: With that, and if I could just
10 briefly introduce -- Again as I said before, it is a
11 special exception case, in my view, limited to the
12 alley side of the property. That being the case, I
13 think under all circumstances, as pointed out by the
14 Office of Planning and our testimony presentation,
15 that it meets and exceeds the standards for a special
16 exception for both side yards.

17 If I could point you to, just as an
18 introductory matter, a drawing here -- and there's
19 significant interest in support of this application.
20 You will notice under the support petition signatures
21 which, I believe, has been already provided for the
22 record or will be shortly, the yellow property is the
23 Toggas, applicant's property. You will see support
24 from their neighbors in the written petition on all
25 four sides rather significantly abutting the property

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1 at various elements and immediately across the street.

2 So I don't want you to be of the view that
3 there isn't substantial support out there.

4 With that, if there are no questions, I'd
5 like to let Ms. Toggas give a brief presentation in
6 the course of which we will take you through some of
7 the boards, with Stephanie pointing to things, and try
8 to run you through this quickly.

9 CHAIRPERSON GRIFFIS: I see. Give me a
10 moment.

11 (Whereupon, the proceeding went off the
12 record at 10:33 a.m. and went back on the record at
13 10:36 a.m.)

14 CHAIRPERSON GRIFFIS: Okay. Our shoes are
15 tied. I think it would be expeditious in this -- and
16 let's settle this right now, whether we are talking
17 about two side yards or one side yard. So we have
18 your oral briefing on that.

19 What I need to do is get the parties up
20 here to address that, and also the ANC. I am going to
21 ask you the quick question of whether this does
22 conform with 2001.4? Does it fit within the
23 provisions of the regulations, in which case this is
24 not part of the special exception? So if we can get
25 everyone up to the table at this point.

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1 We have two parties and ANC. Correct?
2 Who is representing the ANC? Who is speaking for the
3 ANC? All three? We need more chairs. Have a seat.
4 Make yourselves very comfortable. Oh, boy. They were
5 serious when we did party requests. Right? This is a
6 veritable party. Good. Okay.

7 Now we are going to move this along very
8 quickly, but I also want to just state: If you have
9 questions of clarification that are needed, please
10 don't be shy. Ask me the questions. If you have need
11 the regulations of which has just been cited, tell me.

12 We can get another copy up to the table or you can
13 borrow the attorney's that's sitting there flipping it
14 through, or I can read it for you.

15 So let's start with -- It looks like the
16 ANC is right there ready to roll. Let's start with
17 the ANC. Let's go.

18 MR. FROMBOLUTI: I have a question. I'm
19 with -- I'm an architect with 28 years experience here
20 in the District.

21 CHAIRPERSON GRIFFIS: And your name is?

22 MR. FROMBOLUTI: Chris Fromboluti.

23 CHAIRPERSON GRIFFIS: And your address?

24 MR. FROMBOLUTI: 5312 38th Street, N.W.

25 CHAIRPERSON GRIFFIS: And you are also

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1 with the ANC?

2 MR. FROMBOLUTI: Yes. Not in the District
3 which the property is located, but I'm the
4 architectural expert on the Commission.

5 My question is: The addition that was
6 torn down was only one story tall. The addition that
7 is being proposed is three stories tall. Does the
8 five-foot rule apply in that case?

9 CHAIRPERSON GRIFFIS: Absolutely. In
10 fact, the side yard is set, whether it's a one-story
11 or a 10-story.

12 Any other questions that we can clear up
13 right away? Okay. Then let's go ahead. Oh, yes?
14 Yes, ma'am? You just need to state your name and
15 address for the record.

16 MS. KELLY: My name is Cecile Kelly.

17 CHAIRPERSON GRIFFIS: Indeed.

18 MS. KELLY: And I'm the owner of the
19 abutting property on the east. The reason -- The only
20 reason I am coming forward on this question is we have
21 lived at our address for 38 years.

22 CHAIRPERSON GRIFFIS: I understand.

23 MS. KELLY: So we have seen what has
24 happened to that house historically.

25 CHAIRPERSON GRIFFIS: Okay. You know, Ms.

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1 Kelly, all I'm asking for is --

2 MS. KELLY: Well, I have a question.

3 CHAIRPERSON GRIFFIS: Good.

4 MS. KELLY: My question is this: The den
5 was not original with the house, was not built until
6 late Sixties or early Seventies. So does that mean --
7 you know, in other words, the den was probably --

8 CHAIRPERSON GRIFFIS: It's an excellent
9 question. Your question is, well, this wasn't
10 existing. It certainly, in your recollection, wasn't
11 built before the zoning regulations.

12 The first question is how was it built,
13 which I can't answer, because I don't know.

14 MS. KELLY: I think -- I knew the
15 neighbor. It was done by the homeowner who was very
16 adept, and I doubt that he even obtained a permit.

17 CHAIRPERSON GRIFFIS: Okay. So for our
18 purposes -- and, of course, any Board member can speak
19 to this, and also we have, of course, the Office of
20 Attorney General as our attorney here. For our
21 purposes for this special exception, that is being
22 presented as evidence as an existing condition, and
23 the existing condition, whether it was properly done
24 ten years ago, 20 years ago, is not at issue before us
25 today, but as an existing condition which was removed

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1 because it was somewhat destroyed or dismantled or
2 whatever the terminology is, and they are asking that
3 2001.4 be looked at as this is an existing condition
4 that had to be removed, and they are putting back to
5 the similar dimension of the side yard that was there.

6 So to be perhaps more direct, we are of
7 the assumption that that was there, but I don't see
8 how we have the jurisdiction to go into the history of
9 how it got there.

10 MS. KELLY: I see. That has nothing to do
11 with this?

12 CHAIRPERSON GRIFFIS: Not that's been
13 persuasively presented to me at this point.

14 MS. KELLY: That's all I have. I wanted
15 to point that out.

16 CHAIRPERSON GRIFFIS: Okay.

17 MS. MONROE: Mr. Chair, can I say
18 something on that? If it was built after 1958, that
19 would not be nonconforming. It would have to be pre-
20 1958. To fall under 2001.4, it would have to be
21 nonconforming. I don't know if we know that or that
22 we can find that out, but I just want to mention it.

23 CHAIRPERSON GRIFFIS: I'm not seeing where
24 2001 goes to dates at all.

25 MS. MONROE: 2001.4 is what we are talking

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1 about. It says, "If a nonconforming structure is
2 destroyed by fire" -- by definition a nonconforming
3 structure would have to have been in place before the
4 regulations went in place in May of 1958.

5 CHAIRPERSON GRIFFIS: Is that true?

6 MS. MONROE: That's all I'm saying.

7 CHAIRPERSON GRIFFIS: What if they had
8 some sort of relief?

9 MS. MONROE: Well, we don't know. I'm not
10 saying it was. It might have been 1950 it was built.
11 I don't know. I'm saying, whether or not 2001.4
12 would apply would depend on whether or not --

13 CHAIRPERSON GRIFFIS: Is it your opinion
14 that we need to establish the fact that it --

15 MR. KEYS: Mr. Griffis?

16 CHAIRPERSON GRIFFIS: Yes?

17 MR. KEYS: I think I can offer some
18 information that might be helpful at this point.

19 CHAIRPERSON GRIFFIS: Is that so?

20 MR. KEYS: My name is George Keys. I am
21 representing Joseph and Cynthia Dempsey, the owners of
22 3114 Legation Street.

23 I think Ms. Kelly's testimony as to the
24 date is significant, and it is significant for the
25 very reasons that the Office of the Attorney General

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1 has indicated.

2 Also, we made a request of the DCRA for
3 all building permits that had been issued on this
4 property --

5 CHAIRPERSON GRIFFIS: How is that going?

6 MR. KEYS: -- from '58 forward. We got
7 all the permits. There was no permit relating to the
8 side addition.

9 CHAIRPERSON GRIFFIS: How far back do the
10 permits go?

11 MR. KEYS: We had an archival search.

12 CHAIRPERSON GRIFFIS: What's the earliest
13 permit you have?

14 MR. KEYS: The earliest permit we have --

15 CHAIRPERSON GRIFFIS: Roughly. What
16 decade?

17 MR. KEYS: It's the 2003. It's the last
18 permit.

19 CHAIRPERSON GRIFFIS: So how did the house
20 get built? I understand you to say that you --

21 MR. KEYS: You are asking me to prove a
22 negative. I can't establish the absence. I can only
23 report that there was no permit available indicating -
24 - From '58 forward, there is no construction that's
25 been authorized other than two permits that have been

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1 issued.

2 CHAIRPERSON GRIFFIS: I'm not sure what
3 that tells the Board. That tells the Board either
4 that this was built illegally or --

5 MR. KEYS: Well, I think it tells you it
6 is an illegal structure, and it --

7 CHAIRPERSON GRIFFIS: But so is the house.
8 By the same assertion, the house is illegal.

9 MR. KEYS: It post-dates 1958.

10 CHAIRPERSON GRIFFIS: Or maybe it doesn't.
11 Maybe it pre-dates 1958.

12 MR. KEYS: The only testimony that you've
13 got is that it post-dates 1958.

14 MR. BROWN: Mr. Chair, can I interject.

15 CHAIRPERSON GRIFFIS: Yes, please. It's
16 not substantiated testimony. I understand the
17 opinion. Yes, Mr. Brown?

18 MR. BROWN: Ms. Toggas reports to me that
19 the den was original to the house as a porch, and then
20 at some point in the 1970s her understanding was that
21 it was enclosed.

22 CHAIRPERSON GRIFFIS: So there was some
23 sort of structure that --

24 MR. BROWN: That existed at that location.

25 CHAIRPERSON GRIFFIS: -- encroached into

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1 the side yard.

2 MR. BROWN: And it just became from a
3 porch to an enclosed structure. Whether there were
4 permits issued and whether we could establish that, I
5 don't know, but that's how it being reported to me.

6 CHAIRPERSON GRIFFIS: Well, this could be
7 a fun morning exploring this. Do you remember a
8 porch, Ms. Kelly?

9 MS. KELLY: Yes, I did. The porch was
10 there. But I thought that a porch did not qualify for
11 establishing side yard requirements. That's why I
12 didn't -- I thought, because it was a den, you were
13 saying, it does establish side yard.

14 CHAIRPERSON GRIFFIS: It would be my
15 understanding of the regulations that a porch would,
16 as a side yard is an open area, and an open area has
17 to be clearly open to the sky and that's to the point
18 at which you measure from, where it's open directly to
19 the sky or not. If that porch extended out above the
20 ground, I would imagine it should have -- if it
21 wasn't, should have counted toward diminishing the
22 side yard or the measurement of the side yard,
23 depending on which side you look at.

24 MS. KELLY: The porch was there.

25 CHAIRPERSON GRIFFIS: Okay. For the

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1 entire time that you've lived there?

2 MS. KELLY: Yes.

3 MR. BROWN: The house was built originally
4 in the 1930s, is my understanding, to give you some
5 context.

6 VICE CHAIRPERSON MILLER: Okay. I just
7 want to make a comment, that I think that the
8 applicant is relying on 2001.4 and that the applicant
9 does have the burden, I think, of proving the facts
10 that would show that it falls under -- that it meets
11 all the requirements of 2001.5 through .10 as well as
12 that the structure existed on or before 1958.

13 I hear Ms. Kelly saying now that, as far
14 as you remember, the structure did exist then.

15 MS. KELLY: The porch existed.

16 VICE CHAIRPERSON MILLER: The porch
17 existed.

18 MS. KELLY: But the den did not.

19 VICE CHAIRPERSON MILLER: But the den did
20 not.

21 MS. KELLY: The den was enclosed at the
22 end of the Sixties or early Seventies.

23 MR. BROWN: I think, based on what we have
24 provided as well as the admissions by Ms. Kelly, that
25 the applicant has met their burden of proof on the

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1 issue of the existence of the structure.

2 MS. NOLAN: I have a question of
3 clarification. If there was a small, one-story porch
4 on the property previously that gave them the
5 exemption, the --

6 CHAIRPERSON GRIFFIS: It doesn't give them
7 any exemption, but get on with your question.

8 MS. NOLAN: And then they raised that to
9 three-stories, which then affects light and air to the
10 neighbors --

11 CHAIRPERSON GRIFFIS: Okay. I think we
12 just had that question, and the question goes to -- In
13 fact, your architect asked that. So that's what we
14 need to assess now.

15 VICE CHAIRPERSON MILLER: I'm sorry, Mr.
16 Brown. I would like, if you could just articulate
17 what facts you think there are that definitively show
18 that the structure existed on or before 1958.

19 MR. BROWN: Well, in addition to what --
20 the testimony I have provided from Mrs. Toggas, and we
21 can get her up here -- She is under oath. She can
22 provide what she knows. But Ms. Kelly, I believe, who
23 obviously has an historical reference, has indicated
24 or confirmed everything we have said, that the porch
25 existed going back to the original structure, in which

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1 case -- I mean, I hate to put it in legal terms, but
2 that is an admission disfavorable to her argument that
3 it didn't exist.

4 So I think the applicant, based on the
5 collective information, has met the burden of proving
6 that the structure did exist.

7 CHAIRPERSON GRIFFIS: Go ahead. I'm
8 listening.

9 MR. BROWN: Well, I mean -- and Ms. Miller
10 is a lawyer. When you make an admission against your
11 own interests, in this case Ms. Kelly being opposed to
12 the project and, I suspect, opposed to the
13 grandfathering of --

14 CHAIRPERSON GRIFFIS: Okay. Let's not get
15 in too far. When was the building originally
16 constructed?

17 MR. BROWN: 1930s.

18 CHAIRPERSON GRIFFIS: 1930s? And from
19 what we hear today, it appears that there was a
20 structure that was original to the building that
21 created a five-foot, plus or minus, side yard. Is
22 that everyone's understanding? That's what's been
23 said? Agree or not, that's what's been said. Okay.

24 So let's go ahead. We need to have all of
25 you speak very quickly to this exact issue of 2001.4,

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1 now that all this has been clarified, and that is an
2 excellent clarification to bring up, in which case the
3 Board is going to adjourn for two minutes, and then we
4 will return. So who wants to start where we are
5 going.

6 I started with the ANC. So let's continue
7 with that, assessment of whether this falls under
8 2001.4: Nonconforming structures devoted to
9 conforming uses, which is 2001, 2001.4.

10 MS. RENSHAW: Mr. Chairman, Ann Renshaw,
11 2910 Military Road, N.W.

12 CHAIRPERSON GRIFFIS: And a very good
13 morning to you.

14 MS. RENSHAW: And a very good morning to
15 all of you, and a Happy New Year.

16 This case came before the ANC in December,
17 the 13th of December 2004, as an alley/side yard case
18 only. We had some discussion at the ANC meeting with
19 the applicant and among the Commissioners as far as
20 whether or not we were going to be able to talk about
21 the other side.

22 Mr. Toggas, the applicant, maintained that
23 it was strictly an alley/side case. We have our
24 doubts.

25 CHAIRPERSON GRIFFIS: And that's what we

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1 are trying to decide now.

2 MS. RENSHAW: And, therefore, I did
3 inquire of the Zoning Administrator about this matter.

4 He maintained that it was up to the BZA to determine
5 whether it would be a five-foot or an eight-foot side
6 yard setback requirement.

7 So, therefore, the ANC was in a bind, and
8 we judged the case as fairly as we could and our
9 determination is in the record.

10 CHAIRPERSON GRIFFIS: In terms of the
11 direct question that we are dealing with right now,
12 2001.4, does the ANC have an opinion or are you
13 stating that the ANC can't come to a decision on that?

14 MS. RENSHAW: It would have to go back
15 before the full Commission.

16 CHAIRPERSON GRIFFIS: Okay, good. Let's
17 go next to -- Yes, Mr. Keys?

18 MR. KEYS: Mr. Chair, this matter has been
19 raised and this information presented only this
20 morning, and I think that --

21 CHAIRPERSON GRIFFIS: To us, too.

22 MR. KEYS: I understand that.

23 CHAIRPERSON GRIFFIS: But we are rolling
24 with it.

25 MR. KEYS: But I think, to respond to the

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1 factual assertions as to the dating of this building,
2 that we ought to have an opportunity to make an
3 examination of the public records, to attempt to
4 verify the dating of this building.

5 Secondly, with respect to the Section
6 2001.4, it pertains to destruction due to acts of God.

7 The decision to demolish this building was done by
8 the owner of the property. The owner demolished the
9 building. I don't think that is a casualty.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. KEYS: That brings it within 2001.4.
12 It's an election.

13 MR. BROWN: Mr. Chair, can I interject?
14 The casualty occurred as a result of --

15 CHAIRPERSON GRIFFIS: That's understood,
16 in terms of the Hurricane.

17 MR. BROWN: The owner acted based on, you
18 know, professional guidance and the lead testing.

19 CHAIRPERSON GRIFFIS: I think your side is
20 pretty clear in terms of the letter that you
21 submitted, and the point is that there was damage done
22 by the storm, the storm being the act of God which is
23 talked about in 2001.4. It really puts us on a high
24 level here, talking about acts of God and such but,
25 nonetheless, getting into the specifics.

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1 So the point is that the destruction or
2 the damage to that required the demolition of that
3 piece. Okay. Mr. Keys is saying, no, look, you guys
4 demolished it, the storm didn't take it down. Okay.
5 And you're saying that you can't assess whether it,
6 outside of that, conforms to what --

7 MR. KEYS: I can't make the assessment at
8 this point.

9 CHAIRPERSON GRIFFIS: Because you don't
10 know exactly when the building was built.

11 MR. KEYS: I'd like the opportunity to--

12 CHAIRPERSON GRIFFIS: But you had that
13 opportunity on your accord. You investigated all the
14 permits, and you pulled only ones of 2003. So you're
15 saying either this building doesn't exist or it was
16 built in 2003 or somehow was built a long time ago.

17 Why should we give additional time for you
18 to research something that you couldn't find before?

19 MR. KEYS: Because there is always the
20 opportunity that we have not looked in the right
21 places.

22 CHAIRPERSON GRIFFIS: That's very true,
23 and it is. It's elaborate to find a lot of
24 documentation. But in terms of opportunities, we have
25 the opportunity to hear this today, and I think with

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1 everyone here and present, it doesn't seem to make a
2 lot of sense to continue this for months to do
3 additional research on this. But let's continue on,
4 and we will note that for the record. Next? I'll get
5 back to everybody. Who is next? Ms. Kelly, did you
6 want to speak additionally to the 2001.4? Okay.
7 Excellent.

8 Okay. So the Dempsey's have been -- and
9 Kelly and the ANC. Yes? One more time.

10 MS. NOLAN: Samantha Nolan, 2940 North
11 Hampton Street. We just received the information
12 about the lead testing and all of that, and --

13 CHAIRPERSON GRIFFIS: Okay, let's get it
14 clear. So have we. We don't need to hear that
15 anymore. Okay, go ahead.

16 MS. NOLAN: But our community has been
17 written up in the Washington Post and Northwest
18 Current and elsewhere as having a lead problem
19 throughout our community.

20 CHAIRPERSON GRIFFIS: As a lot of
21 communities have. Okay.

22 MS. NOLAN: So that issue, the lead in the
23 children, could be through our water lines which,
24 rather than from any problem with the -- We didn't
25 have a chance to deal with this during our hearing.

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1 CHAIRPERSON GRIFFIS: And that's fine.
2 And you know, I'm not prepared. If other Board
3 members are prepared to take up this lead issue,
4 that's fine, but otherwise I really don't need to
5 delve into this. I think that the Moisture Protection
6 Technologies, Inc. letter speaks for itself, which is
7 signed by Gary Wilson, and it is a very serious issue
8 of which this Board has not the jurisdiction or the
9 knowledge to get into at this time.

10 Yes, Ms. Miller?

11 VICE CHAIRPERSON MILLER: Mr. Brown, what
12 is the date of destruction from --

13 CHAIRPERSON GRIFFIS: Demolition?

14 VICE CHAIRPERSON MILLER: No.

15 CHAIRPERSON GRIFFIS: Or destruction?

16 VICE CHAIRPERSON MILLER: Actually, let me
17 think.

18 CHAIRPERSON GRIFFIS: You want to know
19 when the storm occurred or when they took the building
20 down?

21 VICE CHAIRPERSON MILLER: No, when the 24
22 months starts to run from pursuant to 2001.6. It says
23 that -- Yes, it's the hurricane, I think -- if the act
24 of God results in damage to the property, then
25 restoration should be started within 24 months of the

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1 date of the destruction. So what's the date that we
2 are going back to?

3 MR. BROWN: Hurricane Isabel was September
4 19, 2003.

5 VICE CHAIRPERSON MILLER: Okay. Thank
6 you.

7 CHAIRPERSON GRIFFIS: Anything else from
8 the Board? Any other questions? Mr. Brown, your last
9 summation on this issue, specific?

10 MR. BROWN: I don't believe so. I think
11 the Board has everything they need.

12 CHAIRPERSON GRIFFIS: Good. We will be
13 back in three minutes.

14 (Whereupon, the foregoing matter went off
15 the record at 10:56 a.m. and went back on the record
16 at 11:08 a.m.)

17 CHAIRPERSON GRIFFIS: Okay. We have heard
18 from everyone involved in this case at this point
19 regarding the 2001.4. The Board has done a brief
20 deliberation on it, and I think we need to proceed
21 with this 223 special exception as one side yard which
22 is on the alley side, which is the 1.77 feet.

23 Now before I get into it further and hear
24 from the other Board members on this, let me just
25 reiterate to the fact of the parties, the ANC and

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1 everyone else involved in this. We still have a
2 special exception that has to go to whether the light,
3 air, privacy is impacted by this addition.

4 So quite frankly, in my view, whether it
5 is for two side yards or one side yard, we have the
6 same issues, the same application. So we should move
7 forward on this.

8 Very quickly, yes, Mr. Keys?

9 MR. KEYS: Mr. Chair, there are two things
10 that I'd like to bring to your attention. I think we
11 do have some more information that bears on the
12 question of --

13 CHAIRPERSON GRIFFIS: What is the
14 information then?

15 MR. KEYS: -- the question of damage. I
16 would need to bring a witness to certify that --

17 CHAIRPERSON GRIFFIS: Why?

18 MR. KEYS: This is a photograph of the
19 property --

20 CHAIRPERSON GRIFFIS: Okay.

21 MR. KEYS: -- in the summer of 2003.

22 CHAIRPERSON GRIFFIS: Let me step back
23 here and wonder why this is so strongly -- Why are we
24 spending so much time on this? How does the
25 application change in terms of the impact to the

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1 Dempseys or any of the surrounding area whether this
2 is, or was, part of the relief sought?

3 The relief is not -- The relief doesn't go
4 away. They still have to be here for a special
5 exception for this addition.

6 MR. KEYS: I think there is a great deal
7 of difference as to whether the condition of the
8 property today is a property with a 13 foot side yard
9 that the applicant proposes to reduce, as opposed to a
10 presumption that he is entitled to push the property
11 out to within five feet of the property line.

12 CHAIRPERSON GRIFFIS: Okay. So what
13 you're saying is it would, in fact --

14 MR. KEYS: And I think that this evidence--
15 -

16 CHAIRPERSON GRIFFIS: -- change the relief
17 that is sought.

18 MR. KEYS: -- of the condition of the
19 property --

20 CHAIRPERSON GRIFFIS: Okay. So what is
21 the evidence?

22 MR. KEYS: The evidence is a photograph,
23 and I think perhaps my client is best able to speak to
24 it. I don't want to be --

25 CHAIRPERSON GRIFFIS: What is this going

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1 to show? Tell us what your --

2 MR. KEYS: What it will show is that the
3 applicant has, in the course of making unpermitted
4 repairs to his property --

5 CHAIRPERSON GRIFFIS: Wait. You know we
6 are not getting into that.

7 MR. KEYS: I understand that, but he has
8 removed all the gutters and all of the drain spouts.

9 CHAIRPERSON GRIFFIS: So?

10 MR. KEYS: Well, to the extent that the
11 property then suffers water damage a month or two
12 later may be related to conditions which the applicant
13 created.

14 CHAIRPERSON GRIFFIS: Oh, dear. I can't
15 imagine how we --

16 MR. KEYS: Additionally -- Additionally,
17 you are relying and asking us to accept the testimony
18 of someone I presume is being offered as an expert
19 whose professional opinion is coming into this record,
20 but we have no opportunity to cross-examine him.

21 This information, if it is going to be
22 included in the record as an expert professional
23 opinion, should have been done two weeks prior to this
24 hearing. And I think that you need to allow us an
25 opportunity to respond comprehensively to information

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1 that's come in at the last minute.

2 CHAIRPERSON GRIFFIS: This seems to be
3 making a heck of a lot out of a very small issue, to
4 me, and it is rising to the level of just trying to
5 trying to delay this application. But let's go ahead.

6 Mr. Brown, do you want to address that situation
7 before we actually get into the substance of this
8 case?

9 MR. BROWN: Mr. Chair, which situation am
10 I addressing, the lateness of this issue?

11 CHAIRPERSON GRIFFIS: All of them.

12 MR. BROWN: Well, one, the lateness of the
13 issue, notwithstanding my recent arrival long after
14 Mr. Keys was involved --

15 CHAIRPERSON GRIFFIS: Right. We've
16 assessed that. So that document existed, and you came
17 on a week before, and your advice immediately was to
18 get this in. So it came in. Next.

19 MR. BROWN: Well, and the issue was not
20 raised in an official capacity until Mr. Mordfin's
21 report, which is a week ago when he raised it in the
22 context of that report.

23 So it would appear that Mr. Keys, having
24 moved ahead and done the archival research, was
25 focused on the issue long before anybody else in this

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1 matter, and to -- Everybody else is playing catch-up
2 from where he started from. I think it's pretty clear
3 what occurred. We provided documentation that the
4 Board, in the absence of cross-examination, can assess
5 and determine how worthy it is.

6 CHAIRPERSON GRIFFIS: Okay. You had
7 indicated that you were expecting Mr. Wilson to be
8 here. Is that correct?

9 MR. BROWN: I was. I don't think he is
10 here, is he? No?

11 MS. TOGGAS: May I say something? I don't
12 know if this is confusing to you, like we thought we
13 were going for a special exception for the alley.
14 That was the whole intent of our special exception,
15 and it wasn't brought to our attention until we went
16 to the ANC meeting that everyone thought we should be
17 going for a special exception on the other side.

18 So that's why all this information was not
19 submitted, because we had no idea that we were going
20 for a special exception on the west side of the
21 property.

22 CHAIRPERSON GRIFFIS: Understood.
23 Appreciate that clarification. Does the Board have
24 any questions of that? Is everyone of the
25 understanding of when this issue came up? Okay.

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1 Mr. Brown, what about cross-examination of
2 Mr. Wilson?

3 MR. BROWN: Excuse me. I wasn't following
4 your question.

5 CHAIRPERSON GRIFFIS: What is your legal
6 opinion of the requirement to cross-examination Mr.
7 Wilson?

8 MR. BROWN: It's not required, and I think
9 the Board needs to decide. The document is being
10 offered without any testimony, and the Board has to,
11 like it looks at any document, make an assessment of
12 what it thinks the validity of the document is and
13 what weight to give the document, absent the Board's
14 ability to cross-examine as well as any parties, as
15 well as my limitation of not being able to put on live
16 testimony.

17 It's a two-edged sword, and I think the
18 Board does it every day, takes a document without
19 testimony and assesses it.

20 CHAIRPERSON GRIFFIS: I have no difficulty
21 then keeping the record open, Mr. Keys, for you to
22 submit rebuttal testimony to this letter. I don't
23 want to spiral down into the absurd of whether rain
24 water that is caused by overflowing aspects of gutters
25 or anything like that is an act of God or not an act

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1 of God. Personally, I don't feel I have the authority
2 to say that, or determine it.

3 So let's cut to the quick and get to the
4 specific issues of problem that you have with this
5 letter, which is -- Ms. Bailey, does it have an
6 exhibit number yet?

7 MS. BAILEY: No, Mr. Chairman, but I can
8 give it one.

9 CHAIRPERSON GRIFFIS: Let's do it for
10 proper record here.

11 MS. BAILEY: I'm showing that -- Let me
12 get the case file. Just a second.

13 CHAIRPERSON GRIFFIS: Not to worry. We
14 are going to set an exhibit number on this, but we
15 will keep the record open for submission on that.

16 Okay. Anything else in the aspects of
17 this? We were going to talk further on 2001.4, but I
18 think I have -- we don't have anymore time to. So,
19 Ms. Miller, last comments?

20 VICE CHAIRPERSON MILLER: Yes. I had
21 further opportunity to look at the regulations. So I
22 want to correct the analysis that I laid out earlier
23 that, when looking at 2001.4 which the applicant is
24 relying on, that they need to show compliance with
25 2001.5 through .10.

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1 When I looked at those regulations more
2 carefully, they reference lot occupancy, lot area,
3 with the lot requirements. They do not reference side
4 yard, which is the issue that is before us, and that,
5 in fact, we should be looking at 405.8, which
6 specifically addresses side yards for buildings
7 existing on or before May 12, 1958.

8 CHAIRPERSON GRIFFIS: Excellent, and that
9 is exactly correct in my understanding of the
10 regulations in reading them. Other comments from the
11 Board? If not, then let's proceed.

12 We have a special exception to 223, as
13 advertised. Let's move ahead, Mr. Brown.

14 MR. BROWN: Mr. Chair, I would like to
15 allow ms. Toggas to make a brief presentation, and
16 Stephanie will help point things out as we move along,
17 so we can multi-task and move this along.

18 CHAIRPERSON GRIFFIS: That's true.

19 WHEREUPON,

20 KATHRYN TOGGAS

21 was called as a witness by counsel for the applicant
22 and, having previously been duly sworn, testified as
23 follows:

24 MS. TOGGAS: My name is Katie Toggas, and
25 my husband and I, Tom Toggas, have resided at 3112

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1 Legation Street for approximately 10 years. We have
2 three young children, and we have now outgrown our
3 existing home. Instead of moving out of the District
4 to a larger home, we have decided to go forward with
5 an addition to accommodate our family of five.

6 The size of our lot is 7,205 square feet.

7 The lot is 40 feet in width at the front and 36 feet
8 in width at the back. The existing home is a three-
9 story family home with a one-story accessory building
10 located in the left rear yard. There is a public
11 alley 15 feet wide adjacent to the left side and rear
12 of the property.

13 The addition that we are proposing is
14 three stories with a front porch and back yard
15 flagstone patio. The front of the house will be stone
16 on the bottom and hardy plank siding across the top.
17 The sides and rear will be brick approximately two
18 feet up from ground level and hardy plank siding
19 continued to the top.

20 The one-story porch to be added to the
21 front is approximately eight feet in depth and is in
22 conformance with the 15 feet building restriction
23 line.

24 On the southwest side of the property the
25 addition is proposing a 5.01 and 5.11 side yard. In

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1 the front there will be an 8 feet one-story extension
2 which leads into a three-story addition 20 feet
3 outlining the existing house.

4 The addition extends back with a one-story
5 wall which is 17.8 feet wide and 8 feet high. It then
6 begins to slope into a salt box roof with three
7 skylights. The remaining one-story family room is set
8 back approximately 16 feet from the property line.

9 On the north side -- or I'm sorry, on the
10 northeast side of the property the addition is three
11 stories and extends 18 feet from our existing home.
12 The one-story addition extends 16 feet and is one
13 story in height.

14 The northeast side of the property runs
15 adjacent to the public alley and provides a 1.77 feet
16 for a side yard, which will contain shrubbery and
17 small trees.

18 The basics that we are adding on the first
19 floor are a kitchen-combination sunroom, and a family
20 room. On the second floor we are adding a master
21 bedroom and bathroom, closet space and a spare room.
22 On the third floor we are adding another bedroom,
23 closet space, two bathrooms and attic storage.

24 The neighborhood is developed with single
25 family detached dwellings, ranging from one to three

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1 stories in height. The typical side yard found in
2 this neighborhood is approximately five feet. The
3 neighborhood has many one, two and three story
4 additions.

5 The homes in this neighborhood have many
6 unique characters and are all of different scales.
7 The home to the northeast of the property, 5442 31st
8 Street, is a three-story home with a large covered
9 front porch. The rear yard of the property is
10 approximately 57 feet long and is outlined with a
11 retaining wall, dense line of tall evergreens, and a
12 one-story, two-car garage at the back left of the
13 property. The 15 feet of the public alley separate
14 the two properties.

15 The home to the southwest of the subject
16 property, 3114 Legation Street, is a three-story home
17 with a covered front porch. The rear yard of the
18 property is approximately 150 feet in length with a
19 one-story accessory building to the left. The side
20 yards to the right are approximately five and seven
21 and a half feet, and to the left approximately four
22 feet.

23 The home directly across Legation Street
24 is a three-story home with a two-story addition facing
25 the front street.

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1 The following conditions recommended by
2 the Office of Planning -- Following conditions
3 recommended by the Office of Planning, we will be
4 providing a site type privacy fence surrounding the
5 rear of the property and removing the third floor
6 attic storage room window from the southwest side of
7 the proposed addition.

8 CHAIRPERSON GRIFFIS: Thank you very much.

9 Going to the last two issues, the fence -- is that
10 shown on any of the drawings that were presented?

11 MS. TOGGAS; It is on the site plan.

12 CHAIRPERSON GRIFFIS: In the application?

13 MS. TOGGAS: Yes.

14 CHAIRPERSON GRIFFIS: Right. And it is
15 actually being called as an 8 foot. Is that correct?

16 MS. TOGGAS: We have to change it to 7
17 feet. It was, when we submitted our application to
18 DCRA.

19 CHAIRPERSON GRIFFIS: Is that your
20 understanding of what -- Right. Okay.

21 MR. BROWN: Seven feet is the maximum in a
22 residential.

23 MS. TOGGAS: Yes. We had to change it to
24 7 feet.

25 CHAIRPERSON GRIFFIS: Good enough. In

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1 terms of fenestration, let me ask you on the addition,
2 as you walked us through what is happening on the
3 inside, but importantly for the outside is really what
4 we are looking at. Are there any other windows in the
5 second or third floor on the alley or either of the
6 side yards?

7 MS. TOGGAS: Yes, on the alley side there
8 are.

9 CHAIRPERSON GRIFFIS: In the family room
10 there is small windows that's showing. Correct?

11 MS. TOGGAS: This is a kitchen.

12 CHAIRPERSON GRIFFIS: Kitchen, rather.

13 MS. TOGGAS: Which are approximately six
14 and a half feet up from ground level.

15 CHAIRPERSON GRIFFIS: So they are
16 clerestory type windows? No? They are vision windows
17 out the kitchen? You see them when you are standing
18 in the kitchen?

19 MS. TOGGAS: Yes.

20 CHAIRPERSON GRIFFIS: I see. Okay, good
21 enough. And above that?

22 MS. TOGGAS: There are no windows.

23 CHAIRPERSON GRIFFIS: Okay. And the
24 fenestration that Office of Planning wants removed is
25 which one?

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1 MS. TOGGAS: This is on the west side of
2 the property, facing the west side property. They
3 recommend that we remove the attic storage room
4 window.

5 CHAIRPERSON GRIFFIS: And that window
6 looks into the attic storage space?

7 MS. TOGGAS: It's just an attic storage
8 room, yes.

9 CHAIRPERSON GRIFFIS: I see. Goodness.
10 Okay. Understood.

11 MS. TOGGAS: Do you have any other
12 questions on the windows?

13 CHAIRPERSON GRIFFIS: Yes, a couple of
14 quick questions. Is there anything else that's come
15 to your attention or your opinion that would somehow
16 unduly affect the light and air to the adjacent
17 properties?

18 MS. TOGGAS: No.

19 CHAIRPERSON GRIFFIS: How about the use
20 and privacy of the adjacent properties?

21 MS. TOGGAS: No.

22 CHAIRPERSON GRIFFIS: So in terms of what
23 your putting out there, even your patio or any sort of
24 the windows looking into the back yards or across
25 alleys or across your rear yard or side yards, in your

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1 opinion, does this unduly impact the privacy?

2 MS. TOGGAS: No.

3 CHAIRPERSON GRIFFIS: And through your
4 testimony you have indicated what's happening around
5 the area. You have also described the materials of
6 this addition. It's your opinion that this holds it
7 in the character, the architectural character, of this
8 neighborhood?

9 MS. TOGGAS: Yes.

10 CHAIRPERSON GRIFFIS: I don't have any
11 other questions. Does the Board have any other
12 questions? Ms. Miller?

13 VICE CHAIRPERSON MILLER: I just have one
14 question. When you were referring to other homes in
15 the neighborhood being one to three stories high, how
16 do you define neighborhood? How large an area are you
17 referring to?

18 MS. TOGGAS: I was basically talking about
19 the 200 foot square radius, but as you go outside of
20 that, they are typically all the same. They have the
21 same character as they do within this.

22 VICE CHAIRPERSON MILLER: How far outside?
23 What do you mean?

24 MS. TOGGAS: Well, it's -- I don't know if
25 you are familiar with Chevy Chase, D.C. All the homes

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1 are kind of unique, and they all are of different
2 scale, different character. You have a small house, a
3 large house, a Mexican house, a rancher, a Tudor.
4 It's a wide variety of homes.

5 MR. BROWN: Mr. Chair, can we -- If you
6 will see in the lower board, the yellow is the Toggas
7 home, and the orange reflects the houses --

8 COMMISSIONER JEFFRIES: Can you bring that
9 board up?

10 MR. BROWN: We didn't do that on purpose.
11 The orange reflects the houses within the 200 foot
12 radius that have been added to; and if I draw your
13 attention to the one right above the site plan, it
14 looks very similar to the Toggas home with the side
15 addition, as well as the one there, a little bit
16 bigger house to begin with but again side additions
17 and taking you through the various additions in the
18 area.

19 CHAIRPERSON GRIFFIS: That's an
20 interesting example. Okay. Any other question from
21 the Board?

22 MR. BROWN: Mr. Chair, to support Ms.
23 Toggas' response to the light and air, she had
24 submitted in her prehearing statement a sun study.

25 CHAIRPERSON GRIFFIS: Oh, indeed.

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1 MR. BROWN: So I draw your attention to
2 that. The Office of Planning had that and included
3 that in their report and did a good job summarizing
4 the results of that, which basically on the longest
5 day of the year in December there would be some very
6 minor impact.

7 CHAIRPERSON GRIFFIS: Excellent, and that
8 was actually a contracted sun path study by Flanigan
9 Architects, AIA, out of Bethesda. Is that correct?
10 Excellent. Okay. Anything else?

11 MR. BROWN: Could I point out, just
12 without belaboring the point, with respect to the
13 house on 31st Street -- and it is perhaps not a -- It
14 faces on 31st Street, backs up to the alley. If you
15 count the distance from the rear of that house to the
16 property line, it's 56 feet. Then you have 15 feet
17 for the alley, and then another 1.7 feet. So you've
18 got a substantial distance then hidden, as you see, by
19 the row of trees. So that -- in the lower lefthand
20 corner there.

21 MR. KEYS: Mr. Chairman, I really would
22 have to wonder why counsel was testifying.

23 CHAIRPERSON GRIFFIS: Well, he's not. He
24 is pointing out the --

25 MR. KEYS; Well, I think he is offering

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1 information for the record that really should come in
2 through a witness.

3 CHAIRPERSON GRIFFIS: Okay. You object to
4 Mr. Brown doing it. That's fine. Let's get to --
5 This is the submission of the applicant.

6 MS. TOGGAS: Can I _-

7 CHAIRPERSON GRIFFIS: Just tell me how far
8 the distance is.

9 MS. TOGGAS: This is the 31st Street
10 property. This is our home. This is the front of the
11 property. This is our home right here. This is the
12 31st Street property. This is the back. There is a
13 public alley right here that's 15 feet wide. The
14 whole entire property is surrounded by the large
15 evergreens.

16 CHAIRPERSON GRIFFIS: You need to be
17 closer to a microphone. You're not on the record.

18 MS. TOGGAS: The entire property across
19 the back is surrounded by large evergreen trees, and
20 the bottom picture is a view -- This bottom picture
21 right here is a view of that property from our house,
22 and our addition actually would be facing their two-
23 car garage, the addition that's built.

24 This is our existing home here. This is
25 the proposed addition which basically is centered with

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1 their two-car garage.

2 COMMISSIONER JEFFRIES: I'm sorry. I
3 guess I don't understand that drawing, the one that
4 you just walked away from. It's a plan elevation?
5 Okay.

6 CHAIRPERSON GRIFFIS: Right. So from the
7 alley to the adjacent to the property, which is a
8 party in opposition, it's a plan and showing the
9 dimensions, and then it's an elevation of the
10 proposed.

11 COMMISSIONER JEFFRIES; So what is --

12 CHAIRPERSON GRIFFIS: So what is the
13 actual dimension from the adjacent property?

14 COMMISSIONER JEFFRIES: Face to face?

15 CHAIRPERSON GRIFFIS: Add them up.

16 MS. TOGGAS: Oh.

17 CHAIRPERSON GRIFFIS: Seventy-three feet?

18 MS. TOGGAS: Oh, I'm sorry.

19 CHAIRPERSON GRIFFIS: Seventy-two feet.

20 MS. TOGGAS: Yes.

21 CHAIRPERSON GRIFFIS: Is that correct?

22 MS. TOGGAS: Yes.

23 CHAIRPERSON GRIFFIS: Okay. So 72 feet
24 across. As you have indicated through the photograph
25 and on that drawing, is a line of trees? Evergreens?

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1 MS. TOGGAS: Evergreens. They are almost
2 as tall -- Well, they are as tall as the homes, and
3 it's a dense line.

4 CHAIRPERSON GRIFFIS: Okay. Anything
5 else? Any questions from the Board? Is that your
6 case, Mr. Brown?

7 MR. BROWN: Subject to closing arguments,
8 rebuttal.

9 CHAIRPERSON GRIFFIS: Right. Obviously,
10 we are going to give you opportunity for rebuttal on
11 closing arguments. Any clarification questions from
12 the Board? Very well, Let's move into the cross-
13 examination.

14 Let's go to the ANC. Any cross? No cross
15 from the ANC? Parties in opposition? Let's go. Yes,
16 Ms. Kelly? This is your opportunity to cross-examine.

17 Cross-examination, of course, is direct questions to
18 the witness that has provided the testimony. The
19 questions should be directly related to the testimony
20 that's been provided or that being submitted before.

21 This is your opportunity, of course, to
22 poke holes in their case, and it is preparation for
23 the presentation of your own case. First question,
24 Ms. Kelly?

25 CROSS-EXAMINATION

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BY

Q Well, to begin with, our house is really a two-story --

CHAIRPERSON GRIFFIS: Okay. First of all, Ms. Kelly --

MS. KELLY: Oh, my name? My name --

CHAIRPERSON GRIFFIS: No statements. I need a question. Just questions. This is just cross-examination. There will be no statements from you. I will need a question of the witness.

MS. KELLY: Well, why is the witness calling our house a three-story house? We have a two-story house with an attic.

CHAIRPERSON GRIFFIS: Why is this talked about as a three-story house?

MS. TOGGAS: I'm sorry. I guess when I looked -- I'm sorry. I apologize, Mrs. Kelly. I thought your house was a three-story. I looked at the dormer and thought that.

CHAIRPERSON GRIFFIS: Okay. So you were counting the levels of which there is fenestration?

MS. TOGGAS: Right. I apologize.

CHAIRPERSON GRIFFIS: Okay, good. clarification. We are looking at, I guess, from the

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1 zoning perception, not having the exact grade of the
2 building. But we will take it under your advisement
3 that it's two-story. Next question.

4 BY MS. KELLY:

5 Q The picture of this dense evergreen screen
6 -- Where were you taking it from, the first one, for
7 instance?

8 A The bottom?

9 Q The second -- the middle one.

10 A That's from Legation Street, from across
11 the street.

12 Q Yes. We have trees on the sides and in
13 the back. So if you take --

14 CHAIRPERSON GRIFFIS: Is that true? Is
15 that a question? Are you asking her to verify that
16 that's true?

17 MS. KELLY: Well, what I'm saying is that
18 is representing our screen, but it's not our screen.

19 CHAIRPERSON GRIFFIS: But you need to ask
20 questions. If you can't elicit that out of questions
21 from the cross-examination, present it in your case,
22 but this is very quick, very succinct questions, very
23 succinct answers.

24 BY MS. KELLY:

25 Q Okay. Do you see any spaces between those

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1 trees in the bottom picture? Do you see a lot of
2 spaces?

3 A I see space.

4 Q Would you say that is a dense evergreen
5 screen?

6 A Well, I'm --

7 CHAIRPERSON GRIFFIS: Yes or no?

8 MS. TOGGAS: I would say it's a dense
9 evergreen screen.

10 CHAIRPERSON GRIFFIS: Okay. Next
11 question.

12 MS. KELLY: That's it.

13 CHAIRPERSON GRIFFIS: Thank you very much.

14 Mr. Keys?

15 BY MR. KEYS:

16 Q Ms. Toggas, you have testified that
17 neighbors in the community supported your application.

18 Did you obtain that support personally?

19 A No, I did not. My husband did.

20 Q So you don't know the circumstances under
21 which information was --

22 CHAIRPERSON GRIFFIS: What is the
23 relevancy? Don't we take it on the face of what's the
24 petition signed?

25 MR. KEYS: I don't think you can unless

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1 you know what was communicated to the neighbors.

2 CHAIRPERSON GRIFFIS: Okay. So let's ask
3 that directly.

4 MR. KEYS: I can't ask it directly,
5 because she testifies that she didn't do it.

6 MS. TOGGAS: I wrote the letter. I can
7 testify to what I sent him out with to go get names.

8 CHAIRPERSON GRIFFIS: But let's cut to the
9 quick and not play games with this. I mean, you want
10 to know did you show them drawings? Did you walk them
11 through?

12 MS. TOGGAS: My husband went around with a
13 letter --

14 CHAIRPERSON GRIFFIS: Did you pay off
15 anybody?

16 MR. KEYS: No. I think she hasn't
17 answered your question, and I think it's a relevant
18 question. Did your husband show the elevations of the
19 proposed additions?

20 MS. TOGGAS: My husband went out with a
21 letter stating what we were doing. He went out with
22 the plans, and anyone that wanted to see them, he
23 asked. If they didn't want to see them, then he
24 didn't show it to them. If they wanted to see the
25 plans, they were there for them.

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1 BY MR. KEYS:

2 Q Do you know to whom he showed the plans?

3 A I have the list of the neighbors that --
4 He went to every door in a 200 foot square radius.
5 Some people --

6 CHAIRPERSON GRIFFIS: But the direct
7 question is are you aware of those that looked at the
8 plans or didn't look at the plans?

9 MS. TOGGAS: No, I don't know.

10 CHAIRPERSON GRIFFIS: Do you have any idea
11 whether a majority looked at them?

12 MS. TOGGAS: I think the majority weren't
13 really -- They just wanted, you know, sign it. Some
14 were interested.

15 BY MR. KEYS:

16 Q Do you know if the Kellys looked at the
17 plans?

18 A No. Actually, I'm not sure. I know --

19 Q Do you know if the Kellys were given an
20 opportunity to see the plans?

21 A Yes, I believe they were.

22 Q And on what do you base that belief?

23 A I know my husband presented them with the
24 letter and he went to their house to speak with them.

25 I don't know exactly what they saw or --

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1 CHAIRPERSON GRIFFIS: Okay, let's move on.

2 MR. TOGGAS: Well, I can testify.

3 CHAIRPERSON GRIFFIS: We are not having
4 testimony. This is cross-examination. Mr. Keys,
5 let's continue, please.

6 BY MR. KEYS:

7 Q Ms. Toggas, I'd like to direct your
8 attention to your application, the application that
9 was filed in November. I am going to show you what's
10 marked as Exhibit 2 in the BZA case file. If the
11 Board members need copies of that, I can --

12 CHAIRPERSON GRIFFIS: Let's go. What is
13 your question?

14 BY MS KEYS:

15 Q Did you prepare that exhibit?

16 CHAIRPERSON GRIFFIS: You mean, did she do
17 the site plan?

18 MR. KEYS: The exhibit is a surveyor's
19 plat. There are annotations, and there is a depiction
20 of the proposed building.

21 CHAIRPERSON GRIFFIS: Right. So what do
22 you mean by "prepare"? What are you asking her?

23 MR. KEYS: I'm asking her if she prepared
24 it. This is the only witness I have to speak to right
25 now.

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1 CHAIRPERSON GRIFFIS: I understand.
2 You're asking her if she actually wrote those notes?

3 MR. KEYS: I'm asking if she prepared it.

4 CHAIRPERSON GRIFFIS: Okay. Did you
5 prepare this?

6 MS. TOGGAS: You mean did I submit this or
7 did I make this?

8 CHAIRPERSON GRIFFIS: That's what I was
9 trying to get to. I didn't get an answer.

10 MS. TOGGAS: I'm sorry. I didn't hear.

11 BY MR. KEYS:

12 Q Did you make this?

13 CHAIRPERSON GRIFFIS: Make it? You mean
14 actually write the notes on it? Is that what your
15 question is, Mr. Keys?

16 MS. TOGGAS: I did not. I did not.

17 BY MR. KEYS:

18 Q Do you know who did make the notes on it?

19 A Either my husband or the structural
20 engineer.

21 Q And who was the structural engineer?

22 A David -- What's David's last name?

23 CHAIRPERSON GRIFFIS: Let's get to the
24 relevancy quickly. What is the real question on this
25 one?

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1 MR. KEYS: The whole process from zoning
2 review at DCRA to this Board's review is based on the
3 applicant's certification of the improvements, and
4 there's a series of documents in the record that I'd
5 like to show the applicant to have the applicant
6 affirm the preparation of these documents and that I'd
7 like to cross-examine about those documents, because
8 it bears on the location of this building.

9 CHAIRPERSON GRIFFIS: What building?

10 MR. KEYS: The proposed structure.

11 CHAIRPERSON GRIFFIS: Why are we talking
12 about location? Where is this going? It seems to be
13 a whole different case.

14 MR. KEYS: It's going --

15 CHAIRPERSON GRIFFIS: You're saying DCRA
16 didn't process this correctly?

17 MR. KEYS: I'm saying the information --
18 Well, you'll have to give me an opportunity to
19 establish the authenticity of the documents that are
20 in the case file.

21 CHAIRPERSON GRIFFIS: No. I'm not sure we
22 need to establish the authenticity unless it goes to
23 something that can be shown of relevancy to a special
24 exception 223. How does the authenticity of this come
25 into question? Now the information on it, if there is

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1 a discrepancy or there's issues of which we are
2 looking at -- Is the 1.77 side yard actually not 1.77?
3 -- then let's get to it. But I don't understand where
4 we are going here.

5 If it's issues that you want to bring up,
6 then bring it up in your case, Mr. Keys, because this
7 is the long route to go and try and bring this out in
8 cross-examination.

9 MR. BROWN: And beyond the scope of Ms.
10 Toggas' ability to respond.

11 CHAIRPERSON GRIFFIS: Well, that's getting
12 very clear very quickly. Where do we go, Mr. Keys?
13 What's your next question?

14 MR. KEYS: Just a moment. All right, Mr.
15 Chair, I will deal with these in my case in chief.

16 CHAIRPERSON GRIFFIS: Let's go then. Any
17 other cross-examination? We've hit everybody. Is
18 that correct? ANC, the parties in opposition? Okay.
19 Let's move ahead quickly.

20 Let's go to the Office of Planning's
21 report.

22 MR. MORDFIN: Good morning, Chairman and
23 members of the Board. I am Stephen Mordfin with the
24 Office of Planning, and this application is requesting
25 relief to reduce the northeast side yard from 8 feet

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1 to 1.77 feet for a property that is not in conformance
2 with the minimum lot width and the side yard
3 requirements in order to construct building additions
4 onto an existing one-family detached dwelling, a use
5 permitted as a matter of right within the R-1-B zone
6 district.

7 The applicant has already constructed the
8 foundation for the proposed building additions
9 pursuant to a permit issued by DCRA, and foundations
10 are not required to conform to minimum yard
11 requirements. The applicant is now requesting relief
12 in order to construct those building additions.

13 The side yard proposed for the northeast
14 side of the property is 1.77 feet, the same as the
15 existing situation. However, the subject property
16 abuts a 15-foot wide public alley on this side of the
17 lot.

18 The effect of this alley in combination
19 with the provision of the 1.77 foot side yard results
20 in a separation between the dwelling on the subject
21 property and the neighboring property of more than
22 twice the minimum 8-foot side yard that is required by
23 the R-1-B zone district.

24 As a result, the proposed building
25 addition will not unduly compromise light and air to

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1 the adjoining property or unduly compromise privacy,
2 peace and enjoyment.

3 The lot occupancy proposed by the
4 applicant is approximately 34 percent, significantly
5 less than the maximum 50 percent permitted by Section
6 223 and less than the maximum 40 percent permitted as
7 a matter of right within the R-1-B zone district.

8 Therefore, the Office of Planning
9 recommends approval of the application.

10 CHAIRPERSON GRIFFIS: Thank you very much.

11 Any questions of the Board?

12 BOARD MEMBER MANN: I have a question.

13 CHAIRPERSON GRIFFIS: Mr. Mann?

14 BOARD MEMBER MANN: Why are you
15 recommending that the proposed third floor window on
16 the southwest side of the building addition be
17 eliminated?

18 MR. MORDFIN: The purpose of doing that
19 was, when the Office of Planning reviewed this
20 application, we had discussed the application with
21 DCRA that informed the Office of Planning that 223
22 relief was necessary in order for them to build onto
23 that side of the house.

24 Then reviewing the specific criteria under
25 223, which also goes to privacy of the adjoining

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1 property, we determined that the elimination of that
2 window would help to preserve the privacy of the yard
3 and that of the adjacent dwelling.

4 BOARD MEMBER MANN: Even though it is
5 going to be used primarily as -- or, I guess, solely
6 as a storage area?

7 MR. MORDFIN: That is as proposed by the
8 applicant. However, the Office of Planning determined
9 that, you know, future owners or even the current
10 owner could determine to use that room for something
11 else, and that was the reason for recommending the
12 elimination of the window.

13 BOARD MEMBER MANN: Thank you.

14 CHAIRPERSON GRIFFIS: Just very quickly,
15 what is the view from that window, in your estimation?

16 MR. MORDFIN: The view from that window --
17 It looks out onto the adjoining dwelling.

18 CHAIRPERSON GRIFFIS: Okay, and then
19 across into their back yard?

20 MR. MORDFIN: Perhaps into their back yard
21 also, although it kind of lines up, more or less.

22 CHAIRPERSON GRIFFIS: With the house?

23 MR. MORDFIN: With the adjacent house.

24 CHAIRPERSON GRIFFIS: Oh, I see. So the
25 visual impact you are looking at is looking back into

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1 other windows?

2 MR. MORDFIN: Back into other windows,
3 back maybe from that elevation you could see better
4 into the yard than you can from the second floor
5 windows.

6 CHAIRPERSON GRIFFIS: I see. Okay.
7 Excellent. Any other question of the Board of the
8 Office of Planning? Does the applicant have any
9 cross-examination of the Office of Planning?

10 MR. BROWN: No.

11 CHAIRPERSON GRIFFIS: I got that out in
12 one breath even. Okay, how about the ANC? Any cross-
13 examination of the Office of Planning? You are
14 crossing for the ANC? Why do we have, just for
15 clarification, two representatives from the ANC?

16 MS. RENSHAW: That will be discussed or
17 brought to the attention of the Board during the ANC
18 portion, but I can say that --

19 CHAIRPERSON GRIFFIS: Shouldn't it be
20 brought to our attention now?

21 MS. RENSHAW: Well, it's a circumstance
22 now of one ANC Commissioner in whose jurisdiction this
23 property is situated --

24 CHAIRPERSON GRIFFIS: Oh, boy.

25 MS. RENSHAW: -- leaving the Board, and a

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1 new representative coming on the Commission.

2 CHAIRPERSON GRIFFIS: Okay.

3 MS. RENSHAW: But during the time --

4 CHAIRPERSON GRIFFIS: What is your
5 question for Office of Planning?

6 MS. RENSHAW: -- of the case, I was the
7 representative.

8 VICE CHAIRPERSON MILLER: Mr. Chairman, I
9 just want to state for the record, and then we can
10 decide how we want to deal with this, we have a letter
11 from ANC-3/4G authorizing Commissioner-Elect Samantha
12 Nolan and Commissioner Chris Fromboluti to represent
13 the ANC. We don't have any letter that I know of
14 authorizing Ms. Renshaw to represent the ANC.

15 MS. RENSHAW: Yes, Ms. Miller, that letter
16 is in error, because at the end of the meeting -- and
17 it was detailed in the letter put to the ANC that the
18 representatives designated to appear before the Board
19 would be myself, then the sitting Commissioner for the
20 subject property, and the incoming representative, Ms.
21 Nolan, who had no official capacity during the ANC
22 hearing on the application.

23 Christopher Fromboluti, a Commissioner on
24 the ANC, indicated at the ANC hearing that he would
25 appear before the BZA if called upon. I am afraid

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1 that there has been some -- perhaps some creative
2 editing of the minutes, but it was clearly --

3 CHAIRPERSON GRIFFIS: We are getting into
4 a lot of issues this morning.

5 MS. RENSHAW: Well, but it was clearly the
6 intent that I would --

7 CHAIRPERSON GRIFFIS: Let's hear your
8 question at this point, and not making a judgment on
9 whether you are properly before us or not, but under
10 just time constraint, what is the question of Office
11 of Planning?

12 CROSS-EXAMINATION

13 BY MS. RENSHAW: I'm asking the Office of
14 Planning, on page 2 of your report you made the
15 statement in subsequent discussions with DCRA. DCRA
16 agreed with the applicant, also required relief under
17 223 for the side yard on the southwest side of the
18 property. But then at the end of your report you back
19 off that and approve of that southwest side.

20 Could you explain to the Board and to the
21 ANC how you came to that determination?

22 MR. MORDFIN: With the discussions with
23 DCRA, it was determined that the applicant would need
24 to obtain 223 relief in order to reduce the side yard
25 from 8 feet to 5 feet or 5.01 feet. Then in the

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1 conclusion of the report, the Office of Planning
2 recommends approval of Section 223 to permit the 5.01
3 setback.

4 MS. RENSHAW: And could you detail for us
5 with whom you spoke?

6 MR. MORDFIN: I spoke with Fay. At DCRA?

7 MS. RENSHAW: The full name?

8 CHAIRPERSON GRIFFIS: Ms. Oganey.

9 MR. MORDFIN; Thank you.

10 MS. RENSHAW: Thank you.

11 CHAIRPERSON GRIFFIS: Some folks have
12 difficulty pronouncing that, but I got it down. May
13 even be correct. Okay. Any other questions, cross-
14 examination? Any further follow-up for the Board
15 members? Good. I don't have any other attendant
16 government reports as part of this application. So I
17 think we are prepared to go on to the ANC's
18 presentation of their resolution, if they are
19 prepared. Yes, Mr. Keys?

20 MR. KEYS: I'd like an opportunity to
21 cross-examine the Office of Planning.

22 CHAIRPERSON GRIFFIS: Oh, I'm sorry. Did
23 I not ask you?

24 MR. KEYS: You did not ask me.

25 CHAIRPERSON GRIFFIS: See that, I'm

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1 whipping by him. I have my mind on a ham and cheese
2 sandwich. It's quarter to twelve. Did I skip over
3 everybody, all the other parties? Okay.

4 BY MR. KEYS:

5 Q Mr. Mordfin, I believe your report makes
6 reference to a conversation you had with an architect
7 regarding the sunlight impact on this property.

8 A Yes.

9 Q When was that conversation?

10 CHAIRPERSON GRIFFIS: Wrap them all up in
11 one big question.

12 BY MR. KEYS:

13 Q Who did you talk to?

14 A I spoke with Peter Zari.

15 CHAIRPERSON GRIFFIS: Is that the person
16 from the folks that did the sun path study?

17 MR. MORDFIN: Yes.

18 CHAIRPERSON GRIFFIS: Okay, good.

19 BY MR. KEYS:

20 Q Now the information that you insert in
21 your report comes from that conversation?

22 A Yes, it does.

23 Q Does that information appear in the sun
24 path study that is a part of the record in this case?

25 For example, it says of the 20 minutes of light on

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1 the shortest days of the year, is that in the sun path
2 study that's in the record in this case?

3 A It doesn't specifically say 20 minutes,
4 no.

5 Q It doesn't say that? Okay. You go on to
6 quote that firm as saying that no shading would occur
7 to the rear yard, the second story or the side kitchen
8 window of the dwelling. Is that information set forth
9 in the sun path study?

10 A That information is set -- There are
11 drawings in here, and I contacted the architect to
12 explain them to me, because I had not reviewed a sun
13 path study before; and based on where he was telling
14 me that the angles of the sun would go after the
15 construction of the addition --

16 Q So you relied on the applicant's architect
17 to satisfy yourself as to the impact of light.

18 A I relied upon the person that prepared the
19 sun path study.

20 Q You have no expertise in this matter -- in
21 this particular study at all?

22 A No, which is why I contacted him.

23 Q Mr. Mordfin, do you know what the
24 footprint of the existing structure is?

25 A No, I do not.

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1 Q Do you know the footprint of the proposed
2 addition?

3 A No. Well, you submitted to me some
4 information that you had filed with the Office of
5 Planning.

6 Q So you made no determination to the size
7 of the respective buildings?

8 A That's correct.

9 Q How can you talk about the lot occupancy
10 being 34 percent?

11 A I'm sorry, I misspoke. I did have --
12 Using the drawings for the wall check that was done
13 for the applicant, I used that to calculate what the
14 lot occupancy is.

15 Q Why did you use the wall check?

16 A Because that would be what would be
17 exactly what is out there. The wall check would be --

18 CHAIRPERSON GRIFFIS: I don't understand.
19 What is the pertinence to the case of his
20 calculations of the lot occupancy? What do we care if
21 he said 35 or 37 percent?

22 MR. KEYS: Well, I'm going to argue that,
23 as you look at the structure of these regulations and
24 as you look at the Zoning Commission order that
25 adopted these regulations, the Zoning Commission's

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1 intent was to allow homeowners to use 223 to make
2 reasonable additions to their property.

3 Now I think that it is relevant to a
4 question of whether something is a reasonable
5 addition, and we intend to offer the language of the
6 Commission's order to give you an example of what
7 additions were thought of, that it is relevant to know
8 the size for this addition --

9 CHAIRPERSON GRIFFIS: Hasn't this Board
10 gone through, I don't know, 100 223s. We are going to
11 argue about the intent of the Zoning Commission when
12 we've seen the actual implementation of this
13 regulation? We got 10 minutes to finish this case.

14 You know, this may kick me off the case,
15 but Mr. Keys, you seem overly qualified to be doing
16 this 223. We are getting in so far to something that
17 should be very clear, very concise. Where have we
18 started to hear whether the special exception is met
19 or not?

20 This Board has now taken more than two
21 hours on this. I'm not ready to take more. This is
22 ridiculous for you to be cross-examining the Office of
23 Planning of whether their information on the sun path
24 was there or not. It is clearly here. Let's move on.

25 MR. KEYS; Mr. Chair, that again --

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1 CHAIRPERSON GRIFFIS: Please, let's move
2 on.

3 MR. KEYS: -- is expert testimony. He is
4 relying in his report on statements that are not in
5 the record.

6 CHAIRPERSON GRIFFIS: What is he --

7 MR. KEYS: -- conversations with a witness
8 who is not present.

9 CHAIRPERSON GRIFFIS: The Office of
10 Planning -- their role is to do an analysis. They get
11 all the information into the record, and they do the
12 analysis, and they present their case. If you want
13 to say -- Ask him the question of -- It is in the
14 record. I'm looking at it. He admits to talking to
15 the architect and getting that information, which is
16 just an analysis of the specific facts that are in the
17 sun path. Show us how that isn't right. Don't put
18 him on the spot of whether he was correct in asking
19 the question or not.

20 He's brought us additional information.
21 You have his report. Question the substance of it.
22 Don't question the method.

23 MR. KEYS: I don't have the witness.

24 CHAIRPERSON GRIFFIS: You have the Office
25 of Planning. We are going to take time to go through

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1 whether 20 minutes of shadow is or isn't here? I'm
2 losing patience with this. Go into the substance. You
3 got so many gosh darned line diagrams on this sun
4 path, let's get to it. We got degrees. We got time
5 of day. We got different seasons. We've got it in
6 path. We've got it in --

7 MR. KEYS: I don't think it's my
8 responsibility to explain --

9 CHAIRPERSON GRIFFIS: I've turned your
10 mike off. So you need to turn your mike on. Mr.
11 Keys.

12 MR. KEYS: There should be a witness here
13 to explain that exhibit.

14 CHAIRPERSON GRIFFIS: So bring that point
15 up. Don't take on and waste our time with the Office
16 of Planning cross-examination questions like that.
17 What's the next question for the Office of Planning?

18 BY MR. KEYS:

19 Q Mr. Mordfin, you say that you have
20 recommended that certain windows be omitted from the
21 drawing because of concerns about privacy?

22 A Yes.

23 Q Aren't there other windows that face the
24 Dempsey's property?

25 A Yes, there are.

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1 Q Why haven't you recommended those be
2 deleted out of concern for privacy?

3 A Well, first of all, the applicant is going
4 to erect a privacy fence, a sight type fence, and we
5 felt that that would eliminate any issues from any
6 ground floor windows.

7 There are skylights which we felt that you
8 don't see directly out of the skylight into adjoining
9 properties. Then there are some second story windows
10 that also face the adjoining property, but we didn't
11 feel that it unduly compromised the privacy of that
12 adjoining property.

13 Q Why?

14 A Because there are windows on the side of a
15 dwelling. We felt that windows on the side of a
16 dwelling are an appropriate use. We felt that it
17 wouldn't be up too high that they would be able to see
18 over everything and into the adjoining property, and
19 we thought that it was a reasonable expectation that
20 people would have windows on the second story of their
21 dwelling on the side of the house when there is a
22 house on the adjoining property.

23 Q Isn't it possible in the future that, if
24 this proposed addition is built in the configuration
25 that is proposed, that the uses within that building

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1 could change, uses meaning how one uses the rooms in
2 that building?

3 A Yes, they could change the uses.

4 Q Would that be subject to any further
5 review by your office?

6 A Well, that was the purpose of the third
7 floor window, which is proposed as a storage room.
8 That was part of the reason -- rationale that we
9 thought that maybe that one be eliminated, because
10 it's a storage room, but perhaps in the future it
11 could be used as a bedroom, as an office, as whatever.

12 So that was the purpose of doing it for that room,
13 even though currently it is proposed as a storage
14 room, and as such would minimally affect the adjoining
15 property.

16 Q Take a look at the elevation of the
17 property as it faces the Dempsey's property.

18 CHAIRPERSON GRIFFIS: I just have to make
19 a note here. It's been so long since I've seen actual
20 blueprints, it's kind of amazing to see that on the
21 board. But let's continue with the substance of this.

22 BY MR. KEYS:

23 Q This is what is called the right
24 elevation, and the window you are proposing to
25 eliminate is this one?

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1 A The one at the top. Yes.

2 Q Now, Mr. Mordfin, do you know what on this
3 right elevation the -- Do you know what the proposed
4 addition overlooks?

5 CHAIRPERSON GRIFFIS: Didn't we just go
6 through that? Did I ask you that question?

7 MR. MORDFIN: What this proposed -- Yes,
8 you did.

9 CHAIRPERSON GRIFFIS: Okay. Let's move
10 on.

11 MR. KEYS: I believe you asked about the
12 three-story addition directly adjacent --

13 CHAIRPERSON GRIFFIS: Which portion are
14 you asking?

15 MR. KEYS: I'm asking, as you look at the
16 right elevation, let's look at the portion of the
17 addition that goes beyond the existing structure.

18 CHAIRPERSON GRIFFIS: Okay. So where does
19 that overlook?

20 MR. MORDFIN: What does that portion
21 overlook? Well, the first section, which is
22 approximately five feet off the property line, has
23 three windows, but they are skylights. So they won't
24 provide any opportunity to look onto the adjoining
25 property, and beyond that it's set back approximately

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1 another 16 feet. So while there are ground story --
2 first floor windows, it's set back further and will
3 also be behind the fence. So I don't see that those
4 will be overlooking --

5 BY MR. KEYS:

6 Q But do you know what they overlook?

7 A Those last windows in the back? The rear
8 yard of the adjoining property.

9 Q Do you know what's in the rear yard of the
10 adjoining property?

11 CHAIRPERSON GRIFFIS: Oh, let's move on.
12 Next question?

13 BY MR. KEYS:

14 Q Do you know what's in the rear yard of the
15 adjoining --

16 CHAIRPERSON GRIFFIS: No, there's no
17 relevancy to that, and the Board is well aware of --

18 MR. KEYS: The relevancy is to what
19 privacy issues are affected. What is there?
20 Physically what is in that yard?

21 CHAIRPERSON GRIFFIS: This is drawing it
22 out to an unbelievable level. Ms. Miller?

23 VICE CHAIRPERSON MILLER: Mr. Keys, can I
24 make a suggestion from one attorney to another.
25 Basically, I think what is taking so long here is that

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1 you are not really framing your questions as cross-
2 examination, that it would go a lot faster if you get
3 to your point by saying such as, isn't it true that
4 this is overlooking such and such. Then we can move
5 on. You are basically asking about six questions to
6 bring it out from Office of Planning, and it's taking
7 a very long time.

8 So you are given the opportunity for
9 cross-examination, and I would recommend that you go
10 for it that way.

11 BY MR. KEYS:

12 Q Mr. Mordfin, isn't it the case that this
13 set of windows looks over the patio in the Dempsey's
14 yard?

15 A The ones in the back of the house?

16 Q Yes.

17 A That it looks over their patio? I'm not
18 sure where their patio is.

19 Q You didn't visit the Dempsey's house?

20 A I visited the applicant's house. I saw
21 the rear yard of the adjoining property. I didn't
22 take note of where their patio is.

23 MR. KEYS: Thank you, Mr. Mordfin. No
24 further questions.

25 CHAIRPERSON GRIFFIS: Excellent. Thank

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1 you very much. Is there cross-examination from Kelly?

2 Cross-examination questions of the Office of
3 Planning, Ms. Kelly?

4 MS. KELLY: No.

5 CHAIRPERSON GRIFFIS: Very well. We are
6 picking up speed now. Let's go to the presentation
7 from the ANC.

8 MR. FROMBOLUTI: Mr. Chairman, would you
9 like me to read the letter or should I just --

10 CHAIRPERSON GRIFFIS: No. Is there
11 anything n addition to that? Of course, you know, you
12 are -- Well, I'm not going to go into that. Go ahead.
13 Anything else?

14 MR. FROMBOLUTI: Just to summarize the
15 main points.

16 CHAIRPERSON GRIFFIS: Good.

17 MR. FROMBOLUTI: The ANC voted to deny the
18 requested special exemption as both adjoining
19 neighbors felt that they would be inversely impacted
20 by it. Per 223.2, light and air will be reduced, and
21 let me just say light and air is more than a sun
22 study. You know, there's open sky involved also.
23 Privacy and enjoyment will be affected, and it will
24 visually intrude upon the character, scale and pattern
25 of the neighborhood. End of statement.

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1 CHAIRPERSON GRIFFIS: Excellent. Thank
2 you very much. Did you also want to speak for the
3 ANC?

4 MS. RENSCHAW: Yes. Mr. Chairman, at the
5 time of the ANC meeting --

6 CHAIRPERSON GRIFFIS: I'm going to be in a
7 lot of trouble for this, but let's go ahead.

8 MS. RENSCHAW: -- nothing had been
9 determined about that west side nonconforming versus
10 conforming status of the removed porch, and we have
11 been told again that the BZA have the sole authority
12 to recreate a nonconformity.

13 Just to also point out that no sun path
14 study was brought to the attention of the ANC, no
15 environmental report, and just to mention that the
16 Office of Planning in its report to the Board failed
17 to highlight the ANC's recommendation that the
18 applicant reapply when that west side erosion and
19 setback issues as well as other DCRA and court
20 directives were resolved.

21 CHAIRPERSON GRIFFIS: Good. Thank you
22 very much. I'm sure the entire Board, as myself, is
23 aware of that notion of resubmitting based on the
24 remediation of some of the existing construction
25 conditions. I think the Board has addressed that

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1 substantially in other cases, our jurisdiction line
2 that's drawn between construction and permitting
3 issues and that that are zoning related, unless there
4 was any impact that was actually brought to bear on
5 this specific special exception application.

6 Very well, that being the ANC's
7 presentation -- is that correct? Anything further?
8 Very well. Thank you very much. Don't go anywhere.
9 Let's have Board questions. Ms. Miller?

10 VICE CHAIRPERSON MILLER: Mr. Fromboluti,
11 were you a commissioner at the time that this case was
12 considered?

13 MR. FROMBOLUTI: Yes I was.

14 VICE CHAIRPERSON MILLER: Okay. Could you
15 just tell me how the issue was advertised to the
16 community?

17 MR. FROMBOLUTI: Let's see. We had a
18 presentation by the individual who is building the
19 house whose name -- It was on the list serv. It was
20 on the Northwest Current.

21 VICE CHAIRPERSON MILLER: Tell me what's
22 on the list serv. and the Northwest Current, the
23 meeting or the issue --

24 MR. FROMBOLUTI: The agenda item was on
25 the list serv. and in the Northwest Current.

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1 VICE CHAIRPERSON MILLER: Okay. And the
2 basis for the ANC's decision, as I understand it, was
3 because it impacted those two neighbors, and --

4 MR. FROMBOLUTI: Yes, we had a
5 presentation from the two neighbors.

6 VICE CHAIRPERSON MILLER: And did you
7 consider the concerns of the other neighbors that were
8 in support of the application?

9 MR. FROMBOLUTI: Yes, we did, but in our
10 opinion, or in my opinion also, the neighbors to both
11 sides carry greater weight, because the issue seemed
12 to be a side yard issue, and that seemed to be the
13 main issue. The neighbors across the street weren't
14 affected as much. The neighbors across the street
15 would probably like it, because it would be a new
16 house as opposed to an old house, but their light and
17 air would not be affected.

18 VICE CHAIRPERSON MILLER: Okay. My final
19 question is -- and I don't think I saw it in the
20 resolution, and we give the resolution the great
21 weight. But did you consider any overall ANC general
22 issue or just basically that these two neighbors were
23 affected? Didn't this affect a broader ANC issue?

24 MR. FROMBOLUTI: Well, in my opinion, the
25 whole issue of overbuilding in Chevy Chase is becoming

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1 an issue. There are a lot of what I would consider
2 personally overscale buildings and additions being
3 built.

4 As a matter of fact, I almost don't
5 consider this an addition. The addition is twice as
6 big as the original house. So -- but it is an overall
7 issue.

8 VICE CHAIRPERSON MILLER: But that is your
9 personal opinion?

10 MR. FROMBOLUTI: Yes.

11 VICE CHAIRPERSON MILLER: The ANC didn't
12 reach that question?

13 MR. FROMBOLUTI: We did not discuss that.

14 VICE CHAIRPERSON MILLER: Thank you.

15 MS. RENSHAW: Just for further
16 clarification, notices were taken around to all of the
17 homes in the area on either side of the applicant and
18 across the street. So we did leaflet.

19 CHAIRPERSON GRIFFIS: So noted. Any other
20 question from the Board?

21 MS. NOLAN: Can I make one motion. One
22 more addition is that the issue of the size of the
23 addition did come up at the ANC meeting, and --

24 CHAIRPERSON GRIFFIS: What was the
25 outcome?

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1 MS. NOLAN: Commissioner Fromboluti
2 suggested that this was not an addition but a new home
3 being built around the original house. So that was
4 considered during the ANC.

5 CHAIRPERSON GRIFFIS: Considered. Okay.
6 And not part of the official action of the ANC as a
7 whole?

8 MS. NOLAN: Right.

9 CHAIRPERSON GRIFFIS: Very well. Cross
10 form the applicant?

11 MR. BROWN: None.

12 CHAIRPERSON GRIFFIS: Any cross from the
13 parties in opposition? Mr. Keys? Ms. Kelly? Any
14 cross? Thank you all very much.

15 Is there anyone here present in
16 application 17270 to present testimony? Persons to
17 present testimony in support of the application, if
18 you would come forward at this time and have a seat
19 the table. Let me have a show of hands just to
20 indicate anyone who is present in opposition, persons
21 in opposition to give testimony? Indeed, I'm sorry.
22 That's just my boilerplate stuff I always say, but we
23 definitely have at least two.

24 Okay, let's move ahead then. Persons --
25 Sir, if you wouldn't mind, turn your microphone on,

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1 giving your name and address for the record, and
2 begin.

3 WHEREUPON,

4 MARTIN FUCHS

5 was called as a witness and, having previously been
6 duly sworn, testified as follows:

7 DIRECT TESTIMONY

8 BY MR. FUCHS: My name is Martin Fuchs. I
9 live at 3101 Legation Street. On the map it's over
10 here. I'm across the street from the addition.

11 One of the things that concerned me the
12 most this morning was the statements from the Dempsey
13 attorneys trying to get you to delay things. I think
14 most of the neighborhood would be up in arms if you,
15 you know, delayed your decision today to give people
16 time to bring you more evidence.

17 I think the majority of the neighborhood
18 is in support of this, and is upset about the delay
19 that happened; because the D.C. government originally
20 gave permission to do something, and then changed its
21 mind, and then this has happened.

22 I think that -- I was at the ANC meeting,
23 and the format of that meeting was such that people
24 got to talk, and then the ANC Commissioners gave their
25 views, but there was no way to comment about the ANC

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1 Commissioners' views, and I thought the 6-1 decision
2 was a result of the six people deciding an issue that
3 you are not deciding.

4 The only ANC Commissioner who limited
5 himself to the issue you have decided is before you
6 voted in favor of this proceeding -- in favor of this
7 application.

8 I don't think there's such a big air and
9 space issue, and light and space issue, as has been
10 made out here. The Kellys' property, which is on the
11 other side of the alley, is a large property. It's
12 been brought out that it's a considerable distance
13 away from the Toggas' property, much further away from
14 the Toggas' property than virtually any other house in
15 the vicinity. Most of the houses are much closer
16 together.

17 You can't tell it from this picture,
18 because it's cut off, but this tree over here is
19 significantly bigger than the Toggas' property, and by
20 at least 40 percent taller. So it is cutting off much
21 more light than this addition would. I don't know if
22 that is relevant or not, but it concerns me to set a
23 precedent that, you know, somebody can't grow his
24 trees as high as he wants or it seems like, if the
25 Kellys were allowed to say the Toggases couldn't build

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1 their addition, then the Toggases should be able to
2 tell the Kellys, well, stop -- cut off the tree where
3 it is now, don't let it keep getting in the way of our
4 light.

5 I think the equities on the other side of
6 the property -- I've lived at the property for 18-19
7 years before both the Toggases and their neighbors who
8 were fighting over the other side have lived there,
9 and when they bought the property it was set -- it had
10 the same distance from the Toggas' house as it will
11 after this addition.

12 So this isn't a case where the Toggas'
13 house is going to move closer to their neighbor than
14 the neighbor -- than at the time the neighbor bought
15 his property.

16 As for the alley, I don't think the city
17 is losing anything. The house is going straight back
18 along the alley. The alley is just as usable as it
19 ever was, and I think this kind of addition is good
20 for the neighborhood, is good for the city. It
21 increases the city's tax base.

22 The ANC was -- One of the Commissioners
23 made a statement that there was no opportunity to
24 rebut, that this was inconsistent with what was going
25 on in the area; and I know that was a question of

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1 yours, Ms. Miller.

2 In the immediate block there have been
3 similar three-story additions --

4 CHAIRPERSON GRIFFIS: I'm going to ask you
5 to conclude pretty quickly, please.

6 MR. FUCHS: -- on Legation Street, one on
7 32nd Street, and two on 31st Street. So this is in
8 the character of the other additions that have been
9 put up in the last two or three years in this
10 neighborhood. Thank you.

11 CHAIRPERSON GRIFFIS: Excellent. Thank
12 you very much. Don't go too far. Are there questions
13 from the Board on the testimony? Questions from the
14 applicant or cross-examination? Does the ANC have any
15 cross-examination of the witness? Mr. Keys?

16 CROSS-EXAMINATION

17 BY MR. KEYS:

18 Q Mr. Fuchs, you signed the petition in
19 support?

20 A Yes, I did.

21 Q Did you see the plans?

22 A Not at that time. I've seen them since.

23 Q You did not see the plans when your
24 support was requested.

25 CHAIRPERSON GRIFFIS: That's what he said.

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1 MR. KEYS: Thank you.

2 CHAIRPERSON GRIFFIS: Okay.

3 BY MR. KELLY:

4 Q Mr. Fuchs, when you stand in your yard and
5 look toward the Toggas' house, can you in fact see any
6 part of where this new addition is going to be?

7 A Yes, but not as much as you would see from
8 your house.

9 Q Well, I thought you had just said that
10 this large tree on the corner actually obstructed your
11 view, which it does.

12 A No, the tree is between your house --
13 Well, the tree is closer to your house. The tree does
14 not obstruct my view between my house across the
15 street and the Toggas' house, but it does take away a
16 lot of the sunlight on the Toggas' and your side of
17 the block.

18 Q Well, it's interesting where the sun comes
19 up in the morning and where the sun goes down at
20 night, and the --

21 CHAIRPERSON GRIFFIS: What's the question?

22 BY MR. KELLY:

23 Q The question is: How, given the fact that
24 the sun comes up in the north -- in the east and sets
25 in the west, how could this tree, in fact, affect the

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1 sunlight anywhere?

2 A Well, the tree is blocking a lot of the
3 Toggas' sun, and I was just using it as an
4 illustration of it seemed a little unfair for you to
5 be complaining about what the Toggases were doing --

6 CHAIRPERSON GRIFFIS: So noted.

7 MR. FUCHS: Whereas, you know, they are
8 not complaining about your tree.

9 CHAIRPERSON GRIFFIS: We have not the
10 jurisdiction to establish acts of God and the heights
11 of trees. Okay.

12 MR. FUCHS: I'm sorry.

13 CHAIRPERSON GRIFFIS: Anything else?

14 MR. KELLY: That's it.

15 CHAIRPERSON GRIFFIS: Good. Thank you
16 very much. Okay, let's move ahead then. Let's start
17 with parties in opposition case presentations. What's
18 your estimate of the time required for your case
19 presentation?

20 MR. KEYS: Fifteen to 20 minutes, Mr.
21 Chair.

22 CHAIRPERSON GRIFFIS: Okay. Let's go. We
23 got to move ahead.

24 WHEREUPON,

25 JOSEPH DEMPSEY

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1 was called as a witness and, having previously been
2 duly sworn, was examined and testified as follows:

3 BY MR. KEYS:

4 Q Mr. Dempsey, would you introduce yourself,
5 please?

6 A My name is Joseph Dempsey. I live at 3114
7 Legation Street.

8 Q Mr. Dempsey, did you and/or your wife
9 cause these photographs to be taken?

10 A Yes, we took them.

11 Q And are the dates on the photographs
12 accurate in suggesting the date on which the picture
13 was taken?

14 A Yes, they are.

15 Q Did you also cause the diagram, the chart,
16 to be prepared on --

17 CHAIRPERSON GRIFFIS: Are you going to
18 adopt this as your testimony? Let's just move ahead.

19 You don't need to introduce every piece of evidence
20 under evidentiary rules of the court here. Is that
21 what you're trying to do, Mr. Keys? Do you want to
22 have him adopt his case?

23 MR. KEYS: I'd like him to indicate that
24 he prepared the chart at the end of the package.

25 CHAIRPERSON GRIFFIS: Okay. The whole

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1 thing, right?

2 MR. KEYS: That's correct.

3 CHAIRPERSON GRIFFIS: Okay. Let's go. Is
4 that right?

5 MR. KEYS: Yes, sir.

6 CHAIRPERSON GRIFFIS: Let's move ahead.

7 BY MR. KEYS:

8 Q Mr. Dempsey, I'm going to ask you to think
9 specifically about your family's use of your property
10 and the exterior of your property, and how you deem it
11 is impacted by the proposed addition.

12 A Okay. We spend a lot of time in the back
13 yard and in the front porch. If you look at the
14 pictures, you see that the houses are close together,
15 40 foot lots, I guess, or something. So you can't
16 help that we are side by side. We spend a lot of time
17 out there.

18 Our patio is right next to the Toggas'
19 back yard, and as all the neighbors will tell you, we
20 all spend a lot of time out in those back yards. The
21 idea of a three-story addition being built so close to
22 our property line is really why I'm sitting here this
23 morning, because we feel that such an addition will be
24 much too close, and it will certainly change the
25 characteristic of our back yard, which we all enjoy,

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1 and it will certainly impact on our privacy and just
2 sort of the general pleasant nature of the back yards
3 as we have all enjoyed them in the past.

4 Q Mr. Dempsey, from the plans I notice that
5 the proposed addition includes a one-story structure
6 at the rear of the property that includes a chimney.
7 Do you have any concerns regarding that?

8 A Well, I do. Again, you will see -- The
9 more I talk, you will see that I am not an engineer or
10 an architect, but you look at these things and look at
11 these regs. You look at the plans and certain things
12 come out.

13 There is a chimney, I guess at a family
14 room at the rear that only goes up about a story and a
15 half, I think. Again, I don't have it before me. But
16 that seems low to me. Most chimneys are at the very
17 top of your house, and the reason for that is because
18 they want the smoke to go up and out, and I'm
19 concerned that a lower chimney for a fireplace, I
20 guess, that's in one of the rooms at the back of the
21 proposed addition is going to emit smoke that's lower
22 than a typical chimney would be. And that, obviously,
23 is a layman's understanding about these things.

24 CHAIRPERSON GRIFFIS: Okay, but what is
25 your concern?

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1 MR. DEMPSEY: Smoke, too much smoke being
2 too low.

3 CHAIRPERSON GRIFFIS: Into your building?

4 MR. DEMPSEY: Yeah. I mean, that's just,
5 again --

6 CHAIRPERSON GRIFFIS: Okay.

7 BY MR. KEYS:

8 Q Mr. Dempsey, I am going to ask you to look
9 at the photographs, and I'd like you to take the Board
10 through the photographs, and I'd like you to highlight
11 for the Board the photographs that you think would
12 illustrate the problem and the concerns that you have.

13 A I will do that, and I'll do it quickly.
14 The very first photograph, Number 1, shows the Toggas'
15 home, taken in the summer of 2003. It shows the much
16 discussed side porch/addition.

17 The second picture is taken, as you can
18 see, photo Number 2 was taken May 29 of 2004, and you
19 will see that the addition is now completely torn
20 down.

21 The next picture was taken on June 25,
22 2004, in the summertime, June 25. You will see that a
23 tremendous amount of excavation had already been done.

24 In fact, the excavation began, I think, a few days
25 before that. I know for certain that there was

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1 excavation activity on Sunday, June 20th, which was
2 Father's Day, because it was on that day that, while
3 playing golf at Rock Creek with one of my sons, I got
4 a call that Mr. Toggas, while operating the backhoe,
5 punctured a gas line in the front yard, which caused
6 the Fire Department to come and all of that.

7 CHAIRPERSON GRIFFIS: A memorable day, all
8 in all.

9 MR. DEMPSEY: A memorable day, all in all.

10 That really is when we started -- That was
11 the first red flag for us that this type of work would
12 go on, and it prompted us to start just asking
13 questions. I will say that I don't sit here happily.

14 I'm not doing this for the exercise. But we are here
15 because we started asking questions about these
16 things, and every question that we asked begat another
17 question. There was never an answer that I thought
18 was satisfactory, which prompted us to keep going
19 forward.

20 If at anytime I got the sense or my wife,
21 Cindy -- if we got the sense that this was all sort of
22 by the book and legit and A-Okay, done. I mean, not
23 here this morning taking up your time or anybody's
24 time. But that never happened. These questions kept
25 coming back and coming back.

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1 To whit, you will see here that all this
2 excavation was done -- was completed by the date June
3 25th. An excavation permit was not even let until
4 August 6th. Again, I'm not a detective, but you know,
5 you can find these things out. You know, you go to
6 dc.gov and all this other stuff. You find these
7 things.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. DEMPSEY: Again, I don't know if
10 that's against the law or against common practice. I
11 do not know that, but I can tell you that the permit
12 was not in hand until August 6th.

13 CHAIRPERSON GRIFFIS: Do you also
14 understand that that wouldn't be under our
15 jurisdiction even to that, unless you were actually
16 bringing an appeal of the permit?

17 MR. DEMPSEY: Okay. I didn't understand
18 that.

19 CHAIRPERSON GRIFFIS: Okay. And I don't
20 want to raise any false hopes that, here we are, we
21 are going to establish that this is illegal or permits
22 weren't done.

23 MR. DEMPSEY: We don't want false hopes.

24 CHAIRPERSON GRIFFIS: A clear indication
25 just to remove any sort of construction aspects, but

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1 look at this as what is proposed and its future. You
2 know, if it is built, what will happen? That's what
3 we are looking at.

4 MR. DEMPSEY: Okay. If it's built, what I
5 think will happen is that it will have a deleterious
6 effect on our property, to be sure. This will be a
7 monstrous three-story addition that will be very close
8 to our property line.

9 I don't know from engineer plans and sun
10 path studies. I don't know these things. Okay?
11 Others do. But I can tell you that something that big
12 that close can't be a good thing for our property. I
13 just know it's not.

14 So I mean, that's sort of why we are here.

15 Again, if you sort of go through some of these other
16 pictures -- and again, if you take a look perhaps at
17 photo Number 6 you will see there, that's a pretty
18 good look at sort of the depth and the closeness to
19 the property line, and the property line, you will
20 see, is indicated by a yellow surveyor's stick there,
21 I think.

22 You could see. I mean, that's a big wall,
23 and that's going to go up three straight stories,
24 which if you sort of follow your finger straight up,
25 that's to the tip of that chimney. So that foundation

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1 wall is going to go up three straight stories to the
2 very top of that house.

3 Again, there might be, you know, all
4 manner of rules and regulations, and we've discussed
5 those, but I'm just here as a homeowner to say that
6 this feels mighty close and mighty big. And I also
7 think it changes -- Well, it creates a house, it
8 erects a house that is far bigger than anything else
9 in the neighborhood.

10 Now, surely, there have been a couple of
11 other additions put on. That's for sure. This will
12 be, by far, the biggest. And again, I don't know the
13 numbers, but I think if you sort of take a look --
14 I'll get right to the punchline for you. You go way
15 to the end there. That's this chart here that we have
16 that shows the square footages.

17 BY MR. KEYS:

18 Q Is that what is indicated in red?

19 A Yes. Okay. This is the map with a circle
20 around the houses in our neighborhood. The red
21 numbers indicate the current square footages of all of
22 those houses in the neighborhood.

23 Again, I'm not an architect, but I've done
24 a little bit, and Mr. Keys has helped me -- done a
25 little bit of the math on this, and Mr. Toggas'

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1 property is the big black spot there, 835, and it is
2 currently 2236 square feet as it presently exists.

3 If this addition goes forward, it goes out
4 to almost 7,000 square feet. I don't want to be held
5 exactly to that, but that is a gigantic difference, I
6 think, making this house, you know, far bigger than
7 anything in the neighborhood. And I do think -- I
8 think it sort of sets a precedent, and I understand
9 that you are not worried too much about precedent, but
10 it does.

11 CHAIRPERSON GRIFFIS: Actually, we are
12 terribly fearful of precedent, which is why we proceed
13 with our applications on their own merit but not
14 create precedent.

15 MR. DEMPSEY: I understand.

16 BY MR. KEYS:

17 Q Could you go to photograph 7, please, and
18 explain the view and the angle of view of 7 and what
19 it illustrates?

20 A Okay. Number 7, Photo Number 7, is taken
21 from the alley. We went around -- That's our house at
22 the rear there, the red brick house. We ran around
23 the other side of the alley and stood at what I
24 believe is the very far end of the proposed addition
25 and took a look back at their yard and what becomes of

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1 our yard.

2 You will see that the straight wall
3 closest to our house over on that side wall -- you
4 will see that that is where that wall begins. That's
5 where that three-story edifice goes to, out to there,
6 which also is about kind of the middle of the -- well,
7 not quite the middle, but certainly overshadows all of
8 our patio and the close-in part of our back yard.

9 Number 8 sort of is a different look. You
10 will see there that that's sort of standing in our
11 back yard taking a look out toward the street, and you
12 will see that that wall that we looked at earlier in
13 its earlier days now is kind of growing up. You will
14 see kind of where it begins, and it goes all the way
15 out toward the front to the street.

16 When that wall goes up, it will take away
17 completely the view of the street as we know it, which
18 is nice, you know, to sit out there. You can kind of
19 take a look out. That's gone. That's completely
20 obstructed.

21 Q Does the wall of the new structure run the
22 entire length of this picture all the way to the
23 street?

24 A I believe that it does, yes.

25 Photo 9 is again a look out --

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1 CHAIRPERSON GRIFFIS: That's a seven-foot
2 wall, though, we're talking about. Is that correct?

3 MR. KEYS: Seven-foot wall? I don't
4 understand that.

5 CHAIRPERSON GRIFFIS: You're saying that
6 that wall is going to go -- if you look at photograph
7 8. Correct?

8 MR. DEMPSEY: I am.

9 CHAIRPERSON GRIFFIS: Okay. And that wall
10 is going to go up and obstruct your view from your
11 rear yard all the way to the street. You won't be
12 able to see it anymore?

13 MR. DEMPSEY: Yes. What I'm saying is
14 this wall here represents like the new wall, and that
15 is going to go up three stories.

16 CHAIRPERSON GRIFFIS: Is that correct? Is
17 that your understanding?

18 MR. DEMPSEY: Yes, it is.

19 CHAIRPERSON GRIFFIS: That's the addition?

20 MR. DEMPSEY: Yes.

21 CHAIRPERSON GRIFFIS: Okay.

22 VICE CHAIRPERSON MILLER: Could you just
23 clarify for me: Your view from where? From the
24 street from where?

25 MR. DEMPSEY: Sure. Right here. This is

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1 my back yard, standing there looking straight out.
2 This is what we currently have, nice look, and now it
3 goes straight up.

4 CHAIRPERSON GRIFFIS: What could you see
5 when the den was there?

6 MR. DEMPSEY: A little less. You know
7 matter of fact, if I kind of --

8 CHAIRPERSON GRIFFIS: Could you see
9 anything?

10 MR. DEMPSEY: Oh, sure.

11 CHAIRPERSON GRIFFIS: You could see up to
12 the sky, but you couldn't see the street if you were
13 standing at that place where you took that photograph?

14 MR. DEMPSEY: The question is could I,
15 when the den was there?

16 CHAIRPERSON GRIFFIS: Yes.

17 MR. DEMPSEY: Yeah. Oh, yeah. You could
18 see. You had a good look at the street. It wasn't
19 obscured that way. In fact, give me a second.

20 CHAIRPERSON GRIFFIS: But isn't this going
21 back exactly where the den was placed?

22 MR. DEMPSEY: No. The den ended. Again--

23 CHAIRPERSON GRIFFIS: I understand that
24 part. I'm talking about the encroachment on the side
25 yard. It extends out from the building the same

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1 dimension that the proposed addition did.

2 MR. DEMPSEY; It extends out to where that
3 little den used to be, comes out, then goes all the
4 way back and all the way up.

5 CHAIRPERSON GRIFFIS: I understand that.
6 So when the den was there, it extends out where -- to
7 the level of the

8 MR. DEMPSEY: Right, one story.

9 CHAIRPERSON GRIFFIS: -- proposed, and one
10 story. So your point is that you could see through
11 that den --

12 MR. DEMPSEY: Certainly, I could not see
13 through it. You know, it only took up a little bit of
14 that view.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. DEMPSEY: Okay? The view is now
17 totally gone. When the den was there, there was --
18 you know, it was partially obstructed by that one-room
19 den. Okay?

20 MR. KEYS: Mr. Griffis, we would take
21 exception to one thing that you said, and that is that
22 the outline of the new proposed addition is the same
23 distance as the den that was demolished. There is
24 nothing in the record by way of a survey that shows
25 what the distance between the lot line and the now

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1 demolished den was.

2 I think, if you look at the several
3 exhibits that are in the record either through the
4 applicant's two exhibits of the surveyor's plat with
5 the proposed improvements located, if you look at the
6 plans that were submitted, if you also look at the
7 wall check survey which Mr. Mordfin included in his
8 report, you will see that there is no determination in
9 the record as to that distance.

10 CHAIRPERSON GRIFFIS: Okay.

11 BY MR. KEYS:

12 Q Mr. Dempsey, I'd like you to talk about
13 photograph 9 and what photograph 9 shows.

14 A Photograph 9 shows again how far out --
15 not how close it gets, and this is a picture that is
16 taken from my side porch -- excuse me, my front porch
17 where I spend a good bit of my time, standing on that
18 porch looking east. You know, this is what we will
19 now have, is the wall that will go straight up --

20 CHAIRPERSON GRIFFIS: I'm sorry to
21 interrupt you, but what time of day is this?

22 MR. DEMPSEY: That I do not know. I'm
23 sorry, I don't.

24 CHAIRPERSON GRIFFIS: What's your
25 estimation? Which way is the sun coming?

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1 MR. DEMPSEY: I don't know. I have a
2 feeling that is in the afternoon. But I don't really
3 know, sir. I don't. I'm sorry.

4 CHAIRPERSON GRIFFIS: In looking at this,
5 that's where their proposed front porch is going to
6 be?

7 MR. DEMPSEY: Goes out to, yes, sir.
8 Right.

9 CHAIRPERSON GRIFFIS: In this photograph -
10 - You were standing there. You took this. Correct?

11 MR. DEMPSEY: Me or my wife. One of us
12 did, yes.

13 CHAIRPERSON GRIFFIS: Yes, there it is.
14 At all times you were in control of this -- No. Once
15 this porch was filled out, materials were put on it
16 and someone could stand on it, would this block
17 sunlight to your property?

18 MR. DEMPSEY: The front porch?

19 CHAIRPERSON GRIFFIS: Yes.

20 MR. DEMPSEY: I don't think so. It's the
21 back.

22 CHAIRPERSON GRIFFIS: No, I understand
23 that. All right, go ahead.

24 BY MR. KEYS:

25 Q Now, Mr. Dempsey, this depicts more than

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1 just a porch, doesn't it? It depicts a basement as
2 well?

3 A Right. There's going to be -- As I
4 understand the plans and look at this, I think there
5 is also going to be a storage area underneath the
6 front porch.

7 CHAIRPERSON GRIFFIS: Storage area, not
8 basement is your assessment? Good. Okay.

9 MR. DEMPSEY: Yes. Photo 10 -- Let's see,
10 Photo 10 gives you sort of a good look at what the
11 back yards are like right now. Okay? Again, open.
12 Sort of look through, you see the Kellys' house to the
13 rear there and their garage, but you also see -- Well,
14 again you can see that their addition -- and this
15 doesn't really -- Let me take one more look here.
16 Okay.

17 If you look at my figure for a second,
18 this proposed addition goes to about there, as I
19 understand it. So you see, here is our patio. This
20 is our little bitty patio, back yard. The rest is
21 like kids' land, you know, swings and basketball
22 courts, but this is where we -- you know, we adults,
23 grown-ups, spend a lot of our time, right in here.

24 That addition goes to about there,
25 roughly, and it goes straight up. So privacy and --

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1 You know, again I don't know the specifics, but surely
2 it is a looming presence over a part of the yard that
3 is dear to us. We spend a lot of time. We barbeque
4 out there a lot.

5 CHAIRPERSON GRIFFIS: What time of day was
6 this?

7 MR. DEMPSEY: That looks like it might be
8 the morning. That might be the morning, just given
9 where the sun is hitting our house and the Toggas'
10 house.

11 CHAIRPERSON GRIFFIS: What time of day
12 does your patio get sun?

13 MR. DEMPSEY: Morning, morning and then
14 for a little short while in the evening, but certainly
15 the sun comes in in the morning, you know, goes away
16 and then for a little bit in the afternoon it kind of
17 creeps through the trees.

18 CHAIRPERSON GRIFFIS: So is this -- the
19 average amount of sun that you get on your patio less?
20 Are you expecting the sun to burst through? It looks
21 like a pretty cloudless day.

22 MR. DEMPSEY: Cloudless. I think -- Well,
23 I'll get there. I mean, I think there is more sun.
24 Will this addition impact the amount of sun on the
25 patio? Less than it will the rooms in the house, I

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1 believe.

2 CHAIRPERSON GRIFFIS: I see.

3 MR. DEMPSEY: Okay?

4 CHAIRPERSON GRIFFIS: Go ahead.

5 BY MR. KEYS:

6 Q Number 11?

7 A Eleven, again just an idea for the depth
8 of this, how big this is, and again another look at
9 how close that foundation wall is to our side yard,
10 and a closer look --

11 CHAIRPERSON GRIFFIS: We are looking form
12 the alley across --

13 MR. DEMPSEY: We are looking at the alley,
14 from the alley across.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. DEMPSEY: And again you will see -- A
17 close look over at our property line there, you will
18 see the damage that's been caused by this
19 construction. I know you guys are not a construction
20 group, but there has been a significant amount of
21 damage to our property during this process.

22 CHAIRPERSON GRIFFIS: Okay. And number 12
23 is an interior shot from your home?

24 MR. DEMPSEY: Yes. And that is a shot
25 that was taken in the morning. You will see that that

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1 is the dining room and the living room in our house,
2 and you will see that the sunlight does come in, and
3 it is our belief that that sunlight will surely be
4 shortened and compromised if you put a three-story
5 wall up so close.

6 BY MR. KEYS:

7 Q Now, Mr. Dempsey, we can see through the
8 window in picture Number 12 at the Toggas' house.

9 A Yes.

10 Q And that house now moves toward you?

11 A Yes, it does. That's right. That's a
12 good point. Right. If you look through that window
13 over the TV, you'll see sort of what we currently
14 have. That wall gets eight feet closer than the way
15 you see it in that photo.

16 CHAIRPERSON GRIFFIS: Okay. 12-A shows
17 the same type of situation.

18 MR. DEMPSEY: Same idea. That view, if
19 you sort of look at 12-A, that's our dining room.
20 That vista right there is totally blocked by the
21 addition.

22 CHAIRPERSON GRIFFIS: Understood.

23 MR. DEMPSEY: And 13. Then lastly, photo
24 13. This was taken just recently of the guys that
25 have been working, and you will see -- and again this

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1 is not -- but you will see the type of damage that has
2 been done. All right? The serious --If you take a
3 look at our patio there, that's a flagstone patio, and
4 you can see how much erosion has gone on underneath
5 which has caused us to shut down the entire side of
6 the yard, because we are afraid for the kids to go
7 there.

8 CHAIRPERSON GRIFFIS: It's a serious
9 concern?

10 MR. DEMPSEY: It has been a serious
11 concern, yes, sir.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. DEMPSEY: Just a couple more things,
14 and I know I'm sensitive, too, to the time here.

15 First of all, and please, we do not want
16 to delay this. We do not. I mean, the purpose, as I
17 said at the beginning, is not to be obstructionist,
18 not to delay, not to make it difficult. It isn't. We
19 want this done, but we want it done right. We want it
20 done right there and here. Okay? But I really want
21 people to understand that. This is not for the
22 exercise or, you know, for kicks.

23 One more thing. Well, that's it. I'd
24 like to finish there, if I may. George?

25 CHAIRPERSON GRIFFIS: Thank you very much.

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1 BY MR. KEYS:

2 Q Mr. Dempsey, let me ask you, have you
3 talked to any of your neighbors who signed the
4 petition supporting the Toggas' addition?

5 A I did. I talked to a couple of them, and
6 I asked them, did you see any specifics, did you
7 really know what you were doing when you signed this
8 thing. And they both said, not really, that they just
9 were -- you know, that Mr. Toggas was walking around.

10 The wording was sort of ambiguous: Do you endorse
11 what I'm trying to do? Both people that I spoke to
12 and said, did you see the plans, they both said, no, I
13 did not.

14 CHAIRPERSON GRIFFIS: This may be your
15 first time before us. Let me say something that I've
16 probably overly said in the past.

17 Variances, special exceptions in front of
18 this Board aren't decided by popularity contest.

19 MR. DEMPSEY: Understood.

20 CHAIRPERSON GRIFFIS: We are not counting
21 up the votes here and counting up the votes there. I
22 think it's admirable that an applicant goes around and
23 talks to the adjacent neighbors but, you know what, we
24 need substance when we note these things, and we need
25 people to talk about the specific issues.

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1 That you can pack a room full of
2 opposition doesn't mean you are going to be
3 successful. So I think we understand what signatures
4 in support and in opposition go to, and I think we
5 have a lot of substance in this case to really
6 deliberate on. Anything further?

7 BY MR. KEYS:

8 Q Mr. Dempsey, is this a location survey
9 showing your house and the improvements to your
10 property?

11 A Yes, it is.

12 MR. KEYS: Mr. Chair, I'd like to get that
13 into the record.

14 CHAIRPERSON GRIFFIS: What is it?

15 MR. KEYS; It's a house location survey
16 for 3114. There's nothing in the record that
17 identifies where the improvements are on the Dempsey's
18 property.

19 CHAIRPERSON GRIFFIS: Oh, good. Okay,
20 that's fine. Who did this? Capital Surveys?

21 MR. KEYS: This was a survey that --

22 CHAIRPERSON GRIFFIS: I don't care,
23 really, who did it. But you contracted for this to be
24 done. Is that correct? Okay. So you did an
25 additional survey that shows your property?

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1 MR. DEMPSEY: No, I'm sorry. This was
2 done in 1993. We did that when we were refinancing or
3 something like that. So I've not done it recently,
4 but it is June 15, 1993. We have it, you know.

5 CHAIRPERSON GRIFFIS: Okay. And the
6 relevancy for their site plan is, or their plat?

7 MR. KEYS: Well, we thought it would help
8 the Board in its deliberation in assessing impacts to
9 know exactly where the improvements on my client's
10 property are.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. KEYS: To understand his use of the
13 property.

14 CHAIRPERSON GRIFFIS: Good.

15 MR. KEYS: If you could just give me a
16 moment.

17 CHAIRPERSON GRIFFIS: We are going to take
18 five minutes.

19 (Whereupon, the foregoing matter went off
20 the record at 12:42 p.m. and went back on the record
21 at 12:49 p.m.)

22 CHAIRPERSON GRIFFIS: Let's resume. We
23 have a new photograph?

24 MR. KEYS: Yes, Mr. Chair, we have a new
25 photograph.

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1 BY MR. KEYS:

2 Q Mr. Dempsey, could you describe the
3 vantage point of this photograph and why it is
4 significant to this case?

5 A Sure. This is a new one. I think it's
6 called -- It's written Exhibit D at the bottom, but
7 this is a --

8 CHAIRPERSON GRIFFIS: This is from your
9 neighbor's property?

10 MR. DEMPSEY: It is, yes, indeed. It's
11 taken from the neighbor's, and again it shows you the
12 real sort of look across from Moseleys' yard across
13 our yard to Mr. and Mrs. Toggas' yard.

14 CHAIRPERSON GRIFFIS: And that's your
15 white garage that's showing?

16 MR. DEMPSEY: It is, yes.

17 CHAIRPERSON GRIFFIS: Slate roof?

18 MR. DEMPSEY: Fake slate.

19 CHAIRPERSON GRIFFIS: Fake slate?

20 MR. DEMPSEY: Yep.

21 CHAIRPERSON GRIFFIS: Fake fish?

22 MR. DEMPSEY: Fake fish. But again,
23 that's the look, and you will see -- You can see
24 surely clearly how close we are on the west side,
25 which is why we are sort of fiercely protective of the

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1 other side. We can't help it over here, but to have
2 that other side totally closed off by anything, but to
3 say nothing of a three-story, straight-up addition --
4 you know, that's why we are here, just to try and
5 contest that, because we are afraid of the effects
6 that such an addition would have.

7 CHAIRPERSON GRIFFIS: Succinct and well
8 stated. Anything else?

9 BY MR. KEYS:

10 Q Mr. Dempsey, I'd like you to point out for
11 the Board what appears to be on the plans showing the
12 outline of the slab on which the previous -- the den
13 rested.

14 I think, if the Board has the applicant's
15 elevations, this would be the floor plan -- the first
16 floor plan.

17 CHAIRPERSON GRIFFIS: You need to step
18 back, please. Everyone needs to see it.

19 MR. DEMPSEY: Look at this. Again, my
20 understanding is that this dotted line shows the
21 existing house, where the existing house is. This
22 dotted line out front, this dotted line going up here
23 shows where the previous den -- in this it says
24 existing den. It doesn't exist anymore, but that
25 dotted line, the architects tell me, is where the

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1 house used to be, and they also tell me that one
2 cannot go out further from that. We are talking now -
3 - and Mr. Fromboluti just noted this, and it is his
4 estimation that the distance between this dotted line
5 and this proposed wall line is two feet. Again, I
6 will leave that to the experts to measure. That's
7 what has been reported to me.

8 MR. KEYS: Mr. Chairman, we would also
9 like to put in the record the wall check survey that
10 was prepared at the Toggas' request that is in the
11 surveyor's office, and it is the wall check showing
12 the locations of the actual foundations that are in
13 place, not the plans but the foundations that are in
14 place.

15 This is also illuminated in Mr. Mordfin's
16 OP report, but it is at a very reduced scale.

17 CHAIRPERSON GRIFFIS: Anything else coming
18 into the record that we can get up here now? What
19 else?

20 MR KEYS: That's all the additions to the
21 record.

22 CHAIRPERSON GRIFFIS: Okay.

23 BY MR. KEYS:

24 Q Mr. Dempsey, you have seen the wall check
25 survey. What strikes you as you look at the wall

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1 check survey compared to the other surveyor's plats
2 that are put in this record?

3 A I'm not sure, George -- the wall check?

4 Q There is the wall check survey. Is there
5 anything that you notice about the wall check survey?

6 A You mean how it goes out to the front
7 after? Okay. The wall check survey was done showing
8 the addition going out to a certain -- toward the
9 front to a certain distance, let us say. After that
10 wall check was done, in fact, the wall was built quite
11 a bit further out, further extending, the date after
12 this wall check was done.

13 I'm told -- Well, that's another one of
14 those questions, that when the wall check was
15 submitted on 10/7, there was no -- I mean, there was
16 no indication that the addition was going to go
17 further out toward the street, but shortly thereafter
18 it surely has -- that addition has indeed gone out
19 closer to the street.

20 Q In the other plats that are submitted to
21 the record for the Board in this case, where is the
22 front of the existing house depicted in relation to
23 the building restriction line? It's right on it,
24 isn't it?

25 A I can't see it, George.

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1 Q Oh, I'm sorry. It's set back from the
2 building restriction line. Right?

3 A Right. Yes. The maps that were submitted
4 previous showed the house with the front set back from
5 the building restriction line. Yes.

6 Q So is it your view that the exhibits given
7 to the Board depicting the house location proposed
8 additions, and even the existing structure, are
9 inaccurate?

10 A Well, that's one of the questions that I
11 talked about. I mean, this is the type of thing that,
12 the more we sort of dipped into this, the more
13 puzzling it became. I am not going to sit before you,
14 ladies and gentlemen, and make accusations like that.
15 I'm not. But I just have questions about these
16 documents, about what they show, what they are meant
17 to show. That's it. I don't know the answers to
18 that.

19 CHAIRPERSON GRIFFIS: Okay. Anything
20 else?

21 MR. KEYS: I'd like to make a closing
22 statement.

23 CHAIRPERSON GRIFFIS: Let's take questions
24 from the Board, and then we will do closings.

25 VICE CHAIRPERSON MILLER: Mr. Dempsey, I

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1 just want to get an understanding, or try to, of the
2 difference maybe between the impact from when there
3 was a den there and the addition on your property.

4 For instance, you know, you bring to our
5 attention how much the addition might impact your
6 patio, the privacy.

7 MR. DEMPSEY: Yes.

8 VICE CHAIRPERSON MILLER: And I'm
9 wondering, when there was a den there, did that not
10 impact your privacy on your patio, and am I
11 visualizing it not correctly?

12 MR. DEMPSEY: I understand the question.
13 No, the den was a small one-room right there. It only
14 went back about maybe 10 feet or something like that,
15 again. But it wasn't very big.

16 VICE CHAIRPERSON MILLER: Did it overlook
17 your patio?

18 MR. DEMPSEY: No, it did not. No. Again,
19 it was only like maybe 10 feet long. So it ended sort
20 of toward the beginning of the house, leaving plenty
21 of space as we go further back into the yard, you
22 know, leaving plenty of air space and space between my
23 patio and Tom -- Mr. and Mrs. Toggas' back yard.

24 VICE CHAIRPERSON MILLER: Okay. And with
25 respect -- I'm sorry.

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1 MR. DEMPSEY: Well, I think -- What's the
2 difference? The difference is that den that was 10
3 feet long and 10 feet high, you know, thereabouts, now
4 goes all the way down the whole length of the back
5 yard. Instead of 10 feet long, it's 50 feet long or
6 whatever. But I mean, it's way deep into our yard,
7 and instead of being 10 feet high, it's three stories
8 high. So it's a gigantic difference.

9 VICE CHAIRPERSON MILLER: And with respect
10 to your other photos such as into your dining room and
11 your living room, photo 12, 12-A, 12-B, were they
12 impacted at all by the den that was there previously?

13 MR. DEMPSEY: No.

14 VICE CHAIRPERSON MILLER: No? Because
15 they didn't reach that part?

16 MR. DEMPSEY: That's right. Yes.

17 VICE CHAIRPERSON MILLER: Okay. And then
18 finally, I'm just wondering what the background is for
19 your having taken some of the pictures. For instance,
20 the first picture was taken the summer of 2003. What
21 was the reason for taking the picture?

22 MR. DEMPSEY: I don't really remember. I
23 just -- We just took them. There's no motive. There
24 was no -- You know, I don't know that I had a real
25 reason for it, other than, you know, just to have, I

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1 guess. But I don't know. You know, we weren't
2 thinking ahead to this day, this time and place.
3 Believe me.

4 VICE CHAIRPERSON MILLER: But were some of
5 the pictures taken in 2004, in particular, because of
6 this case?

7 MR. DEMPSEY: Yes. We started in June of
8 2004. Surely, you know, because as I said before,
9 questions begat questions, and we just wanted to sort
10 of have this. Yes. So that's -- The answer is yes.

11 VICE CHAIRPERSON MILLER: Okay. Thank
12 you.

13 BOARD MEMBER MANN: How did you go about
14 calculating the square footage of the neighboring
15 houses shown on graphic number 1?

16 MR. DEMPSEY: That is provided to us --
17 That's public information, I think, from some website.
18 What is it called, Cindy? Real property assessment
19 website of some kind.

20 CHAIRPERSON GRIFFIS: And that is a gross
21 square footage of the structure that's on the site?

22 MR. DEMPSEY: Excuse me?

23 CHAIRPERSON GRIFFIS: Is that the gross
24 square footage?

25 MR. DEMPSEY: I do not know. I mean, it's

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1 whatever information is available to us on that
2 website. It lists my house, 2400 or whatever. What
3 exactly that is, I don't know.

4 BOARD MEMBER MANN: How did you go about
5 estimating the approximately 7,000 square feet that
6 you believe the home to be?

7 MR. DEMPSEY: Mr. Keys did that. Mr. Keys
8 has a better eye for those sorts of things, has
9 reviewed these plans, and I trusted his math on that.

10 BOARD MEMBER MANN: So you don't whether
11 or not they were calculated the same way as the other
12 homes that are shown?

13 MR. DEMPSEY: I do not, no, sir.

14 BOARD MEMBER MANN: Okay. Thank you.

15 CHAIRPERSON GRIFFIS: Any other questions
16 from the Board? Excellent. Closing remarks, and then
17 we'll go to cross.

18 MR. KEYS: Mr. Chairman and the Board, I
19 have alluded to our starting point with the Zoning
20 Commission's order, and that was Order 840. We did
21 so, because the concept that kept repeating itself in
22 that order was reasonableness.

23 In fact, the Zoning Commission introduced
24 and summarized the testimony of the BZA Chairman, and
25 I'll quote this: "The Board believes that the

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1 residents of the District could be served by a change
2 to the zoning regulations" -- that's a change that
3 implemented 223 -- "that would provide a little
4 flexibility in the area of minor residential
5 additions."

6 The ANC at this process expressed some
7 concern that it would allow nonconforming additions to
8 be developed in the R-1 zone by special exceptions as
9 opposed to variance, and the Commission noted that the
10 purpose of the amendments is to more easily allow
11 single family homeowners to make minor additions to
12 their homes in the residential zone.

13 It is our view that the proposed addition
14 is not reasonable. It is simply the largest
15 assemblage of building area which could be fitted onto
16 a narrow 40-foot lot, taking full advantage of the
17 literal meaning of 223.

18 This applicant has shown a consistent
19 pattern of contempt for the regulatory process of the
20 District, the failure to obtain demolition permits,
21 excavation permits, the submission of misleading and
22 contradictory information to DCRA and to this Board.
23 It is too much not to be a pattern.

24 We think, on a basis of fundamental
25 fairness, the applicant doesn't deserve the special

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1 exception.

2 The applicant's proposed addition moves a
3 three-story structure to within five feet of the
4 property line and extends that intrusion 46 feet from
5 front to rear. The proposed addition extends a
6 further 16 feet. From front to rear, the proposed
7 addition, including the front porch, is 70 feet in
8 length, that compared to the 28 foot depth of the
9 existing building and the adjacent property.

10 The extension of the building so far
11 behind the adjacent house at 3114 Legation diminishes
12 my client's ability to enjoy the openness and light of
13 his rear yard, overshadowed, as it would be, by the
14 improvements on the subject property that extend for
15 34 feet beyond the rear line of the existing dwelling.

16 The applicant's proposed addition is out
17 of scale with the neighborhood context, viewed from
18 the street and the public alley. By increasing the
19 building area by over 150 percent, the applicant's
20 residence becomes the largest in the immediate
21 neighborhood on a narrow lot.

22 As seen from the street, the three-story
23 addition to the side of the existing structure, 47
24 feet deep and within five feet of the property line,
25 massively changes the character of the row of houses

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1 along Legation.

2 The scheme of the neighborhood shows a
3 common scale of the houses which serves an aesthetic
4 as well as a practical purpose. The common width,
5 depth and height ensures that each property does not
6 adversely affect its neighbor or at least does not do
7 so in a way different from any other house in the
8 vicinity. Each has the same measure of openness and
9 separation.

10 The applicant's proposed addition unhinges
11 those relationships in this neighborhood and exposes
12 the neighbors to a variety of adverse effects.

13 The applicant, interestingly, has made no
14 effort to show that a different structure couldn't
15 have served its needs for enlarging the existing
16 residence while respecting both an 8-foot side yard on
17 the west side, our side, and a 5-foot side yard along
18 the alley.

19 In this case, a multi-story addition 27
20 feet wide could have been erected and added to the
21 existing structure under 223 that would not have
22 affected his neighbors or the neighborhood so much.

23 If the Board can approve this application,
24 then the intent of 223 to support reasonable additions
25 is rendered meaningless, and the expansion of every

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1 existing structure to the very limits of the
2 development envelope can be approved with only a
3 showing that the applicant wants it.

4 In conclusion, we will ask that the Board
5 deny this special exception on the grounds that it is
6 an unreasonable expansion of the subject property,
7 with adverse impacts on nearby properties, and it is
8 out of scale with the houses in the neighborhood.
9 Thank you.

10 CHAIRPERSON GRIFFIS: Thank you very much.

11 Mr. Brown, cross?

12 MR. BROWN: None.

13 CHAIRPERSON GRIFFIS: No cross? Ms.
14 Kelly, Mr. Kelly, any cross-examination of the
15 witness? Does the ANC have any cross? Thank you all
16 very much. Mr. Dempsey, we appreciate your patience
17 in spending the morning with us.

18 MR. DEMPSEY: Thank you.

19 CHAIRPERSON GRIFFIS: If the Kellys are
20 ready. Just to update, we are going to have the
21 Kellys, party in opposition, presentation. Then we
22 are going to get to the quick, persons in testimony,
23 those that are left, and then -- I'm sorry, you are
24 still here, good -- and anyone else attendant to this
25 application. Then we will go to any sort of rebuttal

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1 testimony and closings, all within the next few
2 minutes. Then we are going to go straight into the
3 next case for the morning, and all the crowd showing
4 up right now are afternoon cases.

5 Mr. Kelly, when you are ready, go ahead.

6 WHEREUPON,

7 CECILE KELLY

8 came as a witness and, having previously been sworn,
9 testified as follows:

10 MS. KELLY: All right. Well, my husband
11 and I have lived in our present home for 38 years.
12 The back of our yard is across the alley from the
13 applicant's property. One-half of our yard faces the
14 east side of their house, which is a nonconforming
15 structure that sits along the edge of the alley.

16 We have always wished that that house were
17 set back, because there is no screening to soften the
18 stark wall of the house, which is quite obtrusive. Of
19 course, that cannot be changed, and we accepted that
20 when we purchased our home. However, we find the
21 proposal to extend this situation on the alley along
22 the remainder of our yard by an addition of 34 feet in
23 the back plus 8 feet for the covered front porch,
24 creating a structure 62 feet long, to be totally
25 unacceptable.

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1 We cannot support it, as it would really
2 double the negatives with which we have lived for
3 almost 40 years. We also think that this building,
4 which will not be too nice to look at from our side,
5 will definitely lower the real estate value of our
6 home.

7 It is one thing to say that the proposed
8 three-story addition would only continue what already
9 exists as far as a side yard is concerned. However,
10 what must be pointed out is that on the east side the
11 proposed addition would extend the building on the
12 edge of the alley, which is already an unpleasant
13 situation, by another 34 feet, for a total of 62 feet.

14 The proposed side yard would not be
15 similar in character to other side yards within the
16 surrounding area, because it would be much, much
17 deeper by an additional 34 feet.

18 A check of the houses in our block reveals
19 that, when additions have been built, they have added
20 to the original structure maybe 25 percent more or 33
21 percent more space. But nowhere have these additions
22 more than doubled the size of the original houses or
23 tripled it perhaps, as is the case in this proposed
24 project.

25 If the applicants wish to more than double

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1 the size of their house so that they are, in fact,
2 building a completely different structure, that is
3 their privilege. But they should not base this new
4 structure on the nonconforming regulations that
5 applied to the original house when it was built in
6 1932. That was not the purpose of present day zoning
7 regulations in providing relief to homeowners from the
8 8-foot side yard requirement.

9 It is inconceivable to me that anyone can
10 claim that a 62-foot building, most of which is three
11 stories high, plus attic, that is situated right on
12 the edge of the alley, as viewed from the street,
13 alley or other public way, shall not substantially
14 visually intrude upon the character, scale and pattern
15 of houses along the subject street frontage.

16 I have an Exhibit C for an idea of the
17 scale of this proposed building, how it would parallel
18 our whole property, and this is what people would be
19 seeing when they would be looking down the alley.
20 They would see this big block just sitting there.

21 If the addition were to observe the 8-foot
22 side yard regulation, it would be much less obtrusive
23 and, thus, less noticeable from Legation Street.

24 It is my understanding that homeowners are
25 to provide landscaping or other features to soften the

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1 harshness of their buildings as viewed by their
2 neighbors. Unfortunately, it is not possible to use
3 the alley to do landscaping, and it is difficult to do
4 very much with 1 3/4 feet that is between a brick wall
5 and a concrete alley.

6 Despite the fact that the onus of
7 providing a buffer is on the owner of the offending
8 property, my husband and I have attempted to do some
9 landscaping of our own to establish a screen between
10 our property and the applicant's current house, and
11 for the most part we planted some cedars.

12 It is true, these have grown quite tall.
13 However, because of the shade cast by the applicant's
14 house, the lower branches of the affected cedars have
15 died. Our evergreens are lush, but only on the side
16 where the house does not throw a shadow.

17 An adequate screen would be helpful,
18 because in the 10 years -- this is very negative, but
19 I guess I have to say it, because we have been looking
20 at this house for 10 years -- well, for 38 years but
21 10 years have been much worse, the last 10 years. We
22 have been trying to grow smaller shrubs, you know, to
23 fill in the space of the cedars, but in the 10 years
24 that the applicants have lived at 3112 Legation
25 Street, the siding that covers the top half of the

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1 alley side of the present house has never been
2 painted, resulting in a most unpleasant peeling and
3 blistering of paint, with some areas having no paint
4 at all.

5 Exhibit A shows the east side of the
6 applicant's house. So that again is why we feel that
7 the 8-foot side yard requirement should stand. It
8 would enable the applicants to do landscaping that
9 will offset the long 34 feet of unbroken wall of the
10 proposed addition.

11 Also, a break in the design between the
12 original house and this high addition would add
13 interest to this massive three-story structure as
14 designed.

15 Our property provides a pleasant view for
16 our neighbors. Our house fits nicely in the middle of
17 the lot. Our garage is 10 feet from the edge of the
18 alley, not 8 feet, not 1 3/4 feet nor 5 feet, as
19 claimed by the applicants on page 4 of their December
20 30 memo to the Zoning Board, and the driveway of the
21 garage, of our garage, has even been used by the
22 applicants from time to time when maneuvering heavy
23 equipment while excavating. We are very happy to have
24 them use it, but it is -- if it were not there, they
25 would not be able to use it.

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1 Exhibit B is a view of our garage that
2 illustrates what adequate spacing can do to make the
3 surroundings more pleasant. We would like some
4 reciprocity. We would like our view of our neighbor's
5 property to be pleasant also.

6 The applicants' cite the size of our back
7 yard and our landscaping as a reason as to why they
8 should be granted an exception. It strikes me that
9 instead they should be demonstrating what they can
10 contribute as a reason for an exception.

11 Our back yard is our outdoor living room
12 that extends to the end of our property. Therefore,
13 the size of our back yard should not determine the
14 size of the side yard the applicants desire. However,
15 if the principle of reciprocity is considered, the
16 size of our yard as opposed to that of the applicant's
17 becomes very significant.

18 Compare how much free space our property
19 offers vis a vis the limited free space we would like
20 the applicants to provide, namely the 8-foot side
21 yard.

22 Exhibit C -- again, I call your attention
23 to it -- illustrates how the proposed project, when
24 completed, would parallel our entire back yard. This
25 exhibit has been prepared to correct the applicant's

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1 section drawing on page 4 of their December 30 memo to
2 the Zoning Board. Here are the corrections.

3 (a) The garage is 10 feet from the alley,
4 not five feet.

5 Item 2: The dense line of full grown
6 evergreens are not so dense in the lower part of the
7 trees that are directly opposite the applicant's
8 house, because their lower branches have died for lack
9 of sun.

10 Item 3: The applicants state that the
11 proposed three-story addition is in line with our
12 garage. It is not. The proposed addition is opposite
13 our garage plus 8 more feet of our back yard, and the
14 rest of our back yard has the current house.

15 To summarize, the proposed nonconforming
16 side yard would be more than 34 feet long, which would
17 be out of synch with the neighborhood. This proposed
18 project is not an addition to an already existing
19 house but, in fact, is a whole new building.

20 The resulting 62 foot warehouse-like
21 building, most of which would be three stories high
22 plus attic, situated right on the alley would visually
23 intrude upon the character, scale and pattern of
24 houses along the subject street frontage.

25 Lastly, the proposed project has already,

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1 and will continue, to impinge on the real estate value
2 of our home. So that's about all I have to say.

3 CHAIRPERSON GRIFFIS: Good. Thank you
4 very much, Ms. Kelly, and I perfectly appreciate your
5 perspective. I have written in on my copy "the
6 warehouse building" in the last paragraph. That was
7 not in the written submission. So it is so noted for
8 the record. Mr. Jeffries?

9 COMMISSIONER JEFFRIES: Mr. Chair, I'd
10 like to ask the Office of Planning a question about
11 some testimony that she gave.

12 CHAIRPERSON GRIFFIS: Sure.

13 COMMISSIONER JEFFRIES: There was a
14 question, a check of houses in the block reveals that
15 most of the additions that have been built have been
16 25-30 percent more from the original structure. Do we
17 have any information about that, even beyond just the
18 block? I mean the general area.

19 MR. MORDFIN: I don't have any information
20 regarding additions that have been built onto the
21 houses within that general area.

22 COMMISSIONER JEFFRIES: Okay.

23 MS. KELLY: Mr. Jeffries, there was in
24 this memo of the Office of Planning, the last page has
25 -- I don't know where they have this, but it's a chart

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1 showing all the -- This is very vague, but the Office
2 of Planning memo is much more clear, and it has an
3 outline of all the houses.

4 Now the -- It even has the new addition.

5 CHAIRPERSON GRIFFIS: Actually, let's get
6 right to the question. Where did you come up with
7 that figure of 25 to 33 percent?

8 MS. KELLY: Oh, because I have walked
9 around our neighborhood.

10 CHAIRPERSON GRIFFIS: Okay, so it's from
11 your visual assessment of properties?

12 MS. KELLY: Yes, but 25-35 percent. AT
13 the end of our -- AT the other end of our alley, for
14 instance, there are two --

15 CHAIRPERSON GRIFFIS: I think that's
16 understood. Is that understood?

17 MS. KELLY: But you can get -- If you look
18 at that, you will see the size of the houses in the
19 neighborhood.

20 CHAIRPERSON GRIFFIS: But the site plan
21 that you are pointing to in the attachment to the
22 Office of Planning doesn't indicate what was added to
23 or what was not added to, what was existing, what was
24 not existing. Is that correct?

25 MS. KELLY: Well, the interesting thing

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1 about it is that the house across the street from the
2 applicant's house on Legation was completed maybe a
3 year or so ago, and the addition is on there. So --

4 CHAIRPERSON GRIFFIS: I know, but what we
5 need is really much more scientific type information,
6 factual information.

7 MS. KELLY: Yes, but that would mean that
8 all these other houses, the additions are there.

9 CHAIRPERSON GRIFFIS: Okay. How many of
10 those that you look at in that site plan have been
11 added to? Can you assess that type of information on
12 that site plan?

13 MS. KELLY: No, but -- Okay.

14 CHAIRPERSON GRIFFIS: No. That's all I'm
15 going to. I understand, and that map actually which
16 Office of Planning puts in their report has an amazing
17 amount of information in it, if you get onto it on the
18 website.

19 All we are trying to do -- Mr. Jeffries, I
20 understood you just to try and figure out where that
21 assessment of that figure is. When you throw a very
22 specific -- Our applications, we are looking at plans
23 that come down to the inch. We are looking at factual
24 basis of information. You have made an assertion of
25 25 percent and 33 percent is the average of what

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1 additions are on other existing structures. So he's
2 just exploring where you came up with that figure, and
3 I think we understand.

4 MS. KELLY: And most of the additions I
5 have seen -- they observe the 8-foot -- They don't
6 take this narrow side yard.

7 COMMISSIONER JEFFRIES: Ms. Kelly, I
8 understand, and I just wanted to get a sense of how
9 you came to that figure and whether that figure could
10 be backed up by the Office of Planning, and they don't
11 have that kind of information. I'm not even certain
12 how they could even get hold of that kind of
13 information. So okay, thank you.

14 CHAIRPERSON GRIFFIS: Good. Thank you
15 very much. Anything other question from the Board?
16 Yes, Mr. Kelly, did you have something to say?

17 MR KELLY: Yes. I just want to say that
18 we've spent the whole morning and part of the
19 afternoon now, really, on the west side of the
20 property, the Toggas property, bordering the Dempseys.
21 But we have spent almost no time on the east side,
22 which is our issue, which is the 8-foot coming back
23 from the alley. But at the ANC, the ANC only really
24 addressed -- and the recommendation only addresses the
25 8-foot back-up on the alley, and they voted six to one

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1 -- six to one -- to deny the applicants' exception for
2 a request for that 8 feet.

3 CHAIRPERSON GRIFFIS: Right.

4 MR. KELLY: I just wanted to emphasize
5 that point, because it really hasn't been made here
6 much this morning.

7 CHAIRPERSON GRIFFIS: Excellent, and well
8 said. I would note, though, the Board hasn't lost
9 perspective of the 1.77 portion nor of any other
10 factual bearings on this case.

11 If there is nothing further then, Board,
12 questions for the Kelly part in opposition. Mr.
13 Brown, any questions on cross?

14 MR. BROWN: None.

15 CHAIRPERSON GRIFFIS: Mr. Keys, any cross?
16 ANC, any cross? Thank you very much. Appreciate you
17 being down here, and we appreciate your case
18 presentation.

19 Let's move on then to the last portion of
20 persons and testimony in opposition to the
21 application. Is there anyone here present? If you
22 are, please come forward, take a seat the table,
23 present your testimony. I will note that persons are
24 afforded three minutes. I am not going to turn the
25 buzzer on or anything of that nature, but I will keep

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1 it in mind and ask you just to conclude when you get
2 close.

3 So are we ready for testimony?

4 WHEREUPON,

5 SCOTT MOSELEY:

6 came as a witness and, having previously been duly
7 sworn, testified as follows:

8 MR. MOSELEY: My name is Scott Moseley. I
9 live at 3118 Legation Street, which is on the other
10 side of the Dempsey property, and in my application
11 for party status, which was so eloquently denied but
12 that's okay -- I'm not going to pretend I understand
13 why, and I don't really care. So I'm happy to come
14 here as a person and be able to talk.

15 You know, as I said, the only thing that I
16 really care about is the fact that, you know, these
17 guys are getting -- are applying for a special
18 exception where they are going to be able to build a
19 property, you know, so large that it is only five feet
20 away from the Dempseys.

21 Why do I care? Well, because the Dempsey
22 property -- their back yard is very similar in nature,
23 both kind of with and the length -- it's large, but
24 it's narrow -- to the Toggas property at 3114 -- or
25 1312, rather.

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1 So to me, you know, if they get this
2 exception and they build this thing, you know, the
3 next people who buy the Dempsey's house, or maybe it
4 will be the Dempseys -- I don't know, but I suspect
5 that if they sell their house, and you guys know what
6 houses ar selling for. You know, that house will go
7 for easily \$700,000-\$750,000.

8 I can darn well bet, and I would put money
9 on it, that whoever buys that house is going to want
10 to double in size and still have a very large yard at
11 the end of the day, and they are going to look to the
12 property right next-door, 3112 Legation. Okay? They
13 are going to look to that, and they are going to see
14 that those people got a special exception.

15 I don't even know if the Dempseys would
16 need a special exception, you know, to take this thing
17 back, because their property -- their current
18 residence is only five feet from the property line
19 anyway. So maybe they can go straight back. I don't
20 know, but if the 3112 property gets a special
21 exception to do this, I would put money on it that the
22 Dempseys or whoever owns the 3114 Legation property
23 would be able to do that.

24 That's a problem, because that would
25 really box me in. I don't have a yard like theirs.

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1 Okay? I have a postage stamp yard like most of the
2 people in the District. So it does affect me.

3 I use the word precedent. You know,
4 listening to you guys deny my party status, you know,
5 I don't know if that was appropriate or not, but I do
6 think it is unique to me. I do live on this block.
7 The other people that they got the approvals or signed
8 their petition -- this doesn't affect them at all.
9 You know, they don't live right next-door to these
10 people or right next-door to the people that are being
11 directly affected.

12 So that's really all my point. I think it
13 is a practical one. The only other thing I would ask
14 -- and you know, Mr. Keys and Mr. Dempsey tried to
15 allude to it, you know, and I don't know through what
16 mechanism you do this. But I would try to ensure that
17 the Office of Planning's report and the facts and
18 figures, setbacks, etcetera, concur or are in
19 agreement with the plans that were submitted by the
20 applicant.

21 Then I would also suggest that somebody
22 ensure that the applicant's plans accurately reflect
23 the existing structure, setbacks on the side, from the
24 front and otherwise; because if they don't, I think it
25 brings a lot into question, and it deserves to be

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1 investigated. And that's it. Thank you.

2 CHAIRPERSON GRIFFIS: Good. Thank you
3 very much. Excellent points that you make, just
4 starting off with, of course, the people that were in
5 support -- Don't go too far, because there might be
6 cross-examination questions of you. The persons that
7 signed the petition in support, of course, didn't
8 apply for party status. So you were bringing that up
9 in terms of the uniqueness aspects, and I think the
10 Board did take a lot of look and has submitted in your
11 application for party status as part of the record.
12 So you have reiterated --

13 MR. MOSELEY: I'm not complaining. That's
14 fine.

15 CHAIRPERSON GRIFFIS: No, I know you're
16 not, and I'm not addressing a complaint, but rather
17 just illuminating a few of the aspects that I think
18 are of import that you've brought up. But now the
19 rest of them escape me.

20 So are there any other questions from the
21 Board? They will come back, but it will be too late.

22 Very well, is there any cross, Mr. Brown?

23 MR. BROWN: No.

24 CHAIRPERSON GRIFFIS: Mr. Keys? ANC?
25 Good. Again, we appreciate your patience being down

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1 here, and we will take it into consideration, all your
2 points.

3 Yes, sir?

4 WHEREUPON,

5 REGINALD WHITE

6 came as a witness and, having previously been duly
7 sworn, testified as follows:

8 MR. WHITE: Hi. My name is Reginald
9 White, and I live at 3122 Legation. I have recently
10 moved in. I wasn't aware of the construction of this
11 neighborhood, and maybe that would have actually put
12 something on my mind whether or not I wanted to. But
13 I entered this neighborhood. I fell in love with it,
14 basically, because the houses were conforming. They
15 all looked the same. It looked like a pretty quiet
16 neighborhood, quaint.

17 I did pay a bit over the amount of which
18 Mr. Moseley did speak for the home. Actually, there
19 were 18 contracts on the house that I'm in right now,
20 and I'm very pleased with it. I'm very pleased with
21 the neighborhood.

22 My very most concern, again, is the
23 precedence that this may set for other homeowners. I
24 live pretty much on the corner, and there is a house
25 on the corner that I'm not even aware that it's marked

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1 as a supporter that even somebody lives there. I'm
2 really clueless on that. Today is the first time I
3 have even seen the Toggases. I've never met them.
4 I'm not aware of anybody lives there. I've never met
5 them before, and I've really never talked to them. So
6 I don't have anything one way or the other.

7 It's just the precedence of just saying
8 that I'm concerned about the house there, its
9 expansion where it could expand to where I live,
10 because I have a sunroom in the back of my home.
11 Actually, they've used my house as the addition -- one
12 of the examples of an addition -- that it would
13 actually block sunlight and give me less privacy than
14 what I have actually bought this home for at this
15 time.

16 I've done extensive work on the outside,
17 as far as fixing up and landscaping, and on the
18 inside, especially to actually go to the outside,
19 because I, too, and my family are outdoor people. We
20 like to have our privacy. We like to have the
21 sunlight. We don't want to have anything blocking
22 that situation.

23 Again, like I said, it's really the
24 precedence which you say is on this part, that I have
25 a concern with what you said. But I guess that's one

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1 of the things.

2 CHAIRPERSON GRIFFIS: Right.

3 MR. WHITE: Basically, that's what I
4 wanted to say.

5 CHAIRPERSON GRIFFIS: Good. Thank you
6 very much, and believe me, I think you have to trust.

7 The Board never loses the perspective of any
8 precedence that this might set and, obviously, focuses
9 directly on the application, as I have stated before.

10 But thank you very much for being down here.

11 One positive outcome that is immediate
12 from this application is maybe we've brought a few
13 neighbors together that have never met before. So
14 maybe you will go out and have a long lunch after
15 this, something that we won't get.

16 Any other questions from the Board? Any
17 cross, Mr. Brown? Mr. Keys? Yes, Ms. Kelly?

18 MS. KELLY: I'd like to ask --

19 CHAIRPERSON GRIFFIS: I'm sorry, but you
20 have to be on a microphone. Otherwise, I get
21 reprimanded. No, you are not on the record. That's
22 the point.

23 CROSS-EXAMINATION

24 BY MS. KELLY:

25 Q How large is your addition?

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1 A The addition that --

2 Q In your house right now. Is it 25
3 percent, 30 percent?

4 A It's less than 25 percent. It's less than
5 20 percent.

6 CHAIRPERSON GRIFFIS: It is?

7 MR. WHITE: Yes. So I mean, it's just a
8 sunroom on the back. So if you look at the total
9 space of the whole house, I mean --

10 COMMISSIONER JEFFRIES: It is less than 20
11 percent of your existing structure?

12 MR. WHITE: Yes.

13 BY MS. KELLY:

14 Q Another question: Does your addition
15 observe at least an 8-foot side yard?

16 A Yes.

17 Q On both sides?

18 A Yes.

19 MS. KELLY: Thank you.

20 CHAIRPERSON GRIFFIS: Excellent questions.
21 Good cross. Thank you very much.

22 MR. WHITE: Thank you.

23 CHAIRPERSON GRIFFIS: Is there anyone else
24 here attendant to application 17270 to give testimony
25 in support, opposition, neutral, funny jokes? Good,

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1 we don't have any time for those, in which case let's
2 move on to Mr. Brown. Are you ready for closing?

3 MR. BROWN: Yes, I am.

4 CHAIRPERSON GRIFFIS: Excellent. Are you
5 going to call rebuttal witnesses?

6 MR. BROWN: No. I do have one rebuttal
7 document.

8 CHAIRPERSON GRIFFIS: Excellent. Let's
9 go.

10 MR. BROWN: Why don't we start and at
11 least get it into the Board's hands. This is the
12 follow-up memo to the sun study which, fortunately for
13 everybody involved, puts it in English as opposed to a
14 bunch of lines on a piece of paper. If I could
15 summarize it --

16 CHAIRPERSON GRIFFIS: Well, this is
17 getting passed out, and I assume it is going to the
18 parties, too. Just tell me who did this summation?
19 Oh, so this is a narrative from the architect who
20 actually did the study.

21 MR. BROWN: That's right.

22 CHAIRPERSON GRIFFIS: You got to watch
23 those architects. They are all about lines and stuff.

24 MR. BROWN: Straight lines mostly.

25 CHAIRPERSON GRIFFIS: This is good stuff

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1 here. Okay, let's go.

2 MR. BROWN: But it puts it in English, and
3 basically on the longest day of the year, December
4 21st, a very minimal impact on the Mr. Dempsey's
5 property, and at eight o'clock in the morning and
6 decreasing every minute thereafter, and December 21st
7 being the longest day of the year, that's the worst
8 case scenario. On either side of that date going
9 forward or backward, the situation improves.

10 So that it gives you some context of a
11 very de minimis --

12 CHAIRPERSON GRIFFIS: Is the 21st the
13 longest or the shortest?

14 MR. BROWN: Shortest day. It depends on
15 where you are.

16 CHAIRPERSON GRIFFIS: That is true.

17 MR. BROWN: My friends from Peru, it's the
18 longest day of the year.

19 CHAIRPERSON GRIFFIS: But for this
20 application, we are talking shortest. Okay.

21 MR. BROWN: To be distinguished from the
22 longest hearing on record.

23 CHAIRPERSON GRIFFIS: We haven't beat that
24 record, but we are starting.

25 MR. BROWN: If I could, and I don't want

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1 to belabor the point, and we will submit these into
2 the record, you can see for yourselves in judging the
3 reasonableness of the size of additions in the
4 immediate 200 square foot area have been built.

5 I would also point out that, as it relates
6 to this case, and the Board has determined that this
7 is an alley side special exception case, even though
8 we have spent -- Mr. Kelly was correct. We spent an
9 awful lot of time worrying about that, to the
10 exclusion of the alley. But on Mr. Dempsey's side, he
11 speaks in terms of a three-story wall along his
12 property, and you will notice that the three-story
13 wall at the five-foot level is only at the existing
14 outline of the building.

15 As you go back, the roof, and you see the
16 sunlight, it's a step-back. So again -- and then you
17 go to the lower scale.

18 CHAIRPERSON GRIFFIS: Are you pointing to
19 something on the ground?

20 MR. BROWN: On the lower drawing. I'm
21 sorry.

22 CHAIRPERSON GRIFFIS: Just for your
23 understanding, we can't see anything that isn't on the
24 easel.

25 MR. BROWN: And I can't see anything above

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1 that.

2 CHAIRPERSON GRIFFIS: Right. That, we
3 know, and we are pretty glad about that. Good.

4 MR. BROWN: So that, again, here the
5 existing structure will be at the five-foot side yard
6 depth. But as you go back -- and this drawing is hard
7 to see, but you will have skylights, so that the whole
8 thing is stepped back from a lateral standpoint as
9 well as stepped back here. So I think that is
10 important to understand, that at the five-foot it's
11 not a solid wall going back here. It's stepped back
12 and articulated.

13 So again, this was done and changed. Mr.
14 Toggas --he flipped the two sides of the building from
15 the original plan, so that there would be that setback
16 in both directions as it relates to Mr. Dempsey.

17 VICE CHAIRPERSON MILLER: How much is it
18 set back? The one story?

19 CHAIRPERSON GRIFFIS: Which part, the roof
20 or the one-story?

21 VICE CHAIRPERSON MILLER: Well, you said
22 the three-story ends at some point, and then --

23 MS. TOGGAS: Yes, and then it indents.
24 It's 18 feet from the property line.

25 VICE CHAIRPERSON MILLER: You need to get

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1 on the microphone, I think, because we can hardly hear
2 you.

3 MS. TOGGAS: This one story room is 18
4 feet from the property line. It indents. I think it
5 comes in like 13 feet.

6 VICE CHAIRPERSON MILLER: How about the
7 piece right next to it?

8 MS. TOGGAS: What's your question?

9 VICE CHAIRPERSON MILLER: Is that stepped
10 back or not stepped back? I'm not an architect.

11 MS. TOGGAS: No. That's straight. That's
12 a five-foot side yard.

13 CHAIRPERSON GRIFFIS: That's the point
14 that's above that first floor where you are showing
15 the double line where it goes white is a pitch of a
16 roof.

17 MS. TOGGAS: That's a slope, what they
18 call a saltbox slope roof. It's one story, and then
19 it slopes to the top.

20 MR. BROWN: Also one final point. The
21 patio as proposed has been pushed back to the very
22 rear of the site, so as to, again, to respect the
23 privacy between the two back yards. It's been pushed
24 back beyond Mr. Dempsey's patio area. So the two
25 don't coincide but are set off.

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1 With that -- and I think the Office of
2 Planning report, while it considered both side yards,
3 that's your worst case scenario based on the Board's
4 decision. It's a much easier decision because with
5 only the alley side yard at issue, this could have
6 been built -- again respecting an eight-foot side yard
7 on the alley side and built along the five-foot side
8 yard on Mr. Dempsey's side. So what we have here is
9 really a much better plan as it relates to the
10 Dempseys, and it's built in context where there is the
11 most space, 70 feet, between the proposed addition,
12 the alley, and the house on 31st Street belonging to
13 the Kellys.

14 Looking through the test, I would draw
15 your attention to the standard: Light and air
16 available to neighbors shall not be unduly affected.
17 I think we have shown a very minimal impact. The use
18 and enjoyment of neighboring properties shall not be
19 unduly compromised. Again, we've shown a very minimal
20 impact. And then the willingness of the applicant to
21 adopt the OP recommendations for a privacy fence,
22 landscaping on the Kelly side, and there was one other
23 request, the removal of the third floor window to the
24 attic space.

25 Again, finally, there is no -- and this is

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1 important. Looking from the street -- and if you
2 could put the front -- Well, you could see that, but
3 also the pictures of the front of the house. Judging
4 from the street or the public alley going up the side
5 of the house in the rear, it won't substantially
6 intrude on the character or pattern of the houses, and
7 again a very minimal change from Legation side street
8 and a change on the alley that is quite minor,
9 particularly as it relates to the adjoining house.

10 Then as far as reasonableness, the lot
11 occupancy of this house as finished will be still
12 significantly below the 40 percent level or the 50
13 percent level that would actually be permitted. So
14 that you have, in the context of the other additions
15 as well as the context of the maximum permitted, I
16 think, a reasonable addition.

17 I think that's really it. It's all been
18 laid out in some detail, both in the filings and the
19 OP report, and I'll leave it at that.

20 CHAIRPERSON GRIFFIS: Excellent. Thank
21 you very much, Mr. Brown.

22 This is what I have at this point. One, I
23 am going to set this for decision making the first
24 public meeting of the Board next, February 1, 2005.
25 Two submissions that we are going to require. As it

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1 is now, the record is being left open for rebuttal
2 narrative of the letter that was submitted regarding
3 the -- what did you call it, the weatherproofing --

4 MR. BROWN: Moistureproof that had to do
5 with the physical condition.

6 CHAIRPERSON GRIFFIS: The damage. Right.

7 MR. MOY: Mr. Chair?

8 CHAIRPERSON GRIFFIS: Yes?

9 MR. MOY: May I ask for a clarification?
10 Is that the letter that was submitted by Gary Wilson
11 dated September 25, 2003?

12 CHAIRPERSON GRIFFIS: Well, you know, I
13 just had it in my hand and have no clue where it is
14 now, but that's probably right. Yes, there it is.
15 Mr. Moy, you indicated that it is -- right, 25
16 September, signed by Gary Wilson, President.

17 Okay. Mr. Brown, I need an assessment
18 from you as to whether -- Of course, we will get into
19 all the schedule, but whether within a week's time,
20 seven days, you could have some sort of axon drawing
21 done of the rear portion of the structure, some sort
22 of three-dimensional that shows the setting, that
23 actually shows Ms. Miller's question, a better graphic
24 illustration of it, what the pitch of the roof is
25 rather than the elevation itself?

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1 COMMISSIONER JEFFRIES: And, Mr. Chair, I
2 have actually -- and I don't know how difficult this
3 is going to be for you, but I would actually even like
4 to see a little bit more context to that volumetric or
5 axonometric with some of the neighboring properties.
6 I just want to get a better sense of it, because I
7 think Mrs. Kelly's statement is leaving me with some
8 concern about some of the enjoyment and so forth. So
9 I just want to get a better sense of just contextually
10 how this is looking as it relates to volume. It's
11 just hard to really get a sense of that looking at
12 these very flat, one-dimensional drawings.

13 I don't know how difficult that is going
14 to be in the time allotted, though.

15 CHAIRPERSON GRIFFIS: Well, I need to
16 address yours separately from Ms. Miller's.

17 COMMISSIONER JEFFRIES: Sure.

18 MR. BROWN: Can we start -- I need some
19 clarification, exactly on what you are looking for, so
20 that I don't misspeak or mis-deliver.

21 CHAIRPERSON GRIFFIS: I'll tell you
22 exactly what she is looking for. I think a very
23 simple axon that showed -- and putting in what Mr.
24 Jeffries just said -- showed the relation of the mass
25 of the building adjacent -- Dempsey's -- and also the

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1 Kelly house and the setting of that, and each of those
2 existing structures could be single line, wire diagram
3 type, and even the addition itself could be close to
4 that.

5 There is no detail involved. This is a
6 simple diagram. In fact, I think Mr. Jeffries and I
7 could knock it out at lunchtime today, but that
8 wouldn't be appropriate. So --

9 MR. BROWN: Are you talking about a one-
10 dimensional, like a site plan, or are you talking
11 about two or three-dimensional?

12 CHAIRPERSON GRIFFIS: It's a three-
13 dimensional. An axon is basically, turn the drawing
14 on an angle, 30 or 60 degrees or make it 45 if you
15 wish, but I would use 30 to 60. Draw the line
16 straight up, out. It will put the building there.

17 Do you still have your architect on board?

18 MR. TOGGAS: I don't quite know what you
19 are asking for.

20 CHAIRPERSON GRIFFIS: We'll get it to you.
21 All you need to do is give us indication. If you
22 can't, we can decide this. It will just take us more
23 time going through this stuff. It's actually going to
24 consist more of -- Yes, that's exactly it.

25 COMMISSIONER JEFFRIES: I mean, this is a

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1 floor plan. This is a footprint. You're going to
2 turn it on an angle and just take the line straight
3 up, so that we can get some sense of volume. When you
4 talked about stepping back and so forth, but again I
5 am intrigued with some of the comments from Ms. Kelly,
6 and I would just like to get a sense of how this
7 building falls in the back, and I can't do that just
8 looking at a one-dimensional. I need to get a sense
9 of volume.

10 So it's not enough just to do your --

11 CHAIRPERSON GRIFFIS: This can't be
12 produced? This is not a very complicated thing, and
13 there's not a lot of detail that needs to be put on
14 it. If this can't happen, just expand the site plan
15 and show us the footprint of the adjacent buildings,
16 and that's it. No elevation/plan. Give us two
17 adjacents, and we'll take it from there. All right.

18 So we are going to have that in by next
19 Tuesday. Yes?

20 COMMISSIONER JEFFRIES: Mr. Chair, just
21 one thing. But I really would like you to try to do
22 it. It's really an easy thing. For me, I don't know
23 if the site plan -- it would be useful but not fully
24 helpful to what I'm trying to get to.

25 CHAIRPERSON GRIFFIS: Let me -- I'm sorry

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1 to interrupt. I think the applicant fully understands
2 the fact that this is a strengthening document to
3 their application. So it only behooves them to get it
4 in here. So we'll let it go at that.

5 MR. BROWN: There was something separate
6 that Mr. Jeffries wanted or is that a compilation of
7 both?

8 CHAIRPERSON GRIFFIS: That's it. There's
9 two things that we are keeping the record open for.
10 One is the parties in opposition for a narrative
11 rebuttal to the letter that you submitted, and this is
12 the graphic that the Board is requesting. Of course,
13 it will be served to everybody, but it's just going to
14 come in.

15 MR. BROWN: Will there be an opportunity
16 for responses, both to the --

17 CHAIRPERSON GRIFFIS: No.

18 MR. BROWN: All right.

19 MR. KEYS: Mr. Chair, I think that there
20 is now another letter that is admitted that needs to
21 be responded to.

22 CHAIRPERSON GRIFFIS: Do you want to rebut
23 this letter?

24 MR. KEYS: Well, we've never had a chance
25 to see it.

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1 CHAIRPERSON GRIFFIS: I'm just asking, yes
2 or no? Do you want to rebut?

3 MR. KEYS: Yes.

4 CHAIRPERSON GRIFFIS: Okay. So we'll
5 leave the record open for rebuttal narrative also on
6 the letter that was just submitted giving the
7 descriptive narrative of the sun path diagram.

8 MS. RENSHAW: Mr. Chairman, Ann Renshaw.
9 Do you need clarification from the ANC on my
10 participation in this hearing?

11 CHAIRPERSON GRIFFIS: Yes? I don't know
12 how you are going to do that. Yes, fine. The record
13 will be open also for that clarification to your
14 participation in the ANC. No reason to close it.
15 Okay, anything else? Anything else from the Board?
16 Good.

17 Mr. Moy, did you take any other notes or
18 anything else that we need submitted?

19 MR. MOY: No, sir. I think that covers
20 everything.

21 CHAIRPERSON GRIFFIS: Excellent. Okay.
22 So to reiterate the schedule then, we've got this set
23 for decision making on the 1st of February. We have
24 two submission items, both of which are going to be --
25 Actually, we will just extend it out, Mr. Moy, until

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1 three o'clock on Wednesday following, which is -- What
2 date is that?

3 MR. MOY: That is January 26th.

4 CHAIRPERSON GRIFFIS: Excellent, the 26th.
5 Any difficulty in reaching that, Mr. Brown?

6 MR. BROWN: Wednesday Noon on the 26th or
7 Wednesday at three o'clock?

8 CHAIRPERSON GRIFFIS: Three o'clock. Why
9 not?

10 MR. BROWN: Thank you. Your generosity is
11 appreciated.

12 CHAIRPERSON GRIFFIS: Overwhelming, isn't
13 it? Okay. Any other questions, clarifications on
14 this case? Nothing further? Thank you all very much
15 for your patience.

16 The Board is going to take five minutes to
17 let this huge crowd go and get the next crowd up here.

18 For those that have shown up for a one o'clock
19 afternoon session, it is, of course, 1:45. We have
20 one last case in the morning. After that case, we
21 will be breaking shortly for lunch, and I guaranty you
22 it is going to be short, and we are going to get right
23 into the afternoon case. But I would not assume that
24 it is before three o'clock.

25 So we'll give five minutes to get this

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1 next case set up.

2 (Whereupon, the foregoing matter went off
3 the record at 1:49 p.m. and went back on the record at
4 2:00 p.m.)

5 CHAIRPERSON GRIFFIS: Very well. Let's
6 resume and call the last case of the morning.

7 MS. BAILEY: Application Number 17271 of
8 JBG/Louisiana LLC, pursuant to 11 DCMR 3103.2, for a
9 variance from the height limitations in the Downtown
10 East Receiving Zone under subsection 1709.23, to allow
11 an addition to an existing office building in the C-3-
12 C District at premises 51 Louisiana Avenue, N.W.,
13 Square 631, Lot 17.

14 CHAIRPERSON GRIFFIS: Thank you very much,
15 Ms. Bailey. Let me just get an assessment for our
16 schedule of those present with us for Case Number
17 17271 to give testimony. Persons to give testimony,
18 show of hands? Well, you guys are all part of the
19 application, I'm assuming, or witnesses.

20 So there is no one else here present to
21 give testimony. Okay. Mr. Nettler, why don't we turn
22 it over to you and start the case, please.

23 MR. NETTLER: Thank you. I have a number
24 of housekeeping matters first. First of all, of
25 course, my name is Richard Nettler with the law firm

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1 of Robins, Kaplan, Miller & Ciresi on behalf of the
2 applicant for the proposed addition to 51 Louisiana
3 Avenue.

4 There are a number of things that are
5 being handed out to you right now, one of which is a
6 letter from the shadow U.S. Senator for the District
7 of Columbia responding to the letter that you have in
8 your file from the Architect of the Capitol, letters
9 of support from the Lincoln Company and from one of
10 the neighbors of the property and from the Holiday Inn
11 as well, and a very detailed study with attachments
12 done by what is probably the principal security firm
13 for the Federal government and for developers of
14 Federal properties, Dusebella, Venture and Santori,
15 who provide security consultants to the Department of
16 Justice, Department of State, the Department of
17 Transportation, the Internal Revenue Service, the
18 Secret Service, the U.S. Marshal, the Federal
19 Protective Service and GSA regarding the Architect of
20 the Capitol's comments and the suggested security
21 matters that we are -- security issues that we are
22 addressing in this building, which you will see in the
23 letter details quite explicitly, and you will hear a
24 little bit more about that from the owner as well.

25 Those are the items that are in the

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1 record. Unfortunately, some people had to leave. Mr.
2 Jacobs is about to start a meeting with the Sergeant
3 at Arms and the Architect of the Capitol regarding
4 this project. So he could not stay for this meeting.

5 Lord Richard Rogers was unable to attend. So we have
6 both the Senior Director and one of the other
7 architects from Richard Rogers Architects here from
8 London who will be testifying. I provided you with
9 the CVs as part of our prehearing statement.

10 We have two witnesses, one of whom is on
11 his way -- supposed to be on his way to Texas shortly
12 who was here on behalf of the tenant, Jones Day, and
13 had some other additional testimony that he is able to
14 provide in terms of the market for these types of
15 tenants in the District of Columbia, and David Orr who
16 is supposed to be -- Actually, he is now going to be
17 late for a meeting with DCRA on another project.

18 What I wanted to try and do before I --

19 CHAIRPERSON GRIFFIS: We will write them
20 all notes.

21 MR. NETTLER: -- was to sort of get your
22 temperature as well. We have a number of issues that
23 we've addressed in our prehearing statement, including
24 providing you some of the testimony such as Mr. Orr's,
25 and we have a number of issues that we are, obviously,

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1 prepared here to address, both architectural issues,
2 security issues, the land use planning issues, the
3 economic issues, and traffic issues, if you want it,
4 and construction issues as well, though we are going
5 to sort of hold off on the necessity of providing
6 those since we have again provided you with statements
7 from our traffic planner.

8 If you would like to hear from Mr. Orr, I
9 can put him on first out of order. Otherwise, his
10 testimony is part of our application. I think it is
11 pretty -- Our prehearing statement is pretty specific
12 on some of the issues that are generally considered
13 when addressing the relief that we are seeking here,
14 and that is specifically some aspects of the practical
15 difficulty question and JBG's representative as well
16 is here.

17 So I am going to ask you, which is not
18 probably normal, but ask you to take your temperature
19 in terms of whether you would like me to put them on
20 first so that they can leave or whether you have any
21 questions for them or whether you might want to just
22 go right into the application's other issues.

23 CHAIRPERSON GRIFFIS: Good. I think we
24 have abandoned all things normal for today. So it's
25 not inappropriate for you to ask, and I think, first

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1 of all, the Board has received all this information,
2 the filing from the applicant. It is incredibly
3 complete, and also straightforward in terms of laying
4 out the uniqueness and the combination of numerous
5 factors, that being the size and the shape and the
6 existence of the original building. The addition is
7 addressed as well as some of the conditions below
8 grade are substantially discussed. The practical
9 difficulty also is no less than three, if not four,
10 and we can get through all of those.

11 So what I would suggest, first of all,
12 call your witnesses as you would in terms of their
13 schedules. We can move on. It is my understanding
14 that this is coming in with no opposition. So the
15 more summations you can give, the better off, I think,
16 we all will be, and then the Board can deal with this
17 as it will, with all of that information.

18 Let me ask one -- I should say, it is not
19 completely without opposition. Is there a
20 representative of the Architect of the Capitol present
21 today? Okay.

22 MR. NETTLER: As I mentioned, his meeting
23 -- It was anticipated that -- They weren't going to be
24 here anyway, but it was anticipated that this hearing
25 was going to be over so that Mr. Jacobs could testify,

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1 even though the Architect of the Capitol wasn't going
2 to be here.

3 CHAIRPERSON GRIFFIS: Okay. We all had
4 that great anticipation.

5 MR. NETTLER: And I would also point out -
6 - it's probably worth mentioning -- this is not in the
7 Capitol overlay. It was our feeling after having
8 obtained all the support that we did from DCPL, Office
9 of Planning, from Commission of Fine Arts, having
10 talked about this with the National Park Service as
11 well, that we wanted to sort of expand our -- touch
12 all bases, regardless of whether they were supposed to
13 participate in this hearing as well.

14 CHAIRPERSON GRIFFIS: Are you saying this
15 is out of the purview of the Architect of the Capitol,
16 because it's not within the Capitol master plan?

17 MR. NETTLER: No, no. I'm saying it's not
18 in the Capitol overlay district. So the Architect of
19 the Capitol wouldn't normally have participated in
20 this here, and probably would not normally have
21 participated if it wasn't for us taking a proactive
22 effort to bring to the attention what we were doing,
23 just so everybody knew what we were doing.

24 CHAIRPERSON GRIFFIS: Right.

25 MR. NETTLER: The Architect of the Capitol

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1 was unable to have a meeting with us, and submitted
2 this letter on behalf of a discussion over the phone
3 as to what was being done at the site. So there were
4 a number of attempts to have that meeting, and it was
5 only until 2:30 this afternoon that the Architect of
6 the Capitol and the Sergeant at Arms is available.

7 CHAIRPERSON GRIFFIS: They could meet
8 here. We could sit in the back of the room or
9 something.

10 MR. NETTLER: But I think we provide
11 sufficient -- as you will see in the submissions that
12 we have made, and you will hear from the witnesses, a
13 sufficient response to the Architect of the Capitol's
14 concerns that we will address in our testimony.

15 So without further ado, I just wanted to
16 bring that up to your attention.

17 CHAIRPERSON GRIFFIS: Good. There's going
18 to be one question that the Board is going to want you
19 to answer, and it is going to go to the height, and i
20 know you have outlined substantially in terms of the
21 110, the 130 and then from the -- or going to the 110
22 with the TDR.

23 So just a reiteration of whether you are,
24 in fact, receiving the additional square footage that
25 would invoke that height or not.

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1 MR. NETTLER: Well, we have it available
2 to us. We could never use it, as we explained in the
3 prehearing statement. The site is configured in such
4 a fashion with the building that has to be retained
5 that we could never use the TDR -- the density that
6 was provided to us. The zoning regulations would
7 permit us to bank those density, which we may end up
8 doing, but we are coming to you as a pure variance,
9 height variance, recognizing that we had the right to
10 go to 110 with the TDRs that are available to us, but
11 this is going from 90 to 130 feet.

12 CHAIRPERSON GRIFFIS: Okay. So that is a
13 straightforward application, is from 90 to 130.

14 MR. NETTLER: Not unlike the realtor's
15 situation, which also had the same -- They could use
16 the TDRs as well, but they had it as a 90 to 130 feet.

17 CHAIRPERSON GRIFFIS: And I think that is
18 clear now, and page 13 lays out, in fact, the FAR that
19 is available that, obviously, you wouldn't be able to
20 use if you went up to the nine as opposed to --

21 MR. NETTLER: We can't even use the
22 existing FAR.

23 CHAIRPERSON GRIFFIS: Exactly. Okay. All
24 right. That being said then, are there any other
25 preliminary questions by the Board? Okay. Let's move

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1 ahead.

2 MR. NETTLER: Then let me do this. Since
3 Mr. Orr's testimony is here, and since he does have
4 his meeting which he is already late for, let me
5 excuse him. I would like Art to say a few words, and
6 I know he's got to catch his plane. If he could just
7 do it out of order, and then we will go with the owner
8 and with the architects, if that is not a problem.

9 CHAIRPERSON GRIFFIS: Fine. The last
10 thing before you get started: Is the ANC-6
11 represented today? ANC-6C? No representative of the
12 ANC is here. Okay, let's move ahead.

13 WHEREUPON,

14 ART SANTRY
15 was called as a witness by the applicant and, having
16 previously been duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 MR. SANTRY: As Mr. Nettler said, I am Art
19 Santry. I am with the Trammell Crow Company, and what
20 I have done over the past decade or so is represent a
21 number of law firms here in the District. I represent
22 Patton Boggs, Vincent & Elkins, Miller & Chevelier,
23 Ballard Spar, a number of firms, and am currently
24 representing Jones Day.

25 Just sort of a macro perspective of what

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1 is going on in the law firm business and why it is
2 applicable to this specific building: Law firms have
3 enjoyed some steady growth over the last 15 years, and
4 with that growth comes, obviously, a demand for
5 additional office space.

6 Unlike other cities, we have a height
7 limitation, which means that we can grow horizontally
8 and, of course, horizontal growth means you've got
9 boundaries and streets, which means you can only go so
10 far before you have to go into another building.

11 So unlike Atlanta where you can go
12 straight up and put 6-700,000 square feet of law firm
13 in one building, it is more difficult here in the
14 District.

15 In representing Patton Boggs in closing
16 their deal just this past December, they ended up
17 bifurcating operations. Thankfully, they were able to
18 find an additional 100,000 square feet in a building
19 directly across the street. So it is not as much of
20 an inconvenience as it would be had they had to
21 relocate X number of blocks down the way.

22 When Jones Day moved into this building
23 back in the late Nineties, it was anticipated that
24 they would be able to stay for their full 15 years
25 without taking additional space, and that -- The good

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1 news and the bad news is they grew rapidly, bad news
2 being they need more space.

3 We have spent some time looking for space
4 in the District and some time actually looking for
5 space in Northern Virginia, and the reality is, to the
6 extent that Jones Day has to bifurcate its operations,
7 put offices in a building that is three, four, five
8 blocks away, it is probably just as inconvenient and
9 maybe more practical, candidly, to have those offices
10 in Northern Virginia where some of their partners
11 actually reside.

12 What the JBG companies has offered us is
13 an opportunity to keep the practice group together
14 under one roof, in essence, on the 51 Louisiana Avenue
15 campus. The way the floorplate has been configured
16 and the things that they have done -- I'm sure the
17 architects will get into more specifics -- will allow
18 Jones Day in essence to stay within the District and
19 stay in that 51 Louisiana Avenue campus for what we
20 see as an indefinite period of time.

21 You know, our goal, the firm's goal would
22 be ideally to keep the firm located in Washington,
23 D.C. and under one roof. That would be the most
24 efficient way for the firm to continue to practice
25 law.

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1 So again, I am here as a representative of
2 Jones Day, not as a representative of JBG but as a
3 representative of Jones Day and, of course, our desire
4 is to make sure that this project works, and it is one
5 that Jones Day can office in for a number of years to
6 come -- decades to come.

7 BY MR. NETTLER:

8 Q Well, I have just two questions for you.
9 First, are there -- What is the availability of other
10 sites in the District for this type of a user?

11 A Well, you know, to the extent that -- and
12 I will answer that two ways, Rich. One, there is
13 additional space being built, as you know, by Republic
14 Properties, not too far away but again, if you are
15 three, four or five blocks away, you might as well be
16 a long way away. That's sort of answer number one.

17 Answer number two is, to the extent that
18 you want to do what an Arnold & Porter did, which is
19 build a campus in one location, obviously, there are
20 very few sites left, none in Georgetown. You know,
21 could we assemble things in the CBD? Sure. There are
22 places we could do it, but it's difficult. It would
23 be a difficult thing, and you know, we still have time
24 left on our lease, and it would make things difficult.

25 Q And the second one is: Are there time

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1 constraints on being able to start this project and
2 have it available for Jones Day?

3 A Yes, that's a good question. We are
4 busting at the seams. We do need space, and depending
5 upon how this all transpires, we are going to make a
6 decision as to whether we -- what we do about our
7 space needs in the next two to three years.

8 Q But do you understand that there is a date
9 certain that you must have new space to move into?

10 A Your targeted date is 35 months from
11 today, in essence, which would be good. We could hang
12 in there for that long.

13 MR. NETTLER: I have no other questions.

14 CHAIRPERSON GRIFFIS: If you split the two
15 sites, would you split evenly the total square
16 footage? Let's say now that is proposed to be 550,000
17 square feet when finished. Could you find two sites
18 or two -- well, I'm not going to do the math -- that
19 are 50 percent of that, or would you -- Go ahead.

20 MR. SANTRY: We have a lease in place now
21 that carries us out another eight years, in essence.
22 So what we would have to do is we've got roughly
23 200,000 feet where we are. We would have to find --
24 call it initially another 100,000 square feet
25 somewhere else.

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1 CHAIRPERSON GRIFFIS: Is there efficiency
2 to be co-located?

3 MR. SANTRY: Oh, yes, without question.

4 CHAIRPERSON GRIFFIS: Would you not
5 replicate certain aspects of each site at each place?

6 MR. SANTRY: I mean, to the extent that we
7 could do everything at 51 Louisiana Avenue, we would
8 not replicate.

9 CHAIRPERSON GRIFFIS: Right, but if you
10 split it up, aren't you duplicating?

11 MR. SANTRY: Yes.

12 CHAIRPERSON GRIFFIS: That would be my
13 assumption. So you are actually looking for more
14 square footage if you had to relocate --

15 MR. SANTRY: Right. Absolutely.

16 CHAIRPERSON GRIFFIS: -- than building
17 onto the existing?

18 MR. SANTRY: Yes. You would have to
19 replicate things like conference facilities,
20 libraries, things like that.

21 CHAIRPERSON GRIFFIS: So if you took it at
22 existing 300,000 square feet now and you were going to
23 propose the addition that would bring it to 550, you
24 are actually not going out, if you can't do the
25 addition, looking for 250,000. You may be looking for

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1 300 or 350?

2 MR. SANTRY: Yes. You would be looking
3 for more. Correct.

4 CHAIRPERSON GRIFFIS: Okay. And how many
5 of those are around the area, 350,000 square feet
6 buildings?

7 MR. SANTRY: Yes, that's very hard.

8 CHAIRPERSON GRIFFIS: But to deliver in
9 '08. Okay.

10 MR. SANTRY: Difficult.

11 CHAIRPERSON GRIFFIS: Mr. Jeffries?

12 BOARD MEMBER JEFFRIES: Obviously, there's
13 a number of locations that they could go, but it's
14 really -- you know, really dealing with the location
15 issue. Well, no even within the District, but the
16 question is really just location, location.

17 CHAIRPERSON GRIFFIS: How pertinent is the
18 location for the moniker of this firm? Does address
19 make any difference?

20 MR. SANTRY: It does. It always does.
21 Sure. I think -- Address aside, I think, Mr.
22 Chairman, if you walked into their space and got a
23 feel for that building, it's quite impressive. They
24 like it. They would like to stay there.

25 It's a decision they made when they did

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1 what they did, moving up to the Hill. It was somewhat
2 of a pioneering move, and in retrospect it was
3 brilliant. I mean the views, the feel of the
4 building. That area has really come around. So they
5 would like to stay there.

6 CHAIRPERSON GRIFFIS: Pioneering right
7 next to the Capitol. Good. Any other questions?
8 Guess I have thicker skin than most, huh? Okay.
9 Thank you very much.

10 MR. NETTLER: I actually would like to
11 give some personal context to that, because Jones Day
12 was originally located at Metropolitan Place --
13 Metropolitan Square and located there at a time when I
14 was representing the District on the demolition of
15 Rose Tavern and Keith Albey Theater situation, which
16 was -- The development of Metropolitan Square was for
17 the purpose of providing this use to Jones Day, which
18 then grew out of that, which then resulted in
19 Garfinkle's being turned over as an additional
20 expansion space for Jones Day and which resulted in a
21 use variance being provided by the Zoning Commission,
22 because it was then slated as a department store under
23 the Downtown Development District.

24 That use variance was very contentious,
25 and I was on the other side of that use variance. But

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1 it ended up being impossible to provide all of the
2 expansion space for Jones Day when that use variance
3 was granted.

4 So we then had to move into the Acacia
5 Building, and then we had the same problem. What we
6 are trying to do, as I think will be explained, is to
7 solve a problem that doesn't continue to exist as it
8 has in the past, but finalizes Jones Day's location
9 and with an appropriate development project.

10 With that, I will turn it over to JBG.

11 CHAIRPERSON GRIFFIS: Actually, before you
12 jump into -- Excuse me, but let me just get one
13 clarification, too, in terms of the historic nature,
14 which is one of the uniqueness aspects and also a
15 practical difficulty which you have brought up.

16 It's a fascinating aspect that I had never
17 heard the terminology of a standstill agreement. I'd
18 love to use that myself. So we'll see if we can get
19 that going.

20 The issue is these buildings are not
21 designated. Is that correct?

22 MR. NETTLER: They are not designated
23 because of the standstill agreement.

24 CHAIRPERSON GRIFFIS: Right. But they
25 have obvious historic significance, and that historic

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1 significance is given to this agreement of which the
2 DCPL will review anything that happens on it. So just
3 for total clarification, there is a historic
4 significance which is part of its uniqueness, and your
5 case presentation says practical difficulty also.

6 MR. NETTLER: Correct. And there was a
7 landmark designation application that was prepared for
8 those buildings. It was -- At the time that I was on
9 the Issues Committee of D.C. Preservation League, and
10 at that time the D.C. Preservation League tried to
11 work out a number of different standstill agreements,
12 of which this was one, in lieu of filing a landmark
13 application; and Acacia wanted to work with DCPL on
14 that issue.

15 Acacia had a proposal for the site that
16 the Commission on Fine Arts rejected, because it
17 pushed the density forward onto the site, both height
18 and density forward onto the site.

19 CHAIRPERSON GRIFFIS: Right. And that's
20 addressed in your written submission, which I think is
21 very clear. But I just wanted to point it out,
22 because actually it is invoked a couple of places in
23 the submission differently. So just for clarification
24 in the record, there is great historic significance
25 and an already agreement of historic review.

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1 MR. NETTLER: Correct. And actually, we
2 will probably have -- It's in the contemplation of the
3 plans of JBG, the owners, that a more formal aspect to
4 the historic significance will probably be developed
5 subsequently, but that is the context in which it has
6 its historical significance today with DCPL.

7 CHAIRPERSON GRIFFIS: Okay. Good.

8 MR. NETTLER: A landmark application is
9 being considered.

10 VICE CHAIRPERSON MILLER: Thank you.

11 MR. NETTLER: Sorry. I didn't mean to be
12 obtuse. Let me turn it over to JBG Company.

13 CHAIRPERSON GRIFFIS: Good.

14 WHEREUPON,

15 DEAN CINKALA

16 was called as a witness and, having previously been
17 duly sworn, testified as follows:

18 MR. CINKALA: Thank you, Richard. Mr.
19 Chairman, members of the Board, thank you for hearing
20 our case today. My name is Dean Cinkala, a principal
21 with the JBG Companies. As many of you may know, the
22 JBG Companies is a real estate investment and
23 development firm that's been in business in the
24 metropolitan Washington area for over 40 years. We
25 have developed millions of square feet of office space

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1 and thousands of residential and hotel units.

2 JBG purchased 51 Louisiana in the summer
3 of 2004 and, as Richard has stated briefly, it
4 consists of two buildings totaling about 210,000
5 square feet, a 460-space above grade parking garage,
6 which is a bit unusual for downtown D.C., and is
7 occupied solely by Jones Day.

8 Later on in our discussion George Dove
9 will touch in more detail on the limiting or practical
10 difficulties of the site. But briefly, they are the
11 irregular shaped nature of the site, the V shaped
12 nature of the existing improvements, the standstill
13 agreement we were just talking about, the fact that
14 the existing Acacia Building and the annex building
15 have 15-foot, floor to floor heights which make it
16 difficult to make compatible with new development, as
17 well as some very significant below grade issues,
18 namely the WMATA Metro tunnel on the D Street boundary
19 of the site and the Tiber Creek, a 24-foot combined
20 storm drain/sewer that runs right through the middle
21 of the property. So all very difficult issues that
22 make it hard to develop this site.

23 One of the first things we did as we
24 started to pursue redevelopment of this site was to
25 try to consider the selection of the appropriate

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1 design team for this project. We went back and looked
2 at prior submissions to the Commission of Fine Arts,
3 submissions that did fail, that were not well
4 received, to try to gain some lessons learned.

5 I would say a couple of the lessons
6 learned were that any project, any proposed
7 redevelopment of this site that visually or physically
8 imposed upon the existing Acacia or annex building,
9 given their historic sensitivity, was not going to be
10 well received, nor any new development that tried to
11 mimic the existing development was likely not going to
12 be well received.

13 That really led our selection to the
14 Richard Rogers Partnership of London, and we have
15 Ivan Harbour here, and Dennis Austin as well. They
16 have a long history of working sensitively with
17 historically significant buildings and integrating new
18 development.

19 I think, based on our experience over this
20 past fall where we have worked with DCPL
21 cooperatively, we've worked with the Office of
22 Planning, we've made our concept submission to the
23 Commission of Fine Arts, we have received unanimous
24 approval from the ANC, that this project and the
25 design has been well received. It has been respectful

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1 to the existing site conditions, and I think has
2 gained unanimous support.

3 We believe the application for the height
4 variance is appropriate, given the unique
5 circumstances of this site. Beyond that, though, we
6 think there are some very positive benefits for
7 redevelopment of this site.

8 We think bringing an architecture firm
9 like Richard Rogers Partnership to town will provide
10 world class architecture and a trophy building to the
11 downtown marketplace. We will be able to accommodate
12 the growing and expanding needs of a significant
13 tenant in downtown Washington, D.C.

14 We have agreed to with the ANC to pursue a
15 lead certified building. We are -- Through the
16 redevelopment of this site, we are taking down what is
17 universally viewed as an eyesore in this neighborhood,
18 a almost six-level above grade parking deck, and as
19 you can see from the OP staff report, our proposal
20 does not cause any negative impact on the city's
21 planning or zoning, as supported by their report.

22 One of the things Richard referred to
23 early in his discussion was this issue that came up
24 last week from the Sergeant at Arms of the Senate,
25 which was a security concern that was raised.

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1 What we have tried to do over the last
2 several business days was work with a firm named
3 Dusebella, Venturi and Santori, a firm we have worked
4 with extensively on a couple of our more important
5 projects, to try to understand the concern and
6 determine if we thought it was a legitimate concern.

7 We looked at three things, particularly.
8 One, what were the existing conditions in the
9 neighborhood today in relation to the Capitol
10 building? What were the conditions like with this new
11 building built? Then lastly, what kind of security
12 protocol could we put in place in our building to
13 mitigate any concern regarding our new proposed
14 development?

15 We have a series of boards that we can
16 have George Dove show to you shortly, George Dove with
17 WDG. But in very brief conclusion, I think what we
18 can show is that the existing conditions today --
19 there are at least 10 buildings that have clear line
20 of sight to the Capitol building, and are at either
21 closer distances or only in a small amount of further
22 distances from the proposed new development.

23 Additionally, if you were to do a line of
24 sight study and look at what is theoretically the
25 exposed area from the existing rooftops, the new

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1 development, in fact, doesn't create any additional
2 exposed area. In most simplistic terms, we think the
3 building doesn't exacerbate what is already an
4 existing condition.

5 In fact, we would argue that our building,
6 given where it is, provides some blockage to other
7 public buildings that are behind our site.

8 Lastly, and you see this in the letter,
9 Dusebella, Venturi and Santori recommends some very
10 simple security things that we can do to our building,
11 whether it is perimeter security, roof security,
12 detection systems on the roof, or other matters like
13 that that should adequately address the security
14 concerns of this building.

15 CHAIRPERSON GRIFFIS: I believe in the
16 submission you indicated that the existing structure
17 has a roof terrace. Is that correct?

18 MR. CINKALA: It does. Yes, that would be
19 right here.

20 CHAIRPERSON GRIFFIS: Oh, there is a
21 model. What do you know. I got to look up once in a
22 while, don't I. Holy moley, we're missing all the fun
23 parts. Okay.

24 MR. SANTRY: We are going to bring it up
25 to you.

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1 CHAIRPERSON GRIFFIS: Yes, indeed. I
2 figured as much. Secondly, should we be concerned
3 that this letter is noted Confidential and Privileged
4 that you put into the record? It's public record now.

5 MR. NETTLER: It is. If you read -- They
6 understood it was going to be made a part of the
7 public record. They just asked for its distribution
8 to be limited to --

9 CHAIRPERSON GRIFFIS: The general public.
10 Good.

11 MR. NETTLER: Limited as much as possible.

12 CHAIRPERSON GRIFFIS: Okay. All right.
13 Well, it's up to you how you want it handled. I mean,
14 you can take it back out of the record.

15 MR. NETTLER: No, I would not.

16 MR. CINKALA: I think it's Bob Dusebella
17 trying to be careful about the information he is
18 disseminating about security concerns at the Capitol.

19 CHAIRPERSON GRIFFIS: Indeed. I think --

20 MR. NETTLER: You don't need to put it on
21 the website.

22 CHAIRPERSON GRIFFIS: Well, who knows what
23 is going to happen shortly. I think this is,
24 obviously, an important issue for the Board, just
25 because the Architect of the Capitol has raised it.

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1 I can say for myself in terms of reviewing
2 this initially, it will be good to have the study,
3 which sounds as if it's exhaustive and conclusive for
4 us. I think we can get through it and have it
5 submitted into the record. We'll see how far it goes
6 and what it actually is.

7 My biggest concern in terms of receiving
8 this letter is that it was just that. It was just a
9 statement out there. There are security concerns in
10 terms of the site lines into the park. For the Board,
11 you know, we see it on the very, very small cases that
12 take six hours and on the very big cases.

13 I mean, really, what we are trying to get
14 to is the real substance of stuff. That doesn't do
15 much for me in terms of -- because the logical extreme
16 of a letter of that is to say let's design our cities
17 to their death, and that means that there should
18 absolutely be nothing that would somehow facilitate
19 somebody's illegal and irrational behavior. I just
20 don't understand what our cities would look like if we
21 started to be judged and designed on that type of an
22 aspect.

23 I mean, basically, you are looking at
24 nothing higher than four feet above the sidewalk,
25 because that would put you above the person next to

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1 you in a larger organization or gathering. I don't
2 see it. We are going to need a lot more substance if
3 -- I will anyway, in terms of deliberating, in terms
4 of an opposition position in this.

5 I think your point is well taken. It is
6 actually -- I don't know that it was definitively put
7 in your submission, but it was something that was
8 clear in my mind in looking at it, is when you
9 describe the site around and the heights of the
10 buildings around it, you know, how does it not invoke
11 the same notion of, well, what do they do with their
12 roofs and how controlled are their occupants in and
13 out of their buildings?

14 This is going to be a single user
15 building, is it not?

16 MR. CINKALA: It will not be initially.
17 Jones Day will likely take 50 percent of the new
18 development initially, but I imagine over the long
19 run, given our option and expansion negotiations, they
20 will have a significant portion of the building
21 encumbered.

22 CHAIRPERSON GRIFFIS: I see. It's going
23 to be, I have to imagine, a Class A office building.

24 MR. CINKALA: Correct.

25 CHAIRPERSON GRIFFIS: It will obviously

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1 have some sort of security check coming in and out.

2 MR. CINKALA: Absolutely.

3 CHAIRPERSON GRIFFIS: And I don't imagine
4 those days are ever going to be over now. Right? I
5 mean, even not the Class A buildings have that. Okay.

6 MR. NETTLER: The concerns that you raise
7 are exactly what is stated in the shadow Senator's
8 letter as well about having to --

9 CHAIRPERSON GRIFFIS: Is that so? Thank
10 goodness I voted for him. Oh, I can't say that.
11 Right. And that's Mr. Strauss who wrote this.

12 MR. NETTLER: Right.

13 CHAIRPERSON GRIFFIS: Oh, indeed. All
14 right. Good. Very well, let's proceed.

15 MR. NETTLER: Our next witnesses are
16 architects from Richard Rogers Partnership.

17 CHAIRPERSON GRIFFIS: I'm sorry. A quick
18 question of the Board members. I think we should see
19 all the boards that you have talked about. We are
20 going to get to that point, and we are not moving
21 beyond it.

22 MR. NETTLER: Right. I think it's better
23 actually to see the project, and then we can go into--

24 CHAIRPERSON GRIFFIS: Good. Let's get to
25 substance, and then we'll get to the others.

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1 MR. NETTLER: Because there are variables
2 in the project which we are going to get into, because
3 it is still undergoing review by the Commission of
4 Fine Arts. It asked us to look at a number of items,
5 not affecting the height of it but affecting other
6 aspects of it.

7 So what we wanted to do was to give you
8 the latest aspect of it, which was part of our
9 prehearing statement, and so you can understand it
10 better both in its context and how it interacts with
11 the existing building. Then we are going to move into
12 the boards as well in terms of the neighborhood and
13 the Capitol.

14 The first witness is Ivan Harbour who, as
15 I said, is a senior director of Richard Rogers
16 Partnership, and I have provided his CV as part of my
17 prehearing statement. I would ask that he be treated
18 as an expert. Lord Richard Rogers, who has worked on
19 this and who was here when we made the presentations
20 to Office of Planning, DCPL and the CFA, as I'm sure
21 you know, is one of the foremost living architects, a
22 winner of the -- knighted in 1991, made a Life Peer in
23 1996, awarded the Legion of Honor in France, and I
24 hope you come to agree with us. This is a pretty
25 significant project that really does a lot for

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2 I will give you over to Ivan, assuming you
3 will accept him as an expert.

4 CHAIRPERSON GRIFFIS: Are there any
5 questions from the Board? I don't think there is any
6 question, Mr. Harbour, and we bestow the great title
7 of expert witness before the Board of Zoning
8 Adjustment for the United States of America. Why
9 don't you proceed with your testimony.

10 TESTIMONY OF IVAN HARBOUR

11 MR. HARBOUR: Certainly sounds very
12 impressive.

13 CHAIRPERSON GRIFFIS: Doesn't it, though.
14 It's all in the delivery.

15 MR. HARBOUR: Well, my first question for
16 you is would you like me to bring the model up and put
17 it on the bench?

18 CHAIRPERSON GRIFFIS: You know what. If
19 there was a place where we could just see it. Do you
20 guys want it up here closer? Are you going to point
21 to it? Are you going to utilize it?

22 MR. HARBOUR: Actually, no. I will
23 probably just point to the model and not be bold.

24 CHAIRPERSON GRIFFIS: I think we can keep
25 it -- Can everyone see it if we lean forward? Let's

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1 do that. Actually, is that easily moved, the podium?

2 That would be grand, because what we need to do is
3 keep you on camera, too, for everything. So if you
4 want to -- and you need to be close to a microphone.

5 I would move it right back where she is
6 going, and then you can put a microphone right near
7 it. So you can use both hands and not have to hold
8 that thing. If it will stay there, that would be
9 perfect. Let's try that microphone on the corner, if
10 you just turn it on, on the table. Yes. The recorder
11 will let us know if it's not picking up. We are all
12 set.

13 MR. HARBOUR: Thank you very much for
14 allowing me to present. I think the first thing to
15 say is this, to us, is an extraordinary site, an
16 extraordinary project, and we are very happy to have
17 been asked to be involved in it.

18 The first thing that hit us is the quality
19 of the existing building, the Acacia Building, '35
20 building, and it's probably not quite such quality but
21 still hanging on in there with its main facade on 1st
22 Street, the '53 addition, and I think our reaction to
23 the site, similar to that already expressed, is how on
24 earth can this exist with this parking garage at the
25 end of New Jersey Avenue. What a great termination

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1 point.

2 So what has really pushed our approach as
3 being to suggest something which is giving over
4 perhaps something a little bit more to the public at
5 the end of that avenue. So we could quite have easily
6 have closed this island off and kept what is currently
7 the back yard, kept that isolated, but our feeling was
8 that, in order for this thing to develop and to become
9 a real place where you are looking forward to coming
10 to work in the morning from mass transit, hopefully
11 using your car less, the ability to organize the
12 building such that it addresses New Jersey Avenue, we
13 create an entrance which is common to the whole
14 complex here and make the central part of this
15 enclosed space really work as a sort of vibrant heart.

16 Now the way we have done that is fairly
17 straightforward. You can all see that drawing, I
18 hope. We have taken liberty to suggest removal of the
19 brick facing on the back of the '53 extension. It's
20 very much -- whereas, the '35 building is stone faced
21 on all sides, the extension is just faced on 1st
22 Street -- to extend the existing floorplates used by
23 Jones Day, and to create a vibrant heart into which
24 all the circulation throughout the complex will work.

25 So it becomes a centralized piece of circulation, but

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1 not a core in the traditional way but more in the
2 manner to which, certainly, we as architects perceive
3 it. It is something that adds some excitement and
4 movement to the space.

5 To the north of that over the existing
6 parking garage, we have put the bulk of the
7 accommodation and, importantly, that -- its
8 relationship with the existing building differs on a
9 floor to floor basis. We are putting 12 floors in a
10 space adjacent to five to six floors of the existing
11 building.

12 So what we have done is separate it from
13 the existing building, which maintains and enhances
14 the aspect in respect of that, but also in technical
15 terms allows us to make connections which aren't
16 necessarily at the same level. So it works as a
17 circulation concept for Jones Day.

18 It splits the new from the old, respecting
19 both, and we are allowing daylight to flow through
20 between the two. We are identifying the new and the
21 old, and that gives respect. We are not trying to
22 copy or indeed imitate the old which, of course, with
23 technology today is, well, prohibitively expensive and
24 impossible to find that labor to do it.

25 The resultant space created by that

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1 rectangular building and the two existing buildings --
2 we are suggesting that that is roof, and we are
3 creating an atrium, and there is a lot of ongoing
4 debate. I mean, this is a preliminary concept. I
5 think the concepts are strong.

6 The nature of that roof, as you can
7 imagine, is under hot discussion. We are balancing
8 how it relates to the existing building. We don't
9 want it to physically touch that building. It's
10 important it stays separate, and how it relates to the
11 new building and the extension and the triangular
12 extension of existing. All those structurally need to
13 make sense, so that when you walk into this space
14 there is a sense that this thing is one organism and
15 not an assembly of pieces.

16 I think probably the most exciting thing
17 is the way that we've opened the heart of this
18 building out onto New Jersey Avenue, particularly at
19 street level, pulling way back from the back of
20 pavement sidewalk line and opening this up, creating a
21 sort of very generous publicly accessible space beyond
22 in front of the new entrance to the two -- to the
23 organization.

24 As presented at that entrance, you have
25 two ways of going. You can either follow the atrium

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1 to the back of the existing '35 building or the new
2 atrium created between that and the new building.
3 That gives our client the ability to, in the short and
4 median term, to operate more than one occupier of the
5 property. It gives them a subdivision within the
6 space, which is not just the question of a sign on the
7 door, but actually it is a direction which is
8 highlighted by top light, sun and space.

9 I think that is broadly the project as it
10 exists. AS I say, it is at a preliminary stage.

11 CHAIRPERSON GRIFFIS: Excellent. Good.
12 thank you very much. It seems, coming from the
13 written submission and your own testimony right now,
14 obviously, one of the practical difficulties is the
15 design solution based on a lot of the unique aspects
16 of this. But one other has kind of come up that I
17 didn't find specifically articulated.

18 That is the actual location of this site
19 is an aspect of uniqueness, and its own practical
20 difficulty. What I mean is you addressed written and
21 orally very well defining that New Jersey Avenue.
22 what is that to be in terms of the addition in
23 conjunction with the existing building. But you know,
24 you could say that anywhere. If you put a building
25 up, of course, you are going to have to figure it out.

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1 Is the front door here or there? What does it look
2 like, blank wall or is it retail?

3 What you didn't speak to is what is across
4 the street, and what we have are these monuments and
5 these public parks and, then going even further. I
6 mean, the stature of that location almost demands a
7 design solution, and I think that is one of the
8 important unique aspects to this, and presents itself
9 as a difficulty, if not a substantial problem.

10 Let me ask you, as we go further, though,
11 into it then, if you want to address further from the
12 written submission, what is pushing you up?

13 MR. HARBOUR: In a straightforward way,
14 what is pushing us up is the desire to create sensible
15 volume within the overall perimeter that we can say is
16 this sort of vibrant focal place. You know, we have
17 deliberately not closed the atria spaces off at the
18 end, because if we close them off, that seals them off
19 from the external environment and it becomes a very
20 introvert world.

21 What we really want to do here is make it
22 clear that it has a function, obviously, as one whole,
23 but that it is actually a window to outside as well.
24 It is engaging with the street. It is not closing
25 itself off.

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1 CHAIRPERSON GRIFFIS: I see. So those
2 others that -- Well, let me see if I understand you
3 correctly. What you're saying is within the massing
4 that is allowed, within the volume, one being the site
5 being the FAR, the square footage that you actually
6 can put on the site -- Within that allowable, you want
7 to maximize it -- that's pretty straightforward -- but
8 that there are unique aspects to this that create,
9 one, the need for the atrium design, but also
10 practical.

11 You've got all the different floor levels,
12 as I understand. That is allowing you to create your
13 circulation between all these buildings -- right? --
14 and bring these floor levels. If you are going from,
15 you know, floor levels that are five or ten feet
16 apart, you can't put that necessarily in a five-foot
17 ramp. I mean, you're running some distance. Correct?

18 MR. HARBOUR: That's correct.

19 CHAIRPERSON GRIFFIS: Okay. So you may
20 need 20-30-40 feet to make up that difference. So
21 that atrium is allowing you to do that, but that is
22 not occupiable space.

23 So if I'm understanding what you are
24 saying, is that open space, of course, creates this
25 dramatic effect, but it's also perhaps a practical

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1 design requirement and, therefore, the other square
2 footage has to be massed with the remainder.

3 MR. HARBOUR: Yes. I mean, to be fair,
4 you -- We've had discussions on the width of the
5 rectangular building. You could push it much closer.
6 You could make it touch the existing '53 extension.
7 You could still make connections work, but they are
8 pretty uncomfortable, and for us the loss of daylight
9 and aspect.

10 It's very interesting working here and the
11 expectations of proximity to window wall than they
12 are, for example, in Europe, and naturally working in
13 Germany. They won't allow you to be further than six
14 meters -- I can't remember what that is in feet, but I
15 suppose it's 20 -- from a window wall.

16 Although it would be technically
17 acceptable here to bring all the rectangular building
18 up against the triangular one and maybe, consequently,
19 reduce its height and build the same overall floor
20 area.

21 In terms of, certainly, a building which
22 is maybe slightly more environmentally sustainable
23 and, you know, is less reliance on our special
24 lighting and perhaps every hope as we develop this,
25 start to look at how the atrium works as an

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1 environmental buffer to outside. Days like this are a
2 classic example.

3 You know, we've got something that
4 breathes easier and allows the building to, I suppose,
5 look toward the future rather than just working with
6 the unsubtlety of just floor space, FAR and that sort
7 of statistic, I guess.

8 CHAIRPERSON GRIFFIS: That's an
9 interesting point. Let me see if I understand what
10 you are saying. So you could move this building --
11 You could squash it out. So you press it on the top,
12 and it bowls out on the side, and that will encroach
13 on the atrium and the open space. But your point is,
14 one, it becomes a little more uncomfortable on the
15 circulation of the change of grades. But you've
16 brought up the second point of being more
17 environmentally sensitive.

18 If I understand what you are saying
19 correctly, it is the more window line you have, the
20 more natural light you get in, the less artificial --
21 the less lighting you have to burn, which burns
22 energy, which burns coal and -- I love those graphics
23 that go all the way to Ohio. All right, I'm
24 digressing.

25 So that's your point, is that you are

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1 actually getting a more environmentally -- which goes
2 to your lead certification, depending on how you might
3 -- or what level you are going to go to. But that is
4 also one of the design solutions that have arisen out
5 of some of the practical difficulties of the existing
6 buildings and the site shape.

7 MR. HARBOUR: That's correct.

8 CHAIRPERSON GRIFFIS: I see. Okay.

9 MR. HARBOUR: I mean, as Dean has said, to
10 actually virtually touch the '35 building, I think, in
11 terms of respecting that building and enhancing its
12 position, obviously, is problematic if you move that
13 building close to it.

14 CHAIRPERSON GRIFFIS: Well, when you say
15 problematic, how is it problematic?

16 MR. HARBOUR: Because the shoulders of
17 that building were designed as freestanding, even
18 though, of course, the same architect then attached
19 something to one of the shoulders. So even he was
20 subject to --

21 CHAIRPERSON GRIFFIS: And the Commission
22 of Fine Arts was shown this separation from that
23 existing?

24 MR. HARBOUR: Yes. Oh, yes. I think this
25 bird's mouth is opening out onto New Jersey Avenue

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1 and, as you say -- and everyone talks about the view
2 to the Capitol. There is actually a stunning view
3 west through the park land and over the monuments and
4 beyond. It's an undiscovered view almost.

5 CHAIRPERSON GRIFFIS: Good.

6 MR. NETTLER: I think a couple of comment
7 son that, because in the prior proposal for the site
8 by Acacia, the Commission of Fine Arts suggested,
9 which Acacia never pursued, that moving the density to
10 the back of the site -- It didn't want the density --
11 The density coming close to the front of the site was
12 not sensitive to those buildings, and so asked for the
13 density to be pushed back.

14 When you start to push the density back,
15 because of what is happening underneath, if you are
16 going to provide parking, as David Orr had provided in
17 his testimony and I think George will talk about a
18 little bit, the cost of being able to do that, because
19 the parking has to really go down deep and be very
20 narrow because you have to deal with both the tunnel,
21 the Metro tunnel, and the Tiber Creek, you are then
22 pushing the density up a well, because you have to
23 compensate for the cost of those construction costs.

24 That also pushes the density up. So you
25 have a variety of things that are acting to push the

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1 thing up, again still not being able to take into
2 account, still not to be able to use all the density
3 on the site, even if it was a 6.5 FAR. You are still
4 not being able to use all the density.

5 So all of those things -- and I think, as
6 I say, George will go into that a little bit more --
7 again end up pushing that density up, including the
8 things that Ivan has referred to.

9 VICE CHAIRPERSON MILLER: You said this a
10 while ago. So I hope you remember what you were
11 referring to. You made a remark about sensible
12 volume, and I'm wondering how you measure that or what
13 you had in mind for sensible volume.

14 MR. HARBOUR: I think it is a question of
15 workplace. It's what is quality working environment,
16 and I think my reference was related to -- in the
17 States, we could actually fill this courtyard with
18 construction, theoretically, but it doesn't create
19 something -- and I'm using the word sensible as in
20 sensible in terms of the human condition -- you know,
21 it's not a great working environment, and we know we
22 can do it and it's a gas guzzler, but it is not
23 something we would recommend.

24 So getting the proportions right, getting
25 your window wall to core wall a good proportion so

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1 that you are creating a good working environment for
2 those in the building.

3 VICE CHAIRPERSON MILLER: Thank you.

4 MR. NETTLER: Three other things that I
5 want to mention is: When we met with the Commission
6 on Fine Arts, DCPL, and the Office of Planning, there
7 were three issues that we were asked to address.

8 One was we were originally encroaching
9 onto New Jersey Avenue, which we no longer do, and so
10 we have addressed that. The other two were the roof,
11 the slanting roof that you see which is continuously
12 going through a variety of redesigns, and we have --
13 if you want to see them, we have all of them, but we
14 will eventually get back to Commission on Fine Arts on
15 DCPL with one that we all are satisfied with.

16 Then the penthouse was also going -- is
17 being considered in terms of how that might be
18 designed or redesigned. So those are things that are
19 going through an iterative process. In fact, we have
20 a meeting tonight as well with DCPL to talk about that
21 some more.

22 So those are not in place. Those are not
23 set in place at this point. The only thing that's set
24 in place is the height, and even the skin of the
25 building -- It's glass, but the precise type of glass

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1 is being --

2 CHAIRPERSON GRIFFIS: Well, on the two
3 issues that are still under design, although I know I
4 would love to spend the rest of the afternoon going
5 through them, do they rise to any zoning issues that
6 are before us?

7 MR. NETTLER: No. No, they will never --
8 No.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. NETTLER: It would either be a smaller
11 roof or a smaller penthouse or something like that.

12 CHAIRPERSON GRIFFIS: Right. And the
13 placement of the penthouse is staying where it is, and
14 it is set back, as required.

15 MR. NETTLER: The setback will stay the
16 same.

17 CHAIRPERSON GRIFFIS: The height is there.

18 MR. NETTLER: Right.

19 CHAIRPERSON GRIFFIS: Okay. I don't see
20 anything covering that atrium that actually goes to
21 any aspect.

22 MR. NETTLER: No. I just wanted you to
23 know what issues were out there in terms of where the
24 status of the plans are. That's all.

25 CHAIRPERSON GRIFFIS: Good. Okay.

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1 BOARD MEMBER MANN: Mr. Chairman?

2 CHAIRPERSON GRIFFIS: Yes, Mr. Mann.

3 BOARD MEMBER MANN: If I could just back
4 up for one moment and ask a kind of a procedural
5 question.

6 What is it that triggered CFA review of
7 this project?

8 CHAIRPERSON GRIFFIS: Good question.

9 MR. NETTLER: Well, it's location. CFA,
10 under Shipstead-Luce, has identified a number of sites
11 in the city which it believes, and the Office of
12 Planning has decided it is not worth challenging --
13 and I'm not sure that this was one that would have
14 been challenged, but that it believes is covered by
15 Shipstead-Luce, and this is one of those sites.

16 BOARD MEMBER MANN: Is it a predetermined
17 location --

18 MR. NETTLER: That's right.

19 BOARD MEMBER MANN: -- when Shipstead-Luce
20 was written?

21 MR. NETTLER: Well, not from when
22 Shipstead-Luce was written, but from the
23 interpretation of Shipstead-Luce since then.

24 BOARD MEMBER MANN: I see. Okay. Thank
25 you.

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1 MR. NETTLER: Our next witness is George
2 Dove, and George is going to address some of the
3 issues of what we have been talking about, as well as
4 some of the security issues that is alluded to in the
5 letter that you have received.

6 CHAIRPERSON GRIFFIS: You know what. I
7 would put the model down in a secure place.

8 MR. DOVE: Is this one?

9 MR. NETTLER: Yes, it is. I think George
10 has been accepted as an expert in architecture here
11 before, and his CV is part of our prehearing
12 statement.

13 CHAIRPERSON GRIFFIS: Indeed. Any
14 questions or concerns from the Board? I don't see any
15 problem with expert status. Let's continue. The
16 boards you are about to show are what was just handed
17 out to the Board. Is that correct?

18 MR. NETTLER: Yes.

19 CHAIRPERSON GRIFFIS: Okay. So we'll
20 follow along.

21 MR. NETTLER: Some of them were just
22 handed out, and some of the others --

23 MR. DOVE: There's some additional
24 information here that I couldn't get reproduced for
25 you.

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1 CHAIRPERSON GRIFFIS: So we'll get them
2 into the record.

3 MR. NETTLER: And some of them are already
4 part of the record, actually. Go ahead.

5 TESTIMONY OF GEORGE DOVE

6 MR. DOVE: I am George Dove, principal at
7 WGD Architecture. We are the associate architect on
8 the project and pleased to be associated with RRP and
9 JBG.

10 A couple of things, I guess, I want to go
11 over just to get on the record are the special
12 circumstances on this site. I think we have covered
13 most of them. So I'll be brief. But clearly it is a
14 five-sided site, meaning five streets intersecting,
15 two of them diagonal, the existing building, its
16 historic nature, the substantial amount of site that
17 it takes up, and the extra high stories that are
18 evident in that building uses up a lot of the volume
19 that would be normally available on the site.

20 Another thing that is increasingly
21 difficult to deal with is the diagonal crossing of the
22 street by the Tiber Island sewer that goes through the
23 site. I don't have a large scale, but it goes
24 basically from northwest -- northeast down to
25 southwest and through going down to the south.

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1 It goes under the existing building, and
2 it will, in fact, go under ours, but it does limit
3 significantly the manner in which we could utilize
4 spaces that normally may be underground, because we've
5 got to provide over 500 parking spaces.

6 That is taking a six-level space as it is.

7 So there is none of the flow space that would
8 normally be underground like first basement area that
9 might be used for program space. So everything has to
10 be above grade for the building, and that is sort of
11 pushing the building, as we have talked about before,
12 to try and fill up some of the volume.

13 I think those are the basic issues of the
14 site and, of course, as you pointed out, you
15 uniqueness of the site itself, being adjacent to the
16 Capitol and historic open spaces and monuments, and
17 trying to create a building here that has that special
18 character that would make it a suitable neighbor for
19 the historic elements of the Capitol grounds.

20 You have been given the letter that we got
21 from our security group. What we've tried to do is
22 document a few things, just to clarify where this
23 building is in light of its existing neighbors, and
24 try and demonstrate that, in our opinion and,
25 obviously, more importantly, in the opinion of

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1 security consultants, the building does not create a
2 bigger threat than already exists.

3 The existing building is in this location.
4 Just down Louisiana Avenue is 101 Constitution Avenue,
5 which is actually the closest building to our
6 imaginary point, which is the northwest corner of the
7 Senate wing of the Capitol grounds, which happens to
8 be the closest point for all of these.

9 Next-door to that is another building.
10 The Bureau of Prisons is behind the Sheridan Hotel.
11 It's just north of our proposed new site. 400 North
12 Capital is here. It's just a little bit farther out
13 than our existing building.

14 So you can see that there are a number of
15 buildings that surround the location, not the least of
16 which, important to remember, is that the existing
17 building has an extensive rooftop deck which is used
18 extensively by Jones Day for social events, as well as
19 a very large meeting facility that is in the seventh
20 floor of the '51 addition. So there are a lot of
21 people already within the range that we are talking
22 about.

23 The height of the buildings is about 20
24 feet higher than most of the buildings in the area,
25 with the exception of the new building that's been

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1 built just north of the Sheridan, which is of equal
2 height at 130 feet.

3 MR. CINKALA: George, that is the Hyatt.
4 Right?

5 MR. DOVE: That's the Hyatt. I'm sorry,
6 not the Sheridan. I apologize. I've been calling it
7 the Sheridan all day.

8 Using the same document and overlaying the
9 existing threat, the white area or the transparent
10 area represents a line of sight that exists from the
11 rooftops of all the existing buildings that I just
12 talked about. You can see that, basically from 101
13 Constitution all the way up to 400 North Capital
14 Street, there is almost a continuous sight area to
15 this wall, north wall, of the Senate building,
16 including from the Sheridan which -- I mean Hyatt
17 which overlooks our site and the adjacent buildings.

18 CHAIRPERSON GRIFFIS: Let me slow you down
19 for a quick second, because I don't know about other
20 Board members, but this is the first time that I have
21 started to assess the height of a roof based on a
22 sniper shot, and not being a rifleman myself, what is
23 this actually meaning? Is 1600 feet a viable sniper
24 shot to that corner? Are you the person to answer
25 that?

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1 MR. DOVE: I'm not the person to answer
2 that.

3 MR. NETTLER: I believe there is a
4 discussion of that in the letter from our expert.

5 CHAIRPERSON GRIFFIS: Oh, is there?

6 MR. NETTLER: Yes.

7 CHAIRPERSON GRIFFIS: I looked at the last
8 portion. They had three aspects that they are
9 proposing. One is landscaping around, I imagine, big
10 thick trees so you can't see anything. That's kind of
11 too bad. The other is the glass. But they are
12 assuming that a sniper can shoot from that distance.
13 Is that correct?

14 MR. NETTLER: Well, the expert is saying
15 that the likelihood of that happening is very remote.

16 CHAIRPERSON GRIFFIS: Oh, they do say
17 that?

18 MR. NETTLER: Yes.

19 CHAIRPERSON GRIFFIS: I mean, is there
20 anything that just helps me gauge? I mean, just like
21 sun diagrams or buildings -- you know what I mean?
22 What is helping me gauge what is and what isn't? You
23 know what I mean? What am I looking at here?

24 MR. NETTLER: Well, that's the problem
25 with addressing the letter, is that the letter is very

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1 open-ended as to -- the letter, I mean, from the
2 Architect of the Capitol is suggesting something
3 without being specific because of a concern, which may
4 not be a realistic concern, and the expert is saying,
5 you know, we don't think it's very realistic, given
6 the distance.

7 The expert actually has seen all of these
8 diagrams and makes reference to them in its statement,
9 that there are a whole bunch of other sites, whether
10 close or farther, whatever, but he doesn't that --
11 doesn't believe that that security concern is a
12 reasonable one and, nevertheless, there are things
13 that the experts suggest that we would do with this
14 building for security purposes -- I think controlling
15 access into the building and up through the building -
16 - that I'm assuming he would recommend for any
17 building that was being built with a height and a
18 sight line that this building has.

19 CHAIRPERSON GRIFFIS: Right. So in your
20 discussions with your security agent or anything like
21 that, they didn't give you a diagram of like, you
22 know, this is a Class A sharpshooter and this is the
23 distance that they can hit a bulls-eye. I mean, do
24 you know anything like -- What's 1,000 feet?

25 MR. CINKALA: No. In fact, we talked at

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1 length -- and again, this issue came up the middle of
2 last week. So we've tried to get as much detail as we
3 could quickly.

4 One of the things Dusebella is going to do
5 for us is actually go to the NYPD and their Sniper
6 Division to try to get ourselves more educated on
7 this, which you will see in the letter. It's in the
8 second page. They say the threat of a sniper is
9 legitimately credible, though the range from a
10 perpetrator to target is significant.

11 CHAIRPERSON GRIFFIS: Right.

12 MR. CINKALA: So it's his way of saying
13 that we think this is a long way off from being a
14 credible threat.

15 CHAIRPERSON GRIFFIS: If I'm coming off
16 diminishing the concern, I don't mean to, because I
17 think it is a very legitimate concern based on, you
18 know, the location of the building. I mean, it's
19 interesting that you picked the corner. I mean, it
20 would have been more appropriate, this week's events,
21 to actually pick the platform in front. That's where
22 the new President or now the continuing President will
23 be sworn in. I mean, isn't that the rifle shot you --
24 I shouldn't say that. But isn't that an interesting
25 target. But going from the corner that you picked, is

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1 there actually a pedestrian area there?

2 MR. DOVE: There is what's called Senate's
3 Park.

4 CHAIRPERSON GRIFFIS: Right, and that's
5 the green, and that's the park out. And there is
6 trees and vegetation around that. But you are picking
7 a point of the building at which no one would really
8 be standing.

9 MR. DOVE: That's correct.

10 CHAIRPERSON GRIFFIS: Okay. Just trying
11 to put all this information together.

12 MR. NETTLER: Unfortunately, it's a
13 response to the Architect of the Capitol who is
14 pointing out an area that, you're right, nobody would
15 be standing in.

16 CHAIRPERSON GRIFFIS: Right. No, I'm not
17 criticizing. I'm trying to fully understand.

18 MR. NETTLER: You can't access the Senate
19 chamber. You can't see the Senate chamber from that
20 part of this building.

21 CHAIRPERSON GRIFFIS: Right.

22 MR. NETTLER: It's blocked. So I don't
23 understand -- I personally don't understand why the
24 Sergeant at Arms picks the Senate chamber, since you
25 can't see it from any point on any of those buildings.

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1 CHAIRPERSON GRIFFIS: Right.

2 MR. NETTLER: With any weapon. But
3 because that's the point that he picked, we simply
4 decided to, well, we'll take his point and then just
5 show you that what we are doing doesn't change the
6 situation as it currently exists.

7 CHAIRPERSON GRIFFIS: Right, and that
8 makes sense, taking the point.

9 MR. CINKALA: Mr. Chairman, could I add
10 something. One of the points you were making earlier
11 is stressed throughout this letter from Dusebella,
12 Venturi and Santori, which is there is a credible
13 target identified. The solution typically is not to
14 impose security enhancements on all of the surrounding
15 neighborhood. It is to take that target and enhance
16 it.

17 CHAIRPERSON GRIFFIS: Right.

18 MR. CINKALA: And whether that's ballistic
19 glass or landscaping at the target, but not to affect
20 a whole neighborhood or a whole community.

21 CHAIRPERSON GRIFFIS: Well, it makes some
22 sense. It's easier to control one point than it is an
23 infinite number.

24 MR. CINKALA: That's right.

25 CHAIRPERSON GRIFFIS: Okay. Of course, we

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1 could just try and change human behavior and we would
2 all be better off. Okay.

3 MR. DOVE: The last document, just to --

4 CHAIRPERSON GRIFFIS: That's the purpose
5 of zoning, isn't it, changing human behavior? Okay.

6 MR. DOVE: Just to reinforce the concepts
7 we are talking about, I've emphasized what would be
8 the new view angle from the new building to this north
9 facade of the Senate wing.

10 You can see that it falls completely
11 within already, if you will, jeopardized areas from
12 the rooftops that are adjacent. So it really does not
13 create any additional view angles, planimetrically
14 anyway, from any -- other than what is already
15 existing.

16 We talked about the view of the Senate.

17 CHAIRPERSON GRIFFIS: For clarification,
18 when you are talking about you are not creating any
19 new view angle, what you're saying is, okay,
20 hypothetically I'm a sniper; I'm looking for different
21 points of which. In the current configuration of the
22 buildings that are there, I have the same view as
23 would be created here. So you know, I've got two
24 other options to go to.

25 MR. DOVE: In fact, there are buildings

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1 closer by 400-500 feet.

2 CHAIRPERSON GRIFFIS: Right, which is
3 shown on dimensions. Okay.

4 MR. DOVE: And then one last thing, just
5 because we talked about it. Because there is a fairly
6 heavily wooded area that's in this Senate Park, the
7 view angle, at least to anything that is at grade, is
8 actually partially obscured by the landscaping that is
9 there. That may not be relevant, but I just thought
10 it was interesting when you see it in a diagram. The
11 hill is so high that the trees actually offer a
12 buffer.

13 CHAIRPERSON GRIFFIS: Okay. Don't take
14 that down. First of all, that's not in the record yet
15 is it? We don't have that document. We can get that
16 in.

17 MR. DOVE: We have that.

18 CHAIRPERSON GRIFFIS: But clearly, just
19 for our understanding, the scale of that -- Is that
20 scale of that drawing the cross-section on top?

21 MR. DOVE: Yes. This is 1600 feet from
22 here.

23 CHAIRPERSON GRIFFIS: Excellent. So it is
24 at a scale. And the trees that are shown, are those
25 also correctly scaled for the existing condition?

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1 MR. DOVE: Yes.

2 CHAIRPERSON GRIFFIS: So that's really an
3 existing condition that we are looking at. That's
4 fascinating. Okay.

5 MR. DOVE: Fairly compelling.

6 CHAIRPERSON GRIFFIS: It is indeed. Okay.
7 Anything?

8 MR. DOVE: I think that's all I was
9 supposed to cover.

10 CHAIRPERSON GRIFFIS: Thank you very much.
11 What else?

12 MR. NETTLER: Unless you have any
13 questions for our other members of our team, that is
14 our presentation. I will reserve any final statements
15 after you have heard from the Office of Planning.

16 CHAIRPERSON GRIFFIS: Okay.

17 BOARD MEMBER MANN: I have a question.

18 CHAIRPERSON GRIFFIS: Yes, Mr. Mann?

19 BOARD MEMBER MANN: Do you know if this
20 project is located within the boundaries of the former
21 Pennsylvania Avenue Development Corporation?

22 MR. NETTLER: It's not.

23 BOARD MEMBER MANN: Okay. thank you.

24 CHAIRPERSON GRIFFIS: Let's move ahead
25 then. If there is nothing further from the applicant,

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1 let's go to the Office of Planning, and I wish I could
2 say a very good morning to you.

3 MR. PARKER: I wish that as well. Good
4 afternoon. My name is Travis Parker. I am with the
5 Office of Planning.

6 Most of the issues addressed in my report
7 have already been discussed or alluded to. In light
8 of the hour, I'd be happy to stand on the record as
9 submitted, unless there are questions from the Board.

10 CHAIRPERSON GRIFFIS: I think that's
11 perfectly appropriate. Ms. Miller, questions?

12 VICE CHAIRPERSON MILLER: I was wondering
13 if you had a comment on the security question?

14 MR. PARKER: None whatsoever.

15 VICE CHAIRPERSON MILLER: Okay, thank you.

16 CHAIRPERSON GRIFFIS: Fairly logical
17 answer. Okay. I appreciate the report. It is, as
18 usual, an excellent report. The graphics involved are
19 also good in terms of the aerial photograph that
20 really puts this in its place, and I think with a
21 significant location to the adjacent park and also the
22 -- It really shows quite well the different
23 confluences of angles of streets that, as the Office
24 of Planning has counted up, six-sided lot or the
25 applicant has indicated it's a five-sided but,

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1 nonetheless, it is a very unique sided lot on this.

2 The, obviously, the analysis is put
3 together very well, and a reiteration of some sort,
4 but also an addition of their own analysis of the
5 applicant's submission on this. So I don't have any
6 other questions of it.

7 Mr. Nettler, do you have any cross-
8 examination of the Office of Planning?

9 MR. NETTLER: No, I don't.

10 CHAIRPERSON GRIFFIS: Okay. One of the
11 points that I would draw the Board's attention to,
12 which I know we always do look at -- It's stated on
13 the graph on page 2 of the Office of Planning. It's
14 stated in the applicant's submission in terms of what
15 the actual lot occupancy and FAR is, and done well.
16 But this is all of it together, and I think that
17 really helped me in terms of understanding the entire
18 application of how it wasn't even getting close to
19 what was allowable, be it the lot occupancy or be it
20 the FAR, the actual square footage that's going into
21 it. so I think it's helpful to re-review that on
22 sheet 2.

23 That being said, if there is nothing else
24 for the Office of Planning, let's move ahead. I don't
25 have any other government agency reports except for

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1 those already noted: One, Exhibit 21 is the Architect
2 of the Capitol. Exhibit 22 is the Commission of Fine
3 Arts.

4 We can move ahead to ANC-6C. Has the ANC
5 shown up for our afternoon session in the morning?
6 Okay. Very well. not having an ANC member here, we
7 will just note, it is Exhibit Number 20. Ms. Miller?

8 VICE CHAIRPERSON MILLER: I just have a
9 question for the applicant. I think I heard someone
10 say that the cost of the garage in part drove the
11 height. I'm wondering how you got to the number of
12 parking spaces you have, whether if you had less
13 parking spaces, that would alleviate the need or some
14 of the need for the height variance.

15 MR. CINKALA: Let me answer that question.
16 Right now we are at about 443 spaces, of which I
17 think 40 are tandem spaces. If you look, I think,
18 around downtown, that -- I am going to not get my math
19 exactly right, but that's about a .7 to .8 ratio,
20 which is on the edge of being typical for downtown
21 parking.

22 If you look at the site condition today,
23 they have some 460 spaces in a 210,000 square foot
24 office building. So they are significantly over-
25 parked. We are trying to accomplish two things,

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1 candidly: One, build a building that responds to the
2 market as best we can; and two, to meet the needs of
3 our tenant, Jones Day, which has an historical record
4 of having more parking than most people do have
5 downtown.

6 So the number we have ended up at, in
7 conjunction with discussions with them and our
8 planning efforts, is a number that they can live with
9 and we think we can live with from a marketability
10 perspective of the building.

11 CHAIRPERSON GRIFFIS: Okay. Bottom line,
12 you are going to help all those commuters find some
13 residences in the District. Right? Yes. Good.

14 MR. NETTLER: I should, I guess, add to
15 one thing. The number of spaces -- We actually have
16 reduced the number of spaces from what we originally
17 had, because it's become so difficult to fit those
18 spaces in there economically. So we are at a point
19 now where we are simply trying to replicate what Jones
20 Day has, and it's not that much above what's required.

21 CHAIRPERSON GRIFFIS: Right. To the point
22 of the balance of, one, how much the existing tenant
23 wants but also how much the market would demand,
24 essentially, to make this a viable project to build.

25 MR. NETTLER: Well, and what the zoning

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1 regulations require.

2 CHAIRPERSON GRIFFIS: Right. But you are
3 above what is actually required. Is that correct?

4 MR. NETTLER: We are, but we are not that
5 much above.

6 CHAIRPERSON GRIFFIS: Right. We are not
7 that much, and how many buildings, in your knowledge,
8 downtown, new office buildings, are built to just the
9 requirement of zoning, for parking?

10 MR. NETTLER: I would almost defer to
11 George from that perspective. You know, I would say
12 everybody is trying to hit with their new buildings
13 this .6 to a .8 ratio for downtown parking.

14 CHAIRPERSON GRIFFIS: Are you aware of any
15 new Class A office building that was built that built
16 just to the zoning requirement?

17 MR. NETTLER: I'm not.

18 CHAIRPERSON GRIFFIS: That doesn't matter.
19 We'll let it go.

20 VICE CHAIRPERSON MILLER: I just wanted to
21 clarify that. But that is only one factor that is
22 driving the height. It's also this sensible volume
23 and other things you touched on.

24 MR. NETTLER: Yes, ma'am.

25 VICE CHAIRPERSON MILLER: Thank you.

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1 MR. DOVE: There are some of those that
2 are not built to code we are tearing down and building
3 parking so that it will be above code.

4 CHAIRPERSON GRIFFIS: Above, though?

5 MR. DOVE: Yes.

6 CHAIRPERSON GRIFFIS: I mean, the point is
7 the market is demanding that it is providing more
8 parking than the actual zoning requirements require
9 you to provide.

10 MR. DOVE: Yes. But a one per thousand
11 ratio is considered a minimum ideal for an office
12 building in the downtown area, and we are going to be
13 right at about one per thousand.

14 MR. CINKALA: We are a little more than
15 that, George. We are at about a .8.

16 MR. DOVE: But we are in that range.

17 CHAIRPERSON GRIFFIS: Right. Exactly.
18 Okay. Good enough. Any other questions? Anything
19 else from the Board? Anything for Office of Planning?
20 Very well. Let's move ahead then. Where was I?
21 Government reports, the ANC.

22 We were going to get into the ANC report.
23 Is there anything, Mr. Nettler, you wanted to ask to
24 that or we will just note the exhibit 20. They did
25 ask for leed's, l-e-e-d's. Interesting. Okay.

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1 I imagine that you have discussed all
2 that. We noted in your submission, actually, an
3 excerpt from the website of the architects, and I know
4 also -- Well, was it the architects? JBG also had
5 something in there, was it not? Anyway, you guys are
6 all working on getting some sort of environmentally
7 sensitive design built, and it may, in fact, get to
8 leed certification level.

9 MR. NETTLER: Correct.

10 CHAIRPERSON GRIFFIS: Okay. Anything else
11 we need to highlight on that? Ms. Miller? Very well,
12 let's move ahead then. Is there anyone here in
13 support or in opposition of application 17271, which
14 has been properly advertised for our morning session,
15 to give testimony? Persons to give testimony? Not
16 noting anybody here to provide testimony, let's move
17 ahead, Mr. Nettler, for any closing remarks that you
18 have.

19 MR. NETTLER: And I will be brief, given
20 the fact that we are on our morning session.

21 I think that both the testimony that
22 you've heard today and the submissions in the
23 application make clear that we meet the requirements
24 for obtaining an area variance, both in terms of the
25 uniqueness of the site, which are many elements to the

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1 uniqueness, the practical difficulties of being able
2 to utilize the site, given the zoning regulations and
3 the needs -- or the consequences of these unique
4 factors.

5 I think, as the Office of Planning has
6 pointed out, that we are consistent with the zone
7 plan. We do take the security issue seriously. That
8 has been raised by the Architect of the Capitol, which
9 is why we have our, of course, meeting with them
10 today, and gone further to -- while we think the
11 security issue is one that affects a lot of properties
12 in this area, and while some may say that it is not
13 one that would provide a basis for denying this
14 application, we have gone further to ensure that we
15 have had a very thorough review by what I would call
16 the preeminent expert in this area and the expert who
17 provides that advice to most other Federal agencies to
18 give us an idea as to what we need to do to make clear
19 that we provide as much security as possible, and even
20 more so, apparently, than many other neighboring
21 buildings.

22 We do have, as the representative of Jones
23 Day recognized a very time sensitive situation for
24 Jones Day and a construction schedule that we are
25 actually compressing to be able to meet their

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1 requirements. So we would ask for approval of this
2 application and approval as quickly as possible, even
3 if you should so deign to do so, a bench decision
4 today with a summary order.

5 We do have a number of reviews that will
6 be coming up. So in terms of this design and any
7 other issues that come up, there are forms to address
8 those, the Commission of Fine Arts, DCPL and others.
9 So this an ongoing design challenge that will be met
10 with them as well.

11 CHAIRPERSON GRIFFIS: Okay. Step lightly
12 in that one. Mr. Nettler, does it give you any
13 concern that, if we did a bench decision today, it
14 would only be three members voting?

15 MR. NETTLER: That doesn't give me any
16 concern. No.

17 CHAIRPERSON GRIFFIS: Good.

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

21 CHAIRPERSON GRIFFIS: Good. We'll call
22 that our lunch break.

23 Just to be clear, we needed a moment just
24 to -- There was a lot of information that was put into
25 the record today, and I think -- just a quick little

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1 deliberative session here -- I think the Board is
2 prepared to move forward with deliberation today.

3 Based on the fact of the testimony that
4 was provided and based on our opportunity essentially
5 to go through this letter written by the consultants,
6 but also to have it addressed by the applicant, I
7 think the record is sufficiently complete, and I do
8 believe it would be most appropriate and expeditious
9 for the Board and its schedule, and based on the
10 hearing that was completed today, to move ahead in
11 deliberation under a motion.

12 I would move approval of Application 17271
13 of JBG/Louisiana LLC, and that would be a variance
14 from the height under 1709.23, which would allow the
15 building height increased to 130 feet at premises 51
16 Louisiana Avenue, N.W., and would ask for a second.

17 BOARD MEMBER MANN: Second.

18 CHAIRPERSON GRIFFIS: Thank you very much,
19 Mr. Mann. Let's go quick through the decision.
20 There's an awful lot that's put into this file, and it
21 really actually was a very dynamic filing, not to
22 mention the dynamic building and design, all of which
23 goes directly to the variance cases I have looked at.

24 In terms of the deliberation, let me
25 start. The unique aspects to this are numerous and

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1 the confluence of all of those bring about the
2 practical difficulties. Uniqueness begins with this.

3 We indicated actually just the specific location, the
4 dimension, the size of the size, meaning the differing
5 size of the five sides and the great expanse of the
6 site.

7 We have existing structures which, in
8 fact, in the written filing by the applicant the court
9 cases that were cited that go to how uniqueness can be
10 -- existing buildings can be an aspect of uniqueness,
11 and I think it is clear in this one, as we have seen
12 before, but certainly clear in this one.

13 We have the below grade aspects that
14 relate to the uniqueness and also the practical
15 difficult that arises: The Metro tunnel, the Tiber
16 Creek which I think was described as a sewer today,
17 which is really disappointing, but nonetheless, the
18 remedial aspects and the construction aspects that
19 have to do with dealing with that. And then -- Well,
20 I think that summarizes, if not specifically outlines
21 most of the unique aspects. Obviously, you can all
22 give more as we get into it.

23 Practical difficulty, I think, is arising
24 out of all of those. Oh, well, one of the uniqueness
25 are the differing floor levels of the existing

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1 buildings in the two different buildings that were
2 built at different times. The floor levels, if I
3 recall -- there was a 15-foot floor to floor height.
4 For our information, that is extreme. I mean, that's
5 a beautiful height, but when you are trying to align
6 it to two different floor levels and different areas
7 on the site, it is obviously lends itself to practical
8 difficulty.

9 I can summarize, in my mind, in terms of
10 the persuasive argument that I heard today and in the
11 written submissions, that the design solutions for
12 these unique aspects create all the practical
13 difficulties, and that is as you try and combine this
14 whole V-shape buildings with a new building, all
15 within the envelope of matter of right zoning, what
16 gets pushed is the height, and the height gets pushed
17 because of the below grade aspects. The height gets
18 pushed in order to set back to create an atrium that
19 creates a circulation through all the differing
20 buildings that can accommodate the differing floor
21 level. Well, those are the exciting ones. So those
22 are the only ones I want to talk about.

23 I think the deference in terms of,
24 actually, the completeness and success of actually all
25 the design solutions, I think, is shown well on the

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1 model in the massing and the deference to the existing
2 buildings, as was part of the agreement or part of an
3 unsuccessful proposal prior of kind of encroaching on
4 the existing buildings.

5 One of the successful endeavors of the
6 design solution is to set back and really give
7 deference to those, which then again creates its own
8 difficulties in how you mass out this site. The
9 location itself is how you address so many streets. I
10 mean, you have two, if not three, prominent street
11 elevations on this, not to mention, as came up
12 somewhat indirectly, but you have four or five
13 spectacular views off of this, and each one needs to
14 be addressed adequately, be it the vision of the
15 building and also the vision from the building.

16 It is in the submission that the height
17 that is being requested is, in fact, within the Height
18 of Buildings Act of 1910, based on the width of the
19 street going to 130 feet, and in terms of whether it
20 would impair the intent and integrity of the zone
21 plan, I don't think there has been any persuasive
22 evidence that it would. In fact, the Office of
23 Planning's analysis is actually supportive of the
24 application, indicating that it, in fact, would not
25 impair the zone plan or map.

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1 Whether it would impair the public good --
2 Would this go against the public good? I think,
3 really, that's where the security issue comes into
4 discussion. You know, more and more, the Board is
5 hearing an awful lot on security, and this Board sits
6 as the FMBZA also where it is of critical importance,
7 and we are well briefed on an awful lot of issues
8 involved in that.

9 So the question of seriousness and
10 severity of security is not taken lightly by the
11 Board. As I indicated earlier in the testimony, I
12 hold to that opinion. I wasn't given much substance
13 in this case in terms of what was the issue that was
14 involved. In order to assess it, we need to know the
15 specifics in order to measure and in order for us to
16 make a decision on it, and also to assess whether
17 there is any way it might be mitigated or, you know,
18 is the security issue actually a matter of the height
19 or not.

20 If it was reduced two levels and brought
21 down to the same level of the buildings surrounding,
22 would that mitigate the security issue, or just a
23 building there -- does that create the security issue?

24 All of these kind of comparative levels are not here
25 for me in this case.

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1 I also think that it was very persuasive
2 in terms of the applicant's testimony and evidence
3 regarding the actual view shed and what is existing,
4 and what is created if this is actually built, and
5 showing that the existing conditions and the proposed
6 conditions don't necessarily create a unique aspect.
7 This can be done anywhere else or, rather, there are
8 other areas to find this same type or level of assumed
9 security risk.

10 There are mitigating conditions which they
11 had talked about in the letter and also in their
12 testimony, I think, is exactly correct in the way you
13 remediate any sort of security concerns around the
14 target, that being it is not necessarily done at the
15 point -- Well, it is done at the point that the target
16 is, and it is obviously easier to secure one place
17 than it is to secure an infinite number of places.

18 Then, you know, it really -- maybe because
19 I'm hungry, but there seems to be some great symmetry
20 to this, going back even with the security, to the
21 design. Of course, I may have just lost that thought.

22 Wow. Lunch break is a good thing, isn't it? Okay.
23 Well, it was a monumental thought.

24 Nonetheless, I am going to move on. I am
25 going to move on, and maybe it will come back to me.

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1 Okay. That's what I see in summation on
2 this. Let me open it to others for any other comments
3 that they might have.

4 VICE CHAIRPERSON MILLER: I concur with
5 all that you have said so far. I think this case has
6 a lot of different types of uniqueness, and I'm not
7 sure that you have covered the one that regards its
8 historic status and that the property is subject to a
9 standstill agreement, which puts great limitations on
10 the type of development that can be done, and that it
11 is also -- We heard today that this may be formalized
12 even further into historic landmark status.

13 I'm not sure that you made reference to
14 the underground constraints such as the Tiber Creek
15 combined with the storm sewer, and the Metrorail
16 tunnel that limits the underground development of the
17 site, and increase the costs of parking.

18 We did hear that that was just -- That is
19 one aspect that drives the height, but only one, and
20 others were the sensible volume concept that I found
21 very interesting and the fact that they were designing
22 this building in a way which will have positive
23 impacts as opposed to any adverse impacts with respect
24 to environmental and aesthetics.

25 Finally, the security was the one major

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1 issue for me, I think for all of us. That touched
2 upon whether there were going to be any adverse
3 impacts here. The Architect of the Capitol raised
4 some concerns, but they were very vague, and I think
5 that the applicant did a good job in rebutting those
6 concerns.

7 The Architect of the Capitol, I assume by
8 the fact that he submitted this letter, knew about the
9 hearing and didn't appear or request an opportunity to
10 submit anything further or more specific for our
11 consideration. So I think that we do have the whole
12 record here, and on that basis I think that the test
13 has been met.

14 CHAIRPERSON GRIFFIS: Good, thank you.
15 Others? Very well.

16 Lastly then, you know, I don't recall a
17 straight height variance coming to this Board, and I
18 think it is probably of the area variances -- in this
19 city, probably one of the most difficult. I can only
20 imagine, but this has been incredibly well put
21 together, and it is obvious that the test has been met
22 in terms of our presentation today and the application
23 that was submitted.

24 So if there is nothing further, we do have
25 a motion before us. It has been seconded. I would

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1 ask for all those in favor to signify by saying Aye.
2 Opposed? Why don't we record the vote?

3 MS. BAILEY: The vote is recorded as
4 three-zero-two to approve the application. Mr.
5 Griffis made the motion. Mr. Mann seconded. Ms.
6 Miller is in agreement. Mr. Etherly and Mr. Jeffries
7 are not present, and did not vote.

8 CHAIRPERSON GRIFFIS: Good. Thank you
9 very much, Ms. Bailey. Thank you all very much.

10 MS. BAILEY: So we are doing a summary
11 order?

12 CHAIRPERSON GRIFFIS: I see no reason why
13 not to waive our regulations and requirements and
14 issue a summary order on this.

15 MR. NETTLER: If a summary order makes any
16 reference to the plans, as it sometimes does, to at
17 least note that these plans may be subject to -- are
18 subject, actually, to further view by Commission of
19 Fine Arts and others.

20 CHAIRPERSON GRIFFIS: Excellent. Do you
21 want to draft that?

22 MR. NETTLER: We will draft that.

23 CHAIRPERSON GRIFFIS: Good. Why don't we
24 have that sent in as soon as you can.

25 Is there any other business for the

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1 morning?

2 MS. BAILEY: No, Mr. Chairman, just
3 perhaps to let the afternoon persons who are here know
4 what time we will begin.

5 CHAIRPERSON GRIFFIS: Good. Thank you
6 all. Appreciate it, and I appreciate everyone's
7 patience. You can see, no matter what the size of the
8 project, we give great emphasis to them all, whether
9 it be a small addition to a single family home or a
10 250,000 square foot addition to a building.

11 With that then, I will adjourn the morning
12 session. We do have a full afternoon schedule that's
13 been set. We are going to break for only 30 minutes.

14 We will be back and call the afternoon session at
15 four.

16 (Whereupon, the foregoing matter went off
17 the record at 3:35 p.m.)

18 - - -

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

Time: 4:19 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. Let me call to order the afternoon session of the 18th of January 2005. This is the afternoon public hearing of the Board of Zoning Adjustment for the District of Columbia.

My name is Geoff Griffis, Chairman. Joining me today is the Vice Chair, Ms. Miller, and also Mr. Etherly with us. Representing the Zoning Commission is Mr. Hood, and representing the National Capital Planning Commission is Mr. Mann.

Copies of today's hearing agenda are available for you. They should be very clear on exactly what we are going to do with the rest of our afternoon.

Importantly, of course, all proceedings before the Board of Zoning Adjustment are recorded. They are recorded in two fashions. First, we are creating an official transcript. The court reporter sitting to my right is doing that for all that is said today. We are also being broadcast live on the Office of Zoning's website.

Attendant to both of those, we ask several things. First of all, if people would turn off

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1 cellphones and beepers at this time, that would be
2 appropriate, so we don't disrupt the transmission.
3 Also, I would ask that people coming forward to speak
4 to the Board to provide testimony, to fill out two
5 witness cards.

6 Witness cards are available -- Looks like
7 that table is empty. There should be some at the
8 table in front of us where you will provide testimony.

9 Those two cards should go to the recorder prior to
10 coming forward to speak to the Board.

11 The order of procedure for appeal
12 applications will be as follows. First, we will have
13 the statement and the witnesses of the appellant.
14 Second, we will hear from the Zoning Administrator and
15 their representatives. Third, we will hear from any
16 k-- the case for the owner, lessee, operator of the
17 property or appellant, rather -- if not the appellant.

18 Fifth would be the intervenor, and sixth
19 will be rebuttal and closing statements by the
20 appellant.

21 Cross-examination of witnesses is
22 permitted by the applicant or parties or intervenors,
23 as will be established for this afternoon's case.
24 There is nothing that prohibits this Board from
25 limiting the scope, time and direction of cross-

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1 examination. We will get very specific into that, as
2 needed, as we progress this afternoon.

3 The record will be closed at the
4 conclusion of this hearing except for any material
5 that is specifically requested by the Board, and we
6 will, as you are probably all well aware, be very
7 specific as to what is to be submitted into the Office
8 of Zoning and when it is to be submitted.

9 After that material is received, of
10 course, the record would finally be closed, and no
11 other additional information would be accepted into
12 the record.

13 The Sunshine Act requires that this Board
14 conduct all proceedings in the open and before the
15 public. This Board may enter into executive session,
16 both during or after a hearing on a case, and that
17 would be for purposes of deliberating on a case or
18 just for reviewing the record on a case. That would
19 be appropriate and in accordance with the Sunshine Act
20 and our own rules of procedure and regulations.

21 The Board will make every effort to
22 conclude sometime this afternoon, hopefully by six
23 o'clock, but I will update you. Obviously, our
24 morning session went well over. It was quite a
25 fascinating morning, and I'm sure some of you sat

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1 through most of it.

2 That being said, let's go to any
3 preliminary matters that the staff is aware of, and
4 say a very good afternoon to ms. Bailey and also Mr.
5 Moy from the Office of Zoning. Ms. Monroe is with us
6 this afternoon representing the Office of Attorney
7 General.

8 Ms. Bailey, are you aware of any
9 preliminary matters for the Board's attention this
10 afternoon?

11 MS. BAILEY: Mr. Chairman and to everyone,
12 good afternoon, sir. The staff does not have any.

13 CHAIRPERSON GRIFFIS: Good. Is there
14 anyone present that has any preliminary matters for
15 the attention of the Board. If so, you can come
16 forward and have a seat at the table in front of us.

17 Not noting any indication of preliminary
18 matters, let me ask all those who are going to provide
19 testimony today if you would please stand and give
20 your attention to Ms. Bailey, and she is going to
21 administer the oath.

22 MS. BAILEY: Please raise your right hand.

23 (Witnesses sworn.)

24 CHAIRPERSON GRIFFIS: Thank you, Ms.
25 Bailey.

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1 MS. BAILEY: Ready for the case, Mr.
2 Chairman?

3 CHAIRPERSON GRIFFIS: I thought so. Yes,
4 let's move ahead.

5 MS. BAILEY: This is an appeal, and the
6 number is 17249 of Advisory Neighborhood Commission
7 2A, and it is pursuant to 11 DCMR 3100 and 3101, from
8 the administrative decision of the Zoning
9 Administrator of the Department of Consumer and
10 Regulatory Affairs.

11 Appellant alleges that the Zoning
12 Administrator erred by issuing a certificate of
13 occupancy permit (No. 81956, dated August 19, 2004)
14 for a 34-seat restaurant (Coggins Sandwich
15 Manufactory) located within the George Washington
16 University dormitory.

17 Appellant alleges that the restaurant and
18 proposed sidewalk cafe is a commercial use serving the
19 general public. Appellant alleges that this use was
20 not contemplated by the Zoning Commission in Order No.
21 958. The property is zoned R-5-D, and it is located
22 at 616 23rd Street, N.W., Square 43, Lot 26).

23 CHAIRPERSON GRIFFIS: It appears to me,
24 first of all, we have initially a request for
25 intervenor status from the George Washington

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1 University, which would be a first preliminary within
2 this case. It has, obviously, come to my attention,
3 as it has been laid in front of me, that we have a
4 second request for intervenor status from Coggins
5 Sandwich Manufactory, LLC. Am I correct that that is
6 the only two? Is there anyone here present that
7 thinks that they have a request for intervenor status
8 that has not been identified?

9 Very well. I am going to ask the
10 appellant to come forward to the table, if they
11 wouldn't mind.

12 Board members, let's take up first the
13 request for intervenor status of George Washington
14 University. If you wouldn't mind just introducing
15 yourself for the record?

16 MS. D. MILLER: My name is Dorothy Miller,
17 and I am Chair of ANC-2A, and this is located in my
18 single member district, which is ANC-2A-05.

19 CHAIRPERSON GRIFFIS: Excellent.

20 MS. D. MILLER: I have given my cards to
21 the people, and I've given copies.

22 CHAIRPERSON GRIFFIS: Perfect. Thank you
23 very much. Let me just start off saying, first of
24 all, do you have the letter dated January 18th from
25 Andrew Kline requesting intervenor status for the

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1 Coggins Sandwich Manufactory?

2 MS. D. MILLER: I just got it a moment
3 ago.

4 CHAIRPERSON GRIFFIS: Indeed. As did we.
5 Okay. Let's start off first then with the request
6 from the George Washington University. Do you have
7 any position on granting of intervenor status at this
8 time, Ms. Miller?

9 MS. D. MILLER: They notified me that they
10 wanted to interview -- be an intervenor, I mean, and
11 that's -- I figured they would.

12 CHAIRPERSON GRIFFIS: Do you support that?
13 Do you oppose it? Are you neutral on it?

14 MS. D. MILLER: I would oppose almost
15 anything GW does at this point. I'm sorry.

16 CHAIRPERSON GRIFFIS: That's okay. Is
17 there substance to that comment or is that what the
18 Board should understand?

19 MS. D. MILLER: First off, they have
20 violated everything in the order that was issued by
21 the Zoning --

22 CHAIRPERSON GRIFFIS: Okay. I'm not
23 getting to the substance of the appeal. This is just
24 based -- The only issue before us right now is whether
25 we grant them intervenor status, and are you aware of

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1 the requirements for granting intervenor status? We
2 can get at that, or what I'd like you to do is just
3 focus on that point at this time.

4 MS. D. MILLER: What are the requirements?

5 CHAIRPERSON GRIFFIS: Yes, Ms. Miller.

6 MS. D. MILLER: I've never been asked that
7 question before.

8 VICE CHAIRPERSON MILLER: Okay. I just
9 want to jump in here. I'm not sure what you can say
10 to this, but 3199.1 defines party, and with respect to
11 appeals it says that the owner, lessee, operator, or
12 contract purchaser of the property involved in the
13 administrative decision, if not the appellant, is a
14 party in these kind of cases.

15 So I'm not -- They are saying, and I don't
16 believe that you are going to refute, that they are
17 the owner of the building.

18 MS. D. MILLER: They do own the building.

19 VICE CHAIRPERSON MILLER: They do own the
20 building.

21 MS. D. MILLER: But, obviously, I'm not
22 sure that they own the sandwich shop.

23 CHAIRPERSON GRIFFIS: But they own that
24 building over at GW?

25 MS. D. MILLER: They own the building.

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1 VICE CHAIRPERSON MILLER: They own the
2 building. So it looks to me, Mr. Chairman, that they
3 fall within (a)(3) as an owner and to be granted
4 intervenor party status.

5 CHAIRPERSON GRIFFIS: I don't disagree. I
6 was just giving Ms. Miller an opportunity as the
7 appellant to address that.

8 VICE CHAIRPERSON MILLER: And she asked
9 what the criteria were.

10 MS. D. MILLER: That's the first time I've
11 been asked the question. That's the reason why.

12 CHAIRPERSON GRIFFIS: I'm just stepping
13 out today. Okay. Any other concerns then? Any other
14 comments? Board members, any comments? I think Ms.
15 Miller is absolutely correct in pointing to this
16 section and in terms of the test of granting or
17 establishing the intervenor status, and I think it is
18 well within the realm of the Board and also within the
19 realm of this appeal that George Washington University
20 be an intervenor in this appeal.

21 Let's take up the second. We have Coggins
22 Sandwich Manufactory, and the same party is indicating
23 in appeal it is the lessee, George Washington
24 University being the owner. The lessee/operator of
25 the property involved, and I think they do also fall

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1 within the criterion of party or intervenor, as based
2 on our own definitions.

3 That being found, I'll open it up, Ms.
4 Miller, again for any comment that you have that may
5 bring light to something that the Board is not aware
6 of.

7 MS. D. MILLER: They have never filed a
8 request with us, with the ANC or with me.

9 CHAIRPERSON GRIFFIS: For?

10 MS. D. MILLER: To be an intervenor.

11 CHAIRPERSON GRIFFIS: Is that a
12 requirement for an appeal before the Board?

13 MS. D. MILLER: Well, it's usually
14 expected.

15 CHAIRPERSON GRIFFIS: Is it?

16 MS. D. MILLER: Well, I got one from the
17 others.

18 CHAIRPERSON GRIFFIS: Indeed. I don't
19 know that that is any requirement from the Board's
20 perspective, unless anyone can point that. Ms.
21 Miller, are you aware of any requirement that this
22 would be filed to the ANC prior to being filed before
23 the Board?

24 MS. MONROE: You mean notice of the
25 appeal? Am I understanding this correctly?

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1 CHAIRPERSON GRIFFIS: No, just notice of
2 requesting intervenor status in the appeal.

3 MS. MONROE: No, I don't think it would
4 need to be.

5 CHAIRPERSON GRIFFIS: Indeed. I'm not
6 aware of any regulation that requires that either, but
7 it's an interesting point to bring up, and we will
8 take it under consideration as we look at all of our
9 regulations.

10 That being said, I think that Coggins also
11 rises to the level of being an intervenor in the
12 appeal. Ms. Miller?

13 VICE CHAIRPERSON MILLER: I would just
14 like to comment that I think, by the fact that
15 3199.1(a)(3) lists them as being entitled to party
16 status, I don't think, therefore, they are required to
17 file in advance for it.

18 MS. D. MILLER: Excuse me. They never
19 have to notify the ANC or anybody that they are going
20 to show up and talk?

21 CHAIRPERSON GRIFFIS: Not based on our
22 regulations.

23 MS. D. MILLER: Okay. Moving ahead then
24 we will have the order of procedure as I outlined in
25 my opening, and I will get to the specifics as we go

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1 through it, but we will obviously start with the
2 appellant's case, which is, Ms. Miller, your case.

3 In order to establish how we progress for
4 this afternoon, first of all, let me make a quick
5 statement. As our requirements in 3117 show, of
6 course, the appellant's case is to be submitted 14
7 days prior to the hearing, the entire case, the
8 witnesses that will be called, any evidence. Ms.
9 Miller, I believe you have met that threshold, and the
10 file is complete.

11 In terms of your presentation of the case,
12 we have the hearing today to afford you an opportunity
13 to embellish on those submissions. That being said, I
14 in my notes show four major pieces to your case
15 presentation, and that is you clearly asked for the
16 revocation of the C of O of restaurant.

17 There are certain issues of error that you
18 assert: One, notification by the Zoning Administrator
19 of the issuance of a permit, also the permit granting
20 for public space construction, issues of whether a
21 bathroom was provided attendant to this restaurant.
22 There are additional issues that fall under all of
23 those headings.

24 That being said, am I aware -- am I not
25 listing any of the pertinent issues that you are going

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1 to present today?

2 MS. D. MILLER: A bathroom is provided,
3 but it is not --

4 CHAIRPERSON GRIFFIS: I know. I listed
5 that, because I'm just bullet pointing al your points.

6 MS. D. MILLER: I'm just -- I'm enlarging
7 on all of those points, and to give you a map of the
8 location.

9 CHAIRPERSON GRIFFIS: Perfect.

10 MS. D. MILLER: That they filed when they
11 filed their application.

12 CHAIRPERSON GRIFFIS: I'm sorry. Just
13 step back for a quick second. Have I missed any of
14 your points that you are going to present?

15 MS. D. MILLER: I'm not quite sure that
16 you have.

17 CHAIRPERSON GRIFFIS: Okay. I'm not going
18 to stop you from talking about any of it, but I think
19 that's it in terms of summation in my own notes.

20 That being said, Ms. Miller, I am going to
21 afford you a 20 minute presentation on your case
22 before us today. An equal amount of time will be
23 afforded all others that are present today, that being
24 the intervenors and also the Zoning Administrator.

25 So when you are ready, the clock will show

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1 20 minutes, and I can give you an update, and I will
2 probably give you an update -- the clock is front of
3 me -- when you have about three minutes left so that
4 you know to start concluding, and then we will move
5 on.

6 Obviously, cross-examination or any
7 questions from the Board don't count toward your time.

8 Don't worry about the clock. If we start asking
9 questions and it doesn't stop, I can assure you that I
10 keep good track with it in front of me, if we need to
11 make up or add any time to the clock.

12 So I am going to take a deep breath. You
13 can do the same, and whenever you are ready, you can
14 start.

15 MS. D. MILLER: Dear Chairman Griffis and
16 Board members, I am Dorothy Miller, Chair of ANC-2A
17 and the ANC Commissioner for ANC-2A-05, the single
18 member district wherein this property is located. The
19 ANC, at a properly noticed public meeting on
20 Wednesday, October 17, 2004, with five of the six
21 Commissioners present voted unanimously that I
22 represent the ANC-2A in this case.

23 As the Board knows, commercial operations
24 open to the public are not allowed on residentially
25 zoned property, which is the designation of all of

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1 Square 43, without an exception. That was done to
2 protect the residential property from increased noise,
3 traffic and health issues, including deliveries,
4 trash, and pests and, particularly, the rats are
5 getting exceptionally large these days related to the
6 commercial use.

7 These uses can devalue residential
8 property and impinge upon the residents' right of
9 quiet enjoyment of their domiciles. Our regulations
10 go even further to protect the residential nature of
11 the communities throughout the city by allowing
12 universities to operate in our neighborhoods only
13 through special exception process under an approved
14 campus plan.

15 Under the special exception process the
16 Zoning Commission, in its order 958, approved
17 construction of a dormitory on Square 43, and
18 condition Number 7 of this order states: "and spaces
19 for these and four food venue services in the lower
20 and first levels." Nowhere in the order is it stated
21 our implied that these services would or could be
22 commercial restaurant facilities serving both students
23 and public.

24 Prior to the fall of 2001 public hearing
25 on this case, the university made two separate

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1 presentations, one to the ANC and another to the Foggy
2 Bottom Association, on this project. The university
3 had at least two opportunities to reveal its plans for
4 commercial operations, including a sidewalk cafe, a
5 public space at this location, and failed to do so.

6 The record shows that the university went
7 on to deliberately sidestep discussing the planned
8 commercial use of these spaces during the public
9 hearings. While we can only speculate as to the
10 university's motivation, the outcome is apparent.

11 The Zoning Commission would assume that
12 these venues -- and this is the first time they are
13 using these things; I looked it up in the dictionary,
14 and it means a gathering place -- were dining
15 facilities similar to Georgetown University's new
16 south campus dining facilities for GW students, and
17 okay the whole project as a university use.

18 The community only learned of GW's
19 commercial plans for these university use venues prior
20 to the September 23, 2004, permit request by Coggins
21 before the Public Space Committee.

22 Initially, the matter was pulled from the
23 agenda, and Coggins was told it would need to file
24 with the Zoning Commission to obtain a special
25 exception for use of the public space, as the Zoning

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1 Administrator had exceeded his authority in granting
2 the use of the public space.

3 Because the interim Zoning Administrator
4 had, contrary to zoning regulations regarding
5 commercial use in a residential zone, approved a
6 certificate of occupancy, the Director of Public Space
7 overruled his staff, and a permit was issued. In
8 fact, at the hearing he said, because the Zoning
9 Administrator has approved it.

10 When the ANC filed its appeal in this
11 case, the new Zoning Administrator sent an inspector
12 to investigate, and Coggins restaurant was found to be
13 in violation of the zoning order, as issued, and was
14 ordered to shut down.

15 I would like to call your attention to one
16 of my attachments that shows the Hatchet article on
17 that particular event. It is attached to my
18 statement.

19 CHAIRPERSON GRIFFIS: What is the Hatchet?

20 MS. D. MILLER: Well, besides giving you
21 something to chop with, it is the newspaper put out by
22 the students.

23 CHAIRPERSON GRIFFIS: Okay.

24 MS. D. MILLER: Where we get most of our
25 basic information.

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1 CHAIRPERSON GRIFFIS: Interesting.

2 MS. D. MILLER: The location of the
3 commercial venues directly abutting the non-university
4 residential area is already creating numerous
5 problems, such as increase in late night pedestrian
6 traffic.

7 Additionally, Foggy Bottom has to cope
8 with an inordinate amount of tour bus traffic, and it
9 is clear that these commercial operations will become
10 a magnet, as has Columbia Plaza, and they are a block
11 away, for tour bus operations, particularly during the
12 summer months, further degrading the residential
13 nature of our community.

14 The ANC is not opposed to neighborhood-
15 serving retail, as demonstrated in the recent Columbia
16 Plaza. Columbia Plaza and Watergate were the first
17 two PUDs put up, and they were given permission for
18 that. But this is university use.

19 What the ANC is opposed to is absorbing
20 commercial operations onto its residential zoned
21 property under the cover of university's use without a
22 full public hearing and consideration.

23 There are city-wide and precedent setting
24 implications in this case that needed to be discussed,
25 but weren't because of a lack of university's closure,

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1 resulting in a complete lack of community awareness
2 during the Zoning Commission hearing.

3 This commercial operation located in the
4 midst of our residentially zoned community on an R-5-D
5 property needs to be considered in a proper setting
6 and with a full discussion.

7 On behalf of the ANC and the community, I
8 request that this case be remanded back to the Zoning
9 Commission for a minor modification hearing that would
10 allow such community input and consideration by the
11 Zoning Commission.

12 I thank you for your time and attention to
13 this matter, and I will answer any questions you might
14 have. I would like to call your attention to the list
15 of things that's attached to this that the public
16 space people told these people they couldn't do, and I
17 want you to notice, if you look at the pictures, the
18 things they violated.

19 I told you about the article, and the plan
20 -- If you look at the maps of the plans that were
21 submitted with their request for the zoning thing, you
22 don't see any sidewalk cafe, and you don't see this
23 coming out on the street for commercial use. Neither
24 one of those plans attached to my statement show that.

25 I thank you.

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1 CHAIRPERSON GRIFFIS: Good. Thank you
2 very much. A couple of quick questions, starting with
3 the last. You indicated that -- Your letter is what
4 I'm looking at, December 1, 2004, to Mr. Bello
5 indicating that the Public Space Committee had not
6 allowed certain things that were happening.

7 Specifically Item Number 8 read that the
8 property owner displays no logos, insignias or
9 advertising of any kind or structure, fixture or
10 material in public space. I assume you are now
11 relating to the photographs that are attached to that
12 and the signage.

13 MS. D. MILLER: Right. Right.

14 CHAIRPERSON GRIFFIS: Is it your
15 understanding that these signages are actually on
16 public space?

17 MS. D. MILLER: Yes, they are, because
18 they can be seen from the public. If you read the
19 zoning regulations, it says none of this can be seen
20 from the street, or from the public.

21 CHAIRPERSON GRIFFIS: The zoning
22 regulations or the public space regulations?

23 MS. D. MILLER: Oh, yes, read 'em. I have
24 a copy with me.

25 CHAIRPERSON GRIFFIS: But you bring up two

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1 issues. Let's clear them all up one at a time,
2 because my mind isn't as good as yours.

3 MS. D. MILLER: Oh, yours is better than
4 mine.

5 CHAIRPERSON GRIFFIS: So the issue is in
6 the public space. Are these signs on public space,
7 meaning, another way, are they not on private space?

8 MS. D. MILLER: What the zoning
9 regulations say, can be seen from public space. Now
10 that's what the regulation says that I have.

11 CHAIRPERSON GRIFFIS: Okay, let's go to
12 your issue then. What is the section that you are
13 citing in the zoning regulations that preclude
14 anything from being seen from public space?

15 MS. D. MILLER: I have a copy of the order
16 as well. Can I get it? I thought I had this right
17 with the rest of this. Here they are. I did have
18 them with me. Thank you. I did have them right on
19 the table with me.

20 CHAIRPERSON GRIFFIS: Okay, good.

21 MS. D. MILLER: This is page 3-12 in the
22 new zoning regulations, and it deals with R-5
23 District.

24 CHAIRPERSON GRIFFIS: I'm sorry. Just
25 give us the section, because quite frankly, we are

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1 going to have 100 different pages up here. What's the
2 section?

3 MS. D. MILLER: All right.

4 CHAIRPERSON GRIFFIS: Does it say in the
5 beginning paragraph?

6 MS. D. MILLER: I'm going to get it to
7 you. "No sign or display" --

8 CHAIRPERSON GRIFFIS: I'm sorry. I'm
9 sorry to interrupt. What I need is the number.
10 What's the section?

11 MS. D. MILLER: Oh. 351.2(d)

12 CHAIRPERSON GRIFFIS: 351.2(d), Chapter 5.

13 MS. D. MILLER: And below that comes
14 3.52.2 which covers universities. And I'd like to add
15 that Congress said no signs could be on buildings like
16 this, and they passed that law in 1911.

17 CHAIRPERSON GRIFFIS: What law is that?

18 MS. D. MILLER: Congress passed a law in
19 1911 and, if you look at the restrictions by the
20 Public Space Committee, they also state that nothing
21 can be seen from the street.

22 CHAIRPERSON GRIFFIS: Okay. 351.2(d) is
23 what you are talking about, Ms. Miller?

24 MS. D. MILLER: I beg your pardon?

25 CHAIRPERSON GRIFFIS: 351.2(d)?

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1 MS. D. MILLER: Right.

2 CHAIRPERSON GRIFFIS: That is for uses, no
3 sign or display indicating existence of adjunct shall
4 be visible from the outside of the building.

5 MS. D. MILLER: And then look at 352.2.
6 But what I want to call your attention to is what was
7 included in what the Public Space people said.

8 CHAIRPERSON GRIFFIS: What was the other
9 cite?

10 MS. D. MILLER: If you look at the
11 conditions that --

12 CHAIRPERSON GRIFFIS: Number 8.

13 MS. D. MILLER: Oh, the other one is
14 352.2: A college or university --

15 CHAIRPERSON GRIFFIS: I'm sorry. I'm
16 probably confusing you. Yes, the Public Space
17 Committee has .8 or the condition number 8, which
18 reads that a property owner display no logos or
19 insignias or advertising of any kind on any structure,
20 fixture or material in public space.

21 MS. D. MILLER: And, well, and it cannot
22 be seen from public space. They --

23 CHAIRPERSON GRIFFIS: That's what I'm
24 asking. Show me in the Public Space Committee where
25 it says that language, not the "in public space"

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1 language.

2 MS. D. MILLER: Well, a building facing
3 public is public space, because what it faces is
4 public space.

5 CHAIRPERSON GRIFFIS: Okay.

6 MS. D. MILLER: At least it is to me.

7 CHAIRPERSON GRIFFIS: Indeed, and I
8 understand that.

9 MS. D. MILLER: And that's the reason,
10 when Congress said you can't have pictures or signs
11 painted on buildings, because they are in public
12 space.

13 CHAIRPERSON GRIFFIS: Boy, how do we have
14 them all over the city?

15 MS. D. MILLER: You're not supposed to.
16 That was because the City Council didn't catch it
17 quick enough, and then Jack Evans said, oh, they will
18 sue us.

19 CHAIRPERSON GRIFFIS: Got ya. Okay. I
20 don't see that direct language in the number 8 of the
21 Public Space Committee. Let's go back to 351.2.

22 MS. D. MILLER: Well, what they did was,
23 if you look at the pictures I originally gave you,
24 they had signs outside the door, and I meant to bring
25 the signs they had posted on every lamp post and every

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1 tree.

2 CHAIRPERSON GRIFFIS: Right.

3 MS. D. MILLER: For a block around.

4 CHAIRPERSON GRIFFIS: The kind of banner
5 signage.

6 MS. D. MILLER: Oh, and that's against the
7 law, too, because --

8 CHAIRPERSON GRIFFIS: Indeed. Let's get
9 specifically to your point, 351.2(d) which I cited and
10 I read (d) portion. Ms. Miller, follow me up to 351.2
11 which states: "Commercial adjuncts as accessory uses
12 to a hotel containing 100 or more rooms or suites
13 shall be permitted in R-5 District, provided" (a),
14 (b), and (d), that no sign or display indicating the
15 existence of adjuncts shall be visible from outside
16 the building. Is this a hotel?

17 MS. D. MILLER: It practically is. It's
18 transient.

19 CHAIRPERSON GRIFFIS: Okay.

20 MS. D. MILLER: But go down to --

21 CHAIRPERSON GRIFFIS: But on your comment,
22 because I take every word of yours of great import, it
23 kind of is for our understanding, and actually for our
24 direct deliberation and decision on this case. Does
25 the zoning regulations allow us to find out that this

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1 kind of is a hotel and it, therefore, is required to
2 come under the regulations for that of a hotel?

3 MS. D. MILLER: Would you read 252.2.
4 Read that one. That's just below it.

5 CHAIRPERSON GRIFFIS: Say it again.

6 MS. D. MILLER: Special exceptions,
7 general, for R-5.

8 CHAIRPERSON GRIFFIS: I'm sorry. 352.2?

9 MS. D. MILLER: Right.

10 CHAIRPERSON GRIFFIS: Okay. "A college or
11 university permitted in R-4 District under a 332.2
12 shall be permitted as a special exception in R-5
13 District if approved by the Zoning Commission under
14 3104."

15 MS. D. MILLER: See, these are all special
16 exceptions, which they didn't ask for, they didn't
17 get, and the order didn't give them.

18 CHAIRPERSON GRIFFIS: Did this building
19 get a special exception approved from the Zoning
20 Commission?

21 MS. D. MILLER: No, they didn't. Read the
22 order. They got no special exception for that.
23 Here's the order.

24 CHAIRPERSON GRIFFIS: For what didn't they
25 get a special exception?

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1 MS. D. MILLER: This is the order. They
2 could have four feeding venues, but they didn't say --

3 CHAIRPERSON GRIFFIS: My question is did
4 this building go through the Zoning Commission's
5 review and get approved?

6 MS. D. MILLER: The building did, and for
7 feeding programs for the students it did, but nowhere
8 did it say there were going to be commercial.

9 CHAIRPERSON GRIFFIS: Good. Let's --

10 MS. D. MILLER: Nor anywhere did they say
11 they were going to open onto the street and be open to
12 the public.

13 CHAIRPERSON GRIFFIS: Is there a
14 difference in what was built and what was shown to the
15 Zoning Commission in plan?

16 MS. D. MILLER: Absolutely.

17 CHAIRPERSON GRIFFIS: How so?

18 MS. D. MILLER: Because they have put
19 tables and chairs outside. They have built a sidewalk
20 and a wall around it that's not supposed to be there.

21 CHAIRPERSON GRIFFIS: Are the tables and
22 chairs in the public space?

23 MS. D. MILLER: Yes, it is.

24 CHAIRPERSON GRIFFIS: Does it have any
25 bearing on this Board in terms of zoning?

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1 MS. D. MILLER: It should, because the
2 Zoning Administrator can't grant that. He has no
3 control over public space.

4 CHAIRPERSON GRIFFIS: But how can it, when
5 it goes across a property line?

6 MS. D. MILLER: It doesn't go across the
7 property line. You cannot put something outside that
8 you are not allowed to put.

9 CHAIRPERSON GRIFFIS: But if it's in
10 public space, it's not on their property. Correct?

11 MS. D. MILLER: Even if it's on their
12 property, it can't be in public space without a
13 special exception, and they didn't ask for a special
14 exception.

15 CHAIRPERSON GRIFFIS: There's two aspects.
16 There's "on their property" or "in public space."

17 MS. D. MILLER: Both. It's both. Go take
18 a look at it. There's a picture. I put a picture in,
19 in my original.

20 CHAIRPERSON GRIFFIS: What is both?
21 There's table and chairs on both public property and
22 private?

23 MS. D. MILLER: First off, they were not
24 granted that right. It required a special exception,
25 which they didn't ask for.

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1 CHAIRPERSON GRIFFIS: Let's go linear
2 here. Let's just stick with one thing and hear it
3 out. Okay? Otherwise, we are not going to get
4 anywhere all day. Okay?

5 Is public space -- Is the permit issued in
6 public space a zoning issue? Is it part and under our
7 jurisdiction as it is outside of the property?

8 MS. D. MILLER: I don't think your
9 question quite covers what the problem is. That's the
10 reason why I keep coming back in a way that doesn't
11 answer your question, because I don't think the
12 question is fixed in such a way that it covers the
13 situation. It just doesn't.

14 CHAIRPERSON GRIFFIS: Okay. How does it
15 cover it?

16 MS. D. MILLER: The university operates in
17 a residential area through special exception.

18 CHAIRPERSON GRIFFIS: Right.

19 MS. D. MILLER: They are guests in our
20 neighborhood, and they need a special exception for
21 anything they do that affects our neighborhood.

22 CHAIRPERSON GRIFFIS: Okay.

23 MS. D. MILLER: They didn't ask for it,
24 they didn't get it, and the Zoning Administrator,
25 without authority, approved it.

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1 CHAIRPERSON GRIFFIS: What is "it"?

2 MS. D. MILLER: I beg your pardon?

3 CHAIRPERSON GRIFFIS: What the "it"?
4 You've lost me.

5 MS. D. MILLER: Approved an outdoor
6 feeding thing -- feeding the public off of the
7 sidewalk coming in, and anybody can go in. Now you go
8 in the bathroom, you have to be escorted to the
9 bathroom. How could they approve a restaurant or a
10 fast food place that doesn't have a restroom? You
11 have to go into the secure part of the building to use
12 the restroom, and you have to be escorted there.

13 CHAIRPERSON GRIFFIS: Okay.

14 MS. D. MILLER: Now you know there's
15 something wrong with this.

16 CHAIRPERSON GRIFFIS: I don't know. I
17 don't really understand what the problem is.

18 MS. D. MILLER: Well, I'm asking that you
19 send it back to the Zoning Commission so they can
20 straighten it out.

21 CHAIRPERSON GRIFFIS: Actually, that's the
22 second point I was going to bring up before I got
23 mired into all the rest of this.

24 You are somewhat changing your request
25 from the Board. First it was to overturn, based on an

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1 error from the Zoning Administrator, overturn their
2 issuance of the C of O.

3 MS. D. MILLER: That's correct.

4 CHAIRPERSON GRIFFIS: But in conclusion on
5 this, you are asking us not to do that but rather just
6 remand this -- what "this" is I'm not sure, but remand
7 this to the Zoning Commission.

8 MS. D. MILLER: Remand this issue.

9 CHAIRPERSON GRIFFIS: What issue?

10 MS. D. MILLER: The issue of
11 commercializing residential space in a residential
12 community by the university.

13 CHAIRPERSON GRIFFIS: But my understanding
14 is, looking at the plans and looking at this
15 application, that the Zoning Commission approved this
16 as planned.

17 MS. D. MILLER: No, they didn't. No, they
18 didn't.

19 CHAIRPERSON GRIFFIS: And what in those
20 plans was not approved or was not seen by the Zoning
21 Commission or, for that matter --

22 MS. D. MILLER: Feeding the public and
23 using an outside area to feed them.

24 CHAIRPERSON GRIFFIS: There were three --
25 As the Zoning Commission articulated, three food

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1 venues.

2 MS. D. MILLER: Four.

3 CHAIRPERSON GRIFFIS: Okay, four.

4 MS. D. MILLER: Three on the lower level,
5 one on the first level.

6 CHAIRPERSON GRIFFIS: Okay.

7 MS. D. MILLER: But if you read the rest
8 of the things which they do not clarify on the
9 regulations for an R-5-D District, they go to great
10 lengths to say what can't be done anywhere else. So
11 why should it be allowed to a university who is
12 already abusing its privilege for being in our
13 residential area?

14 CHAIRPERSON GRIFFIS: Okay. Wow, let's go
15 to it then. You are asking for, let's say, revocation
16 of the C of O or remanding this back to the Zoning
17 Commission, because the Certificate of Occupancy was
18 issued as a restaurant. The restaurant -- and your
19 difficulty in your own submissions is that it's open
20 to the public.

21 MS. D. MILLER: Correct.

22 CHAIRPERSON GRIFFIS: If it just feeds the
23 students, that's fine. Is that correct? If there is
24 an error, as you are asserting that the Zoning
25 Administrator issued the C of O for restaurant, what

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1 is the C of O that -- it should have been restaurant.

2 What is the --

3 MS. D. MILLER: They call it a venue, and
4 a venue is a gathering place.

5 CHAIRPERSON GRIFFIS: Yes, but the Zoning
6 Commission called that. That's not --

7 MS. D. MILLER: No, they didn't. GW
8 called it a venue.

9 CHAIRPERSON GRIFFIS: Okay, follow me
10 here. What does the Zoning Administrator write on the
11 Certificate of Occupancy which is an enumerated use in
12 the regulations? What does he put on that C of O that
13 would be appropriate?

14 MS. D. MILLER: I quoted that in my
15 statement, and I have it marked in the order as well.

16 "The dormitory will contain dormitory residence rooms
17 for male and female upperclassmen, 88 below-grade
18 parking spaces and spaces for three or four feed
19 venues services on the lower levels and the first
20 levels." It doesn't say anything about feeding the
21 commercial public.

22 CHAIRPERSON GRIFFIS: Okay. Actually,
23 your resolution number 04-10B indicates that, as I
24 took it, the Zoning Administrator should have put on
25 the Certificate of Occupancy student serving dormitory

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1 food service.

2 MS. D. MILLER: That's right. That's what
3 they are supposed to be.

4 CHAIRPERSON GRIFFIS: Is that a listed use
5 in the zoning regulations for a Certificate of
6 Occupancy?

7 MS. D. MILLER: When they asked for a
8 dormitory for 800 students and four food places to
9 feed them, what did you think they wanted?

10 CHAIRPERSON GRIFFIS: I wasn't on the
11 Commission.

12 MS. D. MILLER: I know, but what would you
13 think they wanted? To feed the students. But they
14 don't want to do that.

15 CHAIRPERSON GRIFFIS: They don't want to
16 feed the students?

17 MS. D. MILLER: No. That costs money, and
18 GW likes to make money.

19 CHAIRPERSON GRIFFIS: I am lost. What is
20 it? They just want to make money?

21 MS. D. MILLER: Oh, amen, brother.

22 CHAIRPERSON GRIFFIS: Okay.

23 MS. D. MILLER: They have found out they
24 can --

25 CHAIRPERSON GRIFFIS: But they don't make

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1 money on the students.

2 MS. D. MILLER: Well, let's put it this
3 way. They make money on them when they move into my
4 building.

5 CHAIRPERSON GRIFFIS: All right. Well, we
6 are digressing.

7 MS. D. MILLER: They make money on
8 everything else.

9 CHAIRPERSON GRIFFIS: Digressing.

10 MS. D. MILLER: The students complain they
11 make money on everything they do.

12 CHAIRPERSON GRIFFIS: Okay.

13 MS. D. MILLER: They closed the one
14 restaurant in the one dormitory, because it's cheaper
15 for them to farm the stuff out than it is for them to
16 try to run it.

17 CHAIRPERSON GRIFFIS: Ms. Miller, what I
18 am going to try and do, which I'm not doing
19 successfully, is, first of all, as you are well aware,
20 and I know you are, an appeal is different than a
21 special exception or a variance case.

22 MS. D. MILLER: This is my first one.

23 CHAIRPERSON GRIFFIS: Interesting. Well,
24 let me help you out then. An appeal is different than
25 a special exception or a variance. An appeal is

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1 brought before this Board. You being the appellant
2 have indicated that there is an error that has been
3 done, and the Zoning Administrator in this appeal is
4 who you are asserting made that error, and it's very
5 simple to put on an appeal.

6 They are often complex, but it's simple in
7 its process. That is, we need you to identify exactly
8 what the action was and what the error was that led to
9 that action. There, we have two remedies at the end
10 of the day today. That is, we will either uphold the
11 appeal or we will deny it.

12 If we uphold the appeal, it means that you
13 were persuasive and we agree with you that the Zoning
14 Administrator has acted in error in issuing the
15 Certificate of Occupancy, or we will not agree with
16 you and indicate that the Zoning Administrator did not
17 err in issuing a Certificate of Occupancy.

18 That is, as far as I see, what our role,
19 direction, jurisdiction is for the remainder of today.

20 MS. D. MILLER: Could I call your
21 attention to the article that was done by the Hatchet
22 when they sent an inspector down there to take a look?

23 It's not this Zoning Administrator that did this, by
24 the way. It's the last one.

25 CHAIRPERSON GRIFFIS: But it's the office

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1 that did it. So --

2 MS. D. MILLER: Well, this certificate --

3 CHAIRPERSON GRIFFIS: What I really want
4 to instruct you is not to get too caught into side
5 issues and -- let me put it in my words -- into
6 embellishments. This is a very base factual process
7 that we run in appeals -- very. We don't hear, for
8 instance, in your paragraph of adverse effects or
9 maybe this is going to be a tour bus destination.
10 None of that has any bearing on an appeal.

11 What we are only being asked -- What we
12 are only looking at and what we can only hear is your
13 evidence of what the error was that the Zoning
14 Administrator did.

15 MS. D. MILLER: Well, let me ask you. Can
16 I ask you a question?

17 CHAIRPERSON GRIFFIS: I suppose, yes.

18 MS. D. MILLER: What would you think if
19 you had a restaurant and you --

20 CHAIRPERSON GRIFFIS: Okay. But, see, no,
21 that's not a --

22 MS. D. MILLER: All right. The problem
23 being is that, if the students don't use it, they lose
24 money. So they open it to the public. So my point
25 being is --

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1 CHAIRPERSON GRIFFIS: But, Ms. Miller, we
2 are not here to argue about the problems or the
3 adverse impacts or the effects or anything of that
4 nature.

5 MS. D. MILLER: It's on our community
6 that's being destroyed, and that's what I'm trying to
7 protect, our community.

8 CHAIRPERSON GRIFFIS: No matter how
9 passionate you get with it, I can only tell you, we
10 have no jurisdiction. I have no authority to remedy
11 that for you. Right now we need to hear from you on
12 more evidence or additional evidence -- or you're done
13 presenting the case. You have a sufficient amount
14 here -- on the error that was conducted. That's it.
15 That's all we have today.

16 MS. D. MILLER: Well, the point I saw when
17 they had the hearing at the Public Space Committee,
18 first off, they pulled it and said you have to go back
19 to the Zoning Commission and get a special exception.

20 CHAIRPERSON GRIFFIS: How does that tell
21 us to do anything?

22 MS. D. MILLER: Well, that's what they
23 knew, to start with.

24 CHAIRPERSON GRIFFIS: Who was they?

25 MS. D. MILLER: This was Denise Richka.

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1 CHAIRPERSON GRIFFIS: And she is a land
2 use attorney? Does she have --

3 MS. D. MILLER: She is the one that sets
4 up the meetings. Then the person over her --

5 CHAIRPERSON GRIFFIS: Does she have any
6 knowledge of the regulations, that you are aware of?

7 MS. D. MILLER: She does. That's the
8 reason why she told them that, and then the person
9 over her overruled her, and with one day's notice they
10 put this on the agenda. I complained about that.

11 CHAIRPERSON GRIFFIS: If I understand you
12 correctly, Ms. Richter, who is in charge of the Public
13 Space Committee, indicated that for her analysis of
14 DCMR, Title XI, that the Zoning Administrator actually
15 erred in issuing the C of O.

16 MS. D. MILLER: That they needed a special
17 exception to do what they were requesting of her.

18 CHAIRPERSON GRIFFIS: Another way put.
19 Okay. So I think we can take that under advisement as
20 the basis of your appeal.

21 MS. D. MILLER: All right. Then two weeks
22 later they changed their minds.

23 CHAIRPERSON GRIFFIS: That's fine. Okay.
24 Anything else? Any other questions from the Board?

25 MS. D. MILLER: And the Public Space

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1 people said you've got to overturn the Zoning
2 Administrator, because that's why we approved it.

3 CHAIRPERSON GRIFFIS: Okay. Is it your
4 understanding that this Board gives special exceptions
5 for use of public space?

6 MS. D. MILLER: I beg your pardon?

7 CHAIRPERSON GRIFFIS: Does this Board hear
8 special exceptions for use of public space?

9 MS. D. MILLER: This Board?

10 CHAIRPERSON GRIFFIS: Yes.

11 MS. D. MILLER: Or this Zoning Commission?

12 CHAIRPERSON GRIFFIS: Or the Zoning
13 Commission.

14 MS. D. MILLER: The Zoning Commission
15 does.

16 CHAIRPERSON GRIFFIS: They do?

17 MS. D. MILLER: They are the only ones
18 that can approve special exceptions.

19 CHAIRPERSON GRIFFIS: For public space
20 use?

21 MS. D. MILLER: For GW.

22 CHAIRPERSON GRIFFIS: No, I'm asking for
23 public space use.

24 MS. D. MILLER: Public space use by GW.
25 See, all GW stuff goes now under them.

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1 CHAIRPERSON GRIFFIS: I see.

2 MS. D. MILLER: They took it away from the
3 BZA, because it took all of your time you had.

4 CHAIRPERSON GRIFFIS: Ms. Monroe? Public
5 space permit goes through the Zoning Commission?

6 MS. D. MILLER: Requests for them, use of
7 public space.

8 MS. MONROE: No, I don't think so.

9 MS. D. MILLER: By the University, use of
10 public space has to go to the Zoning Commission.

11 MS. MONROE: Within the context of the
12 campus plans or --

13 MS. D. MILLER: Right, right, because they
14 can't do it any other way. They cannot do it any
15 other way.

16 CHAIRPERSON GRIFFIS: Indeed.

17 MS. D. MILLER: It's covered by the campus
18 plan, just like my title on my statement says.

19 CHAIRPERSON GRIFFIS: Okay.

20 COMMISSIONER HOOD: Mr. Chairman, could I
21 ask Ms. Miller a question?

22 CHAIRPERSON GRIFFIS: Of course.

23 COMMISSIONER HOOD: Ms. Miller, I see the
24 submittals and everything that's been presented, and
25 having been the person who participated on this when

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1 it was in front of the Commission, I will tell you
2 that I, to some degree, acknowledge your comments
3 about clarification back to the Zoning Commission.
4 How we get there, I don't know, and I want to hear
5 from everyone else.

6 I'm sure I have agreement up here to a
7 point, but I want to hear from the other people who
8 are going to come up and speak.

9 Obviously, you have looked at the
10 transcript of, I guess, the decision hearing that the
11 Commission had.

12 MS. D. MILLER: I have the whole thing.

13 COMMISSIONER HOOD: In the transcript --
14 Help me fresh my memory. Sometimes things get lost.
15 They don't always make in the order, but was it the
16 intent -- or was that even discussed in the discussion
17 among the Commissioners at the time? Unfortunately,
18 that was -- whenever it was.

19 MS. D. MILLER: It started in '99 and then
20 they took it up really in '01 and '02.

21 COMMISSIONER HOOD: Right. But to your
22 knowledge, was that ever up for discussion? Did the
23 Commissioners ever get to the point where they
24 discussed whether it was going to be for non-students?

25 Was that ever discussed in the discussions between

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1 the Commissioners?

2 MS. D. MILLER: No, because in the past it
3 had always been for students.

4 COMMISSIONER HOOD: In the transcript, did
5 that ever come to light? Was that ever an issue?

6 MS. D. MILLER: No. No, because in the
7 past it had always been for students. It's only been
8 in the last two or three years that GW has
9 commercialized everything down there.

10 COMMISSIONER HOOD: So from your
11 knowledge, in the transcript it never said that it
12 would be or that it would not be?

13 MS. D. MILLER: Correct..

14 COMMISSIONER HOOD; Okay. Thank you.

15 MS. D. MILLER: But that was before they
16 start commercializing everything.

17 CHAIRPERSON GRIFFIS: Any other question,
18 Mr. Etherly?

19 BOARD MEMBER ETHERLY: Thank you very
20 much, Mr. Chair. Mrs. Miller, would there be a
21 distinction between, let's say for hypothetical
22 purposes, a bookstore? Would you be concerned if I as
23 a non-student or employee -- I am in no way affiliated
24 with the university, but I could conceivably go onto
25 the campus bookstore and purchase a periodical of some

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1 sort. Would that, in your mind, create an issue
2 similar to this one here?

3 MS. D. MILLER: Can I give you a picture?

4 BOARD MEMBER ETHERLY: Well --

5 MS. D. MILLER: That's their library.

6 BOARD MEMBER ETHERLY: Once again,
7 involving the situation with the bookstore.

8 MS. D. MILLER: The bookstore -- they have
9 turned their library into a commercial venture.
10 They've got Starbucks, and they've got video tapes for
11 sale.

12 BOARD MEMBER ETHERLY: Okay. So with
13 respect to -- Is it your argument then that the level
14 of commercialization is what determines whether or not
15 -- because what I'm asking in an indirect way is,
16 clearly, there is -- I won't say clearly. There is
17 precedent which speaks to the issue of incidental
18 accessory uses, and the argument here that's been
19 offered by the university or by the intervenor, to an
20 extent, is that this is an incidental accessory use to
21 the mission of the university.

22 So similar to a bookstore or some other
23 type of incident use, how does this differ?

24 MS. D. MILLER: That would -- If it's for
25 academic use, there's a big difference. Academic use

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1 or commercial use to make money is a big difference.

2 CHAIRPERSON GRIFFIS: You mean anything
3 for sale is commercial use?

4 MS. D. MILLER: No. They way they are
5 doing it is commercial. Prior to --

6 CHAIRPERSON GRIFFIS: So I think what he
7 is trying to push forward is what's the way? What's
8 the threshold? What tips it for you? What is one
9 commercial --

10 MS. D. MILLER: When they start things out
11 on the street, start advertising all over the
12 building, putting signs out on the sidewalk so that
13 you can't walk, putting tables out there and chairs
14 out there, and students coming from all over.

15 Now they said this building was going to
16 be for these people. Now they have this building --
17 by the way, if you would like to see the articles --
18 have been vandalized and vandalized and vandalized,
19 this same building.

20 CHAIRPERSON GRIFFIS: I don't know where
21 that goes for us. But --

22 MS. D. MILLER: Well, it goes to the point
23 that they have no control over the building.

24 CHAIRPERSON GRIFFIS: I see. You just
25 made a statement, students from all over. So you have

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1 problems from students from other dorms actually using
2 these venues?

3 MS. D. MILLER: They have a right to, if
4 they are students.

5 CHAIRPERSON GRIFFIS: I see.

6 MS. D. MILLER: But that means that they
7 would be inside, and they are able to use the
8 bathrooms inside without being escorted to them. They
9 are students. It would be academic use.

10 CHAIRPERSON GRIFFIS: Okay.

11 MS. D. MILLER: But selling to the public
12 is not academic use.

13 BOARD MEMBER ETHERLY: If I could follow
14 that up then, Mr. Chair, because I'm playing a little
15 bit of devil's advocate, but at the same time I am
16 also trying to make sure I understand the ANC's
17 argument.

18 Is it perhaps the nature of the building
19 that the facility in question finds itself in that
20 would be an issue for you? By that question, I mean
21 if the facilities that are at issue were located in
22 another building on campus that perhaps had a more
23 public aspect to it, would that change the ANC's
24 argument? To be putting it bluntly, if this were not
25 a dormitory space, would it be different? Would there

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1 be a different outcome?

2 MS. D. MILLER: Of course, it would. I
3 don't think you are saying it quite right, because you
4 expect -- When I went to college, we had a cafeteria.
5 Georgetown has cafeterias. Most of the other
6 universities have cafeterias where they serve the
7 people, but GW doesn't do it that way. They farm it
8 out for commercial use.

9 Now there's a big difference. We are a
10 tiny little residential neighborhood that they have
11 overrun and dominated to the point they have Foggy
12 Bottom/West End.

13 CHAIRPERSON GRIFFIS: Isn't that a
14 changing of the times?

15 MS. D. MILLER: I beg your pardon?

16 CHAIRPERSON GRIFFIS: Isn't that a
17 changing of the times?

18 MS. D. MILLER: No, only with GW.

19 CHAIRPERSON GRIFFIS: Only?

20 MS. D. MILLER: Only. The others don't do
21 it. Now I read up on that, and I read up on it.
22 Other universities are cutting back on taking all the
23 students. GW doesn't say no to any of them.

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. D. MILLER: They are way over their

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1 quota.

2 CHAIRPERSON GRIFFIS: Ms. Miller?

3 VICE CHAIRPERSON MILLER: Ms. Miller, you
4 participated in the hearings on the GW campus plan
5 before the Zoning Commission. Correct? And based on
6 your ANC's resolution and other materials, I read that
7 there is a condition in the Zoning Commission order
8 that provides a basis for three or four food venue
9 services on the lower and first levels.

10 My question is: That says to me that that
11 was before the Zoning Commission, and didn't you have
12 an opportunity in those hearings to explore what they
13 had in mind by three or four --

14 MS. D. MILLER: We tried. We tried, and
15 they didn't tell us. We tried to find out if they
16 were commercial, and we said no to commercial, but
17 they led the Zoning Commission to believe it was going
18 to be for academic use only. If you read the
19 transcript, you will see what I mean.

20 VICE CHAIRPERSON MILLER: So you did
21 actually address that at the Zoning Commission?

22 MS. D. MILLER: We did at the hearings, at
23 the ANC and at the Foggy Bottom.

24 CHAIRPERSON GRIFFIS: How about before the
25 Zoning Commission is the question?

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1 MS. D. MILLER: It never came up, because
2 they presumed it was for academic use.

3 CHAIRPERSON GRIFFIS: But who made that
4 presumption? The plans are in this record. It shows
5 that there are sites for food venues, and that has not
6 been disputed that --

7 MS. D. MILLER: And a building full of
8 students. What would you think?

9 CHAIRPERSON GRIFFIS: I'm looking at plans
10 that seem to be built according to the plans and --

11 MS. D. MILLER: Did you look at the two
12 pictures of the plans they presented I gave you? Take
13 a look at those two pictures.

14 CHAIRPERSON GRIFFIS: Two pictures of
15 plans?

16 MS. D. MILLER: Oh, yeah. They are
17 attached to my statement.

18 CHAIRPERSON GRIFFIS: Two pictures of
19 plans --

20 MS. D. MILLER: It shows the location.

21 CHAIRPERSON GRIFFIS: What are you talking
22 about? Figure N?

23 MS. D. MILLER: It was the first thing, I
24 think, on my list, wasn't it, my attachment? No.
25 That was the --

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1 CHAIRPERSON GRIFFIS: Which one? This?
2 The site plan?

3 MS. D. MILLER: Yes.

4 CHAIRPERSON GRIFFIS: Okay. What is that
5 site plan showing me?

6 MS. D. MILLER: That's showing you where
7 it is located. Does it show you an outside cafe?
8 Does it show you that you have all these things on it?
9 No.

10 VICE CHAIRPERSON MILLER: Excuse me, Ms.
11 Miller. Are you only concerned with the outside cafe?
12 I think there are two -- We need to separate here,
13 because outside is public space, and then there's GW
14 space.

15 MS. D. MILLER: No. No. You know, a
16 commercial place cannot compete. That's what we ran
17 into with the Health and Wellness Center. The public
18 athletic places came and testified they couldn't
19 compete with a tax exempt organization, because GW can
20 undersell them. There's no way they could make money
21 and pay taxes. Now what these people are doing are
22 trying to have it both ways.

23 CHAIRPERSON GRIFFIS: What are you talking
24 about now?

25 MS. D. MILLER: We are talking about

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1 commercializing what is supposed to be for academic
2 use only.

3 CHAIRPERSON GRIFFIS: Okay. So if they
4 sell food just to the students, it's not in your mind
5 a commercial use?

6 MS. D. MILLER: I beg your pardon? No.

7 CHAIRPERSON GRIFFIS: You agree with me?

8 MS. D. MILLER: It's not commercial if
9 they are selling just to the students, inside the
10 building.

11 CHAIRPERSON GRIFFIS: And what would the C
12 of O be listed for in order to get for a building
13 permit an occupancy, certificate of occupancy -- what
14 would be the listing on that C of O?

15 MS. D. MILLER: They would have a bathroom
16 available to them.

17 CHAIRPERSON GRIFFIS: No, no, no. I need
18 one letter -- or rather, one word. What is the type
19 of C of O that is issued? The C of O is in the
20 record. Correct? Do you have it in front of you?

21 MS. D. MILLER: It should be for academic
22 use.

23 CHAIRPERSON GRIFFIS: Food service for
24 academic use?

25 MS. D. MILLER: To serve academic use.

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1 CHAIRPERSON GRIFFIS: Okay. Is that a
2 proper classification for the Zoning Administrator to
3 put on a C of O, in your understanding of the
4 regulations?

5 MS. D. MILLER: He knew it.

6 CHAIRPERSON GRIFFIS: That doesn't really
7 answer the question, but I'll move on.

8 MS. D. MILLER: Well, it answers it to me,
9 because he did know.

10 CHAIRPERSON GRIFFIS: Okay.

11 MS. D. MILLER: And he did know that they
12 didn't have approval for public space use for tables
13 and chairs and umbrellas.

14 CHAIRPERSON GRIFFIS: Indeed.

15 MS. D. MILLER: Or to put signs outside
16 and the posters on all the trees.

17 CHAIRPERSON GRIFFIS: Okay.

18 MS. D. MILLER: They even had umbrellas
19 and tables out there the day the place opened, and
20 blocked the street as well.

21 CHAIRPERSON GRIFFIS: Right. We
22 understand that. Yes, Mr. Etherly?

23 BOARD MEMBER ETHERLY: So perhaps to
24 summarize, Mrs. Miller, it sounds like, in one
25 instance in part, there is a concern about the -- in

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1 the ANC's opinion, the encroachment upon public space
2 of the operation --

3 MS. D. MILLER: Correct.

4 BOARD MEMBER ETHERLY: -- but that's not
5 to suggest that -- Okay, let me -- the encroachment
6 upon public space of the operation and, number two,
7 the fact that the operation of the venues are open to
8 members of the general public.

9 MS. D. MILLER: That makes -- You
10 understand how small these streets are?

11 BOARD MEMBER ETHERLY: No, I understand.

12 MS. D. MILLER: And where they are
13 located?

14 BOARD MEMBER ETHERLY: I understand. But
15 I'm just trying to get a sense of the argument.

16 MS. D. MILLER: People live there. There
17 is a church a half a block away, senior citizens a
18 half a block away, and all of this traffic --

19 CHAIRPERSON GRIFFIS: Is that something
20 the Zoning Administrator should have taken into
21 account when issuing a C of O?

22 MS. D. MILLER: Why would he?

23 CHAIRPERSON GRIFFIS: He wouldn't?

24 MS. D. MILLER: No.

25 CHAIRPERSON GRIFFIS: Then it's not of

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1 issue for us today.

2 MS. D. MILLER: I beg your pardon?

3 CHAIRPERSON GRIFFIS: Then it's not in the
4 jurisdiction for an appeal. We are trying to
5 establish what the error was that the Zoning
6 Administrator --

7 MS. D. MILLER: The Zoning Administrator
8 has made so many errors, and I won't bring them all
9 up, because you know them.

10 CHAIRPERSON GRIFFIS: And it has no
11 bearing on what we are doing today.

12 MS. D. MILLER: It does have bearing on
13 it, because he had no right to grant them a commercial
14 use.

15 CHAIRPERSON GRIFFIS: No, all his other
16 errors that you were talking about.

17 MS. D. MILLER: And the space outside --
18 he doesn't have the authority for use of public space.

19 CHAIRPERSON GRIFFIS: Very well. Any
20 other questions --

21 MS. D. MILLER: They don't own the
22 sidewalks, and they don't own the streets.

23 CHAIRPERSON GRIFFIS: Very well. Let's go
24 to cross. Who would like to start? George
25 Washington. Oh, come on. Have some courage around

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1 here.

2 Does the Zoning Administrator have any
3 cross? Government, does anyone? Intervenors? Very
4 well. Ms. Miller, thank you very much.

5 Let's move on then. I've lost my great
6 organization in all that. Very well. Is government
7 ready? Good evening.

8 MS. BELL: Good evening. Good afternoon.
9 I am Lisa Bell. I am the Senior Counsel with the
10 Office of the General Counsel for DCRA, and I am with
11 the Zoning Administrator, Mr. Toye Bello.

12 I'd like to supplement the record just a
13 little bit with a few remarks in support of the
14 memorandum which I hope the Board has had an
15 opportunity to review.

16 CHAIRPERSON GRIFFIS: Your memo?

17 MS. BELL: Yes. Actually, when we
18 received it from your office, it was attached to Mr.
19 Kline's letter. So it is actually not -- Mr. Kline
20 submitted a letter, and DCRA actually submitted a
21 statement. So you've probably read it and credited it
22 to someone else maybe, but it's the government's
23 position.

24 CHAIRPERSON GRIFFIS: Okay.

25 BOARD MEMBER ETHERLY: I believe it is

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1 labeled Exhibit 28, Mr. Chair.

2 CHAIRPERSON GRIFFIS: We just received
3 this.

4 MS. BELL: Oh. Oh.

5 CHAIRPERSON GRIFFIS: So talk slowly.
6 Let's go.

7 MS. BELL: Well, actually, one of the
8 first arguments I wanted to make, I wanted to raise,
9 is we see this as a very narrow issue, and actually
10 upon listening to the appellant's argument, I would
11 like to make a preliminary point.

12 Unfortunately, the appellant hasn't been
13 able to identify an error made by the Zoning
14 Administrator in the issuance of the Certificate of
15 Occupancy at issue here. So there is a basis for the
16 Board to dismiss the appeal for failure to state a
17 claim, for lack of a better way of explaining it, for
18 which relief could be granted by this particular
19 Board.

20 I apologize. I often use my litigation
21 jargon, but you understand the point that we are
22 raising here.

23 The Zoning Administrator issued the
24 Certificate of Occupancy pursuant to the Zoning
25 Commission's order. The Zoning Commissioner's order,

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1 the 958, was issued pursuant to the campus plan.

2 CHAIRPERSON GRIFFIS: Let me interrupt
3 you. Do you want us to hold your motion in abeyance
4 until you present your case? You've just made a
5 motion to dismiss.

6 MS. BELL: Well, I was going to -- That's
7 correct. I was going to proceed with my argument, but
8 if the Board would like to ask us questions, either
9 myself or Mr. Bello, we would be glad to.

10 CHAIRPERSON GRIFFIS: Let's go. Let's go
11 ahead. Let's hear your argument.

12 MS. BELL: Okay. Pursuant, as I said, to
13 the campus plan, what the appellant overlooked is
14 that, when the campus plan was actually issued, the
15 plans that both the BZA, the Zoning Commission and,
16 subsequently, the Zoning Administrator reviewed were
17 the actual floor plans for the dormitory as well as
18 for the food venues.

19 What has happened here is Coggins sought
20 interior work permits pursuant to those plans, which
21 DCRA approved, and then subsequently the use, the
22 Certificate of Occupancy, was issued based on the
23 exact same plans. Nothing has changed.

24 Unfortunately, she is making an argument
25 here, her concerns about who the audience is and her

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1 concerns about what she understood the food service
2 venue to mean, whether it means a restaurant or a
3 commercial restaurant or a cafeteria, arguments is
4 that she really should have raised when the campus
5 plan was initially brought before the Board as well as
6 the other ANC arguments that were raised.

7 I took a look at the record and,
8 unfortunately, that was not something that was raised
9 by the ANC, or at the very least before the Zoning
10 Commission when it took a look at whether or not to
11 add three or four food venues.

12 It is clear that she was confused about
13 what the term food venue means. The Zoning Commission
14 has used that term with regard to GW, and the Zoning
15 Administrator has interpreted that term to be somewhat
16 analogous to food courts. He is here today, and he
17 can certainly describe for you what his understanding
18 of food service venue is, but I think it is fair to
19 say that the interpretation, what the Zoning
20 Commission intended was for food eateries to be in the
21 areas on the lower and general level, which is exactly
22 what now exists as far as GW is concerned.

23 So to the extent that she is concerned
24 about who the audience is, I think the Board can
25 concede that the Commission did not identify who the

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1 audience should be. She is making an assumption, and
2 she is interpreting what the Zoning Commission's
3 intention is, as we would be or anyone else would be
4 looking at the order.

5 The actual language of the order does not
6 indicate who the food service venue should provide
7 service to.

8 Now there are other areas --

9 CHAIRPERSON GRIFFIS: But isn't it covered
10 in terms of an accessory use? I mean doesn't it
11 somehow fall into who it is going to serve by the fact
12 that, as I am assuming the Zoning Administrator
13 defined it as an accessory use to the larger principal
14 use.

15 MS. BELL: That would be our
16 interpretation, but it is also fair to say that it is
17 an interpretation. The appellant, obviously, wishes
18 to interpret it another way. But to the extent that
19 she is confused or to the extent that anyone would be
20 confused about who the actual audience is, that is an
21 argument that should have been made at the time at the
22 further processing. That is not a timely argument to
23 be raised here with regard to the Zoning Administrator
24 and the Certificate of Occupancy.

25

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E-V-E-N-I-N-G S-E-S-S-I-O-N

(5:00 p.m.)

The Certificate of Occupancy was issued for the use that had been approved by the Zoning Commission. So the question here is -- the core issue is whether or not the Zoning Administrator properly implemented the Zoning Commission's order when it issued the Certificate of Occupancy, and I think there is no other answer but he did.

CHAIRPERSON GRIFFIS: Okay. I think that is well stated on what the issue is before us. So before you get right into that then, speak to the issue of the assertion that there was no bathroom associated with this restaurant which the C of O is granted for, and whether the permit granting for the public space construction -- how you -- what your legal view of that is, and also the notification of the Zoning Administrator of the issuance of the permit.

MS. BELL: Well, our argument with regard to the papers and the argument that I am prepared to make today with regard to the sidewalk cafe -- It is really not properly before you. The use of a public space is not a permit that should be a part of this

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1 appeal.

2 To the extent that the Public Space
3 Committee might have suggested that it was contingent
4 upon the Certificate of Occupancy and its validity is
5 another issue, but it is not before you in that it
6 would not be an error of the Zoning Administrator,
7 because the Zoning Administrator didn't have a role in
8 that process.

9 As to notification, we see the
10 notification issue again as something that should have
11 been raised by the appellant during the Zoning
12 Commission's order. Whether or not she was well
13 informed, it was properly disclosed, and she received
14 adequate due process considerations is again not an
15 issue that the Zoning Administrator would have the
16 responsibility nor the duty to provide to her with
17 regard to her understanding about, you know, the
18 definitions or the ambiguities of what the Zoning
19 Commission means.

20 In effect, what the appellant is saying
21 is, to the extent that I was confused, I want the
22 Zoning Administrator to explain to me his
23 interpretation and to listen to my interpretation and
24 in some way, shape or form make some assessment about
25 it.

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1 Now I will have the Zoning Administrator
2 speak to the issue of the bathroom and the food court,
3 because he is best able to provide those facts.

4 MR. BELLO: Well, good evening, Mr.
5 Chairman, Board members. The issue of bathrooms is
6 not a zoning issue. It is actually a building codes
7 issue.

8 CHAIRPERSON GRIFFIS: Indeed.

9 MR. BELLO: To the extent that bathrooms
10 are provided in other locations of the premises, it
11 speaks to the fact that these food venues are viewed
12 under the building codes as pretty much delis that can
13 share common bathrooms.

14 CHAIRPERSON GRIFFIS: Okay. So the issue
15 of bathroom is the fact that one would need to be
16 accessible, whether it be common and shared by the
17 different venue, but one would have to be provided,
18 and one was provided when this was issued?

19 MR. BELLO: Absolutely. There is a
20 bathroom both on the lower level and on the first
21 floor.

22 CHAIRPERSON GRIFFIS: Okay. Anything
23 else?

24 MR. BELLO: Well, I think the single
25 question before the Board has pretty much been

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1 answered, quite frankly. And again, that goes to --
2 Well, the issuance of the Certificate of Occupancy
3 clearly is predicated on the issuance or the previous
4 issuance of a building permit that implemented the
5 Zoning Commission order.

6 If the building permit is not found to be
7 flawed, which I think ample evidence has been
8 submitted here that it isn't, then the Certificate of
9 Occupancy could not have been issued in error.

10 COMMISSIONER HOOD: Mr. Chairman.

11 CHAIRPERSON GRIFFIS: Yes, Mr. Hood?

12 COMMISSIONER HOOD: I want to ask Ms.
13 Bell, if you would look on what you submitted to us in
14 the submittal we got relatively recently, the one that
15 was submitted that we were speaking of earlier, on
16 page 2 about three-quarters of the way down right
17 after it says *Drudy v. D.C. Board of Zoning*
18 *Adjustment*.

19 The next sentence really concerns me, and
20 this goes into what we are asked to make sure we
21 understand exactly what is going on. It says the BZA
22 has delegated authority to evaluate specific projects,
23 modifications of further processing of the campus plan
24 to the Zoning Commission.

25 Can you explain that to me? I'm not

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1 following that.

2 MS. BELL: As I understand, the zoning
3 regulations spell out that the further processing of
4 campus plans has been transferred to the Zoning
5 Commission.

6 COMMISSIONER HOOD: But you state the BZA
7 has delegated authority.

8 MS. BELL: Yes, because it would have been
9 the authority that the BZA would have initially had.

10 COMMISSIONER HOOD: Maybe you could help
11 me, Mr. Bello.

12 MR. BELLO: I can expound on that a little
13 bit. I think that Ms. Bell actually wanted to say
14 that the Zoning Commission had amended the zoning
15 regulations to take up the responsibility for campus
16 plan approvals. That's basically what that is.

17 CHAIRPERSON GRIFFIS: That's right. We
18 didn't give anything away. They took it.

19 COMMISSIONER HOOD: No, they didn't give
20 anything away, and that concerns me, because this goes
21 back to this whole understanding issue. If we're
22 thinking that the BZA -- and, no, I'm not trying to go
23 jurisdictional or all that stuff. I'm just trying to
24 make sure we understand, in all fairness to Ms.
25 Miller, Commissioner Miller.

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1 I want to make sure we understand exactly
2 what is going on, because if didn't understand that,
3 then I want to make sure that, if you read the
4 transcript, Ms. Bell -- I believe you said you
5 reviewed the Zoning Commission's transcript.

6 MS. BELL: Well, I didn't review the
7 transcripts. I reviewed the paperwork, the orders and
8 things.

9 COMMISSIONER HOOD; Okay.

10 MS. BELL: But you are absolutely right.
11 This was my error. I did not know that the Zoning
12 Commission granted the authority to themselves.

13 COMMISSIONER HOOD: Right. I don't know
14 why they did that.

15 CHAIRPERSON GRIFFIS: Aren't you getting
16 into a bigger issue here? I mean, isn't your direct
17 question what is your legal interpretation of whether
18 we have the jurisdiction to hear this appeal or should
19 this not be --

20 COMMISSIONER HOOD: I've been wanting to
21 ask that since about 4:30.

22 MS. BELL: Whether you have the legal --

23 CHAIRPERSON GRIFFIS: Do we have the
24 jurisdiction to hear this appeal, because it is based
25 on a campus plan? Mr. Bello?

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1 MR. BELLO: I do think that you retain
2 jurisdiction on appeals. The Zoning Commission has
3 not take up that responsibility, because, clearly, the
4 decision of the Zoning Administrator in issuing a C of
5 O is what is being appealed here.

6 CHAIRPERSON GRIFFIS: And is there another
7 avenue before the Zoning Commission for this in terms
8 of bringing a motion for clarification on a condition
9 of one of their special exceptions?

10 MR. BELLO: Absolutely. I believe the
11 amendment clearly states that in campus plan
12 approvals, the Zoning Commission is wearing the hat of
13 the BZA. Actually, those hearings are conducted under
14 the rules and practice and procedures of the BZA.

15 CHAIRPERSON GRIFFIS: Right. I see what
16 you are saying. Yes, indeed.

17 MS. BELL: And can I interrupt. Maybe
18 it's something Corporation Counsel can address, but it
19 would seem to me many of the Court of Appeals
20 decisions that I have read does not suggest that the
21 BZA would not have the authority to rule with regard
22 to the campus plans.

23 COMMISSIONER HOOD: Well, the question, is
24 have the ones that you read -- did the jurisdiction
25 lie up under the Zoning Commission, which was done in

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1 the year of 2000. That was just done. You know, I
2 guess those previous cases.

3 MS. BELL: No, I understand what you're
4 saying.

5 COMMISSIONER HOOD: Case law would have
6 been prior to the Zoning Commission. I'm not a
7 lawyer.

8 MS. BELL: Yes, but there have been more
9 recent cases with regard to challenge just to portions
10 of the plans that have been taken up to the Court of
11 Appeals. So I have not seen anything to suggest that
12 the Board does not have jurisdiction, but it is
13 something that I can look at, if there is a concern or
14 if you want to know the government's position.

15 COMMISSIONER HOOD; I really would like --
16 I think it should be properly in front of the Zoning
17 Commission, since the Chairman made the segue into
18 that. That's just my opinion.

19 CHAIRPERSON GRIFFIS: The appeal should
20 be?

21 MS. BELL: You think the appeal should be.

22 COMMISSIONER HOOD; Well, not the appeal.
23 Probably a better way, the modification, whether it's
24 a minor modification or whatever, a clarification or
25 whatever you call it -- I think that's better served

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1 in front of the Commission.

2 MS. BELL: But this isn't a -- I
3 understand what you are saying, but she didn't frame
4 this as a clarification. She is framing this as an
5 error.

6 COMMISSIONER HOOD; I agree with you.

7 CHAIRPERSON GRIFFIS: Mr. Hood brings up
8 an excellent point, but that's not the strategy that
9 was actually implemented by the appellant in this
10 case. They decided to bring an appeal. Be that as it
11 may, that's what we're faced with. So let's move on.
12 What else do we have from the government?

13 BOARD MEMBER ETHERLY: Can I jump in, Mr.
14 Chair?

15 CHAIRPERSON GRIFFIS: Yes, of course.

16 BOARD MEMBER ETHERLY: I want to come at
17 it from kind of a little bit of a different angle, not
18 dealing with kind of the jurisdictional piece but
19 talking a little bit about kind of the accessory
20 nature of the use.

21 There has been clearly some reference in
22 DCCRA's submission as well as submission of the other
23 intervenor with regard to the issue of accessory use
24 and what's kind of incidental to the operation, if you
25 will, of a university.

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1 In your thinking -- and I will put this
2 same question, if the opportunity presents itself, to
3 the other intervenor -- is there a limit to how you
4 might define what is accessory, i.e., let's say for
5 the sake of discussion that it could be demonstrated
6 that more than 50 percent of the patrons of the food
7 court venue were, in fact, not affiliated with the
8 university. Are you aware of any precedents or any
9 regulatory practice of custom in your experience, Mr.
10 Bello, or from a legal standpoint that would
11 necessarily dictate maybe a different outcome if 51
12 percent of the patrons were, in fact, not affiliated,
13 if somehow you could even demonstrate that? But for
14 the sake of discussion, let's say you could.

15 If 51 percent of the patrons of the food
16 court venue were, in fact, not affiliated with the
17 university, would that change the nature of the
18 accessory use? Would that make it not accessory or
19 not incidental any longer?

20 MS. BELL: Well, that is actually an
21 interesting question, because as I understand it, GW
22 believes the accessory use is to the dormitory, where
23 I think the government's position is the accessory use
24 is to the university.

25 BOARD MEMBER ETHERLY: To the overall

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1 operation of the university.

2 MS. BELL: That's right, to the overall,
3 and I understand, you know, there is the lot test or
4 some -- You know, there is case law that suggests that
5 the same lot test is necessary, but to our way of
6 thinking the campus university is one lot, and so it
7 would be everything within the campus boundary.

8 I think, with regard to incidental public
9 users of accessory use, I think there is a line about
10 -- to be drawn when you are talking about the quantity
11 of people who use a service that is incidental to the
12 dominant use.

13 So if the dominant use is a university and
14 the accessory use is a restaurant where 80 percent of
15 the people who use the restaurant are not affiliated
16 with the university, don't attend the university and
17 are sort of people who come from Maryland and Virginia
18 just for the purposes of going to this restaurant, I
19 think that certainly suggests that the analysis is
20 different.

21 BOARD MEMBER ETHERLY: And is that
22 something that the Zoning Administrator would consider
23 or would endeavor to explore or analyze? And let's go
24 to the reason why I'm asking this. Playing a little
25 bit of devil's advocate and taking the ANC argument to

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1 its logical conclusion, the concern here is that
2 through the accessory or incidental use, are we in
3 effect creating a subtle loophole that enables a
4 university or other tax exempt entity to essentially
5 become a commercial player, but with the benefit of
6 the protection of the incidental or accessory use.

7 So is there -- How would BZA even go about
8 trying to determine that or is that even something
9 that the Zoning Administrator looks at when confronted
10 with this type of application?

11 MR. BELLO: There actually is a previous
12 Zoning Administrator determination that an accessory
13 function would be limited to no more than 20 percent
14 of the aggregate principal activity, however mode of
15 measurement you decide to impose.

16 In the case of a university such as this
17 that is embedded in an open landscape, the practical
18 difficulties are quite obvious, but I do agree that
19 there ought to be, and there is, a limit to an
20 incidental and accessory function, as it is not being
21 accessible to the general public at large.

22 I think there is evidence on the records
23 that at least 80 percent of the users of these
24 premises are students, and to that extent, if you
25 applied that definition or that standard, then it

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1 would still be clearly subordinate to the overall
2 function of the university.

3 BOARD MEMBER ETHERLY: Thank you. Thank
4 you, Mr. Chair.

5 CHAIRPERSON GRIFFIS: Thank you very much.
6 Let me just make one comment. You made an assertion
7 that the university may not -- may look at this as
8 just accessory to the dormitory, and the Zoning
9 Administrator indicates that it is more in the total
10 campus. Is that what you were saying?

11 MS. BELL: Yes. I glean that from their
12 papers.

13 CHAIRPERSON GRIFFIS: Okay. I didn't. So
14 I think they will probably highlight that, and the one
15 assertion that I would say is they talk about how the
16 IRS has actually said that this is incidental to the
17 university, to the academic use, and thereby why their
18 standing for the venues can be classified as the IRS
19 does, because it takes it into accessory to the entire
20 academic and university use. But they will probably
21 say it better than I can in their words.

22 Okay. Ms. Miller?

23 VICE CHAIRPERSON MILLER: Mr. Bello, I
24 just wanted to probe a little bit. I'm not sure what
25 your role was exactly with respect to the C of O, but

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1 you made a statement that, you know, it's up to you to
2 interpret and implement the Zoning Commission order;
3 and the Zoning Commission order spoke in terms of food
4 venues. And you interpreted that to mean food courts
5 or these type of food establishments that are
6 operating and that are at issue before us.

7 I'm wondering on what basis did you
8 conclude that this fit food venues?

9 MR. BELLO: I actually would consider this
10 to be an eating establishment, a location where people
11 gather for that. The closest definition for any kind
12 of eating establishment is that of a restaurant or a
13 fast food restaurant as provided for in the
14 regulations.

15 VICE CHAIRPERSON MILLER: Where are the
16 specific categories for a Certificate of Occupancy
17 laid out? Are they laid out in some regulations? I
18 mean, you don't just think of any word you want and
19 put it in. You have to actually choose a specific
20 designation that comes the closest. Isn't that
21 correct?

22 MR. BELLO: Yes. That will be under the
23 use provisions for each zoning district.

24 Your question was how do you determine a
25 use category?

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1 VICE CHAIRPERSON MILLER: Well, where do
2 you find it? Where did you find like restaurant? Is
3 it somewhere in some regulation?

4 MR. BELLO: Section 199.1, actually
5 provides a definition for restaurant.

6 CHAIRPERSON GRIFFIS: The definitions for
7 all the uses. I understand that. I think the
8 question: Globally, when you put something onto a C
9 of O -- My gosh, we've been through a few remands and
10 appeals on this -- you have to pick a designated use
11 in the zoning regulations. Is that correct?

12 MR. BELLO: Yes. You have --

13 CHAIRPERSON GRIFFIS: Or if a regulation
14 allows you to find a similar type of use, of which --
15 let's not get into that realm, unless that was needed,
16 and it doesn't seem like you invoked that or needed
17 that in this campus plan.

18 MR. BELLO: That's correct.

19 CHAIRPERSON GRIFFIS: So generally
20 speaking, a C of O, you find a designated defined use,
21 zoning use, and that's what goes on the C of O.

22 MR. BELLO: As a first step. That's
23 correct.

24 CHAIRPERSON GRIFFIS: Okay. So when you
25 did that, you went to 199, and you went to

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1 restaurants. Is that correct?

2 MR. BELLO: That's correct.

3 CHAIRPERSON GRIFFIS: And as we look at
4 the restaurants in 199, what were your other choices?
5 Maybe that would help the Board. You indicated one
6 previously, deli, food court.

7 MR. BELLO: Exactly.

8 CHAIRPERSON GRIFFIS: Okay. Fast food
9 even will be a different type restaurant than
10 restaurant.

11 MR. BELLO: Correct.

12 VICE CHAIRPERSON MILLER: For instance,
13 Ms. Miller had suggested academic use or something,
14 and that's not in this list.

15 MR. BELLO: It's not.

16 CHAIRPERSON GRIFFIS: So is, as indicated
17 in the resolution from the ANC, student serving
18 dormitory food service a defined zoning use?

19 MR. BELLO: Well, where the zoning
20 regulations define a specific user -- and part of the
21 Zoning Administrator's job is to assist an applicant
22 to first and foremost fit into a specific use as
23 described -- the Zoning Administrator would actually
24 not be allowed to look outside of the use fits the
25 description of the use that's being presented before

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1 him.

2 CHAIRPERSON GRIFFIS: Okay. So if I
3 understand what you're saying is, say this food venue
4 came to you, and they said, look, what we really are
5 is a student serving dormitory food service, and you
6 said, wow, that's great, but I got to find something
7 to put on the C of O; let me look if that fits under
8 restaurant. Does it fit under the restaurant
9 definition as it's written, which is "a place of
10 business for food, drinks or refreshments are prepared
11 and sold to customers, primarily for consumption on
12 premises; this term shall include, but not be limited
13 to, establishments known as cafe, counter, cafeteria
14 or other small business, but shall not include fast
15 food restaurant"? Does what happens here fit within
16 that definition?

17 MR. BELLO: Absolutely.

18 CHAIRPERSON GRIFFIS: Why is it not a fast
19 food? Well, that's Ms. Miller's next question. She's
20 coaching me as we go.

21 MR. BELLO: Well, the answer to that
22 question is that it could be, and even if one had been
23 issued for a fast food restaurant, that decision would
24 still not have been in error.

25 CHAIRPERSON GRIFFIS: Okay.

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1 BOARD MEMBER ETHERLY: Just as a follow-
2 up, we talked a little bit about the issue of the
3 public space piece, and I don't want to really touch
4 the issue, the permit part of it. But let me ask a
5 question just from the standpoint of: Does the nature
6 that there is a public space associated with the food
7 venue in DCRA's mind or in the Zoning Administrator's
8 mind, change the nature of the accessory use? Would
9 it matter or should it matter if the use were entirely
10 enclosed within the dormitory space? Would that
11 change the analysis or change the outcome of your
12 analysis?

13 MS. BELL: Well, I think it is important
14 to note that the outside space was designated on the
15 floor plans as they were approved, when the dormitory
16 was approved initially through the Zoning Commission.
17 So I think it's fair to say, to the extent that they
18 considered food venues, they obviously understood, or
19 at least they were told, what the intention was, at
20 least for the ground level restaurant to include an
21 outside area.

22 BOARD MEMBER ETHERLY: Okay. And from the
23 standpoint of the Zoning Administrator, the fact that
24 there is an outside portion which is affiliated to the
25 use wouldn't change the outcome of your determination?

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1 MR. BELLO: No, sir.

2 BOARD MEMBER ETHERLY: Thank you. Thank
3 you, Mr. Chair.

4 CHAIRPERSON GRIFFIS: Thank you. Anything
5 else for us?

6 MS. BELL: No.

7 CHAIRPERSON GRIFFIS: Any other questions?
8 Ms. Miller?

9 VICE CHAIRPERSON MILLER: In all your vast
10 experience -- I mean, are you familiar with any
11 situations with universities or other public buildings
12 or entities where the public has been restricted from
13 enjoying or making use of any restaurant or other
14 similar kind of public space that is a part of that
15 building?

16 MR. BELLO: I am, quite frankly, not aware
17 of one.

18 CHAIRPERSON GRIFFIS: Can I rephrase the
19 question? From the zoning perspective, is there a use
20 definition which you would grant a C of O which would
21 preclude public use for food service? Is there a
22 designation that we are missing here?

23 MR. BELLO: The answer is no.

24 CHAIRPERSON GRIFFIS: So for instance, in
25 the record there is a letter from a hospital that has

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1 accessory services, the card shop, the food and all
2 sorts of other things in it. If they came for a
3 Certificate of Occupancy for those types, a stationery
4 store, any other accessory, is there any -- in any of
5 these kind of uses, restaurants or whatever it is,
6 bookstores, is there any designation that would show
7 on the C of O that it was for private use only, not
8 public use or for those users of the primary use?
9 Does that make sense?

10 MR. BELLOW: Yes, it does. Ordinarily,
11 under normal circumstances an incidental and accessory
12 use does not have to be identified on the Certificate
13 of Occupancy. That is not true necessarily for a
14 campus in which you have several buildings on
15 different lots, as a matter of practicality.

16 Given the direction that this type of
17 activity has gone where vendors are, in fact,
18 contracted to run these facilities, the business
19 license structure -- DCRA is structured in such a way
20 that, without a Certificate of Occupancy for such
21 incidental users, as we have here, they would have
22 difficulty obtaining a business license to operate,
23 because it goes to the name of the operator.

24 CHAIRPERSON GRIFFIS: I see. You know,
25 another analogy that pops into my mind is like an

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1 airport, and the concessions at an airport. I mean,
2 is it, in your mind, analogous to this? It may be a
3 totally different scale.

4 MR. BELLO: Well, really, the question
5 goes to who the incidental user is.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. BELLO: If you access an airport, do
8 you automatically become an incidental user? I think
9 so. I think, if you access the campus boundaries,
10 that you somewhat become an incidental user, be it of
11 the library, the university hospital or any other
12 facility on the campus.

13 CHAIRPERSON GRIFFIS: That's an
14 interesting point. Yes?

15 BOARD MEMBER ETHERLY: Just very briefly.
16 With regard to the question that you asked about what
17 would you conceivably call it, perhaps an analogy came
18 to mind. Is there a different -- I don't think it's
19 an applicable case, but I'll just ask it, because I
20 think there is a subset of restaurants or facilities
21 out there that are private in nature.

22 Think, for example, of private membership
23 clubs, University Club, Cosmo's Club, which clearly
24 will have restaurant type operations that are
25 available only to their members. Perhaps a C of O

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1 will have something entirely different and doesn't go
2 to the level of detail as to specify a restaurant, but
3 how would you characterize that type of operation?

4 Once again, I don't think it is very
5 applicable. So it's probably a very easy question to
6 answer. Would we call it a club or something? How
7 would you characterize it?

8 MR. BELLO: Actually, the zoning
9 regulations does provide a definition for private club
10 use, and also determines the structure under which you
11 can operate a private club.

12 BOARD MEMBER ETHERLY: Okay. So it's an
13 entirely different category.

14 MR. BELLO: That's correct.

15 BOARD MEMBER ETHERLY: Excellent. Thank
16 you. Thank you, Mr. Chair.

17 CHAIRPERSON GRIFFIS: Indeed. Excellent
18 question. Okay. If there is nothing further from the
19 Board, let's go to the cross-examination of Mr. Bello.
20 Ms. Miller? You don't need to raise your hand.
21 You're up.

22 CROSS-EXAMINATION

23 BY MS. D. MILLER: Ms. Bell, are you
24 familiar with the University Club's request for public
25 space to serve food outside? The University Club,

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1 which is next to Thurston Hall -- are you familiar
2 with that?

3 CHAIRPERSON GRIFFIS: But you want to ask
4 Mr. Bello.

5 MS. D. MILLER: I'm leading up to the
6 point, the fact that they had to request public space
7 use and it was denied.

8 CHAIRPERSON GRIFFIS: Okay. I'm just
9 asking you to cross-examine the witness, not the
10 attorney.

11 MS. D. MILLER: I'm cross-examining her.

12 MS. BELL: No, no, no. You are cross-
13 examining the witness, which is --

14 MS. D. MILLER: Oh, I can't cross-examine
15 you?

16 MS. BELL: No, sorry.

17 MS. MILLER; What a shame. Well, you
18 suggested that they changed -- they filed plans to
19 change the floor plan for inside the Coggins. Are you
20 familiar with the fact that the ANC is supposed to get
21 copies of every permit that is requested when it is
22 requested, not after it is issued? The law requires
23 it.

24 MS. BELL: Well, wait. I am going to
25 object to that, because I'm a little confused. So I

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1 think that he is not going to be able to answer.

2 What notification are you referring to?
3 Are you referring to great weight or --

4 MS. D. MILLER: No. The law requires that
5 anytime anybody files an application that affects an
6 ANC or a single member district that the Consumer and
7 Regulatory Affairs is supposed to notify the ANC and
8 that ANC Commissioner. It's required by law.

9 Now he said that they filed plans to
10 change the plans -- Coggins.

11 CHAIRPERSON GRIFFIS: So the direct
12 question, Ms. Miller, is are you aware of the fact
13 that notification of request for -- or applications
14 for permit are to -- notification of application of
15 permits are to be given to the ANC?

16 MS. D. MILLER: Right.

17 MR. BELLO: Absolutely, and that
18 notification would have occurred at the time of the
19 issuance of the building permit, not only for the
20 construction of the building proper, as a routine also
21 for the tenant layout permit, and would not be
22 necessary for the issuance of a Certificate of
23 Occupancy, because the Certificate of Occupancy is
24 predicated on the building permit that had already
25 been noted.

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1 CHAIRPERSON GRIFFIS: Okay.

2 MS. D. MILLER: No, we are not talking
3 about the building occupancy. We are talking about
4 the changes that Coggins requested, filed a permit for
5 changes which we never receive, nor did we ever
6 receive a copy of -- We first saw that --

7 CHAIRPERSON GRIFFIS: We are not getting
8 anywhere if we both talk.

9 MS. D. MILLER: I know. I just want to
10 tell you, we first saw the permit before the Public
11 Space Committee, is the first time the ANC ever saw
12 the permit.

13 MS. BELL: I guess this is why I
14 interrupted. You are talking about two separate
15 things. The Public Space permit is different than the
16 building permits or the internal --

17 MS. D. MILLER: No. I'm talking about the
18 occupancy permit. The first time we saw the occupancy
19 permit was before -- in the hearing.

20 CHAIRPERSON GRIFFIS: I don't understand
21 the term occupancy permit.

22 MS. D. MILLER: They were given an
23 occupancy permit for this commercial restaurant.

24 CHAIRPERSON GRIFFIS: Mr. Bello?

25 MR. BELLO: What I was saying earlier a

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1 little bit is that a separate notice for the issuance
2 of a Certificate of Occupancy would not have been
3 necessary, because their notice already occurred at
4 the time of the issuance of the building permit.

5 MS. D. MILLER: We never got that either.

6 CHAIRPERSON GRIFFIS: What?

7 MS. D. MILLER: If we were supposed to get
8 that, we did not get that either.

9 CHAIRPERSON GRIFFIS: The base building
10 permit? You never received notification of it?

11 MS. D. MILLER: No. But don't feel bad.
12 We didn't get any for half of the things down there.
13 They just don't -- They don't bother. We have gone to
14 Mr. Clark two or three times to try to get permits.,
15 and it's not working that way.

16 CHAIRPERSON GRIFFIS: All right. How
17 often do you get notification to DCRA of issuance of
18 permits or application for permits?

19 MS. D. MILLER: Very rarely.

20 CHAIRPERSON GRIFFIS: Give me a number. I
21 mean, what does that mean to me, very rarely?

22 MS. D. MILLER: From one to ten, two.

23 CHAIRPERSON GRIFFIS: Two a day?

24 MS. D. MILLER: Did we get a permit --

25 CHAIRPERSON GRIFFIS: Two a minute? Two a

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1 week? Two a year? What are you talking about.

2 MS. D. MILLER: I'm talking about in the
3 last 10 or 12 years, and the only reason I got most of
4 the ones for the hospital was because the Director
5 picked them up and brought them to me, because they
6 never gave us a single copy on the hospital when they
7 were building it.

8 CHAIRPERSON GRIFFIS: What's your
9 understanding of DCRA's issuance of notifications of
10 applications for permit?

11 MR. BELLO: Twice monthly.

12 CHAIRPERSON GRIFFIS: Twice monthly.

13 MS. D. MILLER: Now permits for -- The law
14 requires that they give us these when they are
15 requested, not when they are issued -- when they are
16 requested. If you go back and read the regulations,
17 and we met with Mr. Clark and explained that to him.
18 There were seven ANC Commissioners --

19 CHAIRPERSON GRIFFIS: Okay. I hear your
20 words, and I have heard them numerous times. I also
21 read them. But I need some factual evidence that
22 shows me that either they issued them or notification
23 wasn't sent to you, you didn't get the notification.

24 MS. D. MILLER: I've never gotten it.

25 CHAIRPERSON GRIFFIS: I now have two

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1 different statements on the same issue.

2 MS. D. MILLER: I never got them. In
3 fact, when we met with Mr. Clark and he said to the
4 then interim Zoning Administrator to give us copies
5 and to give them according to the ANCs, he said, I
6 can't do that. And this was seven ANC Commissioners
7 that met with him, and I've got the letter that Mr.
8 Bardine wrote requesting it.

9 CHAIRPERSON GRIFFIS: Okay. Next cross
10 question.

11 MS. BELL: Actually, this seems like it's
12 going to last a little longer than I had expected.
13 Could we have a break for a moment or could I leave
14 for a moment on a personal matter? I have child care
15 concerns.

16 CHAIRPERSON GRIFFIS: Me, too. Mine is
17 being delivered in about five ;minutes. Yes, let's
18 take -- Now?

19 MS. BELL: IF we could. I don't know if
20 your child is being delivered to you here?

21 CHAIRPERSON GRIFFIS: Let's do it. Let's
22 take five minutes. We will resume at six o'clock.

23 MS. BELL: Do you have any estimate as to
24 how long you think the hearing will last?

25 CHAIRPERSON GRIFFIS: We have cross now.

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1 We have the presentations of George Washington and the
2 other appellant. I would imagine at 20 minutes our
3 questions are getting slimmer and slimmer. No more
4 than an hour more.

5 MS. BELL: Okay. Great. Thanks.

6 CHAIRPERSON GRIFFIS: Okay. We will take
7 five minutes.

8 (Whereupon, the foregoing matter went off
9 the record at 5:58 p.m. and went back on the record at
10 6:09 p.m.)

11 CHAIRPERSON GRIFFIS: Good. Then let's
12 resume. Okay, Ms. Miller, it was to you, cross-
13 examination questions.

14 MS. D. MILLER: I have another question.
15 Mr. Toye, I'm sure that you read the order that --
16 what is number -- what is it, 558? You know the one I
17 am referring to, the order for it. Did you see
18 anywhere in there that they requested a special
19 exception to have a commercial restaurant or to have
20 an outdoor feeding area in the order?

21 MR. BELLO: Well, the simple answer to
22 your question is, no, there isn't a separate special
23 exception for a venue.

24 MS. D. MILLER: Okay. Now the question
25 came up about Coggins being a fast food. It is a fast

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1 food restaurant. They make special sandwiches that
2 you can carry right out. So it is in essence a fast
3 food shop. Correct?

4 MR. BELLO: I can't say that. Again since
5 this decision predated my assumption of the office, I
6 can't say for sure if an assessment was made as to
7 whether the fast food restaurant category would be
8 more appropriate than the restaurant. But as I said
9 earlier, either of those categories would have been
10 okay.

11 MS. D. MILLER: Were you familiar at all
12 with the hearings that went on concerning the Health
13 and Wellness Center which is right across the street
14 from this about the public using it?

15 MR. BELLO: I am vaguely familiar with
16 that, yes.

17 MS. D. MILLER: And do you remember how
18 stringent they tried to make that, that it would be
19 for university use only?

20 MR. BELLO: I do believe that the -- I
21 think it was the Board -- The Board did set specific
22 conditions.

23 MS. D. MILLER: Because the subject came
24 up then, as I recall, and I think you will recall,
25 that they wanted to open it to the public, and the

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1 Zoning Commission said absolutely not.

2 Now I think -- Would you think that, had
3 this subject come up before the Zoning Commission
4 about that this would be for public use as well as
5 university use -- do you think they would have made a
6 different decision?

7 MS. BELL: I am going to object to that
8 question. It requires that he speculate, because that
9 is not what happened. So you really can't give an
10 answer.

11 CHAIRPERSON GRIFFIS: I agree. It calls
12 on speculation to answer the question. Is there
13 another direct question or a rephrase of the question?

14 MS. D. MILLER: All right. I have others,
15 but I guess it's a little late. I have quite a few
16 questions, and I think probably they would not be
17 appropriate this time, because the subjects that we
18 are trying to cover really never came up before the
19 Zoning Commission, and because they didn't come up, no
20 conditions were put on it that should have been.

21 I think the conditions, in my opinion --
22 and I think, if it gets back to the Zoning Commission,
23 you will find out they will put them on.

24 CHAIRPERSON GRIFFIS: Okay. Well, I
25 appreciate your judgment. All right. If there's no

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1 other further cross-examination from Ms. Miller, is
2 there any cross from the University, any from the
3 other intervenor? None? We thank you very much, Ms.
4 Bell.

5 Let's move then to -- Let's hear from the
6 University. Why don't you make yourself comfortable
7 and have a seat.

8 MR. MOORE: Mr. Chair, if it's all the
9 same to you, I would stand.

10 CHAIRPERSON GRIFFIS: If you are more
11 comfortable standing, indeed.

12 MR. MOORE: I learned my trade standing up
13 rather than sitting down.

14 CHAIRPERSON GRIFFIS: So am I, but I like
15 a comfortable chair. Okay.

16 MR. MOORE: So if you don't mind, I'd like
17 to stand. Good afternoon, Mr. Chairman, members of
18 the Board. I am Jerry Moore, law firm of Venable LLP,
19 appearing this evening on behalf of George Washington
20 University. With me is the George Washington
21 University Senior Counsel, Charles Barber.

22 We have submitted our case in writing for
23 the record, and I think that we have touched on most
24 of the points that the Board has issued today, and for
25 that reason I'll be very brief in my presentation.

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1 With due respect to Mrs. Miller, the
2 presence of a retail related facility in a residential
3 district is neither breaking news nor an isolated
4 case. The Zoning Administrator approved the C of O
5 simply because the Zoning Commission approved the C of
6 O. Could the Zoning Commission have limited the use
7 of that restaurant? Absolutely. Absolutely.

8 It could have done that by special
9 exception. Did it? No, it didn't. Was it presented
10 to the Zoning Commission? Yes, it was. Yes, it was,
11 and not only was it presented to the Zoning
12 Commission, it was presented to the ANC and presented
13 to the Foggy Bottom Association.

14 As evidence of that, I would suggest -- I
15 would proffer to you the resolution of ANC-2A which
16 was passed in conjunction with the Square 43 case:
17 "Therefore, be it further resolved that ANC-2A does
18 not oppose the construction of a dormitory, residence
19 hall, and ancillary services project on Square 43."

20 The Foggy Bottom Association by letter
21 dated November 30, 2001, which was entered into the
22 record in the BZA case approving the dormitory: "Dear
23 Madam Chair and members of the Commission: Foggy
24 Bottom Association is in general agreement with the
25 position of Advisory Neighborhood Commission 2A, and

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1 does not oppose the construction of a
2 dormitory/residence hall and ancillary services
3 project on Square 43."

4 They knew about it. They acted on it.
5 They were a party -- Both were parties in the case.
6 They did not appeal the case. They did not ask for
7 reconsideration. They come to the Board of Zoning
8 Adjustment assigning error to the Zoning Administrator
9 way too late. They were wrong in their interpretation
10 that this was not approved by the Zoning Commission
11 because, in fact, it actually was.

12 The food venue is located within the
13 University's approved campus area and provides
14 services that are directly related to the University's
15 mission, as set forth in its approved campus plan. As
16 such, the Coggins food venue is an accessory use that
17 is customary and incidental to the principal use.

18 To emphasize the point, we have done a
19 survey of universities in the District of Columbia and
20 nationwide. A part of that survey is in your files as
21 an exhibit.

22 With Howard University, we have pointed to
23 you the BZA cases where the BZA had approved a
24 Panini's restaurant, a Sky Rancher restaurant, and a
25 Chik-Fil-A restaurant at Howard University.

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1 At American University -- and I have
2 photographs for you here -- we have cited the case
3 where the Zoning Commission approved a number of
4 ancillary retail related -- accessory retail related
5 uses at American. American has a Hagen-Das ice cream
6 shop. It has a Chevy Chase Bank. It has a Subway
7 sandwich shop. It has a McDonald's restaurant. It
8 has a book store. It has a UPS store. It has a hair
9 products store, all open to the public, all with
10 signage to the outside. There is no restriction to
11 any of these -- to any of these retail related uses on
12 the campus of any university in the city.

13 You have in the record a letter from the
14 D.C. Hospital Association which makes it clear that
15 every single hospital in this city except Howard
16 University Hospital is located in a residential zone,
17 and every single hospital in this city has a retail
18 related ancillary use.

19 Bob Nelson in his letter to you said that
20 nobody comes to a hospital as a destination business
21 to go to a restaurant or a gift shop. They are there
22 to do the business of the hospital. Same thing with
23 the University. Same thing with the University.

24 We have done a survey, and Mr. Kline is
25 here to talk for his client, where 86 percent -- 86

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1 percent of the users of this Coggins restaurant are
2 students at the University, and that doesn't even
3 include the faculty and the staff of the university.

4 Nobody comes to these restaurants or comes
5 to campus for the exclusive purpose of using these
6 retail related facilities. They are there for the
7 benefit of the students of the University in full
8 furtherance of its mission.

9 I have read to you the ANC resolution. I
10 have read to you the letter from the D.C. Hospital
11 Association. You have in the record the Zoning
12 Commission's order and the basis on which that Zoning
13 Commission's order was based, that these food venues
14 were approved by the Commission, and they knew about
15 them. The ANC knew about them. The Foggy Bottom
16 Association knew about them. They chose not to
17 comment on them. They were approved.

18 So in the end, the Coggins food venue was
19 approved by the Zoning Commission. It is recognized
20 as a use that is customary and incidental to the
21 principal University use by zoning precedents and by
22 the Internal Revenue Service.

23 It is factually dependent upon the
24 patronage of the 700 students in the dormitory in
25 which it is located. It is located entirely within

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1 the approved campus area, and it is consistent with
2 retail related uses that have been repeatedly --
3 repeatedly approved and are now in existence in the
4 District of Columbia and in other jurisdictions.

5 Thus, the ANC appeal is clearly without
6 merit and, for that reason, should be promptly denied.

7 There was no error here.

8 In our application we also made it clear,
9 the written presentation to the Zoning Commission,
10 that the retail related uses at the Square 43
11 dormitory will be operated in a similar fashion as
12 those at the Marvin Center -- that is, open to the
13 public. That is in the record. That is black and
14 white. It's there, and it is on that basis that the
15 Zoning Administrator issued the C of O allowing this
16 Coggins food venue service to be at this location in
17 this dormitory, on this campus in furtherance of the
18 mission of the University. Thank you.

19 CHAIRPERSON GRIFFIS: Good. Thank you
20 very much. A couple of quick questions.

21 First of all, the resolution of the ANC
22 and also the Foggy Bottom Association -- you cited a
23 letter from them. Are they in the record?

24 MR. MOORE: They are in the record of the
25 BZA case -- of the Zoning Commission case -- I'm sorry

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1 -- for the approval of the Square 43 --

2 CHAIRPERSON GRIFFIS: But they are not, in
3 fact, in the file.

4 MR. MOORE: -- but I can offer them to the
5 record in this case.

6 CHAIRPERSON GRIFFIS: Yes, why don't we do
7 that, if you wouldn't mind.

8 MR. MOORE: I have one for Ms. Miller as
9 well.

10 CHAIRPERSON GRIFFIS: Also, going to your
11 survey there was --

12 MR. MOORE: In addition -- I'm sorry, Mr.
13 Chairman -- we have letters of support that didn't
14 reach the file from some residents of the area. I
15 would like to cite one from Ms. Olive Hopkins who
16 lives in the same residential complex as Mrs. Miller.

17 I will just read briefly:

18 "I have been a resident of Foggy Bottom
19 for over 20 years, and I am amazed that an ANC
20 Commissioner would tell me that I cannot use a
21 convenience store in my neighborhood. I think these
22 stores should be open to everyone. Very few people
23 from outside Foggy Bottom will use these stores,
24 because (a) there is very little parking; (b) only
25 people who live in Foggy Bottom know about the stores;

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1 and (c) people from other areas can buy the same
2 things where they live. They are not coming."

3 We have a letter from the Consortium of
4 Universities as well in support of the decision of the
5 Zoning Administrator. I will give those to Ms. Bailey
6 -- if she were here.

7 CHAIRPERSON GRIFFIS: She will be right
8 back. She is making copies of your last filing.

9 MR. MOORE: Mr. Barber and I are available
10 for any questions that you might have. I will also
11 have copies of these photographs from American
12 University which show a McDonald's, Subway, and UPS
13 store, all signs on the outside, all open to the
14 public.

15 CHAIRPERSON GRIFFIS: Are you aware of
16 Exhibit Number 21 and Number 23, which are both
17 letters?

18 MR. MOORE: I'm sorry.

19 CHAIRPERSON GRIFFIS: Let me start with
20 Exhibit Number 23, a letter from Kevin Mullin. Let me
21 get to the heart of this matter.

22 MR. MOORE: Yes. Those are the letters I
23 just gave to --

24 CHAIRPERSON GRIFFIS: Okay. So you are
25 adopting these into your presentation of the case?

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1 MR. MOORE: Yes.

2 CHAIRPERSON GRIFFIS: And also Exhibit
3 Number 21, Eileen Hennessey?

4 MR. MOORE: Yes. Yes, those are letters
5 that come from the residents of the Foggy Bottom
6 neighborhood saying that they do not agree with the
7 ANC position on this.

8 CHAIRPERSON GRIFFIS: Okay. It would be
9 appropriate to keep them in the record, as we don't
10 have any other way to have letters of support.
11 Substantively, let's get to this 86 percent. That was
12 what you just stated and also in your written
13 submission. You said that 86 percent of those that
14 use the facilities are students. Correct?

15 MR. MOORE: Yes.

16 CHAIRPERSON GRIFFIS: But you then made a
17 statement of that's not including the staff.

18 MR. MOORE: That's correct.

19 CHAIRPERSON GRIFFIS: So then to be very
20 clear, in addition to the 86 percent you have people
21 that are obviously directly associated with the
22 University that are using this.

23 MR. MOORE: Correct. That's correct.

24 CHAIRPERSON GRIFFIS: So did you get an
25 assessment of how much that is?

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1 MR. MOORE: We do not have an assessment
2 of those. What we were able to do is we were able to
3 track the students by what's called a GWorld Card.

4 CHAIRPERSON GRIFFIS: I see.

5 MR. MOORE: They come in. They swipe it.
6 Ah, that's a student.

7 CHAIRPERSON GRIFFIS: I see.

8 MR. MOORE: Count another one.

9 MR. BARBER: But the point is, I think,
10 Mr. Griffis, that the number -- the percentage of
11 University users is in excess of 86 percent. How much
12 in excess we can't judge, but it is in excess. I am
13 one of those people. I am a staffperson. I go to
14 Coggins and pick up a sandwich. I won't be counted in
15 that 86 percent.

16 CHAIRPERSON GRIFFIS: Indeed. That's a
17 good clarification, and another clarification is your
18 name and address for the record.

19 MR. BARBER: I'm sorry. You got me.
20 Charles Barber, Senior Counsel, George Washington
21 University, 2100 Pennsylvania Avenue.

22 CHAIRPERSON GRIFFIS: Excellent. Thank
23 you, Mr. Barber. So my assumption then -- Well, I
24 don't know. But clearly, it's above 86 percent use of
25 those that are directly associated with the

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1 University.

2 MR. BARBER: Yes.

3 CHAIRPERSON GRIFFIS: Okay. I think
4 that's all I have. Question?

5 BOARD MEMBER ETHERLY: Yes. I just wanted
6 to jump in, because I wanted to follow up on that very
7 quickly.

8 Your offer of that statistic -- would that
9 suggest that if the statistic were lower, would that
10 perhaps change the outcome of the analysis? Let's
11 say the statistic, instead of 86 percent, were 49
12 percent and you had a slight majority of the patrons
13 of Coggins coming from off campus. Would that change
14 the outcome of the analysis?

15 MR. MOORE: It would not change the
16 analysis in this case, because this case is dependent
17 upon assignment of error to the Zoning Administrator
18 in issuing the Certificate of Occupancy.

19 As long as the issue was brought before
20 the Zoning Commission, which it was, and it was
21 addressed by the Zoning Commission, which it was, and
22 approved by the Zoning Commission, it wouldn't matter
23 if there was just one student going in there. That's
24 all that it matters. The Zoning Commission has
25 approved the use, period.

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1 BOARD MEMBER ETHERLY: Okay.

2 CHAIRPERSON GRIFFIS: But to be clear on
3 this case, you said that on the record at the Zoning
4 Commission -- Oh, now I forget -- what center was it?

5 MR. MOORE: The Marvin Center.

6 CHAIRPERSON GRIFFIS: The Marvin Center
7 was given as an analogous use. So, clearly, it was
8 addressed, although perhaps in some folks' mind
9 limitedly, but it was addressed in terms of what was
10 actually going to happen there.

11 MR. MOORE: Well, indirectly, yes. The
12 University wouldn't put this facility there as a
13 stand-alone facility without it being a part of the
14 University. It can't be there unless the University
15 says it is going to be there.

16 CHAIRPERSON GRIFFIS: Right.

17 MR. MOORE: And the University put it
18 there to serve its students, for no other reason. To
19 the extent that there are incidental public users was
20 in the case at the Zoning Commission, but the Zoning
21 Commission approved it as is. Why? Because that is
22 the status quo. That's what is happening today in
23 colleges and universities, not only in Washington but
24 around the country. That's what's happening.

25 BOARD MEMBER ETHERLY: Just to follow up,

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1 Mr. Chair, we had a little bit of that exchange
2 between DCRA and you earlier regarding clarification
3 on that issue: Is the accessory use being offered as
4 accessory to the operation of the dormitory or the
5 operation of the mission of the University?

6 I am not necessarily beholden to whether
7 or not that is a pivotal question, but I'll just --
8 For sake of clarification, I wanted to be sure we
9 cleared that up.

10 MR. MOORE: The dormitory has no mission
11 except to further the mission of the University.

12 BOARD MEMBER ETHERLY: Thank you, Mr.
13 Chair.

14 CHAIRPERSON GRIFFIS: Thank you.
15 Excellent. Good question. Ms. Miller?

16 VICE CHAIRPERSON MILLER: Mr. Moore, I
17 wonder if you could just explain a little further
18 about what's at the Marvin Center? Is it very similar
19 to these food venues?

20 MR. MOORE: Well, let me ask Mr. Barber to
21 do that. He is better able to do that than I, if you
22 don't mind.

23 MR. BARBER: Thank you. The Marvin Center
24 is our student center. So there will be a number of
25 media rooms, but in terms of the retail food venues

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1 you have a Subway, you have Starbucks, you have
2 Einstein Bagels, you have an oriental stir fry of a
3 particular chain.

4 So, yes, they are comparable retail food
5 venues, some of which are associated with national
6 chains.

7 VICE CHAIRPERSON MILLER: And are they
8 open to the public?

9 MR. BARBER: Oh, they certainly are.

10 VICE CHAIRPERSON MILLER: Are they visible
11 to the public or you wouldn't know unless you went in
12 the building?

13 MR. BARBER: The way they are situated,
14 particularly since we have reconfigured the building,
15 they are mostly on the interior. The situation before
16 you is probably more analogous to American University
17 where they have a lot of visible presence on the
18 street. With the ivory tower before you, you have the
19 visible presence, particularly of Coggins, and then
20 the rest of them are in the lower part of the
21 building. With the Marvin Center they tend to be in
22 the interior of the building.

23 VICE CHAIRPERSON MILLER: But the public
24 can go into the Marvin Center?

25 MR. BARBER: Yes, they can, and they do.

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1 VICE CHAIRPERSON MILLER: Okay. Thank
2 you.

3 CHAIRPERSON GRIFFIS: Good. Anything
4 further? Any other questions? Mr. Hood?

5 COMMISSIONER HOOD: Mr. Moore or Mr.
6 Barber, you mentioned that the Zoning Commission
7 approved -- they put approval on it. Okay, that's
8 understood. But looking back at the transcripts,
9 which I'm sure you have -- I haven't -- was there ever
10 discussion about who was going to actually use the
11 venues? Was there ever -- Did that discussion ever
12 take place?

13 MR. MOORE: That discussion did not take
14 place, because I think there was a general assumption,
15 because we put in our application it would be operated
16 the same way as the food venues at Marvin Center, that
17 it would be operated the same way as the Marvin
18 Center. Was there ever a direct discussion on that
19 issue? No, sir.

20 COMMISSIONER HOOD: And let me ask you, in
21 the other universities -- I'm sure you looked at the
22 other -- You alluded to another campus plan, which I
23 would not talk about, but was that made evident in
24 that case, too, because they are actually the same
25 principle.

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1 MR. MOORE: I can't speak to the Howard
2 University case. I can speak for the American
3 University case, and there was a discussion on that
4 specific issue, and the end result was that the
5 restaurants are there, with the outside signage,
6 serving the public -- well, serving the university,
7 incidentally serving the public.

8 COMMISSIONER HOOD: Now when I look in the
9 order and it says the dormitory will contain three or
10 four food venue locations, three on the lower level
11 and one at ground level, I know the Commission
12 normally when we try to do ground level, we do that
13 for a reason. I'm just wondering if you had looked at
14 this transcript, did we talk about that? I can't
15 remember. So I have to lean on you.

16 MR. MOORE: It didn't come up, Mr. Hood.
17 I might add one other thing, is that the Coggins
18 restaurant, as we have pointed out in our papers -- it
19 curtails its hours pretty severely during the
20 Christmas break, simply because there's not enough
21 people there to justify the restaurant being open.

22 In addition to that, it is a -- The food
23 venues close to the public at ten o'clock at night,
24 but they remain open to the students until two o'clock
25 the next morning, simply because their primary mission

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1 is to serve the students. To the extent that there
2 are incidental public users, there are no incidental
3 public users after ten o'clock, or very many of them
4 that come in during the breaks.

5 CHAIRPERSON GRIFFIS: Indeed, and that is
6 part of your written submission.

7 MR. MOORE: Yes. Yes, it is.

8 CHAIRPERSON GRIFFIS: Okay.

9 COMMISSIONER HOOD: My next question: You
10 alluded to the Marvin Center. In the order -- I was
11 looking over the order 958. Does it allude to that?
12 I saw it somewhere. Maybe it was in your submittal,
13 but I saw where the Marvin Center was alluded to.

14 MR. MOORE: Yes, it was in the Zoning
15 Commission case approving Square 43.

16 COMMISSIONER HOOD: Square 43?

17 MR. MOORE: That's the ivory tower
18 dormitory that is it at issue here.

19 COMMISSIONER HOOD: And the reason I'm
20 proceeding like this matter, because you know, we had
21 another case I think you represented, and we
22 specifically looked at the uses or who could use the
23 facility.

24 MR. MOORE: Yes, you did.

25 COMMISSIONER HOOD: I just want to make

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1 sure we are consistent. If it's your testimony we
2 didn't do that with American University and Howard,
3 then --

4 MR. MOORE: It's my testimony that you did
5 do that with American University. I don't know about
6 Howard.

7 COMMISSIONER HOOD: The use issue.

8 MR. MOORE: Yes. And you did do that with
9 the Health and Wellness Center, as someone pointed
10 out.

11 COMMISSIONER HOOD: Yes, I remember that
12 one for some reason.

13 MR. MOORE: As I said, the Zoning
14 Commission has the authority to cap or to regulate
15 accessory uses, if it chooses to do that. It did not
16 do that in this case. Therefore, there was no error,
17 and that's the issue.

18 I think Ms. Bell was correct in moving the
19 Board to deny the appeal, because there is no evidence
20 of error, because that's the only issue before the
21 Board: Did the Zoning Administrator commit error in
22 issuing that C of O? There is no evidence that he
23 did, and you need look no further than Order 958.

24 We've given you a lot of background, but
25 the truth of the matter is Order 958.

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1 COMMISSIONER HOOD; You know, Mr. Moore,
2 let me ask you for clarification. That order is not
3 in front of us, but for clarification issue, would you
4 object to maybe the Zoning Commission -- You may get
5 the same -- probably may get the same outcome, but
6 object for future campus plans that they may revisit,
7 would you have a problem with that?

8 MR. MOORE: I haven't discussed that with
9 Mr. Barber.

10 MR. BARBER: Let me just add, Mr. Hood --

11 COMMISSIONER HOOD; I know that's a wide
12 open question.

13 MR. BARBER: Well, let me take a swing at
14 it. I just don't think it would be appropriate. I
15 think the ANC had their shot at that. This was not a
16 surprise. This was not something we were hiding back.
17 It was in our papers about how these venues would be
18 operated. They know how the Marvin Center operates.

19 Some of their members -- Some of their
20 constituents go to the Marvin Center to buy their cup
21 of coffee, their sandwich from Subway. So it was on
22 the record.

23 Now it was behooving on them -- It was
24 their obligation to bring it up at that Zoning
25 Commission. They did with the Health and Wellness

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1 Center, and the Zoning Commission responded. They had
2 the opportunity when this issue was before the Zoning
3 Commission. This dormitory with its food venues was
4 before the Zoning Commission. They had the
5 opportunity to raise this issue as a possible
6 objectionable impact. They did not.

7 I think that door should be foreclosed to
8 them.

9 COMMISSIONER HOOD: Okay. Thank you.

10 CHAIRPERSON GRIFFIS: Any other questions?

11 Good. One last note I wanted to bring to light, and
12 maybe you want to highlight it. But you cite the
13 Citizens Coalition case for the Board, and that had to
14 do with Georgetown University, and it was going to the
15 accessory use. Actually, that was their generator
16 plant, whatever they call it.

17 MR. MOORE: It's the co-gen plant.

18 CHAIRPERSON GRIFFIS: So the analogy, if I
19 understand it, and asking for you to correct it if I
20 don't fully understand, was that here for the
21 University's use they were going to create their own
22 electricity, but anything overflowing what they
23 actually needed at that point, electricity being what
24 it is, they were going to sell it off to PepCo. That
25 was more of an overflow or an accessory to what the

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1 main purpose was.

2 The analogy was to go to this, that the
3 principal use is the University, and the accessory are
4 these food services, and the incidental users are
5 those that aren't directly related to the University
6 or aren't directly students.

7 MR. MOORE: Yes, sir. The principle we
8 cited the Co-gen case for is that the fact that a
9 university accessory use is open to incidental public
10 users does not diminish the status as an accessory
11 use.

12 CHAIRPERSON GRIFFIS: Indeed. Okay.
13 Good. I don't have anything further then unless the
14 Board has any other additional questions. Anything
15 further? Okay. Then let's go to cross. Ms. Miller,
16 do you have questions?

17 CROSS-EXAMINATION

18 BY MS. D. MILLER: Don't you think there
19 is a difference between the campuses of American U.
20 and Georgetown and George Washington? In other words,
21 aren't those other two defined campuses, and this one
22 has such a fluid border that it seems to me under
23 everywhere?

24 MR. BARBER: I think there are differences
25 among those campuses, but those differences are not

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1 significant for the purpose of the issue before us
2 today.

3 MS. D. MILLER: And isn't the Marvin
4 Center in the sort of center and heart of the
5 University where this is on the periphery in our
6 residential area next to a special street?

7 MR. BARBER: The Marvin Center is on 20th
8 Street right across from Tower Records near -- about a
9 half a block from Pennsylvania Avenue, however you
10 might want to categorize it.

11 MS. D. MILLER: This is on 23rd Street.
12 Right? Which is a special street.

13 MR. BARBER: Yes. Ivory Towers is on 23rd
14 Street.

15 MS. D. MILLER: And we did -- I can't
16 believe that you can say that we didn't raise this
17 question when you came before the ANC, when you came
18 before Foggy Bottom. My recollection is we raised it
19 both times, and you all assured us it wasn't going to
20 be commercial. It was going to be just for university
21 use, and nothing was said about any feeding --

22 MR. MOORE; Wait a minute. You're
23 testifying, Ms. Miller.

24 MS. D. MILLER: All right, all right. Did
25 you at anytime tell us there was going to be something

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1 outside? You never did, that I know of.

2 MR. MOORE: Wait a minute. What is the
3 question.

4 CHAIRPERSON GRIFFIS: Asked and answered.

5 MS. D. MILLER: The question is: Did you
6 tell us that it was going to be an outside serving
7 area?

8 MR. BARBER: There are two separate
9 questions. Outside serving area?

10 MS. D. MILLER: Right.

11 MR. BARBER: Our plans clearly showed an
12 outside patio.

13 MS. D. MILLER: No, not the plans you gave
14 us, not the plans that I've got, nor did you say --

15 MR. BARBER: The plans that were submitted
16 to the Zoning Commission that we shared with the ANC
17 did show an outside serving area.

18 MS. D. MILLER: My plans didn't show that,
19 the one that I saw. The other one was that --

20 MR. MOORE; Ms. Miller, the plans upon
21 which the Zoning Administrator relied in issuing the C
22 of O, in consistency with the zoning regulations, show
23 the food venue at ground level with the outside patio.

24

25 MR. BARBER; In fact, I do recollect -- I

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1 recollect a conversation, in answer to your question,
2 with Elizabeth Elliott. Elizabeth Elliott -- You know
3 Elizabeth Elliott. She is a former Chair of the ANC,
4 and the issue was impact of the students in the
5 neighborhood and weren't they going to be making
6 excessive noise and the like.

7 She pointed out, well, you got a patio,
8 and they could be outside. I remember her bringing
9 that up. So I know she was aware of it.

10 MS. D. MILLER: All right. But --

11 MR. BARBER: And our plans certainly were
12 clear.

13 MS. D. MILLER: The patio she referred to
14 -- wasn't that the center court?

15 MR. BARBER: No. It was the outside. She
16 pointed out to me the G Street patio. That's on the
17 plans right here in the record.

18 MS. D. MILLER: Not the ones we have.
19 Anyway, the -- I guess that's it.

20 MR. MOORE: Thank you.

21 CHAIRPERSON GRIFFIS: Thank you very much.

22 Is there any other cross from the other intervenor or
23 the government? No other cross? Okay. Then let's go
24 to the second intervenor.

25 MR. KLINE: Good evening. Andrew Kline on

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1 behalf of Coggins Sandwich Manufacturing. Craig
2 Hanken, who is a principal of the licensee,
3 unfortunately, had to leave. He had to return to New
4 York, was here earlier but, unfortunately, had to
5 leave.

6 I am going to be very brief. Although my
7 client has the most at stake in this proceeding today,
8 as it is the venue that operates at that location,
9 unfortunate to have had Mr. Bello and Ms. Bell, Mr.
10 Moore and Mr. Barber do the heavy lifting today,
11 because it seems to me that most of the issues have
12 been covered.

13 I just want to make two brief points. One
14 is: Ms. Miller said -- and I took note of it, because
15 I think it kind of makes the point based on everything
16 else that we have heard today -- that when she went to
17 college we had cafeterias. When I went to college, we
18 had cafeterias, too.

19 There was a food service venue. It was on
20 campus. There was a meal plan. You know what?
21 Everybody hated the meal plan. Nobody ate there. My
22 parents bought me a meal card. I never used it, and I
23 took other money. Where did I go? I went to
24 commercial establishments that were on or near the
25 campus.

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1 The fact of the matter is the college
2 cafeteria that most of us probably knew -- and I'm not
3 going to say loved, but existed -- is an anachronism.

4 It doesn't exist anymore, and the reason that it
5 doesn't exist is because it has been supplanted by
6 promotional uses on campuses all over the country.

7 Mr. Hanken, who as I said was here earlier
8 and unfortunately had to leave, was previously with
9 Cosi, which is another chain, has 10 or 15 locations
10 in the Washington area, and he recounted to me -- and
11 we will submit something for the record, as he is not
12 here, and I'm not testifying. But they are on six
13 campuses around the country.

14 When he was with Cosi, they opened
15 locations on six campuses. So the point is what was
16 done here is exactly consistent with the modern trend
17 for food service on university campuses. That's the
18 way it's done.

19 Now to open up a Subway or a McDonald's or
20 a Friday's or a Coggins in a university dorm or in
21 another university facility and pretend like the
22 public is not welcome does not represent a very good
23 business model, and it certainly -- having it open to
24 the public does not change its character as being
25 incidental to the mission of the university and as

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1 being an accessory use to what was done in this
2 dormitory.

3 You have already heard the statements that
4 86 percent of the sales, based on a survey that was
5 done, are from students, and that is based upon the
6 GCard that is used commonly on the George Washington
7 University campus.

8 That doesn't include those students who
9 may have left their GCard in their jeans and washed it
10 in the washing machine or left it back in their dorm
11 or students who otherwise used cash to purchase food
12 in the establishment, and this has previously been
13 pointed out. It doesn't include faculty members who
14 may have dined there or even staff members such as Mr.
15 Barber who is here today who indicates that he
16 purchases food and dines in the establishment.

17 So the fact of the matter is this
18 establishment serves the very purpose which was
19 intended by the Zoning Commission, which is to be in
20 the Ivory Towers dorm and serve the university
21 population, be they students, be they staff members,
22 be they faculty members.

23 The only other point I want to address is
24 there has been a lot of discussion around and about
25 the use of public space. The use of public space is

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1 something that is under the province of the Mayor,
2 under reorganization order. There is a Public Space
3 Committee that was constituted.

4 It is up to the Public Space Committee to
5 determine whether public space will be used, and I am
6 the attorney that handled the public space permit
7 before the Public Space Committee.

8 The Public Space Committee granted a
9 public space permit. Their only comment concerning
10 zoning or a Zoning Administrator decision was, if it
11 has a Certificate of Occupancy for a restaurant, then
12 a sidewalk cafe, a public space permit -- sidewalk
13 cafe with a public space permit is perfectly
14 appropriate, which is why they approved the public
15 space permit. There wasn't anything under the public
16 space regulations which prohibited the issuance of
17 that permit, which is why they approved it.

18 The comment to Ms. Miller was, if you have
19 difficulty with the use, then that is a zoning issue,
20 and you need to take that up with the Zoning
21 Administrator, and that's what brings us here today.

22 Other than that, I believe it has
23 thoroughly been covered this afternoon. If any of the
24 members have any questions, I will be certainly happy
25 to answer them.

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1 CHAIRPERSON GRIFFIS: Good. Thank you
2 very much. Are there questions from the Board? Is it
3 your understanding then that under the newly
4 constituted Public Space Committee that even campus
5 plans -- even areas that are in the campus plan go
6 through the Public Space Committee for public space
7 permits?

8 MR. KLINE: Any use of public space goes
9 through the Public Space Committee.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. KLINE: The Public Space Committee has
12 jurisdiction over public space.

13 CHAIRPERSON GRIFFIS: Just to hit this
14 even further home then, even through it is all within
15 the campus plan, the streets and the sidewalks are
16 still public?

17 MR. KLINE: Correct. And to hit it even
18 further, to use your analogy, in order to use public
19 space, as you probably know, one must rent it from the
20 District of Columbia, and in order to do that you
21 apply for a public space permit. That's exactly what
22 was done in this case.

23 CHAIRPERSON GRIFFIS: Okay. Good. Thank
24 you very much. If there is nothing further from the
25 Board, let's go to cross. Ms. Miller?

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CROSS-EXAMINATION

1
2 BY MS. MILLER: Your comments that all of
3 this comes under the Public Space Committee -- Aren't
4 you aware that a permit for use of public space under
5 the campus plan has to be granted as a special
6 exception by the Zoning Commission?

7 MR. KLINE: I believe we are into legal
8 argument, and I wasn't testifying. I was really
9 making argument on behalf of my client. But my --

10 CHAIRPERSON GRIFFIS: I'm sorry. You are
11 the legal representative of your client. Is that
12 correct?

13 MR. KLINE: That's correct.

14 CHAIRPERSON GRIFFIS: All right. Then we
15 got to have cross -- We can't.

16 MS. D. MILLER: All right. Now the other
17 thing --

18 CHAIRPERSON GRIFFIS: I said I'm not sure
19 what we are doing.

20 MS. D. MILLER: Well, he has made a couple
21 of statements I don't agree with, and I am trying to
22 figure out how to correct them.

23 CHAIRPERSON GRIFFIS: Okay. I tell you
24 what. Why don't you save it for our closing, and that
25 way --

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1 MS. D. MILLER: Well, I could do that.
2 Okay. Could do that.

3 CHAIRPERSON GRIFFIS: Okay. If there is
4 no cross of the attorney, which I assume there isn't,
5 then we will move on. You don't need to go anywhere.
6 We are ready for closings.

7 MS. D. MILLER: A couple of things
8 happened at this hearing and at the hearing before the
9 Zoning Commission and at the hearing before the ANC
10 and the Foggy Bottom. Now I gave you a copy of the
11 one that -- the thing that shows the center court.

12 It was our understanding, and I have it on
13 tape, that that was where they thought -- we thought
14 they were going to feed the students from these
15 restaurants, if they fed them outside. And that is
16 what Elizabeth Elliott thought when she asked the
17 question, that it would be in this center court area,
18 not on our sidewalk, not on our street, and not next
19 to a special street like 23rd Street.

20 Now the other thing is that we know that
21 the boundary on George Washington is awfully loose,
22 and intense use of something should be in the center,
23 not on the periphery of the campus; because the
24 periphery of the campus -- This block was originally -
25 - I don't know whether you are familiar with it or not

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1 -- was originally kept residential to protect us from
2 the institution until GW bought all of the houses on
3 it and tore them down, without permission them down.
4 They were told to maintain them.

5 Then they built this. And if we had said
6 no to the dormitory -- ah, ANC doesn't want us to put
7 the students on campus. That's exactly what they
8 would have said. The only reason we approved this was
9 because they owned the land. They were going to build
10 a dormitory. Little did we think it was going to be
11 something this big and this obnoxious, and the
12 problems it is causing our neighborhood.

13 One of the things that has happened is
14 that we have on Columbia Plaza, which is bringing all
15 of this out with GW, is a thing called Sizzling
16 Express, and buses are coming from out of town and
17 parking there and unloading illegally in places to
18 feed, because you have to feed the tourists.

19 So we have got buses parked all over our
20 area. We have got students walking so that you can't
21 drive, and it does get to be a little irritating that
22 a residential area is being totally destroyed and that
23 our government doesn't seem to care, or the people who
24 are supposed to represent us don't seem to care that
25 we have no recourse.

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1 We don't have money. We don't have the
2 lawyers. We don't have the staff. We don't even have
3 an office, because of the way Congress set up the
4 ANCs, and you change them every two years and we have
5 got new ones coming in that haven't the vaguest idea
6 of what's already gone on.

7 Now I was told this was the way to try to
8 correct this problem, that I should file to have the
9 Zoning Administrator's thing -- issuance overturned,
10 because that's what the Public Space Committee said.
11 We only granted it, because the Zoning Administrator
12 approved the occupancy.

13 So when I went to the Zoning Office and
14 asked how I could cope with it, that was what I was
15 told. I should bring a complaint to overturn the
16 Zoning Administrator's issuance of that, and that's
17 what I have tried to do. Obviously, I am failing, and
18 I'm sorry I am failing, because my neighborhood is
19 being destroyed, and that hurts.

20 We don't have lawyers. We don't have
21 money, but we do try.

22 CHAIRPERSON GRIFFIS: Indeed. Thank you
23 very much, Ms. Miller. Are there any last questions
24 from the Board?

25 Let me begin. First of all, I appreciate

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1 everyone's patience with the Board this afternoon in
2 staying so late, and in addition to putting so much
3 time into addressing this appeal, as much time as you
4 put in and the passion and the effort the Board has
5 equally given that time and attention to all these
6 issues and trying to sift through all the responses
7 and, specifically, trying to really narrow the scope
8 of this within our own jurisdiction so that we could
9 frame it in a point and position that we could
10 deliberate and decide on.

11 I believe that, through this hearing, it
12 has been fruitful in narrowing that, and I believe
13 that the Board is prepared to deliberate on this today
14 and offer a bench decision.

15 Ms. Miller, it isn't lost on this Board,
16 or specifically me, the larger issues that are brought
17 up in this appeal, the larger issues in your, frankly,
18 moving concluding remarks of tourists and bus traffic
19 that are coming in, in terms of the expansion of the
20 University or, as you say, the loose boundary of the
21 University.

22 I take issue with the loose boundary, as I
23 thought I was part of the approval of the boundary
24 campus plan, but I understand what you mean. It's
25 moving, and has over the decades.

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1 The issue of the population of students
2 and how they impact the daily life of the residents
3 that are adjacent to the University -- Gosh, you even
4 elicited Congress and what they have done, all of
5 which are important and specific issues of pertinence,
6 certainly, to the residential area in Foggy Bottom
7 and, I think, overall in the city.

8 But to this Board all of those issues
9 don't go directly to the matter at hand for the
10 appeal. You've brought up a larger issue about where
11 this type of service should be located. Is it
12 appropriate close to a border or should it be more
13 central?

14 Again, it counts to the argument that is
15 much more appropriate before now the Zoning Commission
16 in terms of the special exception in approving the
17 building itself, and that process, as is shown in the
18 submissions today and in the oral testimony, was
19 provided; and it was provided under the Zoning
20 Commission order which was issued, which leads us
21 directly to the matter at hand that I find that we
22 were investigating, whether there was an error that
23 was created by the Zoning Administrator in issuing a
24 Certificate of Occupancy.

25 Really, it does go directly to the

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1 question of was the Zoning Commission's order and
2 issuance of this and description and, more
3 appropriately, the issuance of the permit, the base
4 building permit -- maybe that's the connection you
5 could get to. Was there in that chain of events an
6 error that -- or that chain of events that led to a
7 Certificate of Occupancy not being issued or issued
8 for something else?

9 At this point, I haven't seen any
10 persuasive evidence that shows me where the error was
11 made, but rather I see very persuasive evidence of
12 how, in fact, the Zoning Administrator followed the
13 Zoning Commission's own order and the issuance of the
14 original permit and then issued subsequently the
15 Certificate of Occupancy in question.

16 Let me open it up to others that may have
17 additional brief -- or deliberation on this, and then
18 I will continue, if need be. Mr. Hood?

19 COMMISSIONER HOOD: Mr. Chairman, I would
20 just say that -- I'll start off one set, that I
21 believe that this should have been in the jurisdiction
22 of the Zoning Commission, to begin with. But I was
23 presented as an appeal, and since that's the way it
24 was presented, I'm ready to move forward in that
25 venue.

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1 When I looked at the summary order after
2 hearing all of the discussions, I think Ms. Miller
3 raises a concern, also the bigger picture of it that's
4 going on. I would encourage Ms. Miller. A statement
5 I think she made for the record earlier was -- in
6 other words, she wouldn't sit at the table at all with
7 GW. I don't know if she said it in that exact vein,
8 but that's the way I interpreted it. But I would tell
9 you that, looking at the summary order and trying to
10 figure out what the Zoning Commission's intent was,
11 this issue may not have been specifically brought up,
12 but when I look in the order, and we say three on the
13 level -- and I'm just reading the last part of 20
14 that's in the order -- three on the lower level and
15 one on the ground level -- When I look at that, I know
16 how the Commission usually intends to try to attract
17 business on the ground floor level.

18 That may have been the intent. I don't
19 want to speak for my other colleagues as one who
20 participated on that case. So the issue of whether it
21 is for non-students or students only, to my knowledge,
22 never came up, and I don't know if it has ever come up
23 as far as restaurants or eating establishments on any
24 campus.

25 If it has, I will be the first to say that

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1 I made a mistake. But I'm not sure. I know it has
2 come up in other classifications dealing with fitness
3 centers and the like, but in this instance -- and when
4 I look at this, and this is what gives me the
5 confidence level -- When I look at ground level, I
6 believe that my interpretation of what we meant, or
7 what I meant as one who participated, would have meant
8 to draw in the general public or not just for students
9 only.

10 Again, I'll go back to my first statement.

11 I think it is better served in front of the
12 Commission, but this is the way it's presented, and
13 this is what I have faced in front of me, and this is
14 how I will govern myself accordingly. Thank you.

15 CHAIRPERSON GRIFFIS: Good. Thank you,
16 Mr. Hood. Ms. Miller?

17 VICE CHAIRPERSON MILLER: As one who
18 didn't participate in it, I look at the language of
19 the Commission order where it specifically reflects
20 spaces for three or four food venue services, and
21 looking at that, I find it extremely reasonable that
22 the Zoning Administrator would interpret it the way he
23 has and issue a Certificate of Occupancy for a
24 restaurant in this case.

25 I think it would have been improper to

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1 read in an interpretation restricting the public,
2 based on that language. I think that the Zoning
3 Commission has restricted use by the public when it
4 intended to do so. So I don't think it would be
5 proper at all to read in some kind of restriction
6 where one isn't stated.

7 Also, based on that language and based on
8 the testimony we heard, the plans were before the
9 Commission showing a space for three or four food
10 venue services, and I think the time to challenge the
11 access to those services was in that hearing before
12 the Zoning Commission, and that we wouldn't have
13 authority in this particular case to change the
14 conditions to restrict.

15 Based on the testimony we heard, it also
16 appears that this is an accessory use to the
17 University and is allowable. So I don't think that --
18 I don't think we have any evidence that the ZA made an
19 error in this case.

20 Finally, with respect to the public space
21 issues, we don't have jurisdiction to address those.

22 CHAIRPERSON GRIFFIS: Good. Thank you.
23 Mr. Etherly.

24 BOARD MEMBER ETHERLY: Thank you very
25 much, Mr. Chair. I will associate myself for the

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1 purposes of brevity with the remarks of all of my
2 colleagues who have spoken thus far. I will perhaps
3 take just a quick second of dicta which, for those of
4 us who have not been exposed to the joys of law
5 school, simply means language or aspects of a case
6 decision or deliberation that don't necessarily go to
7 the merits of the case.

8 That is to really echo, I think, what the
9 Chair got to in his remarks with respect to perhaps
10 the pains oftentimes and criticisms that this Board
11 has taken with respect to what is very clearly a long,
12 complex and sometimes perhaps even sordid history with
13 respect to the interplay and relationship between
14 Foggy Bottom and the University.

15 I agree once again completely with the
16 grounds for the motion as we begin to move in that
17 direction, Mr. Chair. I think it is the absolutely
18 right outcome, but from the standpoint of the dicta
19 aspect of my comments, I will just simply note
20 sometimes I am hopeful that we do not lose sight of
21 the forest because we are so caught up in the trees.

22 I think this is perhaps an instance where,
23 as has been alluded to by the intervenors, we do have
24 some evidence on the record that there are, in fact,
25 some very positive and constructive purposes that are

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1 perceived to be served by the subject property here,
2 as evidenced by some of the letters that we received
3 from Foggy Bottom residents, and it is perhaps a rare
4 occasion that we have had illustrations of that type
5 of spirit with respect to George Washington University
6 and Foggy Bottom residents. But I don't think that
7 fact is lost on me, that we do have records, we do
8 have testimony in the record, written testimony, which
9 speaks to the positive impact that the subject
10 venue/food court serves in this particular instance,
11 and I think that is very important to note.

12 As was stated by Mrs. Miller, I appreciate
13 the spirit with which she spoke about it, but I also
14 do take very seriously concerns that perhaps a
15 community or a neighborhood is dying, as Mrs. Miller
16 alluded to, or being strangled in some sense.

17 As I noted before and as the Chair noted,
18 this case has had a complicated history, and there
19 have been significant emotions and energies, fears,
20 anger, frustration, you name it. The emotion has
21 probably been on the table with respect to the
22 relationship here, but I just don't simply believe
23 that we find ourselves at that type of situation with
24 respect to this piece.

25 Once again, all of that is dicta. I

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1 think, as my colleagues have stated previously, the
2 regulation, the law, the letter of the law, the letter
3 of the Zoning Commission's decision, I believe, was
4 followed in this case, and I don't find error. But I
5 believe it was important to note that, because I just
6 can't -- I just wouldn't want any of our residents to
7 feel that there is a deaf ear here at the Board on the
8 part of any of our colleagues to concerns about the
9 struggle of many of our communities as they try to
10 continue to fashion a relationship with large
11 institutional neighbors.

12 All of that being said, I just felt it was
13 very important to note that, Mr. Chair, that I think
14 there are some very positive aspects that are being
15 served by the venue here. I hope this Zoning
16 Commission will take a look at it and make an
17 appropriate decision, if they deem necessary, but I
18 just felt it was important to note that. Thank you
19 very much, Mr. Chair.

20 CHAIRPERSON GRIFFIS: Good. Thank you
21 very much, and appreciate those words.

22 Are there others? If not, at this time I
23 would move denial of Appeal 17249 of the Advisory
24 Neighborhood Commission 2A which was, of course,
25 asserting that the Zoning Administrator erred in

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1 issuing the Certificate of Occupancy permit Number
2 81956 which was dated August 19, 2004, at the location
3 within George Washington University known as the
4 Coggins Sandwich at the premises of 616 23rd
5 Street,N.W., and ask for a second.

6 BOARD MEMBER ETHERLY: Second, Mr. Chair.

7 CHAIRPERSON GRIFFIS: Thank you, Mr.
8 Etherly. Speaking again to the motion, I think what
9 has been raised is an awful lot of issues in terms of
10 the ANC's understandings and also the treatment of the
11 ANC or perceived treatment by the University. But I
12 believe that in this appeal that the evidence is
13 lacking to support their assertions, the assertions of
14 (1) the intent of the Zoning Commission, but also the
15 assertions that the Zoning Administrator erred.

16 There are several specific aspects that
17 were enumerated in the appeal submission, all of which
18 either became not zoning issues or the Zoning
19 Administrator played no role in. We talked about the
20 permit granted for the use of public space. We talked
21 about the bathrooms for the specific restaurant.
22 We've talked about notification.

23 Then it went to really the heart of the
24 matter as we looked at this, as it was defined, and
25 that was whether the issuance of the C of O was in

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1 error, and that was loosely defined, as it sometimes
2 is in appeals, and that's not inappropriate
3 necessarily, but the evidence submitted was not that
4 it was a wrong classification, that it should not have
5 ever been issued.

6 Evidence actually was presented of the
7 fact that the plans that went through for special
8 exception approved at the Zoning Commission had not
9 changed, and that the Certificate of Occupancy was
10 issued based on the construction of plans and
11 permitted plans attendant to that approval.

12 Thereby, not having evidence to the
13 contrary, I find that the Zoning Administrator did
14 correctly issue the Certificate of Occupancy.

15 Additionally, we had evidence and
16 testimony that the ANC did participate in the special
17 exception before the Zoning Commission at which these
18 plans were presented, and also the Foggy Bottom
19 Association. There was testimony presented that it
20 was -- the analogy was drawn to the Marvin Center,
21 which is a publicly accessed service center, part of
22 the University.

23 It would have been interesting if there
24 was persuasive evidence to the contrary, but that
25 evidence, in fact, was not refuted.

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1 So be that as I have in my notes and in my
2 understanding in deliberation on this, I will turn it
3 over to others, if there's further comment.

4 BOARD MEMBER ETHERLY: And I think just
5 one final point, Mr. Chair, as the seconder of the
6 motion. I think a very important part of the function
7 of the ANCs is to raise a question, and I think a very
8 important question has been raised here, and it is one
9 that the Zoning Commission, once again at the
10 appropriate point in time, if they so desire, will
11 take it up.

12 I think it is an important question to ask
13 what is the limit of the accessory use function that a
14 university or an institution can take advantage of.
15 It is a complicated question, as has been alluded to
16 in testimony.

17 Clearly, the nature of universities in
18 some fashion has changed, such that the traditional
19 model that we might think of fondly as we look back on
20 our college years may not still be applicable. I
21 think that is an important question to be raised by
22 the ANC.

23 That's not to throw the ANC a bone here.
24 I want to be very clear about that. But that is to
25 note that I think it is a very important question to

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1 ask and to seek some resolution on. So I just wanted
2 to highlight that, Mr. Chair. Thank you.

3 CHAIRPERSON GRIFFIS: Thank you very much.

4 Anything further? If not, we have a motion before
5 us. It has been seconded. I would ask for all those
6 in favor to signify by saying Aye. And opposed?
7 Abstaining? Ms. Bailey, if you wouldn't mind
8 recording the vote.

9 MS. BAILEY: The Board has voted five-
10 zero-zero to deny the appeal. Mr. Griffis made the
11 motion. Mr. Etherly seconded. Mrs. Miller and Mr.
12 Mann and Mr. Hood are in agreement, and this is a full
13 order, Mr. Chairman.

14 CHAIRPERSON GRIFFIS: That's correct.
15 Very good. Thank you all very much. Appreciate you
16 all being down here. We made it five minutes past my
17 assessment of when we would end.

18 Is there anything else for the Board this
19 afternoon?

20 MS. BAILEY: No, Mr. Chairman.

21 CHAIRPERSON GRIFFIS: Very well. If there
22 is nothing further for the Board, let's adjourn the
23 afternoon session of the 18th of January 2005.

24 (Whereupon, the Public Hearing of the
25 Board of Zoning Adjustment was adjourned at 7:08 p.m.)

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