

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ZONING COMMISSION
PUBLIC HEARING

AMENDMENTS -

TOLLING OF PUD TIME LIMITS

Case No.98-6

Hearing Room 220 South
441 4th Street, N.W.
Washington, D.C.

Thursday,
September 17, 1998

The above-entitled matter came on for hearing,
pursuant to notice, at 7:00 p.m.

BEFORE:

JERRILY R. KRESS, Chairperson
ANGEL F. CLARENS, Commissioner
HERBERT M. FRANKLIN, Commissioner
ANTHONY HOOD, Commissioner
JOHN F. PARSONS, Commissioner

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On Behalf of the Applicant

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STAFF PRESENT:

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Office of Zoning
KENNETH KARKEET, Office of Zoning
DAVE COLBY, Office of Zoning
BRUCE BRENNAN, Office of Corporation Counsel

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3 CHAIRPERSON KRESS: Good evening ladies and
4 gentlemen. I'm Jerrily Kress, Chairperson of the Zoning
5 Commission for the District of Columbia. Joining me this
6 evening are Commissioners Parsons, Franklin, Clarens, and
7 Hood. I declare this public hearing open.

8 The case that is the subject of this hearing is
9 Case Number 98-6, Text Amendments Tolling of PUD Time Limits.
10 On March 6th of 1998 the Office of Zoning received a
11 supplemental request for emergency rulemaking from the law
12 firm of Wilkes, Artis, Hedrick and Lane, on behalf of the
13 Archdiocese of Washington.

14 The original application was filed on June 7th
15 1998 under Case Number 95-8. This current request was again
16 filed on behalf of the Archdiocese regarding the property at
17 1717-1723 Rhode Island Avenue N.W., which was the subject of a
18 PUD approval by the Zoning Commission Order Number 496 dated
19 November 3rd 1986.

20 The initial request asked that the Commission
21 take emergency action to amend the text of the zoning
22 regulations to provide for tolling of the PUD time period
23 specified in subsections 2408.8 and 2408.9 during the pendency
24 of litigation. The commission denied this initial request for
25 emergency action and took no further action on the matter.

26 The current request again asks that the

1 Commission act on an emergency basis to provide for tolling of
2 the PUD time period. Notice of today's hearing was published
3 in the D.C. Register on July 31st 1998 and the Washington
4 Times on July 29th 1998. This hearing will be conducted
5 in accordance with the provisions of 11 DCMR 3021. The order
6 of procedure will be as follows:

- 7 1. Preliminary matters.
- 8 2. Presentation of the petitioner.
- 9 3. Reports of other agencies including the
10 Office of Planning.
- 11 4. Reports of advisory neighborhood
12 commissions.

13 And then:

- 14 5. Persons in support or opposition.

15 The Commission will adhere to this schedule as
16 strictly as possible.

17 Those presenting testimony should be brief and
18 non-repetitive. If you have a prepared statement, give copies
19 to staff and orally summarize the highlights. Please give us
20 your statement before summarizing. Each individual appearing
21 before the Commission must complete two identification cards
22 and give them to the hearing reporter before making a
23 statement. If these guidelines are followed an adequate
24 record can be developed in a reasonable period of time.

25 With that we will begin with preliminary
26 matters.

1 MS. PRUITT-WILLIAMS: Madam Chair?

2 CHAIRPERSON KRESS: Is your mic on?

3 MS. PRUITT-WILLIAMS: We've been through this
4 once already this evening, and try again. Could you please
5 turn your mic off.

6 CHAIRPERSON KRESS: Turn mine off?

7 MS. PRUITT-WILLIAMS: Yes.

8 CHAIRPERSON KRESS: Okay.

9 MS. PRUITT-WILLIAMS: I feel like I'm stuck in a
10 bad dream here.

11 MAN: You are. We are.

12 MS. PRUITT-WILLIAMS: We are.

13 MAN: You're not alone here.

14 MS. PRUITT-WILLIAMS: Staff would just like to
15 bring to order that this originally was advertised as an
16 emergency rulemaking measure. Since that time the need for
17 the emergency has abated, so you may want to just hear this
18 under the regular rulemaking process. That's the only
19 preliminary issue there is.

20 CHAIRPERSON KRESS: I believe it's also a
21 decision we can make as we proceed tonight. Thank you for
22 bringing that to our attention, unless it's the Commissioners'
23 desire to make a ruling on that at the moment?

24 Hearing no comments, we will go on and next ask
25 the presentation of the Petitioner.

26 MR. QUIN: Do you want our mics to be off too?

1 CHAIRPERSON KRESS: Oh, yes, mine's off. do you
2 want mine off, what do you want?
3 MS. PRUITT-WILLIAMS: We had them working
4 earlier. Yes, I think if you turn --
5 MR. QUIN: Now it's on.
6 CHAIRPERSON KRESS: Mine's on. Is your's on?
7 MAN: Mine is off.
8 MS. PRUITT-WILLIAMS: I think if you turn your's
9 off while Mr. Quin speaks. I think we can only have one mic
10 on at a time.
11 CHAIRPERSON KRESS: All right.
12 MS. PRUITT-WILLIAMS: We'll try this.
13 MR. QUIN: I will be very brief, I'm sure.
14 Good evening.
15 CHAIRPERSON KRESS: Start again.
16 MR. QUIN: I'm not sure this mic is on, but I
17 think I can speak loudly. I've tried all the buttons. It
18 doesn't seem to work either way.
19 CHAIRPERSON KRESS: The other one.
20 MR. QUIN: And that one is off too. That one
21 doesn't work either. Okay, good evening. Ahhh, thank you,
22 thank you. Does this work? Yes, it does.
23 Good evening, Madam Chairperson and members of
24 the Commission. My name is Whayne Quin with Norman (Chip)
25 Glasgow, Jr. of the law firm of Wilkes, Artis, Hedrick and
26 Lane. We represent the Petitioner, the Archdiocese of

1 Washington.

2 I note that there is no one that appears to be
3 here in opposition and that we've looked at the record and
4 that no one has registered in opposition. So I would love to
5 have some guidance from the Chair as to whether you wish to
6 have an opening statement and want us to proceed, or should we
7 accept the documents that are of record. I am fully prepared
8 to go through, and our full presentation would take probably
9 less than 20 minutes.

10 CHAIRPERSON KRESS: What is the Commissioners'
11 desire? I would like perhaps some minimal.

12 COMMISSIONER PARSONS: I think it would be
13 helpful to hear.

14 MR. QUIN: Thank you.

15 The first point I'd like to make is that while
16 this is filed on behalf of the Archdiocese, this is really a
17 generic text amendment that would apply to all PUDs, and it
18 resolves what we believe is a generic problem.

19 One significant point that you might want to
20 keep in your mind as you go forward, as we go forward tonight,
21 is that the tolling provision that we've offered for enactment
22 by the Commission only goes into affect first if the Zoning
23 Commission has approved a PUD, and secondly if the Court of
24 Appeals in a direct appeal affirms the action of the
25 Commission. Obviously, if the Court of Appeals reversed,
26 there would be no issue of tolling at that point.

1 A plan unit development, as you are all aware,
2 is the only form of conditional zoning that we have in the
3 District of Columbia that works with the Zoning Commission's
4 process, and it's the only type of contested case for the
5 Commission which provides a time limitation which provides a
6 time limitation within which an applicant must proceed with
7 its project, filing for a building permit within two years and
8 filing for actually commencing construction within three years
9 under sections 2408.8 and 2408.9.

10 Thus PUDs in many ways are identical to the
11 Board of Zoning adjustment decisions which now have a two year
12 time limitation, and for which this Commission has enacted the
13 tolling provision which is again virtually identical to what
14 we are seeking here today.

15 PUDs and the city we believe have served us well
16 as to permitted creative solutions in many cases, some
17 flexibility and benefits to communities which otherwise would
18 not be available. It has provided, without going through a
19 litany of the different cases, sound economic development in
20 many cases, and housing which is one of the unique ways that
21 housing has been provided for low income housing through the
22 PUD linkage program.

23 The specific problem which this text amendment,
24 this tolling amendment, addresses relates to the infeasibility
25 or risk that applied to a developer when a planned unit
26 development decision is challenged in the D.C. Court of

1 Appeals.

2 Of course before any order is issued the Zoning
3 Commission has made the determinations that are provided for,
4 and required applying the criteria of the Zoning Enabling Act
5 including the determination that the project is not
6 inconsistent with the comprehensive plan.

7 An order is then issued with findings of fact
8 and conclusions of law, and of course the Zoning Commission
9 has given due and careful consideration. The developer, under
10 the rules, then must proceed within the two and three year
11 time limitations.

12 In many jurisdictions the PUDs are approved
13 legislatively, and thus the challenge to those PUDs lies in a
14 court of first instance like a trial court as opposed to a
15 direct appeal to the Court of Appeals. And that's a different
16 situation because there a person challenging a PUD has to bear
17 substantial costs in terms of attorney representation. And,
18 if they seek an injunction, they have to normally put up a
19 bond or security to offset costs that might be incurred by the
20 developer.

21 But here in the District of Columbia a
22 challenger need only file with the D.C. Court of Appeals for
23 \$50.00 a direct appeal and that in effect has an injunctive
24 action -- in effect is an injunctive action. It's not
25 technically an injunctive action, but because of the risk it
26 prevents the applicant or the developer from proceeding

1 because of the risk of the possible either procedural or
2 substantive reversal. And that affects a lending institution
3 as well as the developer so that what happens in these cases,
4 and in virtually every case that we can think of, in those
5 cases where there is an appeal, whether there is merit or not
6 merit, the developer and the lending institution is simply
7 unwilling to proceed with the project.

8 The D.C. Court of Appeals decisions
9 unfortunately take somewhere between six and three years. Our
10 average time, six months and three years. Our average time
11 runs about one and a half to two years in terms of simply
12 processing the case before the Court of Appeals. Thus once an
13 appeal is filed there is a stay in effect, or significantly or
14 substantially in effect, for that same period of time.

15 In the event the Zoning Commission committed
16 error, substantively or procedurally, then the Court of
17 Appeals will reverse. On the other hand, assuming that the
18 Zoning Commission's decision is upheld, the court will enter
19 an order which normally falls towards the outer edge of the
20 two year period, and that, thus without tolling, the applicant
21 then is faced with the proposition of having to come back to
22 the Commission to get an extension because the vesting under
23 the two-year period is not something that you can just do,
24 it's filing building plans with the building department to
25 vest your permit which runs thousands and sometimes hundreds
26 of thousands of dollars.

1 So the process doesn't end here. When the
2 order, assuming that the order of the Zoning Commission is
3 granted extending the PUD, then there is another appeal. So
4 this sets into motion what we believe is an endless
5 destructive cycle in which the mere filing of consecutive
6 appeals can bar the project from proceeding. Because once the
7 applicant receives the extension order, an individual or
8 organization can file a second, third, fourth, forever and
9 keep some litigation pending. There is nothing that prevents
10 that under American jurisprudence.

11 The tolling provision which we have proposed
12 would address the problem. It would simply toll the validity
13 of the Zoning Commission's PUD order until judicial
14 proceedings are complete, at which time the normal time
15 limitations would apply. Our text proposal, we believe, will
16 provide certainty without prejudice to legitimate challenges
17 to Zoning Commission orders.

18 Now the Commission has addressed the identical
19 situation, as I said earlier, with regard to the BZA and its
20 order number 770, and we cited that in our pre-hearing
21 statement. In that order the Commission enacted language that
22 was similar to that which we now request, and that really
23 stemmed from a case known as French v. District of Columbia
24 BZA.

25 I found the rest of my testimony. For at least
26 30 years, in fact I've been here more than 30 years so I know

1 that it's been more than 30 years, the Corporation Council had
2 advised people that when an appeal was taken, a developer,
3 that there was in law and in equity an automatic stay, so we
4 all treated that as being what the law was in this
5 jurisdiction.

6 In French however the court indicated that
7 tolling purely by equity needed to be within the zoning
8 regulatory framework. The Corporation Council, the court
9 said, had no authority to amend the statute or regulations.
10 Of course they do have authority to interpret the regulations.
11 And there was a close question there, but the court went off,
12 in its wisdom, a different way. The Zoning Commission
13 therefore enacted a tolling provision which effectively
14 codified the rule that's been applied in the District of
15 Columbia for certainly a lot longer than I've ever practiced
16 here, and I suspect longer than anybody in our firm has ever
17 practiced here.

18 To make a long story short, the Office of
19 Planning recommended favorably on that tolling statute, as it
20 has in this case. It gave it's detail of reasoning as to the
21 appropriateness of amending the regulations, and those are set
22 forth. We've quoted those in our pre-hearing statements,
23 pages four and five, and we believe that that same rationale
24 applies here.

25 You should have received in the record several
26 letters in support of this text amendment. One from Jay

1 Brody, the former Executive Director of Pennsylvania Avenue
2 Development Corporation. One from Richard Harps, real estate
3 appraisal. One from Marlorie Walker, a mortgage broker. One
4 from C.B. Richard Ellis, a real estate broker. One from the
5 DCBIA. And one from the D.C. Chamber. All of these giving
6 their specific reasons for adopting the tolling provision.

7 CHAIRPERSON KRESS: We have received all of
8 those.

9 MR. QUIN: Excellent.

10 Our witnesses part of the testimony will be very
11 limited. And, if you wish us to, we would proceed with our
12 administrative law and land use expert testimony. They have
13 that in writing which they could submit, if you so wish, or
14 they can make a short statement. That would be followed by a
15 short statement from a mortgage broker representative. And
16 finally a brief statement, if you so wish, from Steven Sher,
17 Urban Planner. And then I would like to reserve, if there is
18 any question at the end, the opportunity to respond to any
19 questions or the need for clarification. And with that, that
20 completes my opening statement.

21 CHAIRPERSON KRESS: All right.

22 Fellow Commissioners, what's your pleasures?
23 Should we go ahead and hear brief statements from the three
24 remaining witnesses? Yes, we would like to hear brief
25 statements.

26 MR. BRAUNEIS: I'll move away from the other

1 microphones here.

2 Good evening, Chairperson Kress and Members of
3 the Commission. My name is Robert Brauneis and I am here with
4 my colleague, Joshua Schwartz, to testify in support of the
5 proposed tolling amendment.

6 Professor Schwartz and I both teach at the
7 George Washington University Law School here in the District
8 of Columbia. Professor Schwartz teaches and writes in the
9 areas of administrative law, legislation and property. I
10 teach and write in the areas of land use law, real estate
11 transactions, and property. You'll find more details about
12 our background and qualifications in our written statement.

13 We thank you for the opportunity to present this
14 joint testimony. And on behalf of both of us I will summarize
15 our written statement and then we'll both be happy to answer
16 any questions you may have.

17 Let me start with our conclusion. We believe
18 that the tolling amendment before you today is sound as a
19 matter of policy, and we believe that it is entirely
20 consistent with the existing framework of administrative law
21 and land use law. Tolling the time limits on exercising PUD
22 approvals for judicial review is at once fair to developers,
23 consistent with the interest of the community, and protective
24 of the PUD process.

25 As you know, implementation of PUD approvals is
26 generally extremely costly and time consuming. It places a

1 heavy burden on a developer who has already spent a lot of
2 time and money on the approval. A tolling provision would do
3 no more than assure a developer of, one, fair opportunity to
4 go forward with development after he has successfully defended
5 this Commission's PUD approval on judicial review.

6 Furthermore, a PUD that has met all of the standards for
7 approval is a boon to the community. It brings jobs, taxes,
8 neighborhood revitalization, and other benefits.

9 No one can seriously argue that such a project
10 should be shelved solely because of the delay caused by
11 judicial review. Yet that is what may well happen with many
12 projects if no tolling provision is adopted. The net effect
13 then will be that the policies and decisions of this
14 Commission would be frustrated rather than implemented as the
15 Commission intends.

16 Finally, the lack of a tolling provision
17 threatens to make the PUD process so uncertain for developers
18 that the viability of the planned unit development as a land
19 use control device here in the District will be left in doubt.
20 The important benefits of the PUD process, we believe, should
21 not be subverted by the opportunity for protracted non-
22 meritorious litigation that exists under the current scheme.
23 Thus, both fairness to the developer and a broader concern for
24 community interests weigh in favor of adopting the proposed
25 tolling provision.

26 In evaluating the tolling proposal of course,

1 it's important to consider the reason why there are time
2 limits on the exercise of PUD approvals in the first place.
3 If we understand those reasons, then we'll have a better sense
4 of whether tolling is a good idea or a bad idea. We believe
5 that there are two central policies supporting the time limits
6 and that tolling turns out to be consistent with both of those
7 policies.

8 The first reason there are time limits on PUD
9 approvals is that the District has an interest in seeing that
10 neighborhood and the community can promptly begin receiving
11 the benefits from improved development rather than suffering
12 the nuisances that may be created by land that is just being
13 held for future development. If the developer can't find the
14 resources to begin development by the end of a certain period,
15 then it's a good idea to force that developer either to focus
16 on more realistic plans for the particular parcel in question
17 or to step aside and place a development in the hands of
18 someone else who is in a better position to move forward.

19 But there's no reason to think that a developer
20 who is defending a PUD approval on judicial review is in that
21 position. To the contrary, common sense and basic economics
22 teach us that, if a developer has successfully obtained PUD
23 approval and is actively defending that approval in a judicial
24 review proceeding, that it is able and eager to proceed. Thus
25 the tolling provision does not interfere with the goal of
26 weeding out unrealistic development or incapable developers.

1 More generally the tolling provision could
2 actually reduce the average time that elapses between PUD
3 approval and implementation because it limits the possibility
4 that development will be further delayed by judicial review of
5 Zoning Commission orders that extend the initial time limits
6 on PUD approvals.

7 It has also been argued that time limits on PUD
8 approvals allow reassessment of a PUD after a substantial
9 amount of time has passed because neighborhood and community
10 circumstances have changed so drastically that the PUD no
11 longer meets the standards for approval. Although tolling the
12 time limit could, in theory, affect this opportunity to
13 reassessment, we think that there is little danger in practice
14 that tolling would result in development ever going forward
15 that has become unsuitable.

16 First, this Commission approves PUDs only after
17 a thorough review for compliance with the District's
18 Comprehensive Plan and with the extensive criteria that govern
19 PUD approvals here in the District. The approval that is the
20 outcome of such an extensive review, we believe, is unlikely
21 to become obsolete within just a few years. The existing time
22 limits on going forward under PUD approvals, two and three
23 years, themselves reflect the understanding that such radical
24 changes of circumstances are unlikely to occur.

25 And here, I might add, the history of the Board
26 of Zoning Adjustment orders on variances and the like is

1 instructive. We note that although tolling has been the
2 practice in the District with regard to BZA approvals for over
3 20 years, we have been unable to find a single case in which a
4 party has argued that an approved use or structure has become
5 unsuitable by the end of the toll period with regard to a BZA
6 approval.

7 And, as you know, in February of last year this
8 Commission lengthened the initial deadline for action on BZA
9 orders from six months to two years. An action it undoubtedly
10 would not have taken had there been significant problems with
11 changed circumstances.

12 The second reason that tolling is unlikely to
13 result in a development going forward, even though it no
14 longer serves public land use goals, is a terribly important
15 reason and it is this: If a project became unsuitable because
16 of some changed circumstance, it typically would also become
17 unprofitable and would not go forward for that reason. For
18 example, if a new highway redirects traffic away from a
19 development site, the lack of access will usually doom the
20 development to the same degree that it is a planning problem.

21 The third reason that we believe tolling will
22 pose no realistic problem is that there is continued public
23 control of many of the hypothetical changes in circumstances
24 that might render a project unsuitable. For example, while a
25 PUD has been approved but not yet constructed because the
26 approval is on appeal, other nearby landowners may consider

1 changing their land use in some way that it would become
2 incompatible with the approved PUD. Presumably however the
3 Zoning Commission and Board of Zoning Adjustment would
4 consider subsequent development requests in that area in light
5 of the already approved PUD and thus retain control over the
6 development in the area.

7 Finally, once we start down the road of imaging
8 all conceivable changes in circumstances it turns out that
9 many of them will trigger regulatory limits that are
10 completely independent of PUD approval. For instance, if a
11 parcel becomes a habitat for an endangered species, the
12 developers will be restricted by federal law regardless of any
13 tolled limit on PUD approval.

14 So here then is a summary of our evaluation of
15 the proposed tolling amendment. We think that it helps the
16 kind of PUDs that this Commission has determined to be in the
17 public interest to actually get built. We think it safeguards
18 the PUD process. And we think it provides a modicum of
19 fairness for developers. At the same time we think it's
20 consistent with the policies that underlie the initial time
21 limits on exercising PUD approvals.

22 Some have suggested other alternatives such as
23 case by case review of extension requests either by this
24 Commission or by the Court of Appeals. Case by case review of
25 requests by this Commission is of course the status quo. Its
26 costs are well known, the time spent by this Commission, by

1 the parties, by their lawyers and experts, by the Court of
2 Appeals on appeal, and the further delay of actually breaking
3 ground on approved PUDs.

4 Its benefits on the other hand have never become
5 apparent since there has never been a case in which this
6 Commission actually decided that changed circumstances
7 required a denial of an extension request.

8 Case by case review by the Court of Appeals is
9 an even less appealing alternative. The Court of Appeals is
10 even less familiar with the case. It does not have the
11 relevant expertise, and it would be straining the limits of
12 its traditional role under administrative law and
13 constitutional law to do that.

14 Our written statement addresses this matter in
15 some more detail. It also considers a number of technical
16 issues about how the tolling provision would relate to other
17 statutes. We'd be happy to answer questions about those
18 technical matters, but we will otherwise refer you to our
19 written statement. Our overall conclusion remains that the
20 carefully drafted tolling amendment before this Commission
21 strongly serves the public interest while providing protection
22 to PUD applicants.

23 We thank you again for the opportunity to appear
24 before you, and we strongly urge you to approve this proposal.

25 CHAIRPERSON KRESS: Thank you.

26 We're going to hold the questions until the end

1 of the presentation.

2 MR. BRAUNEIS: Okay.

3 CHAIRPERSON KRESS: Who gets the microphone
4 next?

5 MR. QUIN: The next witness is Mr. Phil Hummelt,
6 Westchester Realty Advisors.

7 MR. HUMMELT: Thank you.

8 Good evening, Madam Chairman and Members of the
9 Commission. My name is Phil Hummelt of Westchester Realty
10 Advisors. I'm a mortgage banker and real estate financial
11 consultant.

12 In my career I have been involved in securing
13 financing for many large and complicated projects including
14 commercial, residential, and institutional, and multi-use
15 buildings. There is no doubt in my mind that the pending
16 litigation which challenged the fundamental right to build a
17 project would have a chilling effect on the ability to obtain
18 financing for that project.

19 As a mortgage banker I understand the risks. I
20 understand the risk sensitive and risk adverse nature of the
21 capital markets. The source of capital that I represent are
22 very conscious of the factors which influence whether to lend.
23 Given the global range of opportunities for investment there
24 are many safer choices than funding a project where the basic
25 security for the deal could be taken away if a court reverses
26 the Commission's approval.

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1 Furthermore, the uncertainty of timing in which
2 commencement of construction of a project would take place
3 would inhibit a capital source from committing to finance a
4 project until after all appeals have been resolved. These are
5 opinions that were shared with me by three different
6 institutional lenders whom I contacted regarding this issue.

7 Consequently, I believe that it would be
8 difficult to the point of being impossible to arrange
9 financing for a project under challenge. If a project were
10 never able to escape from under the shadow of a legal
11 challenge, the project would never go forward. From a
12 lender's point of view I believe that the proposed tolling
13 provision makes a great deal of sense.

14 Following approval a developer must do a lot to
15 turn the project approval into a finished project including
16 obtaining financing. Most of the pre-development processes
17 are put on hold while litigation is pending. Once a lawsuit
18 is disposed of the activities can be restarted. However, if
19 the two year approval period is virtually eaten up by the time
20 taken to decide an appeal, there is no opportunity left to
21 take other necessary actions.

22 If an extension is required, you run the risk
23 that another appeal will be filed you are unable to even
24 complete the process. Adoption of the tolling provisions
25 allows the two year period to run from the time a developer
26 otherwise has a clear path to proceed. That is a fair and

1 effective way to stabilize the process and I would urge you to
2 move in that direction. Thank you.

3 CHAIRPERSON KRESS: Thank you.

4 MR. SHER: Good evening, Madam Chair and Members
5 of the Commission. For the record my name is Steven E. Sher,
6 Director of Zoning Services with the law firm of Wilkes,
7 Artis, Hedrick and Lane. I just want to make a couple of
8 comments that I think pretty much reiterate what you've heard
9 from Mr. Quin and others.

10 As I see the case there are only two types of
11 cases in which zoning relief is granted where a time limit is
12 imposed. You have the BZA special exception and variance case
13 where you have two years to file for a permit and then certain
14 other time frames to go forward thereafter, and you have the
15 PUD case where you have two years to file and three years to
16 start construction. No similar time period for a zoning map
17 amendment, no period like that for a text amendment, so you're
18 dealing with two focused type areas of relief.

19 I don't see any reason why the PUD process
20 should not be treated in the same way that the Commission has
21 treated the BZA process in amendments which were adopted back
22 in 1995.

23 As I see the rationale for tolling I think there
24 are three basic issues here:

25 One, it strengthens and supports the PUD process
26 in general which we believe and I believe is generally

1 beneficial for the city. This Commission knows that PUD
2 approvals are not given lightly. They're given only after an
3 extensive and structured process. Those decisions must
4 reflect District policies as set forth in the comprehensive
5 plan. They require an applicant who is seeking extra density
6 to come in here with an extra level of amenities or benefits,
7 and they also allow the Commission to control development on a
8 more precise level than is possible through a generalized
9 zoning district which would apply across the board wherever
10 that zone is mapped.

11 The second issue was fundamental fairness. If
12 the case is granted, as you see in the letters that have been
13 submitted to you, as you've heard from Mr. Hummelt, the filing
14 of an appeal effectively prevents a development from
15 proceeding, you have difficulties with financing, with finding
16 tenants, with obtaining title insurance and so forth. The two
17 and three year period set forth in the regulations implicitly
18 allow time for the normal pre-development activities to occur.

19 If the Zoning Commission's approval is upheld by
20 the Court of Appeals, then a successful applicant should have
21 the time and the opportunity to make the project a reality,
22 prepare the plans, find the tenants, close on the financing,
23 do all the other things necessary to make the project happen.

24 The two years allowed for filing of a permit
25 application will on average be consumed by the time it takes
26 for the Court of Appeals to get through its decision-making

1 process. And you've had that experience in enough cases to
2 know that, if it takes two years to get through the Court of
3 Appeals and you only get two years to start, you're going to
4 be back here seeking an extension.

5 The third issues is efficiency. And having sat
6 on your side of the table and having sat on my side of the
7 table, we don't need to do things that we don't need to do.
8 If you adopt the tolling provision, it eliminates the need for
9 our side of the table, an applicant, to spend the time and the
10 money seeking an extension when pending litigation is
11 specifically identified as one of the good causes for which an
12 extension may be granted. It saves the government time and
13 resources when you don't have to sit and listen to PUD
14 extensions of applicants who are telling you under section,
15 paragraph 2408.11C I'm entitled to an extension because of
16 pending litigation. So you don't need to spend the time
17 hearing that, they don't need to spend the time writing an
18 order, they don't need to spend the time writing a report
19 telling you what's already self-evident in that situation.

20 Adopting the tolling provision in my judgement
21 does nothing more than hold the running of those time periods
22 while the court works its will. The clock starts ticking
23 again when the court is finished, and the normal time periods
24 run from that point. I don't believe there is any sound
25 reason that I can think of that you should not adopt that
26 regulation as proposed. Thank you very much.

1 CHAIRPERSON KRESS: Thank you.

2 MR. QUIN: Madam Chairperson and Members of the
3 Commission, that completes our direct testimony. If there are
4 questions, we are prepared to answer them, or we can wait
5 until after I think one more witness, who is not our's,
6 appears, whatever is your pleasure.

7 CHAIRPERSON KRESS: What is your pleasure, do
8 you care to ask questions? I think we'd like to go ahead and
9 ask the questions now.

10 COMMISSIONER FRANKLIN: I have a couple.

11 Commissioner Franklin?

12 COMMISSIONER FRANKLIN: With so much legal fire
13 power here I'm always inclined to see if I can get a little
14 education.

15 I should disclose to my colleagues that my son
16 last month began teaching administrative law at George
17 Washington University Law School, so my already high opinion
18 of that school has not been diminished by the testimony.

19 A couple of maybe not terribly important
20 questions. With the consecutive appeals that have been filed
21 in the Rhode Island case does the Court of Appeals simply
22 consolidate those appeals because the matter that was appealed
23 from the first appeal is still pending, is it not?

24 MR. QUIN: Yes. But that's at the option of the
25 court. And, you know, I could see a situation where they
26 could go on forever. I mean how long can you go on

1 consolidating appeals, I mean, you know --

2 COMMISSIONER FRANKLIN: Yes.

3 MR. QUIN: -- theoretically you --

4 COMMISSIONER FRANKLIN: But I presume that once
5 an opinion comes down that that in effect erases all those
6 consecutive appeals.

7 MR. QUIN: Only if it is joined and combined,
8 which we are seeking to do in that particular case.

9 COMMISSIONER FRANKLIN: That's not automatic,
10 you're just seeking to do that?

11 MR. QUIN: Oh, no, that's not automatic at all.

12 COMMISSIONER FRANKLIN: Second question, if we
13 adopt this suggested text amendment, should we also do away
14 with the provision that we adopted the last time we looked at
15 good cause reasons? You know, Mr. Sher mentioned that one
16 reason for an extension would be the pendency of litigation.
17 If we have an automatic tolling provision, does that render
18 moot that provision?

19 MR. QUIN: No, not at all. I think there are
20 different reasons, and certainly this Commission and the
21 members of the Commission are aware of a period of time in the
22 '80s and in the '90s as well when financing simply dried up.
23 At one point you remember when interest rates were at 18
24 percent and no one could get financing or no one could afford
25 to finance, and so there are other reasons.

26 COMMISSIONER FRANKLIN: No, I'm not talking --

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1 I'm just thinking of subsection C, the one as Steve Sher
2 referred to it, the litigation --

3 MR. QUIN: The litigation only, yes.

4 COMMISSIONER FRANKLIN: -- right. Would the
5 adoption of this tolling provision render unnecessary that
6 specific reasons for granting an extension?

7 MR. QUIN: I would tend to think that it would
8 only with regard to litigation.

9 COMMISSIONER FRANKLIN: Only with regard to
10 litigation?

11 MR. QUIN: Right. Now, litigation, the way it's
12 set up now as we said earlier, it only applies, number one, in
13 a contested case situation where you have a condition, a time
14 limitation. It doesn't apply to your text amendments, it
15 doesn't apply to your map amendments or your large area ones,
16 so it's fairly limited.

17 COMMISSIONER FRANKLIN: I don't know whether all
18 of your colleagues --

19 MR. QUIN: Well, I'd be glad to hear. Maybe I
20 should have consulted with my attorney first.

21 MR. SHER: For the record I'm Professor Joshua
22 Schwartz. The only other concern, and we're thinking on the
23 fly here, is there could be litigation other than the direct
24 judicial review proceeding which could cause a delay. That
25 kind of litigation, say a lawsuit under the Endangered Species
26 Act, challenging that would have the same effect of making it

1 impossible for the project to go forward, but it wouldn't
2 trigger the automatic toll which is proposed by the amendment
3 today. And it probably would make sense to continue to have
4 available to the Commission the option discretionarily, as it
5 has now, to say well because of that we'll extend it.

6 And at the very worst you would have a very
7 little bit of redundancy which would be harmless because the
8 Commission would never exercise its authority to extend
9 something that was automatically extended, so the overlap
10 would have no negative consequence that I can see. So my
11 opinion would be that there would be no need to make the other
12 deletion.

13 COMMISSIONER FRANKLIN: All right, thank you.

14 MR. SCHWARTZ: It's safer not to do so.

15 COMMISSIONER FRANKLIN: Yes, I agree with you.
16 And I'm not reminded that I myself had drawn that distinction
17 with Mr. Nettler several months ago when I said that there
18 could be third party litigation not involving an appeal to the
19 Court of Appeals that would also justify the extension of a
20 PUD.

21 THE WITNESS: Yes, I will take the advice of my
22 attorney.

23 COMMISSIONER FRANKLIN: Now, this gets, and I
24 hope my colleagues won't mind a little bit of just a slight
25 digression because they know my concern over the extent to
26 which this Commission has routinely been granting extensions

1 when in my judgement there has not been a good faith effort to
2 seek financing for the projects.

3 So Professor Schwartz since you and Professor
4 Brauneis have commented on the reason why we limit the time
5 for PUDs in the first instance, and I don't know whether you
6 are familiar with our regulations for extensions for good
7 cause, but I have found that the kind of justifications that
8 are submitted to us by developers seeking extensions are very,
9 very flimsy, sometimes there are a few letters from a mortgage
10 broker or a bank saying we've been in discussions, etcetera,
11 and we are hopeful that we will be able to finance this
12 project, and we've had PUD extensions running for, oh from
13 neigh on to 10, 12 years I suppose. Certainly I've only been
14 on the Commission for two and a half years, but I'd like to
15 hear your comment as to what the public policy ought to be in
16 terms of diligent processing financing or what the benefits
17 might be for somebody sitting on an approved PUD just sort of
18 as a land bank and not doing anything basically to pursue the
19 approval.

20 MR. BRAUNEIS: Well, I guess I can say that if a
21 developer is truly just using this as a land banking option and
22 is pushing it off indefinitely into to the future, then that
23 may well not accord with policies that this Commission has set
24 forth in the regulations and it may be a bad idea to continue
25 extending these things indefinitely. However, I just have to
26 come back and say that of course this particular amendment

1 that's before you is not one of the cases where there's a
2 flimsy rationale. This once you have -- when you have an
3 appeal pending you really can't go get financing and --

4 COMMISSIONER FRANKLIN: My question is a
5 digression from the main text here --

6 MR. BRAUNEIS: Right, right.

7 COMMISSIONER FRANKLIN: -- and goes to the
8 underlying public policy of limiting the time PUDs.

9 MR. BRAUNEIS: Right. We --

10 COMMISSIONER FRANKLIN: Which you gentlemen had
11 addressed in your remarks.

12 MR. SCHWARTZ: If I could add just one thought.
13 Obviously I don't think either of us is in a position to
14 advise the Commission on whether the records that have been
15 made in the past in support of good cause showing for other
16 reasons other than litigation pending were sufficiently strong
17 or not. We haven't seen those records.

18 I guess the only comment I would offer that
19 hopefully is a little bit helpful is it seems to me that what
20 this proposed text amendment does is to set clearly aside one
21 group of cases where there's a particular ground where we
22 think there really is a recurring pattern and that the
23 Commission need not inquire because there's really nothing to
24 inquire into. And then the Commission obviously has to decide
25 what level of rigory, with what level of rigory it wishes to
26 examine the records in other cases.

1 In effect what you're doing here is separating
2 the wheat from the chaff, and I really can't tell you how
3 closely you want to scrutinize the other one. But a
4 reasonable approach from an administrative point of view, if
5 you say let's focus our attention in the area where there may
6 be a problem.

7 And, Commissioner Franklin, you're suggesting
8 that your view is that there is a problem. So you want to
9 move the microscope in on those cases and put out of your
10 field of vision the classifications that are not really
11 controversial. It seems to me that by making that distinction
12 you've put the focus where the Commission should put its
13 focus. I don't know how helpful that is, but that's my
14 comment.

15 COMMISSIONER FRANKLIN: I have no further
16 questions.

17 CHAIRPERSON KRESS: Thank you.

18 COMMISSIONER CLARENS: I have a question.

19 CHAIRPERSON KRESS: Yes, please, Commissioner
20 Clarens.

21 COMMISSIONER CLARENS: Out of curiosity,
22 historically what is the maximum time that you collectively
23 might have a recollection of PUD cases being stuck in Court of
24 Appeals? The six months to two years was given as a guideline
25 for typical time, but have there been cases that have been
26 stuck in the Court of Appeals for three years, four years,

1 seven years, 15 years?

2 MR. QUIN: I don't know of any that's gone in a
3 specific appeal in the D.C. Court of Appeals for longer than
4 say four, four and a half years.

5 COMMISSIONER CLARENS: But in consecutive
6 litigation, stuck in litigation for an indefinite period of
7 time?

8 MR. QUIN: Well, that can happen. In this case
9 it's happened, but it also has been commingled with other
10 issues so it would be hard to specify that the sole reason it
11 was there was the -- I happen to believe it was the sole
12 reason, but was the seriatim filing of appeals. I mean we're
13 now on the ABCDE, we are on E now, which is the fourth
14 extension, if I'm not mistaken.

15 COMMISSIONER CLARENS: Okay. The point I'm
16 trying to make, or what I'm trying to get to, is that we could
17 then envision a case where ten years down the road, in fact
18 the circumstances have changed, and all this time, all the
19 time this PUD has been stuck in litigation, it finally comes
20 out of the Court of Appeals, the tolling that is the amendment
21 that is being proposed in fact is in place and therefore the
22 PUD is a valid PUD and the Zoning Commission has no
23 opportunity to review the case and in fact check if the
24 circumstances have not changed and the PUD can in fact go
25 ahead.

26 MR. QUIN: I don't believe that would happen for

1 this reason. The consecutive appeals relate solely to just
2 challenges to the extension, to the extension, so that the
3 merits, the substantive position would be over. The court
4 would decide, let's say someone challenged a PUD on the basis
5 that they felt that it did not comply or was inconsistent with
6 the comprehensive plan, that issue substantively would be
7 decided by the Court of Appeals normally within two years,
8 three years at max say, that's an average.

9 COMMISSIONER CLARENS: Right.

10 MR. QUIN: Then anything after that would be a
11 request for extension. So what, as our professors from GW
12 have stated, this text amendment actually shortens the period
13 because there would be finality to the extension process.
14 That's what's keeping, in large measure, orders number CD and
15 E, and I think it actually was B, BCD and E of this case.
16 Without BCD and E this case would have been decided. And
17 hopefully with the time limitations the building would be
18 underway because right now is a great economic market.

19 COMMISSIONER CLARENS: So an appeal is both --
20 appeals then are filed both against substantive issues and
21 also about the extensions that this Commission grants?

22 MR. QUIN: Yes.

23 COMMISSIONER CLARENS: Appeal and then that
24 complicates and lengthened the process before the Court of
25 Appeals.

26 MR. QUIN: That's the cyclical destructive

1 position that our American jurisprudence have unless you
2 legislatively in our jurisdiction solve it.

3 COMMISSIONER CLARENS: Okay.

4 MR. QUIN: And I might say that, I don't want to
5 talk about the equity, but that's an unworkable situation
6 because you never have certainly. You never know who is going
7 to rule which way. Whereas a legislative act, you know by
8 virtue of your Fiat that it terminates at the time the courts
9 have finished their process.

10 COMMISSIONER CLARENS: There is also a time
11 limit to the filing of appeals on substantive issues from the
12 time that the order is issued?

13 MR. QUIN: Yes, 30 days.

14 COMMISSIONER CLARENS: Okay. So after 30 days,
15 if no other appeal has been filed, then the appeal, only the
16 appeal that has been filed within those 30 days on issues of
17 substance are the ones that are before the Court of Appeals.

18 MR. QUIN: Exactly.

19 COMMISSIONER CLARENS: And once those are
20 resolved then the tolling ceases to be needed and therefore
21 the two years go into effect?

22 MR. QUIN: Exactly.

23 COMMISSIONER CLARENS: Okay, I get it.

24 CHAIRPERSON KRESS: Any other questions?

25 COMMISSIONER HOOD: Madam Chair, can I ask a
26 question briefly?

1 CHAIRPERSON KRESS: Certainly.

2 COMMISSIONER HOOD: This has definitely been a
3 very informative session thus far. My question is, I
4 understand you said there was no opposition, but within our
5 packet we had one or two letters I believe of opposition.

6 CHAIRPERSON KRESS: I was going to actually
7 bring that up.

8 COMMISSIONER HOOD: Okay. Well, I'll let you do
9 it then.

10 CHAIRPERSON KRESS: I was just going to say yes
11 we do have one from Mr. Nettler that specifically speaks to
12 the Committee of 100, the DuPont Circle Citizens Association,
13 and the Residential Action Coalition who oppose this, and also
14 one from the Downtown Housing NOW Committee.

15 MR. QUIN: That was of the same substance as the
16 1995 opposition I think.

17 CHAIRPERSON KRESS: Yes, they're both dated
18 March of 1998.

19 MR. QUIN: Right.

20 CHAIRPERSON KRESS: But I only bring that up as
21 a clarification, we do have information --

22 MR. QUIN: Yes.

23 CHAIRPERSON KRESS: -- and I think the reasons
24 are stated clearly. I just wanted the record to --

25 MR. QUIN: To reflect.

26 CHAIRPERSON KRESS: -- reflect that we had those

1 things.

2 MR. QUIN: Thank you.

3 CHAIRPERSON KRESS: Did you want to follow on
4 with a specific question?

5 COMMISSIONER HOOD: Yes. Well, maybe there
6 must have been something I missed, I was wondering has that
7 been rectified or have they pulled it back?

8 CHAIRPERSON KRESS: No, they remain in
9 opposition.

10 COMMISSIONER HOOD: Okay.

11 MR. BRENNAN: I thought the earlier comment was
12 that there was no opposition.

13 COMMISSIONER HOOD: I think he meant no
14 opposition present.

15 MR. QUIN: That's right.

16 MR. BRENNAN: Okay.

17 CHAIRPERSON KRESS: Any other questions?
18 Hearing none, we'll move on.

19 MR. BRENNAN: Madam Chairman, there had been a
20 preliminary matter about the emergency --

21 CHAIRPERSON KRESS: Yes.

22 MR. BRENNAN: -- and I just didn't know whether
23 the witnesses wanted to speak at all to whether they are still
24 pursuing adoption --

25 MR. QUIN: We will make it clear on the record.
26 We are not pursuing an emergency.

1 CHAIRPERSON KRESS: Thank you.

2 All right, with that we'll move to a brief
3 report from the Office of Planning before we go to the
4 remaining testimony.

5 MR. COLBY: The Office of Planning has not only
6 a short report, which you have, but also very little to add to
7 the discussion, particularly because the applicants have noted
8 that our reports have been incorporated into their reports, or
9 portions of it.

10 I would only reiterate that the Office of
11 Planning strongly supports the notion that all PUDs should,
12 all PUDs, should have sufficient litigation-free time to
13 become reality. And the Commission has made it very clear
14 that it wants PUDs to move forward and not to be pieces of
15 paper not to be irrelevant, but to happen. And particularly
16 in the case of the church and that PUD for Saint Matthews,
17 this has been a serious problem, and the PUD development has
18 not been able to move forward. And in other cases it has been
19 a problem for the applicant.

20 And I would only say that while those of us who
21 seek to make a change in that use will use, all of us, use
22 whatever resources are available, and the community has used
23 the reports appropriately in there, appropriate to them, to
24 try to change or argue against the decision that's been made
25 and it has had the effect of not allowing a few days to go
26 forward.

1 So again we strongly support the tolling of PUDs
2 as we did the tolling of BZA cases also.

3 CHAIRPERSON KRESS: Thank you.

4 Any questions of the Office of Planning?

5 COMMISSIONER FRANKLIN: I have just one, and I
6 don't know whether I should ask it of the Office of Planning
7 or the gentleman from the real estate community. But is there
8 any evidence, Mr. Colby or anybody in the room, that the ease
9 with which by the payment of \$50.00 somebody who opposes an
10 approved PUD can in effect delay that project to up to three
11 or more years? Is there any reason to believe that that has
12 deterred any economic development within the District in
13 relationship to adjoining jurisdictions? Or maybe another way
14 of phrasing the question is, is our method of dealing with
15 this so at variance with suburban jurisdictions that we might
16 inadvertently be chilling the economic development potential
17 of the District?

18 MR. COLBY: I can't answer the question
19 competitively. I can only say that we in government often
20 take the long view, and the long view is at odds with the fact
21 that time is money. And in each case where a PUD has to go
22 through a cycle because it's in court, it's really, well it's
23 part of the process that we're involved in, and then go
24 through the cycle again, it's really not fair to the
25 development process and clearly that puts us at a competitive
26 disadvantage. As to whether other jurisdictions go through

1 the same or have the same problem, I can't answer that, and
2 I'm not sure if anybody in the audience can.

3 MR. QUIN: I certainly have not made a survey of
4 that, but I know for example in Montgomery County, and I think
5 it's in the record, the site plan approval situation, or
6 somewhat similar to PUD, does have a tolling provision. But
7 generally speaking we have a very peculiar statute, I mean we
8 have a direct appeal of \$50.00, and when you challenge a case
9 in the court of first instance you normally have to hire an
10 attorney and you usually have to at least split the cost. You
11 bear your own cost under American jurisprudence. In England,
12 in the United Kingdom, you do not. It's the prevailing party
13 that does not have to pay. It's the losing party that has to
14 pay. And frankly we think that that would be a very good
15 policy to adopt in the United States, but we haven't been
16 successful in pushing that yet.

17 CHAIRPERSON KRESS: Thank you.

18 Any other questions of Office of Planning? If
19 not, is there really only one more person to testify?

20 Is that just you, Lindsley? Would you mind
21 coming forward then.

22 MR. WILLIAMS: Good evening, ladies and
23 gentlemen. For the record my name is Lindsley Williams and
24 I'm here to testify this evening in connection with the case
25 you are now hearing, 98-6. My testimony will be brief. It's
26 a banner day in your life and mine, I managed to get my

1 thoughts down on one page.

2 MAN: There are still footnotes.

3 MR. WILLIAMS: There are still footnotes, yes.
4 And the bottom of the letter I say to you, I urge you to have
5 a bench decision and adopt the prior BZA order expeditiously
6 to affect this change at the earliest possible opportunity.

7 Backing up a bit, I'm supporting this as an
8 expert. I think you've seen me before in planning and zoning
9 matters and, if it's relevant to your findings, perhaps you
10 should acknowledge that. As an expert I favor the proposal
11 because I declare that it promotes the public interest, and my
12 letter identifies why.

13 It promotes certainly for reasons that I
14 identify and the previous witnesses have done. It establishes
15 a consistent pattern within the zoning regulations providing
16 treatment on matters appealed to courts already in place with
17 respect to the BZA on the zoning side of the ledger.

18 It would be fully consistent with my view with
19 the opinions already on file in the companion earlier case
20 from the Office of Corporation Council and legal merits of
21 having a tolling provision in the first place, which you can
22 re-read at your viewing pleasure later on. And it would be
23 consistent with what I call the tenants of regulatory reform,
24 a period of time we're in right now.

25 And a companion issue of trying to make sure
26 that we're establishing rules that are -- I wish George Wright

1 were here now to hear me say this, not inconsistent with the
2 provisions of surrounding jurisdictions, which is basically
3 are we doing anything here which would be anti-competitive,
4 are we setting ourselves up in a bad way? No. What you're
5 doing here tonight is hearing a case that will allow you to
6 better even the playing field between us and the surrounding
7 areas.

8 And for all those reasons, ladies and gentlemen,
9 I urge you to go forward with this thing as quickly as
10 possible.

11 Now, as I approached this in my own head, and I
12 know it's advertised and argued in the context of PUDs, and
13 Mr. Quin has identified that that's the only place where there
14 is a time limit, I wrote my letter more generically. Because
15 if there are other places in the zoning regulations where time
16 limits apply to decisions you make, I'm wondering right now
17 whether or not that might not be the case for example with
18 respect to air rights, then I would urge you to adopt a
19 generic provision that would cover anything that has such a
20 time limit. Because, if there is a time limit, there will be
21 a tolling potential, and you might as well solve the problem
22 now rather than have it come visit upon you later on.

23 Similarly, although I think I know the answer to
24 this, there are times when the Commission will act sua sponte
25 in relationship to a BZA order. The BZA orders are very clear
26 they have a tolling provision. But what happens in the case

1 of a sua sponte situation and an appeal from that? God knows
2 it would be messy, but my point is to think about right now.

3 Having said that, I'm not trying to delay
4 getting on with adopting the order at hand, but to just expose
5 to you for thinking the issue about whether there are any
6 other time limits and then try and figure a way of curing it.

7 Ladies and gentlemen, that's my testimony. I
8 think I did it in two minutes. Thank you.

9 CHAIRPERSON KRESS: Thank you.

10 Any questions? Hearing none, thank you very
11 much for your testimony.

12 And I ask Mr. Quin if he'd like to make any
13 final remark?

14 MR. QUIN: We find ourselves agreeing completely
15 with Mr. Williams with regard to a bench decision, and we
16 would urge you to do that. Thank you.

17 CHAIRPERSON KRESS: Thank you.

18 What is your pleasure, colleagues? For me, I'm
19 prepared to vote. This is something we have talked about in
20 many forms for a very long time.

21 COMMISSIONER CLARENS: I need a clarification on
22 this.

23 CHAIRPERSON KRESS: Please go ahead.

24 COMMISSIONER CLARENS: Yes, I need to get
25 something clarified, and I apologize for not being properly
26 prepared. But we have a particular case in front of us, we

1 have the Archdiocese of Washington, that's the case now, and
2 this is -- I'm a little bit confused as to whether we're
3 dealing with a particular PUD or we are dealing with a
4 modification and text amendment.

5 MR. QUIN: This is solely a text amendment.
6 There is no particular case in front of you. That would
7 affect every PUD, all PUDs.

8 COMMISSIONER CLARENS: This is a text amendment
9 that will affect all PUDs?

10 MR. QUIN: All PUDs, yes.

11 MR. BRENNAN: This is a rulemaking proceeding
12 rather than any proceeding affecting any individual case.

13 COMMISSIONER CLARENS: I see. And then that
14 renders the letter from Mr. Nettler basically null because it
15 addresses a particular issue, it addresses a case. The
16 position is really to the case and not to what is in front of
17 us apparently.

18 MR. BRENNAN: That may affect the weight or
19 weighting you give to Mr. Nettler's submission, but I believe
20 that this has been advertised as a rulemaking hearing, and Mr.
21 Nettler has responded to it as a rulemaking hearing.

22 Both he and those that have suggested,
23 petitioned with this rulemaking, have pointed to the
24 Archdiocese case as a particular egregious example or a
25 particular example that is involved in the circumstances of
26 the generic rulemaking. But it's clear that this is a

1 rulemaking that would be applicable to all PUDs, and the
2 Archdiocese case is an example of the circumstances in which
3 that rulemaking would apply.

4 COMMISSIONER FRANKLIN: Are these the same
5 parties who have filed the sequential appeals? Essentially
6 it's the same group that has filed sequential appeals from
7 extensions.

8 Madam Chair, I agree that I don't see the
9 usefulness in delaying this, if we have the time to make a
10 decision. If people are unready, that's a different story.

11 COMMISSIONER HOOD: I just have one question for
12 a point of information. If this was passed this evening, we
13 vote on it and make a decision this evening, where would that
14 put the Archdiocese case, would they have to come back again
15 or where does that --

16 CHAIRPERSON KRESS: I can answer that probably
17 best, but you go ahead.

18 MR. QUIN: There is presently pending an appeal
19 in the D.C. Court of Appeals which we have to complete that
20 process. Any further extensions would not be necessary. In
21 other words, if we -- we believe that the Court of Appeals
22 will affirm the previous decision that related to an extension
23 for good cause, and I think that was A was it, or B? B, so
24 that's up there with a mixed basis for extension as I recall.
25 And the further extensions after B dealt solely with the
26 extension for litigation. In other words we still have to go

1 to the Court of Appeals, and we're in court now, these will be
2 consolidated and the court will enter a decision on the merits
3 of the appeal of the first extension.

4 MS. PRUITT-WILLIAMS: Mr. Hood, for some
5 clarification that might help, the Zoning Commission approved
6 an extension of the PUD for Rhode Island recently for three
7 more years. So it will allow the applicant to go through
8 litigation and have three years to hopefully go through the
9 Court of Appeals and then also deal with and have some time
10 left over on that. And in the meantime, if this rulemaking
11 goes through, then the extension, I mean the time frame would
12 not be necessary.

13 COMMISSIONER HOOD: Okay. Then that wouldn't
14 fall back upon --

15 MS. PRUITT-WILLIAMS: Right. But they have sort
16 of taken two roads, they applied for the extension, not
17 knowing that this would necessarily go through, so they are
18 protected on that end.

19 COMMISSIONER HOOD: Okay.

20 MR. QUIN: We just did not want to have to come
21 back here again. I mean this gets forever because then there
22 would be another appeal.

23 COMMISSIONER HOOD: Okay.

24 COMMISSIONER FRANKLIN: If it will help, Madam
25 Chair, I will move the adoption of the text amendment
26 proposed.

1 COMMISSIONER PARSONS: Second.

2 CHAIRPERSON KRESS: Any further discussion?

3 Hearing none, all those in favor signify by aye.

4 CHORUS: Aye.

5 CHAIRPERSON KRESS: Opposed?

6 The motion carries.

7 (Whereupon, the motion was unanimously carried.)

8 MS. PRUITT-WILLIAMS: Staff would report that
9 the vote was five to zero to approve. Motion made by Mr.
10 Franklin and seconded by Mr. Parsons.

11 CHAIRPERSON KRESS: Is it appropriate to ask,
12 since there is a petitioner, to write some findings of fact,
13 conclusions of law? No, don't need any? I'm just trying to
14 help get our decision written.

15 MR. QUIN: We will furnish a draft order.

16 CHAIRPERSON KRESS: That's what I mean. Thank
17 you.

18 If there isn't any other business, I'll just
19 say, ladies and gentlemen and other members of the Commission,
20 I wish to thank you for your testimony and your assistance at
21 this hearing.

22 We have made our decision. It will be referred
23 to NCPC for federal impact review, and we'll take final action
24 at a public meeting following the receipt of the NCPC
25 comments. And we ask that a draft order be forwarded as soon
26 as possible. And with that I now declare this hearing closed.

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1 Thank you.

2 (Whereupon, the proceedings in the above-
3 entitled matter were concluded.)

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