

GOVERNMENT

OF

THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

WEDNESDAY

MAY 5, 1999

The meeting convened in Room 220, 441
4th Street, N.W., Washington, D.C. 20001, pursuant
to notice at 9:30 a.m., Sheila Cross Reid,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

SHEILA CROSS REID	Chairperson
BETTY KING	Vice Chair
JERRY GILREATH	Board Member
ANTHONY HOOD	Zoning Commissioner

STAFF PRESENT:

Sheri M. Pruitt, Director
Alberto Batista, Staff
John Nyarku, Staff
Paul Hart, Staff
Beverly Bailey, Staff
Alan Bergstein, Esq., Staff

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

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

2 (9:59 a.m.)

3 MS. REID: Good morning. Those of you
4 who are here for the hearing this morning, we have a
5 public meeting first and then we will commence with
6 the hearing. I'd also like to apologize for the
7 delay this morning.

8 We had issues that came up that the
9 Board had to address prior to coming in as well as
10 the fact that we were looking to have our system up
11 and running this morning and, after undue delay, we
12 realized that it's not going to happen, so again,
13 we're going to just have to project our voices and
14 amplify. Everyone who speaks here will have to
15 amplify so that they can be heard hopefully.

16 So the special public meeting for May
17 5th will now commence.

18 MS. KING: Madam Chair, I move approval
19 of the meeting minutes for the public meeting of
20 April 7th and for the public hearing of March 3rd.
21 I want to make some comments on the March 17th
22 meeting minutes, so I would move those, too.

23 MR. GILREATH: I second the motion.

24 MS. REID: Okay. All in favor.

25 (Ayes)

26 MS. REID: All opposed.

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1 MS. KING: With regard to March 17th, on
2 page two, the minutes with regard to the Georgetown
3 University Residence Hall. I would like to suggest
4 a couple of amendments, if I may. Under one, I
5 would suggest that it read as follows. "The
6 Georgetown University shall honor its commitment to
7 use this project to remove a large number of
8 students living in the neighborhoods and shall not
9 increase its student enrollment." And I have that
10 in writing and will give it to the staff.

11 MS. REID: Okay. Repeat that again,
12 please.

13 MS. KING: "The Georgetown University
14 shall honor its commitment to use this project to
15 remove a large number of students living in the
16 neighborhoods and shall not increase its student
17 enrollment." It, I think, has the same impact but I
18 think it's clearer.

19 MS. REID: Doesn't it say that?

20 MS. KING: No, not to me, it doesn't. I
21 think this is better.

22 MS. REID: It says, "Shall adhere to the
23 statement that the purpose of the project is not to
24 increase enrollment but to remove a large number of
25 students living in the neighborhood."

26 MS. KING: I just --

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1 MS. REID: Do you feel comfortable with
2 that?

3 MR. GILREATH: -- specific. Setting a
4 limit.

5 MS. REID: All right.

6 MS. KING: And I don't understand item
7 #4. Is it possible that there are typos or
8 emissions, but I don't get it.

9 MS. REID: Okay.

10 MS. KING: I don't know what it means
11 and it doesn't scan and it's not good grammar and
12 what does it mean?

13 MS. PRUITT: I don't have a copy of it.

14 MS. KING: Oh, I'm sorry. I thought it
15 was on the agenda for today.

16 MS. PRUITT: They are. I just don't
17 have them in my package.

18 MS. KING: It says, "The university
19 shall consult ANC 2E and the surrounding neighbors
20 and particularly West Georgetown for the purpose of
21 providing the students who reside in this residence
22 and the most appropriate locations for pedestrian
23 access to and from campus that are more directly
24 into Canal Road rather than through the residential
25 streets of West Georgetown." I don't know --

26 MS. REID: Something is missing.

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1 MS. KING: -- it's a word or a phrase
2 or--
3 MS. REID: Something that's missing.
4 MS. PRUITT: We can go back and check
5 the transcript.
6 MS. KING: Okay. So should we
7 postpone consideration of this until the next
8 meeting?
9 MS. PRUITT: So you can postpone those
10 until next month.
11 MS. KING: Madam Director, can I give
12 you my wording for item one?
13 MS. PRUITT: Certainly.
14 MS. KING: And I wasn't here for the
15 March 31st meeting, so I can't vote on that.
16 MS. PRUITT: Mr. Parsons left so we have
17 to postpone that. Madam Director, we have to
18 postpone it.
19 MS. REID: Thank you, Ms. King, for that
20 observation.
21 MS. KING: Thank you.
22 MS. REID: Very keen observation. Okay.
23 MR. HART: The first case to be decided
24 this morning. Application No. 16433 of the
25 Protestant Episcopal Cathedral Foundation of the
26 District of Columbia, pursuant to 11 DCMR 3108.1 for

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1 a special exception under 205 for the construction
2 of an athletic facility with below grade parking and
3 to establish two surface athletic fields to an
4 existing private school located in an R-1-B District
5 at premises 3500 Woodley Road, N.W. (Square 1944,
6 Lot 25).

7 MS. REID: Okay. This particular case
8 is fraught with a lot of different twists and turns
9 that we have been trying to absorb and to digest.
10 Nonetheless, it appears that, given time, some of
11 the positions that were received and the ability to
12 be able to consult with corporate counsel, it is our
13 view that we should postpone or continue this
14 particular decision today until such time that we're
15 able to get the appropriate input from our corporate
16 counsel and to be able to adequately review the
17 instruments that have come in to us, the instruments
18 that have come in to us within the last couple of
19 days. And corp counsel is here this morning to
20 speak on the nuances of the position that the Board
21 is advocating here today.

22 MS. KING: Do you need a motion that we
23 postpone consideration?

24 MS. REID: I was going to do it after,
25 but we can do it now and then allow him to speak.

26 MR. BERGSTEIN: Madam Chairperson, my

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1 name is Alan Bergstein, assistant corporation
2 counsel. I don't think I need to say anything on
3 the substance of what's been submitted other than to
4 remind the Board that at least one of the parties
5 has requested an extension of time to submit a late
6 filed submission, and I believe that there's other
7 submissions that may be to be considered in terms of
8 when they were filed by whom.

9 But I would also ask the Board to remind
10 the parties that they are not to communicate with my
11 office directly and that since the record is closed,
12 there should be no need to file subsequently with
13 the Board unless the Board is going to request other
14 materials. But I'd request the parties not to
15 contact my office unless they all contact my office
16 collectively through a conference call because I
17 don't want to engage in any separate communication
18 with any party in this proceeding.

19 MS. REID: That should be our policy at
20 all times, I think we've agreed.

21 MR. GILREATH: I reluctantly support the
22 postponement. I feel that the applicant has
23 provided enormous information and so forth and I
24 believe I personally have a very substantial
25 knowledge of the issues and so forth. However,
26 apparently some things have arisen that perhaps have

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1 some potential legal implication and caused this
2 uncertainty, certainly on the part of the other
3 Board Members. I concur that postponement is
4 appropriate.

5 MS. KING: Mr. Bergstein, should we deal
6 with the question of Mrs. Miller's submission as to
7 whether or not we just make a decision to receive
8 it?

9 MR. BERGSTEIN: My understanding of what
10 has occurred is that ANC Commissioner Ruth Ann
11 Miller filed a submission that was both filed after
12 the April 27th close of the record and that the
13 order of the Board on its face appeared to be
14 limited to submissions by the parties and since
15 Commissioner Miller was responding in her capacity
16 as an ANC Commissioner alone, she did have that
17 status. So if the Board wanted to take into account
18 the submission by Commissioner Miller, it would have
19 to either interpret its order as having contemplated
20 that she was going to provide a separate response or
21 to modify its order to allow, in this case, a non-
22 party who was nevertheless ANC Commissioner to
23 provide a response in this particular instance and
24 to provide one that was out of time in terms of the
25 close of the record.

26 MS. KING: And should we decide to adopt

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1 that last alternative, would we therefore need to
2 supply that same option to all of the ANC
3 Commissioners in ANC 3C?

4 MR. BERGSTEIN: If you did view your
5 order as being discreet as to Ms. Miller, then any
6 person in her same category, if they had wanted to
7 respond, would not have known that they could have
8 based upon the order.

9 MS. KING: But in this circumstance, the
10 12 members, the other 12 members voted for the
11 resolution. She was the one dissenting vote and, in
12 effect, filed a minority opinion. Can we admit her
13 letter and presume with some confidence that the
14 other 12 were in favor of the resolution that they
15 voted for?

16 MR. BERGSTEIN: Well, since they
17 formally voted for it, you do know their position
18 with respect to the issue and, therefore, in that
19 sense, her submission could be viewed as a singular
20 instance and that there are no other persons who
21 fall into that category of persons, since there's no
22 other person who is both an ANC Commissioner of that
23 Commission who is in opposition to the position of
24 the NCH.

25 MS. KING: In that case, Madam Chair, I
26 move that we accept Ruth Ann Miller's submission,

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1 although it was untimely filed.

2 MS. REID: Do you want to make a motion
3 to postpone or to continue?

4 MS. KING: I move that we postpone.

5 MS. REID: Okay. I'll accept that.

6 MS. KING: And that we accept Ruth Ann
7 Miller's letter as part of the record. Do you go
8 along with that or do you want me to bifurcate the
9 issues?

10 MS. REID: No. I think that I am in
11 agreement with you but I think that we should simply
12 state for the record that this is --

13 MR. GILREATH: Louder please.

14 MS. REID: -- that we should say for the
15 record that this is an unusual circumstance under
16 which we are adopting this position at this time.

17 MS. KING: Yes. Well, the thing is that
18 Ruth Ann Miller was representing the ANC at the
19 public hearing, and we asked her to go back and see
20 if the ANC wished to amend its earlier resolution,
21 which it did, but she had a minority opinion on it
22 so, since Mrs. Miller was so intimately involved in
23 the situation and had represented the ANC, I think
24 that we should open the door to receive her minority
25 report on their second resolution.

26 MR. GILREATH: I agree with that.

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1 MS. REID: Mr. Bergstein, in regard to
2 some of the other issues that were raised in both
3 submissions, the draft orders, the post-hearing
4 submissions, the draft orders, should we address any
5 of those at this time or just table it until --

6 MR. BERGSTEIN: It's my understanding --

7 MS. REID: -- the next --

8 MR. BERGSTEIN: -- that you are
9 postponing your decision -- that both you are
10 accepting the submissions that had been received
11 even though one was late filed and that you are
12 postponing your decision in order to analyze all the
13 post-findings of facts and the conclusions of law
14 that your decision will be reflective of your
15 opinion regarding the issues that are raised.

16 MS. REID: Okay. Ms. King, we were
17 discussing earlier the aspects of the merits of the
18 case and the conditions.

19 MR. GILREATH: We can't hear.

20 MS. KING: When we were discussing this
21 earlier with the -- yes.

22 MS. REID: There was a question in
23 regard to the conditions that were proffered by both
24 the ANC and the Cleveland Park Business Association.
25 Was it your feeling that that encompassed for the
26 most part the primary conditions that we were going

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1 to address within any order that we --

2 MS. KING: I think we've got such a
3 volume of material and new material that was given
4 to us this morning that I don't think that I could -
5 - the question was, you know, all of these
6 conflicting conditions that have been proposed by
7 various people in their draft orders, in
8 resolutions, in agreements--

9 MS. REID: Amendments.

10 MS. KING: -- and amendments and so
11 forth. I think that any conversation about that
12 needs to be postponed as well because I have not had
13 the opportunity to read all the material that I was
14 handed this morning and so I think that we need to
15 just postpone all further discussion of this until
16 the 2nd of June.

17 MS. PRUITT: So Madam Chair, unless you
18 are going to ask for additional information at this
19 time from various people, I would suggest you
20 postpone that.

21 MS. REID: I don't know if there's
22 anything else that we need to request from the --

23 MS. KING: We've got more information
24 than we can --

25 MS. PRUITT: I would agree so I think
26 maybe we just should vote on the motion of

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1 postponement and the acceptance.

2 MR. BERGSTEIN: Can I just clarify from
3 the discussion you just had that obviously you won't
4 be discussing the conditions unless you've decided
5 to first grant the special exception and, since no
6 decision has been reached, that discussion of the
7 conditions wouldn't be relevant. You have not at
8 this point reached a decision whether or not to
9 grant the application.

10 MS. KING: Exactly.

11 MR. BERGSTEIN: If you did grant the
12 application, then the next question that would
13 follow is what conditions you've attached to the
14 grant.

15 MS. REID: My question --

16 MS. KING: She was just wondering if you
17 needed more information.

18 MS. REID: My question was not in regard
19 to discussing the conditions per se. What my
20 question was was with regard to the fact that there
21 have been so many conditions by different entities
22 and some of which are opposing in their content and
23 I was just querying the Board to see if in fact we
24 needed to request that there be some aggregate type
25 of submission that would make it easier for us
26 rather than us having to go through the materials

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1 and determine what's relevant and what's not
2 relevant and then to go even further into analyzing,
3 in some instances, amendments to the conditions.

4 MR. BERGSTEIN: I think that's fine. I
5 just wanted to make -- request for that information,
6 you haven't pre-judged the ultimate --

7 MS. REID: It's not as clean as I would
8 like to see it.

9 MS. KING: No, but I think we're going
10 to have to, you know, we're going to have to decide.
11 If we decide to grant the application and if we
12 decide to impose conditions, I think we're going to
13 have to be the ultimate arbiters of what they are.

14 MS. REID: I was trying to see if there
15 was a way that we could circumvent having to do
16 that.

17 MS. KING: I think we've done as much as
18 we can.

19 MR. GILREATH: Can we have some kind
20 of-- maybe before the regular meeting -- it seems to
21 me we need some time to sit down and go through
22 systematically and say, okay, here are the issues --

23 MS. KING: I don't think we can do that
24 in camera, Jerry. I don't think it's legal. I
25 think we have to make our decisions in public.

26 MS. REID: I have no problem with doing

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1 that publicly. Perhaps we can do it prior to when
2 we have the decision making meeting prior to
3 actually going to the decision making discussion,
4 perhaps we can take some time and then enumerate
5 issues.

6 MS. KING: There's a sunshine law in the
7 District of Columbia. I don't think we can sit in
8 the other room --

9 MS. REID: No, no, no. I prefaced it by
10 saying publicly, Ms. King, that to publicly sit here
11 and to determine point by point all the issues that
12 we want to consider prior to going into the
13 discussion about the decision on the record
14 publicly. I don't see anything wrong with that. Is
15 there, Mr. Bergstein?

16 MR. BERGSTEIN: In fact, the court
17 feels, has held that the sunshine law does not apply
18 to this body.

19 MS. REID: Oh.

20 MS. KING: Oh, really?

21 MR. BERGSTEIN: Yes.

22 MS. REID: Okay. That'll work. I agree
23 with that.

24 MR. GILREATH: But I think we need
25 something saying ANC, one said this and one said
26 this, so we can go through and compare.

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1 MS. REID: This issue, that issue.

2 MS. PRUITT: Madam Chair, I think that
3 may be better served when we do at the decision
4 meeting on the 2nd because we have a fairly heavy
5 agenda here this morning.

6 MS. REID: Exactly.

7 MS. PRUITT: So unless there's
8 additional information --

9 MS. REID: Just kind of floating that
10 balloon to see whether or not that was something we
11 could do and I think that we're all in agreement
12 that we can do it and will do it.

13 MS. KING: Could the staff person on
14 this case, however, follow Mr. Gilreath's suggestion
15 and do a matrix to show those areas of agreement and
16 those areas of disagreement amongst all the various
17 --

18 MS. PRUITT: We'll certainly try to put
19 together some type of a listing or --

20 MS. KING: The bottom line is that we've
21 got an agreement with the Cleveland Park Citizens
22 Association, we've got a resolution of the ANC, and
23 we've got the appellant's draft order.

24 MS. REID: Not appellant. The
25 applicant.

26 MS. KING: The applicant. Sorry. The

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1 applicant's draft order and, if we could see where
2 those mesh and where they don't --

3 MS. REID: It would be most helpful.

4 MS. KING: And if we could have that in
5 our package together with Alan's legal opinion prior
6 to the meeting of the 2nd, that would be very
7 useful.

8 MS. REID: So are we all in agreement
9 that from this time until the actual postponed
10 hearing date -- I mean decision date, there will be
11 no other, no further submissions by anyone.

12 MS. KING: Not another word.

13 MS. REID: Nothing else from anyone.

14 MS. KING: Not a word, please.

15 MS. PRUITT: Can you call for the
16 question.

17 MS. REID: All right. All in favor.

18 (Ayes)

19 MS. REID: Opposed.

20 MR. GILREATH: I would like to ask our
21 staff, will we get a copy of this matrix prior to
22 our meeting?

23 MS. KING: Yes, on the Friday.

24 MR. GILREATH: I'd like to study it and
25 so forth.

26 MS. KING: And Mr. Bergstein's legal

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1 opinion also, at least on the Friday.

2 MS. PRUITT: And this is being postponed
3 until July 2nd.

4 MS. KING: June 2nd.

5 MR. BERGSTEIN: I'm sorry. June 2nd.
6 June 2nd. And no more submissions.

7 MS. REID: No more submissions please.

8 MR. HART: Next case. Application No.
9 16432 of Sam and R.D. Ansellem, pursuant to 11 DCMR
10 3107.2, for a variance from Section 2001.3(c) to
11 allow an addition to an existing non-conforming
12 structure, a variance from the minimum side yard
13 requirements, Section 405.9, and a variance from the
14 minimum width of an open court requirement, Section
15 406.1, for addition to an existing non-conforming
16 single family dwelling in an R-1-B District at
17 premises 3417 Fulton Street, N.W. (Square 1941, Lot
18 18).

19 MS. REID: Board Members, I would move
20 approval of this application.

21 MS. KING: Madam Chair, I have a real
22 problem with this. I think there isn't a real
23 detriment to the neighborhood.

24 MS. REID: I'll tell you the basis of my
25 decision, Ms. King, was predicated upon, 1) the fact
26 that these particular applicants have received an

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1 order, an approved order #15496, for the same relief
2 that they're requesting now and they were unable to
3 act on it for various reasons. Nonetheless, they
4 did have an approval. And then I looked at the
5 submission in regard to the shading, the shadowing,
6 and that seemed to be the only aspect of it that was
7 in contention, how the sun hit the yard next door.
8 And I looked at the pictures submitted by the
9 applicant and looked at the drawings that were
10 submitted by the neighbors, Finnegan and Courier,
11 and it appears to me that the amount of shading or
12 the amount of adverse impact was not such a
13 magnitude that would convince me to turn down the
14 application.

15 MR. GILREATH: I concur with that, that
16 almost any of us who are --

17 MS. REID: Are you seconding?

18 MR. GILREATH: I will, but I'd like to
19 make a statement first.

20 MS. REID: Oh, okay.

21 MR. GILREATH: As a homeowner, I was
22 looking at our house with the sun at different
23 angles in the winter and in the spring and in the
24 summer. We all get a little bit of shade. And
25 looking at that, I concur with our chairman that the
26 bit of shading that occurs at certain times of the

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1 day, certain times of the year, I think is really
2 minimal and, therefore, I second the motion and
3 think it should be approved.

4 MS. REID: Okay. And I think if -- were
5 here had agreed to eliminate the ballast --

6 MS. KING: The balustrade. Yes.

7 MS. REID: The balustrade. He agreed to
8 try to compromise. I like to see people try to
9 reach each other and give some, take some, and he --

10 MS. KING: But the balustrade is not
11 going to cause -- is not going to be an element in
12 the shadow.

13 MS. REID: That was something that --

14 MR. GILREATH: He agreed to remove that.

15 MS. REID: Yes. Someone had brought it
16 up as an issue and he agreed to eliminate that. And
17 I think that there may be some adverse impact, but I
18 just didn't think that it was of such a degree to
19 merit the application being denied.

20 MR. GILREATH: I thought he also
21 established the fact that the lot is situated in
22 such a way that the house is not configured normally
23 the way a lot would be. It's an east-west thing.
24 The lot is facing south. It has unique qualities to
25 it.

26 MS. KING: It's in my block, so I know

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1 the property.

2 MR. GILREATH: All right. I defer.

3 MS. KING: I will not oppose granting of
4 this application.

5 MS. REID: Okay. All in favor.

6 (Ayes)

7 MS. REID: Opposed.

8 MS. KING: With the inclusion of the
9 condition that the balustrade be eliminated from the
10 design.

11 MS. REID: I think that we should also
12 stipulate that we felt still that they had met their
13 burden of proof in regard to -- if you want to just
14 amend that vote to stipulate that we felt that they
15 had met their burden of proof in regard to the three
16 pronged test of uniqueness and adverse impact not
17 being of adverse substantial detriment to the public
18 good and that it would not impair the intent and
19 integrity of the zoning regulations or map. I want
20 to just add that.

21 MS. PRUITT: Staff will record the vote
22 as three to zero to approve motion made by Ms. Reid,
23 seconded by Mr. Gilreath.

24 The next application before you is 16412
25 of Florida Avenue Associates, pursuant to 11 DCMR
26 for a special exception to permit a change of

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1 nonconforming office use to a restaurant in a
2 DCOC/R-5-B District at premises 2128 Florida Avenue.
3 It is before you for a decision today.

4 MS. KING: Madam Chair, I move approval
5 of this application with some conditions. I would
6 attach to the order the voluntary agreement entered
7 into between Florida Avenue Associates and ANC 2-B
8 and, as a further condition, I would require that if
9 the -- that they -- I'm trying to figure out how to
10 say this right.

11 MS. REID: Okay. Now you said the
12 agreement. Let me look at that.

13 MS. KING: The voluntary agreement
14 between Nora's and 2-B.

15 MS. REID: What I was looking for in
16 this agreement was the provision for the --

17 MS. KING: That's what I'm going to try
18 to deal with.

19 MS. REID: Okay.

20 MS. KING: I also would impose as a
21 condition that should either of the parking off site
22 parking -- off street parking agreements that have
23 been filed by Florida Avenue Associates be voided,
24 that they be required to inform the Board of Zoning
25 Adjustment of any such cancellations and to provide
26 us with information about substitute parking that is

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1 provided. In other words, if they do not continue
2 to have the off street parking with Cafritz and --

3 MS. REID: Cafritz and also Church of
4 the Pilgrim.

5 MS. KING: -- and Church of the
6 Pilgrims, that they either provide us with similar
7 signed agreements with other off street parking
8 facilities or come back to us for a review of their
9 application.

10 MR. BERGSTEIN: May I suggest a word
11 choice? We say voided or terminated.

12 MS. KING: Okay. Say it for me right,
13 Alan.

14 MR. BERGSTEIN: The entire request?

15 MS. KING: Right.

16 MR. BERGSTEIN: All right. I believe
17 what you're requesting as a condition is that if the
18 applicant is advised that its parking agreements are
19 to be terminated or voided --

20 MS. KING: Or if they terminate or void
21 them themselves.

22 MR. BERGSTEIN: -- or if they decide to
23 terminate the agreements themselves, that they
24 immediately provide the Board with notice of that
25 event and of any substitute or existing parking
26 arrangements that they have reached.

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1 MS. KING: Thank you. That's my motion.

2 MS. REID: I would second the motion,
3 Ms. King, and also just add that the letter that was
4 submitted to us from the State Department, my read
5 on it is is that it really did not get permission
6 for parking on that particular lot, the Embassy lot,
7 and if, in fact, this were to happen, it would have
8 to be done by virtue of them first coming to BZA to
9 get such an approval. So that particular letter
10 does not, in my opinion, reach the requirement for
11 an agreement to park on that lot and it appears
12 that, given the fact that they do have two other
13 lots, two other agreements with Universal as well as
14 with the -- I'm sorry -- with Cafritz and also with
15 the Pilgrim Church.

16 MS. KING: Whatever.

17 MS. REID: The Pilgrim -- whatever --
18 the Church of the Pilgrim, that that seems to be
19 adequate. So --

20 MR. GILREATH: I concur with that. I
21 think the Embassy parking is really irrelevant to
22 this. It's not essential. If they want to do that,
23 they can go through the process, and I presume it
24 has to come through foreign missions BZA. Is that
25 the procedure and that the parking at the Universal
26 Building -- I guess that's the Cafritz parking --

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1 and the church I think is fully adequate.

2 MS. REID: And that they have complied
3 with their burden of proof for a special exception
4 and it appeared that the Florida Avenue Associates
5 took adequate action to try to diffuse and mitigate
6 adverse impact in regards to this application being
7 approved. All in favor.

8 (Ayes)

9 MS. REID: Opposed.

10 MS. PRUITT: Staff will record the vote
11 as three to zero approval. The maker of the motion
12 is Ms. King, seconded by Ms. Reid.

13 The last issue before you is a motion,
14 an appeal of No. 16405 of Mildred R. Crary, pursuant
15 to 11 DCMR from the administrative decision of the
16 Zoning Administrator to issue the following building
17 permits. Permits were issued for the property
18 located at 3020 43rd Street.

19 MS. KING: Madam Chair, I find -- I mean
20 I have been concerned all along that the Department
21 of Consumer and Regulatory Affairs has failed to
22 testify in this case. I think it's been appalling
23 and I trust that somebody has written to the Mayor
24 or whoever. But anyways, the thing that came in my
25 packet on Friday that I found most compelling was
26 this affidavit of Inspector Shelton which is the

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1 only information we have received from DCRA. He's
2 the Building Inspector.

3 MS. REID: What was that?

4 MS. KING: It was part of the
5 Intervenor's submission.

6 MS. REID: I don't have that.

7 MS. KING: You don't have it? Mr.
8 Gilreath, you don't have it either?

9 MR. GILREATH: I'm not sure I do. What
10 does it say at the top?

11 MS. PRUITT: Which document are you
12 talking about?

13 MS. KING: Before the Board of Zoning
14 Adjustment.

15 MS. PRUITT: What's the date?

16 MS. REID: I don't have that. What does
17 it say, Ms. King?

18 MS. KING: "Inspector Shelton, being
19 first sworn, deposes and says, '1) I'm a Building
20 Inspector with DCRA and I'm confident to make this
21 statement.'"

22 MS. PRUITT: It's Exhibit G.

23 MS. KING: "2, my responsibilities
24 include enforcing the zoning regulations. Charles
25 Sissan is the owner of 3020 43rd Street, N.W. Duly
26 filed with the District government in full

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1 accordance with all laws and regulations, building
2 permits" and gives the numbers to renovate that
3 residence. In connection with the issuance of the
4 required building permits, I inspected the premises
5 on several occasions to determine whether the work
6 performed was in accordance with the permits.

7 Based on my inspection, the work was in
8 full compliance. On one occasion, it was determined
9 that the work exceeded the permit. This occurred
10 when the contractor took down the existing garage
11 rather than simply constructing the approved
12 addition. A stop work order was issued and
13 subsequently lifted when the corrected permit was
14 issued.

15 I'm unaware of any information or facts
16 that would change my opinion."

17 MS. REID: I think that in this
18 particular instance we have a situation that we have
19 to address with regard to the allegation of ex parte
20 communications and we discussed that at some length
21 at the last hearing. However, at the conclusion of
22 the hearing, we requested that, all things being
23 equal, that the counsel for the applicant get to all
24 persons involved a copy of the materials that were
25 submitted to Mr. Bergstein just so as not to give
26 any appearance of any ex parte communication.

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1 MS. KING: I think it's established that
2 communication with our attorney is not ex parte but
3 improper I think would be --

4 MS. REID: I prefaced what I said, Ms.
5 King, by saying the appearance, the appearance. We
6 didn't want even the appearance because his -- okay.
7 Anyway, be that as it may, we want to -- we have not
8 received -- I have not received the material that
9 was submitted and also the counsel of the Appellant
10 stated that they had not received the material as
11 requested to be provided to all parties in this
12 case.

13 MR. GILREATH: Are there two issues
14 here? One is the ex parte matter and the other is
15 the timeliness and so forth. If the ex parte matter
16 requires that there be some kind of postponement so
17 the Appellant or the opposition can have access to
18 this one matter, legal counsel will have to advise
19 me on that.

20 On the other, I am prepared to offer at
21 least my own read of this other matter, the
22 timeliness and what have you. So do we have to
23 split this up? Okay. If we leave the legal part of
24 it out.

25 MS. KING: It's not only this question.
26 Ms. Dwyer didn't submit the information that she had

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1 promised to submit, both to the Board and to the
2 opposing counsel.

3 MR. GILREATH: This is -- but the terms
4 of the original applicant, when he applied to the
5 D.C. Regulatory Affairs Office and so forth, and
6 particularly since there was this work stopped order
7 and then he complied with that, to me, I don't feel
8 that he would have any reason to say well, he has to
9 question what has been approved for him. He need
10 not be an authority. And secondly, when they start
11 investigating this, get digging into it, they found
12 this one and later on they found that one.

13 MS. REID: Oh, I see what you mean.

14 MR. GILREATH: There's the timeliness
15 and so forth. The legal cases they gave is about
16 three months and some of these go about seven or
17 eight months and what have you. So in terms of
18 that, from what I've seen and particularly this
19 affidavit, I think the homeowner acted in good
20 faith in assuming that what had been approved was
21 acceptable and legal.

22 MS. REID: Okay.

23 MR. BERGSTEIN: -- what the posture is
24 for this because I thought that this matter was
25 postponed for a hearing, the actual appeal, and that
26 what was going to happen -- I didn't know this was

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1 even on the agenda today and I apologize. But I
2 thought what was going to happen was that an
3 opportunity was going to be given to the property
4 owner to file a motion to dismiss.

5 MS. PRUITT: And that's what has to be
6 filed.

7 MR. BERGSTEIN: And that's what has to
8 be filed, and which I have not seen.

9 MS. REID: And the motion to dismiss was
10 predicated upon the ex parte communication
11 allegation.

12 MR. BERGSTEIN: Well, it came up that
13 initially when the ex parte communication issue came
14 up, the Board was going to give the applicant an
15 opportunity to respond to whatever it was had been
16 given to me. I suggested that instead that if the
17 property owner had a request to make that related to
18 that packet proved something, then he should either
19 submit a trial brief or a motion to dismiss.

20 MS. REID: Wait a minute. Excuse me.
21 I'm not following you because you're saying that
22 your understanding was that Ms. Dwyer was not asked
23 to supply the same materials that she had given you
24 to all the other parties concerned. That was our
25 understanding.

26 MR. BERGSTEIN: She was asked to do that

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1 and to do it as part of either a motion or a trial
2 brief which she said that she would give to the
3 applicant, the Appellant that day. Then a time was
4 set to respond. But that was separate from the fact
5 that there would still be a hearing on the
6 application itself, assuming the Board did not grant
7 the motion -- if she did do a motion to dismiss, if
8 the Board did not grant the motion to dismiss, there
9 would be a hearing. On the other hand, the Board
10 could hold the motion to dismiss in abeyance and
11 still have the hearing.

12 But I don't know what it is before the
13 Board, if there's a motion to dismiss that the Board
14 is going to be acting on. If it denies the motion
15 to dismiss, it would still have to have a hearing on
16 the actual application, on the actual appeal.

17 MS. PRUITT: Or they could hold it in
18 abeyance until after any hearing.

19 MR. BERGSTEIN: Right. I haven't seen
20 this motion, so I don't know what the grounds are
21 and what it encompasses or if it's been responded to
22 or if it attaches materials that were sent to me.
23 But if the Board is going to act on the motion to
24 dismiss if it denies it, that simply means that the
25 appeal isn't dismissed but would go forward and
26 you'd have a hearing on the issues.

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1 MR. GILREATH: Well, if we vote to
2 dismiss this ex parte matter, will that subsequently
3 have legal ramifications?

4 MR. BERGSTEIN: I received the motion
5 and I did read it completely and I gave it to one of
6 my staff people to respond to and to provide you
7 guidance. I wasn't aware that you had agendized
8 this motion for decision and whether or not you
9 intended to take up that motion or request that
10 related to the ex parte today as well. I'm simply
11 not aware of that.

12 MS. KING: Are you suggesting that it
13 would be prudent for us to postpone this until June?

14 MR. BERGSTEIN: Yes, because I really
15 don't know what it is that you're proposing to do
16 here.

17 MS. KING: I move that we postpone this
18 until the June 2nd meeting.

19 MS. REID: All right. Before disposing
20 of this particular case, I am not clear as to the
21 status and what I mean by that is if in fact there
22 was a request that Mrs. Dwyer supply all the
23 parties, the counsel for the Appellant as well as
24 the Board Members, with the documents that have been
25 given to you that form the basis for the alleged ex
26 parte communication, if that has not been done, then

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1 it can't be done from this point forward even though
2 we're postponing the hearing. Is that not correct?

3 MR. BERGSTEIN: Well, if --

4 MS. REID: She had a time certain to
5 submit that.

6 MR. BERGSTEIN: It was my understanding
7 that whatever was going to be filed, whether it was
8 going to be a motion or trial brief, would be
9 accompanied or would have attached to it those
10 materials so that it would allow the property owner
11 an opportunity to respond to it in the context of
12 some sort of formal request or brief or whatever.
13 Again, I don't know what it is that's been received
14 or what it is --

15 MS. REID: But that has not -- the
16 material that was specifically asked for has not
17 been received by us or, according to the letter that
18 we received from the Appellant counsel, by them
19 either.

20 MR. BERGSTEIN: Well, I think that the
21 contemplation was that whatever it was that was
22 going to be filed, motion or the time frame was set,
23 I recall, by the attorney for the property owner
24 when she said that she would provide the motion, I
25 believe that day and so it was my contemplation that
26 those materials would be provided that day. But the

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1 Board did not specifically order the materials. I'm
2 trying to recall off the top of my head.

3 MS. REID: We did. We specifically
4 asked for it.

5 MR. BERGSTEIN: It was certainly the
6 intent of the Board that those materials would be
7 provided to --

8 MS. REID: Right.

9 MR. BERGSTEIN: -- the property owner
10 and that the vehicle that was agreed to by all, I
11 thought, would be that they would be attached to
12 something like a pleading that would explain their
13 relevance and either to be a trial brief that
14 explained the relevance of the package or could be a
15 motion to dismiss.

16 MS. PRUITT: Which is what they have
17 supplied to you in the motion to dismiss. It is not
18 the exact package, but it's sort of a -- let me get
19 it. I believe Mary Mabel has had this and she had
20 an opportunity to look at it.

21 MS. KING: Could we just, to make
22 everybody happy, myself included, ask Ms. Dwyer to
23 supply an exact copy of the material that she
24 supplied to Mr. Bergstein to all the parties and to
25 the Board?

26 MS. REID: Ms. King, that's the whole

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1 point. We did that and it was not done.

2 MS. PRUITT: I don't believe, Ms. Reid,
3 that it was as explicit as that.

4 MR. BERGSTEIN: I think we need to --

5 MS. PRUITT: We can go back and check
6 the transcript.

7 MS. REID: I'm sure it was because I
8 think when --

9 MS. PRUITT: I have a different
10 recollection --

11 MS. REID: -- not wanting to have any
12 appearance of any tainting or any type of
13 impropriety or anything unethical, we specifically
14 asked that, all things being fair, that you submit
15 it so that that would, for all intents and purposes,
16 eradicate that as an issue that in regards to ex
17 parte communications.

18 MR. BERGSTEIN: I would ask an
19 opportunity to look at this because it seems to me
20 what I'm seeing is that what's been supplied here
21 are the things that -- what I was supplied was what
22 I'm seeing here plus some cases. That's what I
23 believe I'm seeing. If this motion cited the cases
24 that I was given copies of and contains those
25 materials, those additional materials, then it would
26 contain everything that I sought, either by the

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1 specific documents or references to the cases, a
2 citation to the cases, which anyone can pull in a
3 public library.

4 MS. REID: What is it that you had
5 because we don't have it?

6 MR. BERGSTEIN: Well, I have --

7 MS. KING: He has the submission that we
8 have.

9 MR. BERGSTEIN: I have a motion that was
10 filed by the intervenor to dismiss and it contains
11 one, two, three, four, five, six, seven attachments.
12 Most of them look very familiar to me as being part
13 of what I was provided. I see --

14 MS. REID: Could I see that, please?

15 MR. BERGSTEIN: Certainly.

16 MS. PRUITT: Ms. Reid, you have that in
17 your package.

18 MS. REID: I don't know what he's
19 looking at. I just wanted to make sure that what I
20 have and what he's looking at is one and the same.
21 Okay. Is this what you're saying is --

22 MR. BERGSTEIN: This is what I'm saying
23 and I'm looking at these attachments and each one of
24 these -- and I didn't know this was on today and I
25 didn't bring anything with me -- but these look all
26 very familiar in terms of what I was provided. The

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1 only thing that's not here are cases which I was
2 also provided.

3 MS. REID: Initially she said it was an
4 agenda. She gave you an agenda.

5 MR. BERGSTEIN: Yes.

6 MS. REID: The agenda and then
7 materials, about a half inch of materials that were
8 attached to the agenda and that's what we want to
9 get to the exact submission that was given to you by
10 Ms. Dwyer. Everyone should have a copy of the exact
11 same thing. We can eliminate the ex parte
12 communication aspect of this case and move forward.
13 That's what I'm thinking.

14 MR. BERGSTEIN: What I can do for the
15 Board is to look at my package, compare it with
16 this, provide the Board with what's not in this.

17 MS. REID: Okay.

18 MR. BERGSTEIN: And then the Board make
19 its determination upon what --

20 MS. KING: But we want to provide it
21 also to the attorney for the Appellant.

22 MR. BERGSTEIN: I'll be glad to. What
23 I'll do is I will forward a communication to you
24 with the attachments and I'll copy that to the
25 attorneys.

26 MS. KING: Okay. Please do.

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1 MS. PRUITT: Mr. Bergstein, do you have
2 the original package?

3 MR. GILREATH: When does it occur?
4 Today or a subsequent meeting?

5 MS. PRUITT: -- the applicant for Mr.
6 Sisson's attorney.

7 MR. BERGSTEIN: That's Ms. Dwyer?

8 MS. PRUITT: Yes.

9 MR. BERGSTEIN: Yes. Not with me right
10 now. I didn't know this was on here today.

11 MS. PRUITT: Why don't we just make this
12 simple and you provide us that --

13 MR. BERGSTEIN: I'll provide you with
14 the whole thing.

15 MS. PRUITT: And then we'll provide it
16 to everybody.

17 MR. BERGSTEIN: That's fine.

18 MR. GILREATH: When does this occur? By
19 the next meeting? Are we done in between and then
20 okay, so we're talking about a postponement.

21 MS. KING: Yes, we're talking about a
22 postponement. So do we need a motion to postpone?

23 MS. PRUITT: So you're going to take the
24 view that we will be taking up the issue of whether
25 or not to dismiss it in abeyance until we've gotten
26 all this information?

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1 MR. BERGSTEIN: When was the hearing
2 scheduled for in this matter?

3 MS. KING: We haven't decided whether to
4 have a hearing or not.

5 MS. PRUITT: No, no. It was scheduled.
6 I'm sorry. May 26th.

7 MS. KING: Are you sure?

8 MS. PRUITT: Yes.

9 MS. KING: I beg your pardon.

10 MS. PRUITT: May 26th.

11 MS. KING: For what?

12 MS. PRUITT: A hearing.

13 MS. KING: But we haven't decided
14 whether to have a hearing or not.

15 MS. PRUITT: Well, it was scheduled for
16 hearing and if you decide to have it, it will be
17 there. I mean you have this motion to either
18 dismiss or have a -- you can dismiss this and not
19 have a hearing and you can do it at the beginning of
20 that hearing.

21 MS. KING: It's going to be a special
22 hearing.

23 MS. PRUITT: Or you can hold this into
24 abeyance until after you have the hearing.

25 MS. KING: I didn't know anything about
26 a date of the 26th.

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1 MR. BERGSTEIN: I may have not
2 understood that today was the day we were going to
3 decide this thing. There's two issues, the ex parte
4 issue and then the issue of deciding this.

5 MS. REID: The what?

6 MR. BERGSTEIN: There's two issues.

7 MS. REID: What's the second one?

8 MS. KING: The issue of deciding whether
9 to --

10 MR. BERGSTEIN: The ex parte issue which
11 has been raised which is a separate pleading about
12 and then there's this issue of a motion to dismiss.
13 Has there been a response to this motion?

14 MS. REID: No. The motion is to --
15 requires us to make a decision whether it will be
16 heard or dismissed.

17 MR. BERGSTEIN: If you feel you can make
18 the decision, I don't want to forestall you. I just
19 was not aware that this had all come in and,
20 therefore, I didn't provide you with any guidance on
21 it. I apologize because I believe there was a staff
22 problem in my section. If you believe that -- if
23 there was a time allowed for response and no
24 response was given and you believe you can make a
25 decision today, I'm not requesting that you postpone
26 it. I think I did not note on my calendar that you

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1 were going to decide this today.

2 But since the parties are here and time
3 for response has passed and there's been no
4 response, and if you feel comfortable deciding the
5 matter, I apologize.

6 MS. KING: There was no response to the
7 motion to dismiss?

8 MS. PRUITT: Not in the file. They had
9 a week from the 21st. I mean that's typical how we
10 do on all responses.

11 MR. BERGSTEIN: But did the pleading
12 that came in about the ex parte request a stay?
13 Could I see that? I'm sorry.

14 MR. GILREATH: Wasn't there an actual
15 request for a stay?

16 MR. BERGSTEIN: Yes.

17 MS. REID: Let me correct something I
18 said earlier, too, matter of fact, and that was in
19 regard to the ex parte communication being
20 predicated by the motion to dismiss as basically --
21 is saying that it was based on the motion for the
22 stay. Now, the ANC also -- so let's not overlook
23 the fact that the ANC also had some grave concerns
24 about this ex parte communication issue and, giving
25 them the great weight to which they are entitled, we
26 certainly don't want to overlook that or be remiss

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1 in our responsibility to see that that is addressed
2 adequately.

3 I think that what we need to do is to --
4 my motion would be to stay the case until the next -
5 -

6 MS. KING: Postpone.

7 MS. REID: Postpone.

8 MS. KING: Please.

9 MS. REID: -- the next hearing date and
10 then, once we've gotten this issue of ex parte
11 communication straightened out, then we will make
12 the determination on whether or not we will hear the
13 case or dismiss the case.

14 MS. KING: Okay. So it's postponed
15 until the 2nd of June.

16 MS. PRUITT: Madam Chair, you've already
17 scheduled a special public hearing for May 26th.
18 That was determined at the last meeting.

19 MS. KING: But we haven't made a
20 decision as to whether we're going to have a
21 hearing.

22 MS. PRUITT: You determined that you
23 would schedule a hearing. At that point, you would
24 determine whether or not you want to dismiss it or
25 have a hearing.

26 MS. REID: Okay. Well, I wasn't certain

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1 as to the date but whatever the date is --

2 MS. PRUITT: Right. That's what I

3 wanted to let you know. It's the 26th.

4 MS. REID: But we already have a date

5 and that's the 26th.

6 MS. KING: Are you suggesting that we

7 have a special public meeting at our next meeting?

8 MS. PRUITT: What would you need a

9 special public meeting for?

10 MS. KING: To make a decision on this.

11 MS. PRUITT: You can make that decision

12 at the hearing.

13 MS. KING: We just come in for a special

14 meeting --

15 MS. PRUITT: A hearing and/or meeting,

16 depending upon what your decision is. Yes.

17 MR. BERGSTEIN: You can decide at the

18 hearing as a preliminary matter, I believe.

19 MS. PRUITT: Correct, which is what was

20 determined.

21 MR. BERGSTEIN: To deal with the ex

22 parte issue, deal with the motion to dismiss, at

23 that point, either go on to have a hearing or not.

24 MS. REID: Right. Can I get a second

25 and a motion.

26 MR. GILREATH: We have a motion.

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1 MS. REID: My motion is to continue it,
2 postpone it until May 26th. All in favor.

3 (Ayes)

4 MS. REID: Opposed.

5 MS. KING: So there's nothing else on
6 the agenda for the 26th but this case. Is that
7 correct?

8 MS. PRUITT: Correct.

9 MS. REID: That will conclude our May
10 5th meeting.

11 (Whereupon, off the record briefly at
12 10:55 a.m.)

13 MS. REID: Okay. Are we on now? Repeat
14 that, Ms. King.

15 MS. KING: As someone who voted in favor
16 of this last motion on the Crary case, I would like
17 to submit -- I don't know parliamentarily what I do,
18 but I want to change our motion. I would move that
19 we make a decision as to whether or not we hear this
20 case at the beginning and in a special public
21 meeting on the 19th of May prior to our public
22 hearing. Should we make a determination to hear
23 this case, it will be heard on the 26th of May.

24 MS. REID: Okay. That's fine. However,
25 I don't know if we have to have a special hearing to
26 do that. I think we can do it just as a matter of -

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1 - I mean a special meeting to do it. I think we can
2 do it just as a matter of public hearing.

3 MS. KING: It has to be done in --

4 MS. REID: As a preliminary matter.

5 MS. PRUITT: My understanding is Ms.
6 King wants to do it at a regular schedule in case it
7 --

8 MS. KING: Should we decide to dismiss
9 the appeal, we will then not have to come down to
10 the BZA on the 26th since we have nothing else on
11 the agenda.

12 MS. REID: Okay. You want it to be
13 discussed at a meeting on what day?

14 MS. KING: On the 19th.

15 MS. REID: At a regularly scheduled
16 meeting.

17 MS. KING: We will make a decision on
18 the appeal to the motion to dismiss. All the legal
19 issues will be smoothed out.

20 MS. REID: I see what you're saying now.
21 Okay. I got it.

22 MS. KING: And then, should we decide to
23 have a hearing on the appeal, we will then come back
24 a week later and devote as much of that day as we
25 need to to this sole case.

26 MS. REID: Okay. Then what we need to

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1 do is we nullify the previous motion.

2 MR. GILREATH: Modify it.

3 MS. REID: Or just amend it.

4 MS. KING: Amend it to say that we
5 postponed the decision until the 19th and, should
6 the decision favor a hearing, that the hearing will
7 be on the 26th.

8 MS. REID: Does everyone understand
9 that? I just don't want any confusion. It is
10 rather convoluted. I just want to make sure that
11 we're all clear, everyone is clear on what we're
12 doing.

13 MR. BASTIDA: Excuse me. --

14 MR. BERGSTEIN: The problem is that
15 we're having a lot of talking off the record and I'm
16 hearing it and I -- We have a motion to stay that
17 may have been filed in lieu of a response which is
18 why there was no response to the motion to dismiss.
19 And if the Board is going to determine both the
20 issue of the ex parte contact and the substantive
21 issues presented in the motion to dismiss, then
22 perhaps it should be made clear to the Appellant
23 that without waiving their arguments with respect to
24 the stay, it's still the expectation of the Board
25 that they file a response unless your view is that
26 they had to file a response rather than file a

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1 motion to stay.

2 In other words, I believe that what
3 happened here was that a motion to stay proceeding
4 was filed in lieu of response to the motion to
5 dismiss. Therefore, with the idea that a response
6 might follow at some future point. If the Board
7 intends to take up the issue of stay first, which it
8 would have to do before it moves on a motion to
9 dismiss, and then denies that motion and proceeds on
10 to the motion to dismiss, whether at this point the
11 Appellant should file a formal response to the
12 motion so that we have everything together.
13 Otherwise, the argument that may be made is that you
14 can't cite on the 19th but you have to wait until
15 there's been a ruling on the motion to stay. But
16 there is no stay at this point because you haven't
17 ordered a stay.

18 MS. KING: Okay.

19 MR. BERGSTEIN: So the question is what
20 do you want to do about the absence of response? Do
21 you want to clarify that because you haven't yet
22 ruled on the motion to stay, that response is
23 therefore due even though it's late?

24 MS. KING: Yes.

25 MR. BERGSTEIN: All right. And then how
26 much time do you want to give the Appellant to

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1 respond to the motion to dismiss?

2 MS. KING: How much time do you think it
3 should be, Alan?

4 MR. BERGSTEIN: Well, let me look at my
5 calendar.

6 MR. GILREATH: Can it be done by the
7 19th?

8 MS. KING: I mean he doesn't have to --
9 I mean does there have to -- if he responds, does
10 Ms. Dwyer then have to respond to his response?

11 MR. BERGSTEIN: No. We're not going to
12 allow a response.

13 MS. KING: Okay. So all we need is his
14 response --

15 MS. REID: -- to her submission.

16 MS. KING: To her submission which
17 should be available -- I mean --

18 MR. BERGSTEIN: The time frame of doing
19 something by the 19th, I would hope by Monday.

20 MS. KING: But the packages come to us
21 on Friday.

22 MR. BERGSTEIN: The what?

23 MS. PRUITT: -- which was brought up
24 earlier, traditionally, from the time -- there's a
25 week from the submission of the motion for the
26 respondent to respond.

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1 MS. REID: Which motion?

2 MS. PRUITT: This would be the motion to

3 dismiss. In this case, it appears Mr. Brown

4 responded in a stay as opposed to a response to the

5 dismissal, which is what Mr. Bergstein is talking

6 about.

7 MS. REID: Okay.

8 MS. PRUITT: So we're sort of doing

9 apples and oranges.

10 MS. REID: It's the same. It's the same

11 thing.

12 MS. PRUITT: Not exactly but --

13 MS. KING: I would err on the side of --

14 I mean for efficiency sake and as long as our

15 lawyers don't think that we're treading on unstable

16 ground, I would ask that Mr. Brown submit his

17 response by the morning of the Friday before or the

18 close of business on the Thursday before the 19th --

19 MR. BERGSTEIN: That would give us the

20 opportunity to --

21 MS. KING: -- so that we can deal with

22 the--

23 MS. PRUITT: Corp counsel would not have

24 the opportunity to give you benefit --

25 MS. KING: -- motion to dismiss and wrap

26 up everything in the same meeting.

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1 MS. PRUITT: Ms. King, though in doing
2 that, we would not allow corp counsel the
3 opportunity to give you the best advice. I mean
4 what we could do is do it a week from today, which
5 is what -- if this were to come in as a motion
6 today, typically we give a week for response so it
7 would not be shortcutting or giving any additional
8 time.

9 MS. KING: Great. Fine.

10 MR. GILREATH: Will there be ample time
11 for the Appellant to prepare his response?

12 MS. KING: Well, the traditional amount
13 of time that he would have to respond.

14 MR. GILREATH: The 19th would enable him
15 to meet the normal traditional requirements.

16 MS. PRUITT: Actually, it would be
17 before the 19th --

18 MS. REID: Okay, let's reiterate.

19 MS. PRUITT: -- which would allow us to
20 give corp counsel the opportunity --

21 MS. REID: Let's reiterate time line.
22 Okay. Now, we have submission by Ms. Dwyer.

23 MS. PRUITT: We have that.

24 MS. KING: No, no. Mr. Bergstein is
25 going to give to Ms. Pruitt-Williams what he got
26 from Ms. Dwyer and she is going to provide it to the

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1 Board and to all parties.

2 MS. REID: Okay. All right. That's

3 fine.

4 MS. KING: -- in house.

5 MS. REID: When will that be done?

6 MR. BERGSTEIN: I'm going to do that

7 today.

8 MS. REID: Today. Okay. Now, also

9 provided to Mr. Brown.

10 MS. KING: And, therefore, it would be

11 distributed not later than a week from today.

12 MS. REID: Also, it would be given to

13 Mr. Brown.

14 MR. BERGSTEIN: I'm going to give it to

15 Office of Zoning, Office of Zoning is going to

16 distribute it to the parties.

17 MS. REID: Okay. Today.

18 MS. PRUITT: No, not today.

19 MS. REID: Somebody just said today.

20 MS. PRUITT: He's going to -- he will

21 not be able to distribute it today.

22 MS. REID: All right.

23 MS. PRUITT: It has to be copied.

24 MS. REID: When will it be distributed?

25 MS. PRUITT: Probably by Friday or

26 Monday.

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1 MS. REID: Okay.

2 MS. PRUITT: I am going to be out of the
3 office Thursday and Friday so I will say close of
4 business Monday so I can be sure it's done.

5 MS. REID: Once that is distributed,
6 then what is the time line for Mr. Brown to respond
7 or does he have to?

8 MS. KING: He's responding to the motion
9 to dismiss of which he already has a copy.

10 MS. PRUITT: Which the clock starts
11 today.

12 MS. REID: No, wait a minute. Wait. I
13 thought that he did respond in the form of the
14 motion to stay.

15 MR. BERGSTEIN: That's right, but he
16 didn't respond to the substance of the motion to
17 dismiss.

18 MS. REID: Okay. So we're giving him an
19 appertained to do that as well?

20 MR. BERGSTEIN: That's right.

21 MS. REID: Okay. All right.

22 MS. KING: So because first we will
23 consider the motion to stay and, should we decide
24 not to stay, then we will consider the motion to
25 dismiss.

26 MS. PRUITT: Excuse me, Ms. King. What

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1 we can also do to expedite and make sure everybody
2 gets everything at the same time. The --

3 MR. BERGSTEIN: I can provide --

4 MS. PRUITT: They're going to serve it
5 on all the parties today. We can make sure --

6 MR. BERGSTEIN: What?

7 MS. PRUITT: The information that you
8 got. Ms. Dwyer will serve on Mr. Brown and the ANC
9 today so that, therefore --

10 MR. BERGSTEIN: And a courtesy copy to
11 me, please.

12 MS. PRUITT: A courtesy copy to the corp
13 counsel.

14 MS. KING: And to the Board.

15 MR. BERGSTEIN: Can I suggest something?
16 We're setting time schedules that relate to the
17 parties. I don't know what the Board's rules are at
18 meetings and hearings, but what's going on here is
19 the parties seem to want to communicate to the
20 Board. -- absolute ban against that at a meeting.
21 But what you're doing is you're setting pleading
22 schedules as if you're at a hearing during a meeting
23 and I can see that the parties seem to want to
24 communicate to you. I don't know if that's allowed,
25 but we're in a situation where we may be doing
26 something that --

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1 MS. KING: I mean let's not end up in
2 court on this one.

3 MR. BASTIDA: Well, the Board has the
4 authority to waive its rule and accept information
5 from the parties.

6 MS. REID: And we're doing it --

7 MR. BASTIDA: I mean --

8 MS. REID: We're doing it here, Ms.
9 Pruitt-Williams.

10 MS. KING: But I would be much more
11 comfortable if Mr. Brown and Ms. Dwyer were to speak
12 to us, and I have no problem with that if you have
13 no problem, Madam Chair.

14 MR. GILREATH: We're wanting to just set
15 a reasonable time frame here. All this intermediary
16 thing is -- if we can waive the rules, let's --

17 MS. REID: I think that without their
18 participation, I think we've got it, don't we? I
19 mean don't we have a time line now?

20 MS. KING: I would like to hear from
21 their lips whether they feel what we are proposing
22 is --

23 MS. REID: Then we'll have to waive the
24 rule --

25 MS. KING: -- is acceptable.

26 MS. REID: -- to allow them to speak.

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1 MS. KING: Yes.

2 MS. REID: All right. Very well.

3 MR. BASTIDA: You should re-vote for the
4 record, Ms. Reid.

5 MS. REID: All in favor of a waiver to
6 allow the two counsels for the Appellant and the
7 Intervenor to speak at the meeting.

8 (Ayes)

9 MS. REID: We made the motion.

10 MR. GILREATH: Second the motion.

11 MS. REID: Okay. All in favor, aye.

12 (Ayes)

13 MS. REID: All opposed. Okay.

14 MR. BROWN: I identify myself as Patrick
15 Brown, counsel for the Appellant.

16 In setting a schedule, 1) I think it
17 needs to be based on my and everyone else's receipt
18 of what Mr. Bergstein received from him. I think
19 that way there's no question that what he received
20 is what everybody received. I have difficulty
21 responding -- again, I filed the motion to stay in
22 lieu of opposing the motion to dismiss because,
23 based on this outstanding issue, I wasn't in the
24 position to respond.

25 Once I receive that, the requisite seven
26 day period to respond would be appropriate. I do

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1 have some logistical problems, as I mentioned
2 earlier. I am going on vacation, but I'll work
3 around that. But I think my clock shouldn't start
4 running until in fact I have in hand what I refer to
5 as the ex parte communications from Mr. Bergstein as
6 the recipient of them.

7 MS. REID: Mr. Brown, did I understand
8 you to say that in lieu of that material coming from
9 the Office of Zoning, you wish it to come directly
10 from --

11 MS. KING: He doesn't care where it
12 comes from as long as he gets it.

13 MS. REID: No. Let him answer. Let him
14 answer.

15 MR. BROWN: I want it to come -- and
16 again -- from Mr. Bergstein to the Office of Zoning,
17 but I want a copy made of his copy, not somebody
18 else's because again, we're talking about what he
19 received.

20 MS. REID: I think in all instances
21 we're speaking of nothing else but what he received.

22 MR. BROWN: But there's no question
23 about it. If he transmits it to Office of Zoning
24 staff and then they transmit it to everybody, then
25 we are in agreement.

26 MS. REID: Fine.

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1 MR. GILREATH: When can Mr. Bergstein
2 make this available to him?

3 MR. BERGSTEIN: What I was going to do,
4 again, was to write a cover memo to the Office of
5 Zoning that says Attached are the communications
6 that I received from Ms. Dwyer and, with that
7 statement, you can then -- and I can make copies if
8 that would make your life easier. But then it would
9 be for the Office of Zoning to distribute that to
10 the parties.

11 MR. GILREATH: Ms. Pruitt, what time
12 would that occur?

13 MR. BERGSTEIN: I would provide it today
14 and, if it makes it easier, I'll provide copies of
15 it today.

16 MS. PRUITT: If that's --

17 MS. REID: Today. May 5th.

18 MR. GILREATH: Mr. Brown and Ms. Dwyer
19 get copies?

20 MR. BERGSTEIN: That's right.

21 MR. GILREATH: When will they get their
22 copies?

23 MS. PRUITT: If we messenger it out
24 tomorrow, they'll get it the same day.

25 MS. REID: So it will be May 6th, not
26 the 5th. As of May 6th. Correct?

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1 MR. BERGSTEIN: Well, can it not be made
2 available for pick up by the parties as opposed to
3 messengering? Do the parties oppose the idea of
4 having the package available for pick up at this
5 office by close of business today?

6 MR. BROWN: That's fine.

7 MS. REID: So May 5th.

8 MR. GILREATH: So you will have enough
9 time then to prepare your response for the 19th?

10 MR. BROWN: Well then, the question is
11 setting that time. Seven days from --

12 MS. REID: From your receipt of the
13 packet.

14 MR. BROWN: Assuming that occurs today--

15 MS. REID: Wednesday. No, Tuesday.

16 MR. BASTIDA: Wednesday the 12th.

17 MS. KING: Close of business on
18 Wednesday the 12th if you get it at close of
19 business today. If it slips to tomorrow, then it
20 slips another day.

21 MR. BROWN: Okay. The problem is if it
22 slips, I leave the office at the end of the day May
23 11th and I don't return until Tuesday the 18th. So
24 if I get it today, I'm willing to work with six days
25 and file before I leave. If I don't --

26 MS. KING: I'm sorry. I don't think the

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1 Board can take into account -- I mean it's seven
2 days. If you get it today, you've got seven days.
3 One of those days you're going to be on vacation. I
4 hope you have a great time. But I don't think that
5 our rules encompass seven days unless the lawyer is
6 on vacation.

7 MS. REID: Well, he said he would make
8 sure that he had it in if it was issued today.

9 MR. BROWN: Yes, I mean I'll do that.
10 But if we just fall into the next day, then I am --

11 MS. REID: You have a problem.

12 MR. BROWN: Yes.

13 MS. REID: Let's just assume, just for
14 the purposes of clarity, that you will receive it
15 today and that will give you the time that you need.

16 MS. KING: And Mr. Bergstein is going to
17 supply copies to this office that you can pick up by
18 the close of business today.

19 MS. REID: Your submission will be in by
20 May the 11th or 12th?

21 MR. BERGSTEIN: It will be due the 12th
22 but--

23 MS. KING: The 12th is the deadline.

24 MS. REID: The 12th. Okay.

25 MR. BASTIDA: Madam Chairperson, who is
26 going to provide the copy to the ANC, which is a

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1 party?

2 MS. PRUITT: That will go out from our
3 office. We can messenger it out. We'll do it. If
4 we get it today, we can messenger it today so
5 everybody has it the same day.

6 MR. BASTIDA: Okay. So Mr. Brown is
7 going to pick it up here, the ANC will receive it by
8 messenger.

9 MS. PRUITT: Since there's no ANC person
10 represented, we have to.

11 MR. BASTIDA: Okay. I just wanted to
12 make sure that everything is covered.

13 MS. REID: Thank you. Thank you very
14 much, Mr. Bastida.

15 MR. GILREATH: Madam Chair, if you get
16 the copies today, then you can -- there's no problem
17 in terms of the logistics of getting this to Mr.
18 Brown. In other words, they will go out?

19 MS. PRUITT: Oh, he's offered to pick it
20 up.

21 MR. GILREATH: He can come and pick it
22 up.

23 MS. PRUITT: Yes.

24 MS. DWYER: And, as counsel for the
25 Intervenor, I will pick up a copy as well and I
26 assume I have the same seven days to respond.

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1 MR. GILREATH: Absolutely.

2 MR. BERGSTEIN: Well, to respond to
3 what?

4 MS. REID: To respond to what? It's your
5 document.

6 MS. DWYER: It's my document.

7 MS. REID: Why would you want to respond
8 to your document?

9 MS. DWYER: Well, let me just say
10 something. Mr. Brown is given the opportunity, an
11 additional opportunity, to respond to the motion to
12 dismiss that we filed. Let me go back for a minute.
13 When we filed the motion to dismiss at the last
14 hearing, the understanding was we filed that on
15 Thursday so that he would respond by the following
16 Thursday. And his response was in the form of
17 another motion.

18 Traditionally, what happens is a lawyer
19 files a response and may, in the alternative, file a
20 motion because that seven day period ends. You are
21 now giving him an additional opportunity to respond
22 to our motion to dismiss, which I object to because
23 I believe he had the opportunity and chose not to
24 take it. He has also the opportunity to respond to
25 whatever is coming into the record today and, as a
26 party, I want to have the same opportunity to file a

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1 response. Maybe it's further clarification of
2 issues in our motion to dismiss. But I see no
3 reason why I'm precluded from filing something on
4 May 12th if the other parties have the same
5 opportunity to file something on May 12th.

6 MR. BERGSTEIN: But I thought -- sorry
7 to jump in.

8 MS. KING: Jump away.

9 MR. BERGSTEIN: I thought that what was
10 going to be responded to was the Intervenor's motion
11 to dismiss. I understand that I'm to provide the
12 package for the point of clarity of what was
13 provided to me which relates to the motion for stay
14 and the opposition. I'm not clear of what is being
15 responded to in terms of that package or anything
16 that's supposed to be responded to in that package.

17 MS. DWYER: And that's what I'm trying
18 to clarify. If his only response on the 12th is to
19 our motion to dismiss, then that's fine. But if he
20 is requesting, as I understand it, the opportunity
21 to also respond to the agenda with the Zoning
22 Administrator and any attachments to that, that's an
23 additional response that he's planning and I think,
24 since the other parties are getting served copies,
25 they have the same opportunity to respond.

26 MR. BERGSTEIN: And the question is, is

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1 the Board contemplating that the Appellant is also
2 going to be providing a written response when the
3 Appellant is going to be receiving this package? I
4 understand that the package is triggering response
5 time to the motion to dismiss.

6 MS. KING: But that's just because his
7 motion to stay was based on the unavailability of
8 the information that he had earlier supplied to you.
9 I think that the response is limited to his response
10 to the motion --

11 MR. BERGSTEIN: -- to dismiss.

12 MS. KING: -- to dismiss.

13 MR. BERGSTEIN: Okay.

14 MS. KING: And not widespread comments
15 on -- I mean it's just so that everybody has all of
16 the same information, but the response, Madam Chair,
17 that I think we're requesting from Mr. Brown is
18 simply the response that he did not formulate when
19 he made his motion to stay his response to the
20 motion to dismiss. Just on that basis and that he's
21 being supplied with the information from you simply
22 so that he has everything before him that he needs
23 in order to formulate that response to the motion to
24 dismiss.

25 MR. BROWN: I'm not so sure I'm
26 comfortable. I understand that certainly one of my

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1 responsibilities is to have my opportunity to
2 respond to the motion to dismiss. But the document,
3 what I refer to as the ex parte communications,
4 again, once I see that, I don't think I should be
5 foreclosed from making comment on that as part of --
6 I mean I've raised what the Board considers an issue
7 of legitimate concern wherever they come out on it
8 finally. So I'm not so sure I'm comfortable being
9 precluded and I can't say, again, having never seen
10 the document other than a few minutes at the last
11 hearing, what's in there. And so I don't want to
12 foreclose my ability to respond to that, but my
13 ability to respond to the motion to dismiss filed by
14 Mr. --

15 MS. REID: My understanding was the
16 purpose of making sure that Mr. Brown and the ANC
17 and all parties were provided with this material was
18 for the purpose, if in fact, they wanted to, that
19 they could have the opportunity to respond to it.

20 MR. BERGSTEIN: What --

21 MS. REID: That was my understanding.

22 MR. BERGSTEIN: What was supposed to
23 happen was that those materials were supposed to be
24 attached to this motion to dismiss and they would
25 respond to it in the context of that motion. Now,
26 the issue has been raised, and I don't know if it's

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1 true, that all those materials weren't attached. So
2 to remedy that situation and to allow the Appellant
3 to respond fully to the motion to dismiss based upon
4 all the materials that were provided to me, those
5 will be provided to him.

6 What I would suggest is, rather than
7 invite another written response to this, if the
8 Board is going to take up the issue of the ex parte
9 stay motion on May 26th, that you can invite the
10 parties to make any supplemental arguments they wish
11 to make based upon the full package supplied today
12 rather than to have a formal written response and
13 then a reply. It's a very short time frame here.

14 MS. REID: You said to invite the
15 parties to do what?

16 MR. BERGSTEIN: To allow the parties
17 before you make the decision on a motion to stay,
18 whether or not they wish to provide any further
19 comment, oral comment, concerning the difference
20 between the package that was -- actually, the
21 package because the motion to stay is based upon a
22 package that was provided to me. I am going to
23 provide what I believe to be the package today.

24 The stay motion was written before that
25 package was delivered to the Appellant so that if
26 the Board wishes, it can allow the Appellant, whose

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1 motion it is, to make any further comment that he
2 believes would be appropriate with respect to what
3 the package actually represents based upon what the
4 package is. And that can be done as a form of oral
5 argument to the Board of Hearings -- a written
6 response. It would just perhaps be quicker.

7 MS. KING: Good idea.

8 MR. BROWN: One question. Mr. Bergstein
9 was saying May 26th.

10 MS. PRUITT: May 19th.

11 MR. BERGSTEIN: May 19th. I apologize.

12 MR. BROWN: May 19th.

13 MR. GILREATH: Well, if we decide not to
14 dismiss and say there's a stay on the 26th, then
15 they'll have a chance to get a response in on this
16 date, the 26th meeting, is what you're saying, other
17 than for --

18 MR. BERGSTEIN: What I'm saying --

19 MR. GILREATH: Mr. Brown's response is
20 just for the dismissal.

21 MR. BERGSTEIN: What I'm -- The
22 Appellant's attorney is going to put in a response
23 to the motion to dismiss and that will be done by a
24 week from today. At the hearing on the 19th, the
25 first thing the Board will consider is the motion to
26 stay. If it grants the motion to stay, there's

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1 nothing else you need to do. -- decide how long
2 it's to be stayed for.

3 If the motion to stay is denied, then
4 you would go on to consider the motion to dismiss.
5 If the motion to dismiss is granted, there's nothing
6 else to do. If the motion to dismiss is not granted
7 or granted partially, then you will go on to have a
8 hearing on what remains.

9 MS. KING: On the 26th.

10 MR. BERGSTEIN: On the 26th.

11 MR. GILREATH: Then Mr. Brown and Ms.
12 Dwyer both, if we approve the stay, then they can
13 provide whatever responses they want, additional
14 responses.

15 MR. BERGSTEIN: I'm sorry. I missed
16 that.

17 MR. GILREATH: Well, if we do not vote
18 for dismissal and say it's stayed on the 19th, then
19 these responses or the additional options of
20 responding, they would prepare written responses for
21 the 26th meeting on the stay then.

22 MR. BERGSTEIN: There are no more
23 responses. The only -- there's already been a
24 written response in opposition to the motion to
25 stay. We have that.

26 MR. GILREATH: Yes.

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1 MR. BERGSTEIN: The only thing I'm
2 suggesting is that on the 19th, before the Board
3 considers its decision on the motion to stay, to
4 allow the Appellant and the Intervenor the
5 opportunity to comment on any additional points they
6 wish to make concerning the package as they know it
7 to exist which they will know based upon -- at least
8 Appellant will know based upon what I'll be
9 providing today.

10 MS. KING: And that'll be oral argument.

11 MR. BERGSTEIN: There'll be oral
12 argument maybe for the motion to stay.

13 MR. GILREATH: That will be the only
14 response from the --

15 MR. BERGSTEIN: That will be the only
16 response that relates to the package itself. There
17 will be a written response that relates to the
18 motion to dismiss and that's due a week from --

19 MR. GILREATH: I understand that.

20 MS. PRUITT: Madam Chair, given all of
21 this, what time will you be hearing? Is this going
22 to be a special public hearing on this prior to the
23 regularly scheduled one at 9:00, I mean at 9:30 or
24 8:30 given the problem with the --

25 MS. KING: 9:00.

26 MS. PRUITT: Do you think you can handle

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1 this in half an hour?

2 MS. REID: What date? May 19th?

3 MS. PRUITT: May 19th.

4 MS. KING: Well, we never start on time
5 anyway so if we're really here and really start at
6 9:00, we can handle in the hour that we usually
7 waste.

8 MS. PRUITT: Do you want to start at
9 9:00 or 8:30?

10 MS. KING: 9:00.

11 MS. REID: Is everyone comfortable with
12 this scenario?

13 MS. KING: Yes.

14 MS. DWYER: I understand the time frame
15 and the deadlines. I just want to state on the
16 record again that we object to giving the Appellant
17 in essence three weeks to respond to a motion when
18 it was clear at our last meeting that he had to file
19 his response by April 29th and I see no reason why
20 he could not have responded to the motion to dismiss
21 and at the same time filed a motion to stay, which
22 is normally the way it is done.

23 But I understand the time frame you've
24 set out, and we will abide by it.

25 MS. KING: Thank you.

26 MS. REID: Okay. Are we straight with

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1 the time lines and what's expected of who, when,
2 where, how, what date?

3 MR. GILREATH: You fully understand the
4 time. You're satisfied with the time lines.

5 MS. REID: I would suggest that we all
6 make sure we get copies of the final resolution to
7 the time line from staff so that we'll all be on the
8 same page. Okay? All right.

9 Any other issues, questions, whatever?

10 MS. KING: No.

11 MS. REID: All right. This is for the
12 record when I reconvene the meeting so what we'll
13 do, this is closing the meeting that was reconvened
14 after we closed the first meeting, closed the
15 meeting the first time.

16 (Whereupon, the meeting was closed at
17 11:25 a.m.)

18

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