

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

JUNE 15, 2010

+ + + + +

The Regular Public Hearing
convened in Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 9:30 a.m., Meridith H. Moldenhauer,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MERIDITH H. MOLDENHAUER, Chairperson
SHANE L. DETTMAN, Vice Chairman (NCPC)
NICOLE SORG, Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
BEVERLEY BAILEY, Sr. Zoning Specialist
JOHN NYARKU, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

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Board of Zoning Adjustment
District of Columbia
CASE NO. Transcript
EXHIBIT NO.null

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OFFICE OF PLANNING STAFF PRESENT:

PAUL GOLDSTEIN
KAREN THOMAS

The transcript constitutes the minutes from the Public Hearing held on June 15, 2010.

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

2 9:30 a.m.

3 CHAIRPERSON MOLDENHAUER: Good

4 morning. The hearing will please come to
5 order.

6 Good morning, ladies and
7 gentlemen. This is the June 15, 2010 Public
8 Hearing of the Board of Zoning Adjustments of
9 the District of Columbia.

10 My name is Meridith Moldenhauer,
11 Chairperson.

12 Joining me today is Vice Chair
13 Shane Dettman, representative of the National
14 Capital Planning Commission, and mayoral
15 appointee, Nicole Sorg.

16 Copies of today's hearing agenda
17 are available to you and are located to my
18 left in the wall bin near the door.

19 Please be advised that this
20 proceeding is being recorded by a court
21 reporter and is also being Webcast live.
22 Accordingly, we must ask you to refrain from

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1 any disturbing noises or actions in the
2 hearing room.

3 When presenting information to the
4 Board, please turn on and speak into your
5 microphone, first stating your name and home
6 address. When you are finished speaking
7 please turn off your microphone so that the
8 microphone is no longer picking up sounds or
9 background noise.

10 All persons planning to testify
11 either in favor or in opposition are to fill
12 out two witness cards. These cards are
13 located to my left at the table near the door
14 and on the witness tables. Upon coming
15 forward to speak to the Board, please provide
16 both cards to the court reporter to my right.

17 The order of procedures for
18 special exceptions and variances is as
19 follows: statements and witnesses of the
20 applicant, government reports including Office
21 of Planning and Department of Public Works,
22 reports from the ANC, parties and persons in

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1 support, parties and persons in opposition,
2 and closing remarks by the applicant.

3 Pursuant to Section 3117.4 and
4 3117.5, the following time constraints will be
5 maintained. The applicant, appellant, persons
6 and parties in support including witnesses
7 will be provided 60 minutes collectively. The
8 appellees, persons and parties in opposition
9 including witnesses will be provided 60
10 minutes collectively. Individuals will be
11 provided 3 minutes.

12 These time restrictions do not
13 include cross-examinations or questions from
14 the Board. The cross-examination of witnesses
15 is permitted by the applicant and parties.

16 The ANC within which the property
17 is located is automatically a party in a
18 special exception or variance case.

19 Nothing prohibits the Board from
20 placing reasonable restrictions on cross-
21 examination, including time limitations and
22 limitations on the scope of cross-examination.

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1 The record will be closed at the
2 conclusion of each hearing except for any
3 particular material that is requested by the
4 Board. The Board and the staff will specify
5 at the end of the hearing exactly what is
6 expected and the date by which person must
7 submit the documentation and evidence to the
8 Office of Zoning. After the record is closed
9 no other information will be accepted by the
10 Board.

11 The Sunshine Act requires that the
12 Public Hearing on each case be held in the
13 open before the public. The Board may,
14 consistent with its rules and procedures and
15 the Sunshine Act, enter into Executive Session
16 during or after a Public Hearing on a case for
17 the purposes of reviewing the record or
18 deliberating on the case.

19 The decision of the Board in these
20 contested cases must be based exclusively on
21 the public record. To avoid any appearance of
22 the contrary, the Board requests that persons

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1 present not engage members of the Board in
2 conversation.

3 Please turn off all beepers and
4 cell phones at this time so as to not disturb
5 these proceedings.

6 The Board will now consider any
7 preliminary matters. Preliminary matters are
8 those which relate to whether a case will or
9 should be heard today, such as requests for
10 postponements, continuances, or withdrawals,
11 and whether the proper adequate notice for a
12 hearing has been given. If you are not
13 prepared to go forward with a case today or if
14 you believe the Board should not proceed, now
15 is the time to raise such matters.

16 Mr. Secretary, are there any
17 preliminary matters for this morning?

18 MR. MOY: Good morning, Madam
19 Chair and members of the Board. Two of the
20 three hearing cases this morning have issues
21 regarding posting issues of timeliness. Other
22 than that, those are the preliminary matters.

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1 The staff would suggest either
2 addressing those now or you can address that
3 as we call the case.

4 CHAIRPERSON MOLDENHAUER: We'll
5 just address those with each case.

6 Will all individuals wishing to
7 testify before the Board please stand to take
8 the oath?

9 (WITNESSES SWORN.)

10 CHAIRPERSON MOLDENHAUER: Thank
11 you very much, Ms. Beverley.

12 Can we please call the first case,
13 Mr. Moy?

14 MR. MOY: I believe Ms. Bailey
15 will do the reading of the advertisement.

16 MS. BAILEY: Madam Chair, members
17 of the Board, and to everyone, good morning.

18 The first case is Application No.
19 18069. It's the application of Patrick and
20 Jennifer Serfass, pursuant to 11 DCMR Section
21 3104.1, for a special exception to allow the
22 construction of a three story rear addition

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1 with roof deck to an existing row dwelling
2 under section 223, not meeting the lot
3 occupancy (section 403), rear yard (section
4 404), and nonconforming structure (subsection
5 2001.3) requirements in the R-4 District at
6 premises 1126 I Street, Southeast (Square 995,
7 Lot 31).

8 CHAIRPERSON MOLDENHAUER: Thank
9 you very much.

10 Will the applicant please step
11 forward and come to the table? Once you come
12 to the table you can turn on your microphone
13 and then introduce yourselves.

14 MR. SERFASS: Good morning. My
15 name is Patrick Serfass. I live at 1126 I
16 Street, Southeast.

17 MR. FOWLER: Good morning. Mike
18 Fowler, 1819 D Street, Southeast.

19 CHAIRPERSON MOLDENHAUER: Thank
20 you.

21 The first preliminary matter, as
22 Mr. Moy indicated, is the posting. The

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1 posting is supposed to be posted 15 days prior
2 to the hearing. It was actually a day late.

3 Is there anything specific as to
4 why it was late?

5 MR. SERFASS: This is Patrick
6 Serfass. When my wife picked up the signs she
7 was told that they needed to be displayed on
8 the 5th. That's why we put them up then. It
9 was obviously a misunderstanding.

10 There isn't any opposition with
11 the case that we know of. So hopefully that
12 will be taken into consideration. My
13 apologies.

14 CHAIRPERSON MOLDENHAUER: It
15 actually says that you put it up on June 1.
16 Did you put it up on June 1 or June 5?

17 MR. SERFASS: To be honest with
18 you, I don't remember.

19 Mike, do you?

20 MR. FOWLER: Yes. I --

21 MR. SERFASS: We put it up as soon
22 as we found out that it needed to be up. We

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1 had the signs.

2 MR. FOWLER: I noticed that it
3 wasn't up on the 1st and I notified them.
4 They put it up immediately. They were under
5 the impression that it didn't have to go up
6 until the 5th. But it did go up on the 1st.

7 CHAIRPERSON MOLDENHAUER: It did
8 go up on the 1st?

9 MR. FOWLER: On the 1st, correct.

10 CHAIRPERSON MOLDENHAUER: Okay.
11 So then it's still just a day late versus then
12 being 5 days late?

13 MR. FOWLER: Correct.

14 CHAIRPERSON MOLDENHAUER: I'm just
15 trying to figure out the facts. Considering
16 the fact that we do have sufficient letters of
17 support -- actual notice is also something
18 that would permit us to waive our requirements
19 -- I think the other Board Members agree that
20 we'll waive our requirements, and we can move
21 forward.

22 MR. SERFASS: Thank you.

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1 CHAIRPERSON MOLDENHAUER: You're
2 welcome.

3 Just one reminder that there is a
4 new text amendment, 3118, which permits
5 expedited review process. This is a case that
6 in the future we probably would like to see on
7 an expedited calendar.

8 There is a lot of support for the
9 case. OP is obviously in support of it. The
10 ANC is in support.

11 That being said, if you'd like to
12 rest on the record, you can. If you would
13 like to present your case, you can also do
14 that.

15 MR. FOWLER: We would like to rest
16 on the record.

17 CHAIRPERSON MOLDENHAUER: Okay.
18 Thank you.

19 Does the Board have any specific
20 questions for the applicant? Seeing none.

21 At this time we'll go over to OP's
22 report.

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1 MS. THOMAS: Good morning, Madam
2 Chair, members of the Board.

3 The Office of Planning deems this
4 to be a modest addition. We have no objection
5 to granting the special exception relief as it
6 meets the test.

7 Thank you.

8 CHAIRPERSON MOLDENHAUER: Thank
9 you very much.

10 The one question -- I just want to
11 make sure that I have the relief correct. The
12 rear yard relief was actually determined not
13 to be necessary, is that correct?

14 MS. THOMAS: Yes.

15 CHAIRPERSON MOLDENHAUER: Okay.

16 MS. THOMAS: I just have little
17 technical correction on the table. Under lot
18 area where it says existing, that's the
19 correct existing lot area. Under proposed,
20 that's just a typo. It should be 1390 and not
21 1309.

22 CHAIRPERSON MOLDENHAUER: Okay.

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1 At this point in time, is anybody present from
2 -- I'm sorry. Does the Board have any
3 questions for the Office of Planning? I
4 didn't believe we did. Okay.

5 At this time it would be the
6 opportunity for the ANC-6B to present. I
7 don't see anybody in the audience.

8 But we do have our Exhibit 23,
9 which is a letter from ANC-6B indicating that
10 there was a regularly called and publicly
11 noticed meeting on May 11, 2010, in which a
12 quorum was present and they voted unanimously
13 to support the application. So that will be
14 referenced and it will receive great weight.

15 Are there any persons and parties
16 in support or in opposition of the case?
17 Seeing none.

18 I'll just reference that we have
19 our Exhibits 24, 22, and 8, and two or three
20 unidentified letters in regards to my exhibit
21 numbers. They are letters from Margo Flynn,
22 who lives at 1127 I Street; a Kimberly Rose,

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1 who lives at 1122 I Street; and a Mary Holder,
2 who lives at 900 12th Street. All of those
3 letters are letters in support.

4 At this time we turn back to the
5 applicant for any closing statements.

6 MR. SERFASS: I don't think
7 there's anything really substantive to add.
8 We're excited to have a little bit more space
9 in our house. I grew up on Capitol Hill in DC
10 and we're preparing for a family.

11 I think the addition to the house
12 not only will allow us to have extra space,
13 but the architectural feature with a mansard
14 roof will help to contribute to the
15 neighborhood. We're excited about that. I
16 think the neighbors are as well.

17 CHAIRPERSON MOLDENHAUER: Thank
18 you very much.

19 At this time, if the Board does
20 not have any additional questions for the
21 applicant, we'll conclude this hearing and we
22 will then enter into deliberation.

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1 As I stated earlier, I think that
2 the application is quite full. OP did a great
3 a job summarizing the facts in their report.
4 I can incorporate that into reference.

5 I do agree with the applicant's
6 statement that the mansard roof does add some
7 additional benefits to the appearance of the
8 neighborhood. That's articulated in all the
9 letters of support, both from the ANC and from
10 his fellow community.

11 The ANC letter will receive great
12 weight.

13 I would vote to submit a motion to
14 approve the Application No. 18069 for a
15 special exception relief under 223 to
16 construct a rear addition to an existing
17 single-family home, for an increase in the lot
18 occupancy to 69 percent.

19 A motion has been made.

20 Do I have a second?

21 MEMBER SORG: Second.

22 CHAIRPERSON MOLDENHAUER: The

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1 motion's been made and seconded.

2 Is there any further deliberation?

3 Seeing none.

4 All those in favor, say aye?

5 ALL: Aye.

6 CHAIRPERSON MOLDENHAUER: Mr. Moy,
7 could you please read back the vote?

8 MR. MOY: Yes, Madam Chair. Staff
9 would record the vote as 3-0-2. This is upon
10 the motion of the Chair, Ms. Moldenhauer, to
11 approve the application for relief from
12 special exception (223), not meeting lot
13 occupancy (403) and nonconforming structure
14 (2001.3). Seconded by Ms. Sorg. In support
15 of the motion, Mr. Dettman. No other Zoning
16 Commission Member or other participating Board
17 Member.

18 Again, the vote is 3-0-2.

19 CHAIRPERSON MOLDENHAUER: Thank
20 you. Since there's no opposition we'd like to
21 waive our requirements for a summary order.

22 MR. MOY: Very good. Thank you.

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1 CHAIRPERSON MOLDENHAUER: Thank
2 you.

3 Thank you very much and good luck.

4 MR. FOWLER: Thank you.

5 MR. SERFASS: Thanks.

6 CHAIRPERSON MOLDENHAUER: We can
7 now read the next case.

8 MS. BAILEY: Application No. 18072
9 is the application of Juliet Eilperin,
10 pursuant to 11 DCMR Section 3104.1 and 3103.2,
11 for a variance from the floor area ratio
12 requirements under subsection 402.4, a
13 variance from the alley setback requirements
14 under subsection 2300.2(b), and a special
15 exception under section 223, to allow the
16 construction of an accessory garage serving a
17 one-family semi-detached dwelling, not meeting
18 the lot occupancy (section 403) and
19 nonconforming structure (subsection 2001.3)
20 requirements.

21 The property is located at 2745
22 Macomb Street, Northwest. It is zoned R-5-A.

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1 It's located in Square 2218, Lot 1.

2 CHAIRPERSON MOLDENHAUER: Thank
3 you very much, Ms. Beverley.

4 Will the applicants please
5 introduce themselves for the record?

6 MS. EILPERIN: I'm Juliet
7 Eilperin, the owner and resident of 2745
8 Macomb Street, Northwest. This is my
9 contractor, Henry Canby, who'd be doing the
10 work on the garage.

11 CHAIRPERSON MOLDENHAUER: Okay.
12 If you could, Mr. Canby, introduce yourself
13 also with your home address for the record?

14 MR. CANBY: Henry Canby, 501
15 Slaters Lane, Unit 922, Alexandria, Virginia
16 22314.

17 CHAIRPERSON MOLDENHAUER: Thank
18 you very much.

19 MR. CANBY: You're welcome.

20 CHAIRPERSON MOLDENHAUER: At this
21 point in time, we have a preliminary matter
22 similar to as in the other case.

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1 I've got a copy of your affidavit
2 of posting. We're required to have a posting
3 at least 15 days prior to the June 15 meeting.
4 This was posted on June 1. That's only 14
5 days prior.

6 Is there any specific --

7 MS. EILPERIN: There are two
8 reasons. One, I'm the National Environmental
9 Reporter for the Washington Post and I was in
10 the Gulf covering the oil spill. In addition
11 to that, I called the office here and they
12 told me I should come by on the 1st. So there
13 was obviously a miscommunication there. But
14 I picked it up and posted it that day.

15 CHAIRPERSON MOLDENHAUER:

16 Wonderful. Thank you for your efforts down
17 there. As we said earlier, one day is not a
18 large issue and obviously we can waive that
19 requirement.

20 I think the Board by consensus is
21 agreeing to waive the requirement. We can
22 move forward onto the merits of the case.

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1 We've gone through all of your
2 documentation. I think that we have a very
3 full record, as well, in this case. We've
4 seen the history in regards to prior
5 construction of the garage and things to that
6 effect, and all of the details.

7 If you'd like, you can present
8 some specific instances in regards to your
9 application, or we can rest on the record and
10 move forward.

11 MS. EILPERIN: I think the record
12 generally speaks for itself. But again,
13 really, this is all the result of being
14 defrauded by a previous contractor who
15 instructed us that they had gotten the
16 necessary permits and had not. Therefore,
17 that's why we lost our grandfathering in. But
18 obviously, we've gone through the process to
19 address all the issues that were raised by the
20 actions of our previous contractor.

21 CHAIRPERSON MOLDENHAUER: Thank
22 you.

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1 Does the Board have any specific
2 questions for the applicant on this case?

3 Seeing none.

4 We'll move forward to the Office
5 of Planning's report.

6 MR. GOLDSTEIN: Good morning,
7 Madam Chair and members of the Board. For the
8 record, my name is Paul Goldstein and I'm with
9 the Office of Planning.

10 The Office of Planning recommends
11 approval of the applicant's request for
12 special exception and area variance relief.

13 We're happy to rest on the record.

14 CHAIRPERSON MOLDENHAUER: Thank
15 you very much for your report.

16 Do any Board Members have any
17 specific questions for the Office of Planning?

18 Seeing no additional questions for
19 the Office of Planning.

20 Just one moment. I was just
21 reviewing the relief requested and making sure
22 that we had all of the elements. That's fine.

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1 Thank you very much. I have no
2 additional questions.

3 Does the applicant have any
4 questions for the Office of Planning?

5 Then at this point in time we will
6 open the floor for the ANC.

7 Is ANC-3C here?

8 Not seeing anybody present in the
9 audience.

10 We have our Exhibit 27 which is a
11 May 26, 2010 letter, which indicates that at
12 a publicly held meeting where a quorum was
13 present, they voted 9-0 to support the
14 application.

15 Are there any persons or parties
16 in support or in opposition? Seeing none.

17 We have some additional letters in
18 this file, as well, in support of the
19 application. We have an email, Exhibit 25,
20 indicating support of the project.

21 Just a quick question to the
22 applicant. Have you worked with all of your

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1 other neighbors?

2 MS. EILPERIN: Absolutely. I
3 mean, they're all familiar with it. But it's
4 the two that abut us that are the ones that I
5 asked to submit comments in support for the
6 record.

7 CHAIRPERSON MOLDENHAUER: I have
8 the one, Exhibit 26.

9 MS. EILPERIN: There should be
10 two. Both of them were submitted. One is
11 from the Christenberries and one is from the
12 Fredericks.

13 CHAIRPERSON MOLDENHAUER: I don't
14 know if I actually have one from the
15 Christenberries.

16 Does anybody else have that in the
17 record?

18 MS. EILPERIN: It was also
19 submitted. Paul Goldstein would have it, if
20 not.

21 CHAIRPERSON MOLDENHAUER: It was
22 together. It was a separate page on a same

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1 document. That's fine. Okay. So the second
2 page is from Donald Frederick. Thank you.
3 And the first email; they were attached. Both
4 are Exhibit 26. Wonderful.

5 Do you have any closing remarks?

6 MS. EILPERIN: Only that, again,
7 this will be a smaller structure than what was
8 originally there, and also won't be in danger
9 of falling down. So in both of those ways I
10 think it will contribute to the neighborhood.

11 CHAIRPERSON MOLDENHAUER: Thank
12 you.

13 At this point in time we'll
14 conclude the hearing and we'll enter into
15 deliberations.

16 I'll start us off. Obviously, we
17 can incorporate the Office of Planning report.

18 This is an application for a
19 special exception pursuant to 223 and an area
20 variance associated with constructing a one
21 story detached accessory garage at 2745 Macomb
22 Street, Northwest.

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1 This is a case in which the
2 applicant has shown that she satisfies all of
3 the requirements for a special exception, in
4 regards to not having any issues with light
5 and air for their neighboring properties.

6 We have letters of support, as
7 indicated in our Exhibit 25.

8 In regards to the area variance,
9 the property does have a unique and
10 exceptional circumstance in regards to its
11 past history and in regards to the peculiar
12 nature of its past history. Considering that
13 the applicant had a prior contractor who
14 completely demolished a garage that could have
15 been grandfathered in. And then the
16 compliments of factors in regards to the fact
17 that after the garage was demolished, it could
18 not be reconstructed in accordance with the
19 Zoning Requirements.

20 Office of Planning has a very full
21 analysis of the requirements. I will not go
22 into all of them but I'll just touch on some

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1 of the major points.

2 For relief under 402.4, the Office
3 of Planning and the applicant both articulate
4 that the new garage would actually be more
5 conforming under Zoning Requirements than the
6 previous garage in regards to the size for a
7 vehicle.

8 In regards to relief for the
9 minimum setback, the relief setback would
10 actually not be permitted based on the current
11 distance, trees that are on the property, and
12 the home that's actually located on the lot.

13 In addition to that, it's
14 currently parallel with all of the other
15 structures on the alley. Thus it would appear
16 conforming with all of the other structures.

17 The Office of Planning filed a
18 motion of support in their report which is our
19 Exhibit 30.

20 The ANC submitted also a vote to
21 support the application.

22 As we indicated, we have letters

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1 of support in the file.

2 I would submit a motion to support
3 Application No. 18072 for special exception
4 pursuant to 223 for lot occupancy, for area
5 variance relief under the maximum FAR from 9
6 to 1.03 FAR, area variance for minimum setback
7 for the abutting alley to allow the setback of
8 7.5 to now be a 12 inch relief requirement,
9 and area variance for the maximum occupied
10 area restriction for the required rear yard.

11 A motion has been made.

12 Is there a second?

13 VICE CHAIR DETTMAN: Second.

14 CHAIRPERSON MOLDENHAUER: The
15 motion has been made and seconded.

16 All those in favor, say aye?

17 ALL: Aye.

18 MR. MOY: Madam Chair, the staff
19 would record the vote as 3-0-2. This is on
20 the motion of the Chair, Ms. Moldenhauer to
21 approve the application for the special
22 exception relief (223) to not meeting lot

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1 occupancy requirements under section 403.

2 Also, the three area variances:
3 the FAR (section 402.4) and the associated
4 relief under 2001.3(b)(2), the area variance
5 to 2300.2(b), and finally, the area variance
6 for the required rear yard under 2500.3.

7 Seconding the motion, Mr. Dettman,
8 the Vice Chair. In support of the motion, Ms.
9 Sorg. No other Zoning Commissioner or other
10 Board Member participating.

11 Again, the final vote is 3-0-2.

12 CHAIRPERSON MOLDENHAUER: Thank
13 you very much, Mr. Moy.

14 Seeing that there's no opposition
15 in this case, the Board would be willing to
16 waive the requirement and have a summary order
17 issued.

18 MR. MOY: Very good. Thank you.

19 CHAIRPERSON MOLDENHAUER: Thank
20 you very much.

21 MS. BAILEY: Madam Chair, are you
22 ready for the next case?

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1 CHAIRPERSON MOLDENHAUER: Yes, we
2 are. Thank you very much.

3 MS. BAILEY: Application No.
4 18071, application of the Washington Ballet,
5 pursuant to 11 DCMR 3104.1 and 3103.2, for a
6 special exception and/or variance to allow a
7 private ballet school with dormitory and
8 ancillary office use for six students and
9 three staff under sections 206 and 302.

10 The property is zoned R-2. It's
11 located at 3704 Porter Street, Northwest
12 (Square 1911, Lot 19).

13 CHAIRPERSON MOLDENHAUER: Good
14 morning. Would the applicant please introduce
15 themselves?

16 MR. KAUFMANN: Good morning, Madam
17 Chair. My name is Roy Kaufmann. It's a
18 pleasure to appear before the Board. I'm
19 representing the Washington Ballet.

20 MR. ALLEN: I'm Russell Allen,
21 Executive Director of the Washington Ballet,
22 currently residing at 1127 Marion Avenue,

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1 McLean, Virginia.

2 CHAIRPERSON MOLDENHAUER: Thank
3 you both very much.

4 To start off, I think our first
5 order of business is to identify the actual
6 relief that's required. This application has
7 obviously kind of gotten bounced around with
8 different types of relief based on the ZA
9 referral relief, and then the Office of
10 Planning relief. A modified application in
11 regards to trying to be all-inclusive, it
12 seems, in regards to the different types of
13 relief that have been recommended.

14 The Board has gone through and
15 reviewed the different types of relief that
16 have been presented. In our opinion -- and
17 we'll open it up for some discussion with the
18 Board Members -- the initial Zoning
19 Requirement from the Zoning Administrator when
20 they submitted their recommended referral
21 indicated that this was for a special
22 exception, which is our Exhibit 4.

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1 Looking at that, we actually look
2 at the special exception requirements. Most
3 importantly, section 206 which would permit a
4 dormitory or office space as an expansion of
5 a private school.

6 I know this property has had a lot
7 of past history. But currently there's a
8 unique aspect, from my understanding of the
9 record, that now the school owns the
10 property --

11 MR. KAUFMANN: That is correct.

12 CHAIRPERSON MOLDENHAUER: -- which
13 is separate and apart from how it's been in
14 the past.

15 There are other cases. BZA Appeal
16 No. 8877 which was in 1966, in which other
17 schools had dormitories, and in which a
18 dormitory was permitted in an R-1 District.
19 Dormitories were considered customarily part
20 of an internal part of a private school or a
21 privatory school.

22 I think that that's the way the

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1 Board has reviewed the record, and feels that
2 they're ready to move forward on a special
3 exception.

4 Based on that, I'll open up the
5 floor to any comments in regards to what
6 relief we're going to be reviewing this
7 application on first before moving forward.

8 MR. KAUFMANN: Just for
9 clarification, I'm not understand what exactly
10 the Chair is asking me to respond to. I'm
11 sorry.

12 CHAIRPERSON MOLDENHAUER: I'm just
13 trying to make sure that you're aware, if you
14 start presenting a case, that you're
15 presenting your case only on the special
16 exception standards in 206; that right now,
17 the Board is not going to be looking at this
18 case under a variance standard.

19 MR. KAUFMANN: As long as the end
20 result is what we're hoping for, that's fine.
21 Because actually, the standard is a little bit
22 lower for a special exception anyway. So we

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1 would be certainly very happy to have that
2 change and the standard apply.

3 CHAIRPERSON MOLDENHAUER: Do any
4 other Board Members have any additional
5 comments in regards to the analysis for a
6 special exception under 206?

7 Seeing none, we will go forward
8 and I'll ask the applicant if they would like
9 to start their presentation.

10 MR. KAUFMANN: Madam Chair, in the
11 interest of time, Mr. Allen here is the
12 Executive Director of the Ballet. He is
13 certainly able to testify live. He is also
14 willing to incorporate by reference all of the
15 matters set forth in Exhibit 4 in our bound
16 submission.

17 We have therein set forth the
18 various criteria that we thought would apply
19 to the request for an area variance, which by
20 amendment we had assumed would be the
21 standard. But most of that information is
22 directly applicable to the standard that is

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1 going to apply to the special exception, also.

2 Just by way of summary, I would
3 point out that the Ballet has been in
4 existence for almost half a century as an
5 integral part of the cultural status of the
6 District of Columbia.

7 Not only that, it contributes to
8 the publichood in two other ways. It runs a
9 school program in the elementary schools and
10 it performs service by providing ballet
11 classes to senior citizens.

12 The intended use of the property
13 would be for seven students, one house mother,
14 and a visiting teacher. That would be for
15 nine total occupants. This is unchanged from
16 the original application, the total number.

17 The particular property is unique
18 in that it abuts the main campus, as the Board
19 has already recognized. That's the value of
20 the property to us in that these students who
21 are permitted to have cars can walk right next
22 door to the main campus.

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1 These students are not local.
2 These are usually international students. I
3 have appended an exhibit which shows, for
4 example, an advertisement that we ran in a
5 magazine in Japan announcing auditions for the
6 school. This is a school of international
7 repute and it is important for us to be able
8 to encourage international students to attend.

9 One of the benefits of this is to
10 assure the parents of these young ladies that
11 they're going to be protected, supervised, and
12 not incur unnecessary risk or danger in
13 walking next door to the property.

14 We have submitted in Exhibit 4 the
15 various indicia of the tests that we believe
16 have been met. There will be no substantial
17 detriment to the neighborhood. There will be
18 no change in the use. This has been a
19 residence and will continue to be a residence.
20 There is a little conference room and an
21 office there that is of incidental use.

22 After many hours of presentation,

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1 the ANC voted unanimously in support of our
2 application. All of our immediate neighbors
3 have submitted letters in support of the
4 application. We know of no opposition to the
5 application.

6 We would submit that it will be a
7 proper and beneficial act for the Board to
8 take to approve the application.

9 CHAIRPERSON MOLDENHAUER: Thank
10 you.

11 Do the Board Members have any
12 specific questions for the applicant?

13 Seeing none, I'll just ask a
14 couple of different questions.

15 You are indicating that the school
16 has been around since 1976. Have there ever
17 been any complaints against the property or
18 the use in conjunction with the Washington
19 School for Ballet?

20 MR. KAUFMANN: Not at all. The
21 school has been in operation since 1944.

22 CHAIRPERSON MOLDENHAUER: 1944?

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1 Okay.

2 MR. KAUFMANN: We enjoy very good
3 relations with the neighbors, excellent
4 relations.

5 The photograph of the posting will
6 evidence how the building is kept up. It's a
7 beautifully maintained residence.

8 CHAIRPERSON MOLDENHAUER: Do Board
9 Members have any additional questions? Seeing
10 none.

11 At this point, if the applicant
12 has no additional testimony, we'll move on to
13 the Office of Planning's report.

14 MS. THOMAS: Good morning, Madam
15 Chair, members of the Board. Karen Thomas
16 with the Office of Planning.

17 The Office of Planning reviewed
18 this as a variance, as you can tell from our
19 report, from the definition of a family, based
20 on going over several issues as to what is the
21 most appropriate relief.

22 We believe at this time we would

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1 submit that it's variance relief from the
2 family unit because of the way the residence
3 was run was as a family unit. In this case,
4 they wanted more than what was permitted in a
5 residence, more than six persons. So to us,
6 it appeared as the cleanest way.

7 Since we've had no more cases
8 since 1966 regarding the dormitory as a
9 customary school use, we were not quite clear
10 on how the Board will look at it at this time.
11 But if that's the way the Board decides to go,
12 we have no objection.

13 CHAIRPERSON MOLDENHAUER: Thank
14 you very much.

15 Does the applicant have any
16 questions for the Office of Planning?

17 MR. KAUFMANN: No.

18 CHAIRPERSON MOLDENHAUER: Do any
19 Board Members have any questions of the Office
20 of Planning?

21 Thank you very much for providing
22 that report and providing testimony. I know

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1 this is challenging considering that we're
2 looking at different standards. But I
3 appreciate your comments and your testimony.

4 At this point in time we'll move
5 on to the ANC. This is in ANC-3C. Seeing
6 nobody in the audience; the ANC is not
7 present.

8 We do have our Exhibit 26 which is
9 a letter and a resolution. We'll actually
10 look at the resolution because the resolution
11 provides all of our standards.

12 The resolution indicates that this
13 was at a duly held and publicly noticed
14 meeting, that a quorum was present, and that
15 the ANC voted to support the application with
16 the following condition: that the students
17 residing at the 3704 Porter Street residence
18 may not bring cars to the campus.

19 That being stated, I'll turn to
20 the applicant and ask, is that something that
21 the applicant is willing to accept as a
22 condition or is that something that they're

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1 already putting in place?

2 MR. KAUFMANN: That is already a
3 condition of the lodging agreement which is
4 appended as an exhibit to our booklet. That
5 is correct.

6 CHAIRPERSON MOLDENHAUER: That's
7 in regards to the lodging agreement. Just out
8 of curiosity, the staff and the housemother,
9 do they have cars that are going to be parked
10 at the property?

11 MR. KAUFMANN: The housemother has
12 a car so that she can run errands and things
13 along those lines. But the youngsters are not
14 permitted to have cars.

15 CHAIRPERSON MOLDENHAUER: Okay.
16 There's just one car for the housemother --

17 MR. KAUFMANN: That's correct.

18 CHAIRPERSON MOLDENHAUER: -- not
19 multiple? Okay. And the staff member does
20 not have a car?

21 MR. KAUFMANN: There are only nine
22 residents: seven students, one housemother,

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1 and a visiting teacher. The visiting teacher
2 does not have a car.

3 CHAIRPERSON MOLDENHAUER: Okay.
4 Mr. Dettman, do you have any questions for the
5 applicant?

6 VICE CHAIR DETTMAN: I do. Thank
7 you, Madam Chair.

8 Can you just give us a sense on
9 the number of vehicles coming to the site?
10 When I say that, I mean the house that we're
11 looking at as well as the ballet school that's
12 on Wisconsin Avenue.

13 And then how much parking do you
14 have collectively?

15 MR. KAUFMANN: I'll let the
16 Executive Director who has better knowledge of
17 that respond.

18 MR. ALLEN: The main campus of the
19 Washington School of Ballet has many, many
20 cars that come by on a daily basis during the
21 regular session. I mean, we have 300 students
22 enrolled there. So on a daily basis you might

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1 have as many as 100 cars coming through the
2 property.

3 Primarily, what they do is drive
4 in our drive, off of Wisconsin onto Porter
5 Street, and leave. It's basically a drop-off
6 and a pickup space.

7 VICE CHAIR DETTMAN: Okay.

8 MR. ALLEN: As far as regular
9 parking, the staff of the Washington Ballet is
10 contained in the Wisconsin Avenue facility
11 that's adjacent to the Porter Street facility
12 under question. We have about 30 regular
13 full-time employees who have cars and work
14 there.

15 Additionally, as far as parking
16 goes, we actually have an extant agreement
17 with the Giant Foods Store that some overflow
18 parking can go down there for an all-day basis
19 as needed. That's up to 25 cars down at the
20 Giant. So there's a lot more foot traffic as
21 a result, but no more cars.

22 VICE CHAIR DETTMAN: Okay. So

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1 long as you've been there with the school, do
2 you know of any situations that have occurred
3 with respect to, say, complaints from
4 neighbors or adjoining properties, or anything
5 with respect to parking?

6 MR. ALLEN: No complaints.

7 VICE CHAIR DETTMAN: Okay.

8 MR. ALLEN: We have a very good
9 relationship with our neighbors.

10 VICE CHAIR DETTMAN: Okay. Thank
11 you.

12 CHAIRPERSON MOLDENHAUER: Any
13 further questions from the Board at this time?

14 Seeing none, I would turn to any
15 persons or parties in support or in
16 opposition.

17 Seeing nobody else in the
18 audience, I will just then reference the
19 Exhibit 27, which has additional tabs on it
20 which includes A through H from Exhibit 6,
21 which includes letters of support and from
22 different neighbors in the community

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1 indicating their support for this application.
2 I won't go through all of them in detail since
3 they are provided in the record and I've
4 referenced their exhibit number.

5 At this point in time we turn back
6 to the applicant for any closing statements.

7 MR. KAUFMANN: We'll rest on the
8 record. Thank you.

9 CHAIRPERSON MOLDENHAUER: Thank
10 you very much.

11 Do Board Members have any follow-
12 up questions?

13 Thank you very much. At this
14 point we will enter into deliberation, so
15 thank you.

16 This case, No. 18071, is an
17 application submitted by the Washington School
18 of Ballet for a special exception to permit
19 the establishment of a dormitory and accessory
20 office space at 3704 Porter Street, Northwest,
21 Washington, DC.

22 This application was actually a ZA

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1 referral, which is our Exhibit 4, which shows
2 that the ZA recommended it come before us on
3 a special exception standard under 3104.1.

4 Thus, as I indicated earlier and
5 as part of our deliberation, we went back and
6 looked at some past cases. One which is No.
7 8877 which was a 1966 appeal, in which case
8 the Board ended up reviewing a dormitory,
9 indicating that a dormitory was permitted in
10 the R-1 District following a special
11 exception, and that a dormitory would be
12 considered an incidental or integral part of
13 a private school or privatory school.

14 Here we have the Washington School
15 for Ballet which has been in existence for
16 many years, which the applicant has testified
17 along with his counsel, Mr. Allen, that there
18 have been really no complaints over the long
19 history of the school from the neighbors.

20 I don't see an issue with
21 evaluating this under the 206 standard, basing
22 it on the 1966 appeal. Especially considering

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1 that now the applicant as the owner of the
2 school and the owner of the parcel is before
3 us; that they really are using it as part of
4 the school for, as indicated by the applicant
5 in hearing today, both ancillary office space
6 and conference rooms; and that a visiting
7 dancer staff comes.

8 There's also a housemother and
9 seven students. Those seven students are not
10 permitted to have cars, which is referenced as
11 one of the concerns of the ANC. The only car
12 that is then on the property at Porter Street
13 is actually the one car from the housemother.

14 We have documentation in our
15 record from the community indicating that this
16 would not be any sort of challenge or create
17 any noise or traffic concerns for the
18 neighborhood.

19 I don't see any information in the
20 record that would indicate that this would not
21 be in harmony with the Zoning Plan.

22 OP in this case has analyzed the

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1 specific facts of the case on a different
2 standard, the variance standard. They
3 indicate that obviously that's not what we're
4 reviewing the case on currently, but that they
5 would have no objection to that review.

6 In addition to that, as I said
7 earlier, there's no evidence that there would
8 be any adverse effect on the neighboring
9 community, no impact on noise and traffic from
10 the students, and no concern about parking.

11 Based on that, I would also
12 reference the letter of support from the ANC,
13 which is our Exhibit 26, in which the ANC
14 indicates that they would support it subject
15 to the fact that the students residing at 3704
16 Porter Street would not be permitted to have
17 cars on their campus.

18 That being said, I would be
19 willing to submit a motion to approve the
20 application, but I'll first see if there's any
21 additional deliberation from the Board
22 Members. Seeing none.

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1 I will submit a motion to approve
2 Application No. 18071 for 3704 Porter Street,
3 Northwest, for a special exception under 206
4 to allow a dormitory for seven students, one
5 housemother, and one staff, and ancillary
6 offices to be located at the premises, so long
7 as it's conditioned upon none of the students
8 being permitted to have cars on campus.

9 The motion has been made.

10 Is there a second?

11 MEMBER SORG: Second.

12 CHAIRPERSON MOLDENHAUER: The
13 motion's been made and seconded.

14 All those in favor, say aye?

15 ALL: Aye.

16 CHAIRPERSON MOLDENHAUER: Mr. Moy,
17 could you please read back the vote?

18 MR. MOY: Yes, Madam Chair, with
19 pleasure. The staff would record the vote as
20 3-0-2 on the motion of the Chair, Ms.
21 Moldenhauer to approve the application for
22 special exception relief under 206 standards.

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1 Seconding the motion, Ms. Sorg. In support of
2 the motion, Mr. Dettman. No Zoning Commission
3 Member or other participating Board Member.

4 It's conditioned as the Chair has
5 stated regarding the one house member with one
6 car; one staff and no students driving to the
7 campus, I believe.

8 CHAIRPERSON MOLDENHAUER: Yes.

9 MR. MOY: Again, the final vote is
10 3-0-2.

11 CHAIRPERSON MOLDENHAUER: Thank
12 you very much.

13 Seeing that there's no opposition
14 in this case, the Board would waive their
15 requirements and recommend a summary order.

16 MR. MOY: Very good.

17 CHAIRPERSON MOLDENHAUER: Thank
18 you very much.

19 MR. ALLEN: Thank you very much.

20 CHAIRPERSON MOLDENHAUER: I
21 believe we have no additional cases for this
22 morning?

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1 MR. MOY: That's correct, Madam
2 Chair.

3 CHAIRPERSON MOLDENHAUER:
4 Wonderful. Then we will adjourn until the
5 1:00 afternoon hearing.

6 Thank you.

7 (Whereupon, at 10:47 a.m. the
8 hearing was adjourned to reconvene at 1:26
9 p.m.)
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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 1:26 p.m.

3 CHAIRPERSON MOLDENHAUER: Good
4 afternoon. This hearing will please come to
5 order.

6 This is the June 15, 2010 Public
7 Hearing of the Board of Zoning Adjustments for
8 the District of Columbia.

9 My name is Meridith Moldenhauer,
10 Chairperson.

11 Joining me today is Vice Chair
12 Shane Dettman, representative of the National
13 Capital Planning Commission, and mayoral
14 appointee, Nicole Sorg.

15 Copies of today's hearing agenda
16 are available to you and are located to my
17 left in the wall bin near the door.

18 Please be aware that this
19 proceeding is being recorded by a court
20 reporter and is also being Webcast live.
21 Accordingly, we must ask you to refrain from
22 any disturbing noise or actions in the hearing

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1 room.

2 When presenting information to the
3 Board, please come forward, turn on your
4 microphone, and speak into the mic, stating
5 your name and home address. When you are
6 finished speaking please turn off your
7 microphone so that the microphone is no longer
8 picking up any sounds or background noise.

9 All persons planning to testify
10 either in favor or in opposition are to fill
11 out two witness cards. These cards are
12 located to my left on the table near the door
13 and on the witness tables. Upon coming
14 forward to speak to the Board, please give
15 both cards to the reporter sitting to my
16 right.

17 The order of procedures for
18 special exceptions and variances is:
19 statements and witnesses of the applicant,
20 government reports of Office of Planning,
21 reports from the ANC, person and parties in
22 support, persons and parties in opposition,

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1 and closing remarks by the applicant.

2 The order for appeals is as
3 follows: statements and witnesses of the
4 applicant, Zoning Administrator, or government
5 official's case; case of the owner, lessee, or
6 operator of the property involved, if not the
7 appellant; the ANC in which the property is
8 located interveners in the case if permitted
9 by the Board; and rebuttal and closing
10 statements by the appellant.

11 Pursuant to Section 3117.4 and
12 3117.5, the following time constraints will be
13 maintained. The applicant, appellant, persons
14 and parties in support except the ANC,
15 including witnesses, have 60 minutes
16 collectively. Appellees, persons and parties
17 in opposition except the ANC, including
18 witnesses, have 60 minutes collectively.
19 Individuals are provided 3 minutes.

20 These time restraints do not
21 include cross-examinations or questions from
22 the Board. Cross-examination of witnesses is

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1 permitted by the applicant and parties.

2 The ANC within which the property
3 is located is automatically a party in a
4 special exception case.

5 Nothing prohibits the Board from
6 placing reasonable restrictions on cross-
7 examination, including time limits and
8 limitations on the scope of the cross-
9 examination.

10 The record will be closed at the
11 conclusion of each case except for any
12 materials specifically requested by the Board.
13 The Board and the staff will specify at the
14 end of each hearing exactly what is expected
15 and the date by which the person must submit
16 the evidence to the Office of Zoning. After
17 the record is closed no other information will
18 be accepted by the Board.

19 The Sunshine Act requires that the
20 Public Hearing on each case be held in the
21 open before the public. The Board may,
22 consistent with its rules and procedures and

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1 the Sunshine Act, enter into Executive Session
2 during or after the Public Hearing on a case
3 for purposes of reviewing the record or
4 deliberating on the case.

5 The decision of the Board in these
6 contested cases must be based exclusively on
7 the public record. To avoid any appearance of
8 the contrary, the Board requests that persons
9 present not engage members of the Board in
10 conversation.

11 Please turn off all beepers and
12 cell phones at this time so as to not disturb
13 these proceedings.

14 The Board will make every effort
15 to conclude the Public Hearing as near as
16 possible to 6:00 p.m. If the afternoon cases
17 are not completed by 6:00 p.m., the Board will
18 assess whether it can complete the pending
19 case or cases remaining on the agenda.

20 At this time, the Board will
21 consider any preliminary matters. Preliminary
22 matters are those that relate to whether a

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1 case will or should be heard today, such as
2 requests for postponement, continuance,
3 withdrawal, or whether proper adequate notice
4 of the hearing has been given. If you are not
5 prepared to go forward with a case today or
6 you believe the Board should not proceed, now
7 is the time to raise such matters.

8 Mr. Secretary, are there any
9 preliminary matters?

10 MR. MOY: Good afternoon, Madam
11 Chairman, members of the Board. The first
12 case of the two cases for this afternoon,
13 there has been sort of a reintroduction or a
14 revisit, so to speak, of party status request
15 of John Moore. This is to Case No. 17810.

16 That completes the statement on
17 that, Madam Chair.

18 CHAIRPERSON MOLDENHAUER: Thank
19 you.

20 Will all individuals wishing to
21 testify this afternoon before the Board please
22 stand and take the oath?

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1 Ms. Bailey will administer the
2 oath.

3 (WITNESSES SWORN.)

4 CHAIRPERSON MOLDENHAUER: We can
5 go ahead and call the first case for the
6 afternoon.

7 MS. BAILEY: Thank you, Madam
8 Chair. It's Application No. 17810, the
9 application of Michael Reitz, pursuant to 11
10 DCMR 3104.1, for a special exception to allow
11 a garage addition to an existing one-family
12 dwelling under section 223, not meeting the
13 lot occupancy (section 403), and rear yard
14 (section 404) requirements.

15 The property is located in the
16 D/R-5-B District at premises 1505 Harvard
17 Street, Northwest (Square 2577, Lot 42).

18 CHAIRPERSON MOLDENHAUER: Thank
19 you very much.

20 Will the parties please introduce
21 themselves for the record?

22 MR. REITZ: This is Michael Reitz.

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1 I'm the owner of 1505 Harvard Street, the
2 subject property.

3 MR. MOORE: John Moore, the owner
4 of 1510 that adjoins Michael Reitz's property.

5 MR. KEYS: Good afternoon, Madam
6 Chair. George Keys, representing John Moore.

7 CHAIRPERSON MOLDENHAUER: Thank
8 you very much.

9 First, we have a preliminary
10 matter which is the party status application
11 for Mr. Moore.

12 I believe last time we had
13 indicated that we were going to grant that.
14 But again, I can indicate on the record for
15 this case that based on a consensus of the
16 Board, we will grant party status to Mr.
17 Moore. Now we can continue on.

18 This was a limited hearing. We
19 had briefs by both parties on this limited
20 matter before us.

21 What I'd like to ask is how long
22 each individual believes we should take so

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1 that I can understand how we can gauge this
2 afternoon.

3 Mr. Reitz?

4 MR. REITZ: I would think it would
5 be about an hour and half, something like
6 that.

7 CHAIRPERSON MOLDENHAUER: Okay.
8 You're only permitted 60 minutes at the most,
9 so I'm not sure. This is your specific --

10 MR. REITZ: I thought for the
11 whole --

12 CHAIRPERSON MOLDENHAUER: No.
13 Just for your specific --

14 MR. REITZ: I won't need that much
15 time.

16 CHAIRPERSON MOLDENHAUER: --
17 statement in regards --

18 MR. REITZ: I would say maybe 10
19 minutes.

20 CHAIRPERSON MOLDENHAUER: Okay.
21 Mr. Keys, are you going to match the 10
22 minutes?

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1 MR. KEYS: I can go for at least
2 45. But, no. I think a half an hour would be
3 sufficient to respond to the Board's concerns
4 and to discuss the legal questions that I
5 think the Board is pointing to.

6 CHAIRPERSON MOLDENHAUER: Okay.
7 Then what we'll do is we will give both
8 parties 30 minutes on the clock to present
9 their case on the limited issues.

10 That being stated, why don't we
11 move forward, and I will let you start your
12 testimony.

13 MR. REITZ: Is that myself, Mike
14 Reitz?

15 CHAIRPERSON MOLDENHAUER: Yes.

16 MR. REITZ: I submitted a
17 statement for the Board. My major thing is I
18 would like to have the questions and issues
19 that I raised addressed by the Board. That's
20 my primary interest.

21 Just to summarize those, there's
22 basically about three. The question of

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1 whether or not the right-of-way still exists,
2 given that it wasn't properly on the Recorder
3 of Deeds. And also, a question of
4 jurisdiction, who has the right to make that
5 determination.

6 Especially with that as the
7 documentation that was provided -- given that
8 the burden of proof rests with the person that
9 brought the appeal, have the documentations
10 been verified to the satisfaction of the
11 Board.

12 Also, the question on public
13 versus private. I'm of the understanding
14 that, if it still does exist, that it would be
15 private and not a public easement or right-of-
16 way. Given that, there was in the previous
17 October 21, 2008 hearing statements from
18 Secretary Moy that if it was, there was
19 conjecture at that point.

20 But the point was brought up that
21 if it was in fact a public easement, it would
22 have been recorded by the Zoning Board. And

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1 also, that even if it was private, it wouldn't
2 affect my lot size and lot occupancy that was
3 brought into question.

4 So that was just kind of those
5 questions with regards to affecting lot
6 occupancy percentage.

7 Lastly, I brought up the fact that
8 historically this right-of-way has been all
9 locked, or that area behind the houses has
10 been secured with gates and locks for as long
11 as I've owned the property, which is about 15
12 years now. So it was never a public, at least
13 recently.

14 At that time -- the gate that
15 existed when I bought the property 15 years
16 ago was an Asian gate. So that gate has
17 existed for at least 20 years, from what I can
18 tell.

19 Lastly, if it does exist, there is
20 an issue of substantial encroachment onto that
21 4 feet of the back property lot. It's a
22 approximately 1 foot along the whole line.

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1 That is substantial with regards to my back
2 property, given that it's such a small
3 property.

4 If it is determined that it does
5 exist, a remedy should be made to have the
6 deck and the fences built on that property
7 removed from the property so that the full
8 right-of-way could be given to whomever it's
9 intended for.

10 Perhaps I'd suggest at the end
11 that maybe the city could perhaps do a survey
12 of the property to identify exactly where the
13 boundaries are. We don't have good property
14 points with regards to the border. That would
15 be helpful if the city would offer that
16 service, given there's questions and concerns.

17 That's pretty much my statement.

18 CHAIRPERSON MOLDENHAUER: Just to
19 try to address a couple of those, I'll take
20 from the end forward. Any issues in regards
21 to enforcement of an easement are not
22 something that this Board has jurisdiction on

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1 and we will not address.

2 This case was actually sent back
3 so you still have an element of burden. The
4 opposing party, Mr. Moore, has brought up
5 additional issues which they have a burden of
6 proof on their own. But you have to show that
7 the application initially submitted for the
8 223 was correct and that that is the relief
9 that is required.

10 Currently we are here to discuss
11 whether or not an easement exists. And then
12 if it does exist, is it included in the lot
13 occupancy calculation.

14 So if you have any additional
15 testimony as to whether the easement exists or
16 does not exist, and if it does exist how it is
17 potentially used for a narrowly private
18 purpose, it would be beneficial for you to
19 provide that now.

20 MR. REITZ: Yes. I provided that
21 in my statement. I basically said that the
22 property lot sizes were based on the property

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1 lot sizes and calculations of square footage
2 that I paid property tax on. So therefore it
3 is my property.

4 The only question that came in was
5 whether it's determined to be public or
6 private. And there's no indication that it's
7 been public, that I can tell, with regards to
8 working with the surveyor's office and going
9 to the Recorder of Deeds. There was no
10 indication that it was public. There was some
11 indication that it was recorded way back when
12 and it never stated anything about it being
13 public.

14 Thanks.

15 CHAIRPERSON MOLDENHAUER: Okay.
16 Do Board Members have any questions for Mr.
17 Reitz?

18 I have a couple. What I'm going
19 to do is I'm actually going to hold off. I
20 will wait following Mr. Keys' presentation to
21 see if I have any additional questions.

22 Mr. Keys, you can now present Mr.

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1 Moore's.

2 MR. KEYS: Thank you Madam Chair,
3 members of the Board.

4 This is an interesting
5 circumstance and I think I have learned a
6 number of things about the city, and about the
7 ways in which people have tried to accomplish
8 their purposes with real estate.

9 I would start with just the
10 observation that this situation is not that
11 unusual. When you have irregular shaped
12 blocks and squares in the city, very often as
13 the city expanded and developed and moved into
14 outlined areas, they were not regularly
15 platted with public rights-of-way.

16 Private parties saw the need to do
17 what everyone who relied on public alleys was
18 able to do, which is to have access to have
19 both front and rear. In doing that they
20 created private easements.

21 The first question the Board asked
22 was whether or not this easement exists as a

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1 legal matter. My conclusion, based on the
2 title analysis that has already been submitted
3 to the Board, is it does exist.

4 An easement once created has to be
5 extinguished in order to terminate. Whether
6 it appears in subsequent deeds or not, the
7 easement is still a covenant, a right
8 affecting the land. It runs with the land.

9 We discussed in my letter the
10 likely origin of this easement. I kind of
11 associated it with Mr. William Moreland.

12 I think there's a deed attached to
13 the submission I provided the Board on June 8.
14 That was based on the belief that Mr. Moreland
15 was the person who subdivided and created Lots
16 40, 41, and 42. Lot 42 is the lot in
17 question. I assumed that the right-of-way,
18 the easement was created by Mr. Moreland in
19 connection with that subdivision.

20 I think you also have a copy of
21 the subdivision plat that Mr. Moreland filed
22 in December 1914, creating those three lots.

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1 I was mistaken in that and I'd
2 like to give you a copy of another deed.

3 CHAIRPERSON MOLDENHAUER: Can you
4 provide that to Ms. Bailey and she'll
5 provide --

6 MR. KEYS: This is the Recorder of
7 Deeds copy of the deed on record. This is the
8 deed into William Moreland. This deed was
9 dated January 19, 1914. It's from Charles
10 Murray, his wife, and three other people.
11 What the conveyance is, it's the conveyance of
12 Lots 36 and 37, which later became Lots 40,
13 41, and 42.

14 If you look at this deed, which
15 precedes the earlier deed that I provided you,
16 it says down in the lower paragraph that the
17 grant is subject to the right-of-way for alley
18 purposes over the northerly 4 feet of said
19 lots.

20 What this tells me is this was not
21 Moreland's creation, but it proceeded
22 Moreland. I'm wondering and did wonder how

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1 far back this goes. So we went and got the
2 subdivision plat creating the square.

3 This plat dates from December 29,
4 1904. It was created by yet another party.
5 But it's the creation of all of the lots
6 within the square bounded by Columbia Road,
7 15th Street, 16th Street, and Harvard, but
8 Harvard didn't even exist then. This
9 subdivision creates the lots but it makes no
10 reference to the right-of-way.

11 My only supposition is that the
12 source document creating the right-of-way is
13 between 1904 and 1914. That simply shows you
14 the antiquity of the right-of-way.

15 I would direct your attention to
16 the report of the Law Offices of Arthur
17 Konopka. It's simply stating a proposition
18 that, as a matter of law, an easement created
19 doesn't extinguish unless an instrument is
20 recorded or a court makes a determination to
21 extinguish an easement.

22 Searches in both Recorder of Deeds

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1 and the Superior Court of the District of
2 Columbia failed to turn up anything
3 extinguishing the easement.

4 I think as a matter of law, we
5 have an easement. It's a right-of-way and its
6 purposes are for alley purposes. I think that
7 is a significant statement.

8 I'd like to ask Mr. Moore a few
9 questions regarding his knowledge of the
10 easement in question.

11 MR. MOORE: Okay.

12 MR. KEYS: Mr. Moore, would you
13 again state your address and its relationship
14 to the property that is the subject of this
15 hearing?

16 MR. MOORE: My property is 1510
17 Columbia Road. I just said 1510 earlier. I
18 omitted Columbia Road; 1510 Columbia Road is
19 directly in back of the Harvard Street
20 property including 1505, 1503, and 1501.

21 MR. KEYS: Mr. Moore, how long
22 have you lived there?

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1 MR. MOORE: Since 2004.

2 MR. KEYS: Mr. Moore, when did you
3 become aware that there was a right-of-way
4 behind your property?

5 MR. MOORE: When I first went to
6 look at the house to consider buying it, the
7 previous owner, the woman who sold it to me
8 told me that there was an easement that
9 allowed access to both Harvard Street and to
10 15th Street.

11 MR. KEYS: Is there any reference
12 to such an easement in your deed?

13 MR. MOORE: No. Not in my deed.
14 There's a drawing that shows a dirt walkway
15 but there's no language.

16 MR. KEYS: Have you used this
17 easement to gain access either to Harvard
18 Street or to 15th Street?

19 MR. MOORE: Yes. I've used it a
20 couple of times to go in both directions.
21 That was when I first moved in before Mr.
22 Reitz built the garage. Before he built the

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1 garage he also built a gate. Before that,
2 that was how I accessed Harvard Street or 15th
3 Street.

4 MR. KEYS: Did any of your other
5 neighbors use the easement?

6 MR. MOORE: Yes. That's my
7 understanding.

8 MR. KEYS: Did you see them use
9 the easement?

10 MR. MOORE: Yes.

11 MR. KEYS: How did they use the
12 easement?

13 MR. MOORE: To access their
14 backyards from the street. My neighbor at 1512
15 Columbia Road used it to get appliances into
16 their backyard. I didn't see that personally
17 but they told me.

18 Also, anytime somebody from the
19 phone company comes out or the cable company
20 comes out to work on the phone or cable lines,
21 they have to go through the gate. They have
22 to get to the back of 1506. So when I first

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1 had phone service turned on, the technician
2 had to go through that gate to get to the box
3 for the entire block.

4 MR. KEYS: Have you seen people
5 use that for other purposes such as moving
6 bicycles?

7 MR. MOORE: Yes. People have used
8 it to -- exactly that, to bring bicycles or
9 motorcycles in to store in the back of their
10 house.

11 MR. KEYS: Has the existence of a
12 gate at the 15th Street end of the easement
13 prevented you from using that easement?

14 MR. MOORE: Not entirely prevented
15 it. It's an obstacle, but it lifts off its
16 hinges so that's what people do who want to
17 use it.

18 MR. KEYS: Thank you, Mr. Moore.

19 MR. MOORE: Thank you.

20 MR. KEYS: I have no more
21 questions.

22 Does the Board have any questions

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1 of Mr. Moore?

2 CHAIRPERSON MOLDENHAUER: Board
3 Members, do you have any specific questions?

4 I believe we may have a few in a
5 moment.

6 MR. KEYS: Madam Chair, if I may,
7 I'd like to continue.

8 CHAIRPERSON MOLDENHAUER: I'm
9 sorry. I thought you actually concluded.

10 MR. KEYS: No. I'd like to
11 continue with the second question.

12 CHAIRPERSON MOLDENHAUER: Go right
13 ahead then, please.

14 MR. KEYS: The second question you
15 posed is, what's the significance of an
16 easement if it exists? And I think the
17 easement is there. It's a 4-foot right-of-way
18 that runs roughly from the end of my client's
19 property, runs in an easterly direction to
20 15th Street, and runs across the northern 4
21 feet of Mr. Reitz's property.

22 I think it's significant from the

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1 description. This easement is different from
2 the easements that I'm used to seeing and what
3 I think the easements the Board is used to
4 seeing.

5 You have referenced a decision of
6 the Board in Appeal No. 17631 as sort of a
7 touchstone to how the Board might think about
8 these easements that are created by private
9 parties.

10 One of the interesting things
11 about this easement that makes it uniquely
12 different is the statement of purpose that
13 it's for alley purposes. It's not a driveway.
14 It's not serving a particular piece of
15 property. But it's embedded in the middle of
16 the square and it's for alley purposes.

17 Now, usually when you see
18 easements and the easements that were in
19 question in No. 17631, they're very specific
20 that it's an easement across this land for the
21 benefit of another piece of land. There's
22 both a benefit and a burden.

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1 Here, there's none. Here, there's
2 created an open right for alley purposes. Its
3 obvious purpose is to serve the rears of
4 properties on both the Columbia Road side of
5 the square and the Harvard Street side of the
6 square.

7 In the case that you have
8 referenced, No. 17631, the Board noted each
9 easement may only be used for the purpose of
10 parking the motor vehicles belonging to the
11 lots to which the parking spaces are assigned.
12 As such, neither serves any public purpose.

13 You used this observation, this
14 fact to distinguish this case from other cases
15 across the country which had held the exact
16 opposite in terms of how you look at easements
17 and what the consequences of those easements
18 are.

19 The cases you distinguished, and
20 you did it in a footnote, the basis for
21 distinguishing them was that they rested on
22 unique ordinances and distinct fact

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1 situations. And I think here you've got a
2 fact situation that is very different from No.
3 17631. I'd like to show you how it's
4 different.

5 I have copied two cases that I
6 think are pertinent. Both of these cases deal
7 with the exact same issue. That is, in
8 looking at a private right-of-way roadway
9 that's created on a lot, whether or not that
10 easement area should be included for the
11 purposes of lot size calculations. Both come
12 to the conclusion that the area of the
13 easement needs to be excluded from the lot
14 size calculations.

15 I'd like to ask you first to look
16 at Summers. The Summers decision is 1957. I
17 think it's important. It's in Baltimore.
18 It's a decision by the Court of Appeals in
19 Maryland, which is the highest court of
20 Maryland. That's important because in the
21 District of Columbia when there are not cases
22 on point, particularly cases dealing with real

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1 estate, local courts will look to Maryland as
2 the basis for authority when ours are silent.
3 Because we derive from the same common law
4 principles dealing with real property.

5 What I'd like you to do is if you
6 could turn to page 627 of that decision, which
7 is the third page, I'd like to look at the
8 bottom of the first column. There's a
9 definition of a lot. The court found this
10 definition to be important.

11 The city zoning ordinance defined
12 a lot as a parcel of land now or hereafter
13 laid out, occupied by one building and the
14 accessory buildings, or uses customarily and
15 necessarily incident to it, including such
16 open spaces required by this ordinance.

17 I think that's an interesting and
18 useful expression. Because what it allowed
19 the court to do in this case was to say that
20 that definition allowed for the exclusion of
21 the roadway from the definition of a lot.
22 Because you can't build across a roadway, you

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1 can't build across a private easement. And
2 the purpose of a lot is land laid out to be
3 occupied or occupied by a building.

4 If you look at the top of page 627
5 on the column -- I'd like to read -- the Court
6 says, "Whether the alley in question is public
7 or not, it seems to be unquestioned that
8 others, at least the owners of land abutting
9 on the alley, have rights to use the alley as
10 such. We understand it to be conceded that
11 the public has actually used the alley for
12 many years.

13 "Under these circumstances, the
14 area included in this alley at the rear of the
15 appellant's property is not a parcel of land
16 laid out and occupied by one building and the
17 accessory buildings or uses customary and
18 necessarily incident to it.

19 "We agree with the judge's view
20 that the definition above shows that a lot for
21 zoning purposes means only the land used for
22 a building or the uses incident to the

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1 building."

2 On that basis it excluded the lot
3 area from the calculation of the roadway. In
4 this case, it is a 9-foot private alley.

5 The next decision is Banker's
6 Trust which comes out of Connecticut, 1974.
7 I'm not going to extend it. But again, you're
8 dealing with a private right-of-way that was
9 created to connect parcels to a principal
10 road. And the question was whether the area
11 of that roadway had to be subtracted from the
12 lot area in calculating minimum lot
13 requirements.

14 Again, the court's conclusion was
15 that it should be excluded. And again, this
16 is based on the definition of a lot.

17 I think if you compare the
18 definitions of lot used there and the
19 definitions of lot used in our Zoning
20 Regulations, you'll see the essential and
21 substantial similarity.

22 In Section 199 of our regulations,

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1 lot is defined as the land bounded by definite
2 lines that, when occupied or to be occupied by
3 a building or structure and accessory
4 buildings, includes the open spaces required
5 under this title.

6 I think that the definition here
7 and the definition in these cases is
8 consistent in the essential point that land
9 which cannot be built upon is excluded from
10 the calculations.

11 Now, the difficulty here, of
12 course, is that this is not like a public
13 alley that exists in a surveyor's plat in the
14 District of Columbia. It's not something that
15 immediately comes to the attention of the
16 Zoning Administrator. Really, it's only known
17 to the parties of the property who own
18 property in relationship to it.

19 This is not an usual situation in
20 the District of Columbia. I think you'll
21 likely see this kind of problem arise again.
22 But I think it's a question that really has to

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1 be faced.

2 That is, if these legal precedents
3 are applied to the circumstances of this case,
4 then the area of that 4-foot right-of-way
5 should have been deducted from the lot area
6 calculations. And this property should not
7 have qualified for the relief it was granted
8 under section 223.

9 That's the consistent reading that
10 the Office of Planning had in the matter. In
11 their supplemental addendum report to the
12 Board they indicated, "We found evidence that
13 there's a Sanborn depiction of this easement
14 area. But if it's found to exist and if it's
15 found to be a public easement" -- I
16 distinguish the public sense of that not as
17 it's a public alley owned by the District.

18 But rather, is this a private
19 right created by parties that doesn't run to
20 a particular lot but is a general right? And
21 I think it is a general right in this square
22 to use this lane for alley purposes.

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1 I think the Board is obligated to
2 follow that conclusion to its logical end and
3 its legal end, which is to exclude it from the
4 calculation of lot area.

5 The other points Mr. Reitz makes
6 about encroachments are irrelevant. The
7 points he makes about there being a gate or
8 there being a narrowing of that easement
9 doesn't do away with the existence of the
10 easement.

11 I would take it that the parties
12 in this square have the right to enforce that
13 easement. If that's something that they find
14 inconvenient and necessary to make their lives
15 easier, they can enforce that easement.

16 I think I've completed what I'd
17 like to say. I'd be happy to hear the Board's
18 questions on any of the legal precedence that
19 I have utilized.

20 CHAIRPERSON MOLDENHAUER: Thank
21 you very much, Mr. Keys. I just have a couple
22 of questions and then I'll open up to see if

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1 any other Board Members have questions.

2 I'm of the opinion that I do
3 believe an easement does exist. I think
4 there's sufficient evidence in the record from
5 the title abstract. I don't know how other
6 Board Members feel but in regards to phrasing
7 my questions and going forward, I'm just
8 trying to put my opinion out on the record.

9 That being said, I guess then my
10 question is, is it a private easement or is it
11 a public easement? I hear your arguments on
12 that. But it seems to me that you're making
13 an assumption without actually having -- and
14 you admitted that you don't have the creation
15 document, either the covenant or the easement
16 that was somehow created sometime between 1904
17 and 1914.

18 Without having that in hand to see
19 whether it was a mutually beneficial easement,
20 potentially just for the individuals who owned
21 property on Harvard Street to gain access to
22 15th Street or potentially for both Columbia

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1 Road and Harvard, we don't know who were the
2 beneficial property owners or who were the
3 servient owners.

4 How can you make that assumption
5 without having that specific document in hand?
6 That's my first question.

7 MR. KEYS: I make the assumption
8 based on the fact that the repetition of the
9 phrasing in the subsequent deeds, to me,
10 evidences the intent of the grantors to
11 emphasize the important language. I mean,
12 that's what you carry forward, the location of
13 the easement and its purpose. And if the
14 grantors had intended the easement to be
15 limited in its benefit, there's certainly
16 legal phrasing that would accomplish that.

17 CHAIRPERSON MOLDENHAUER: I want
18 to make sure I understand the facts. I think
19 that Mr. Moore, when you were questioning him,
20 indicated that he did not have language in any
21 of his deeds or subsequent deeds that
22 reference this easement?

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1 MR. KEYS: That's correct.

2 CHAIRPERSON MOLDENHAUER: So the
3 only deeds, from my understanding, that have
4 knowledge or have reference to this deed are
5 those that are adjoining on Harvard Street; is
6 that correct?

7 MR. KEYS: That's correct.

8 CHAIRPERSON MOLDENHAUER: Okay.

9 MR. KEYS: Well, as far as we
10 know, that is correct. The deed restriction
11 is on the three lots at issue.

12 If the Board thinks it crucial, we
13 could find every deed that existed affecting
14 this property, going back in time to see if
15 the language is any different. But I think
16 the repetition of the operative language from
17 deed to deed to deed, in 1914 through 1917,
18 suggests the significance of the language.

19 CHAIRPERSON MOLDENHAUER: I'm not
20 asking for every deed back to 1914. I'm just
21 asking the question. Obviously, you've had
22 time to prepare. We identified the limited

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1 scope a prior hearing. I'm just trying to
2 make sure I understand what facts we have
3 currently and what evidence we have currently
4 before us.

5 MR. KEYS: You also have -- I
6 would direct your attention to Exhibit 28 in
7 the case file. This is a letter in opposition
8 from Kathleen Clark. I think that letter
9 references the fact that she has known of the
10 existence of the easement for over 40 years.
11 I think she's a longtime resident of the
12 neighborhood.

13 CHAIRPERSON MOLDENHAUER: What is
14 Ms. Clark's address so I don't have to dig
15 through my file?

16 MR. KEYS: 1512 Columbia Road.

17 CHAIRPERSON MOLDENHAUER: Okay.
18 She is on Columbia Road?

19 MR. KEYS: Yes. She's immediately
20 adjacent to Mr. Moore's property and her
21 property abuts the easement.

22 CHAIRPERSON MOLDENHAUER:

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1 Switching gears in regards to questions, there
2 was testimony about the use and Mr. Moore's
3 use of the alley for a multitude of different
4 reasons.

5 Have there ever been public
6 officials such as garbage men that have
7 actually used or gone into the alley to
8 service the homes, other than individual use
9 to service their private homes?

10 MR. MOORE: To answer, the garbage
11 is picked up in the fronts of our houses. I
12 was told that there had been a couple of
13 occasions -- again, this was my neighbors
14 Kathy Clark and Mike Gangland who have been
15 living there for decades -- a couple of
16 occasions where the alley was used as egress
17 in an emergency situation. But that's not
18 something that I experienced personally. So
19 not that I've seen or that I've been witness
20 to.

21 CHAIRPERSON MOLDENHAUER: But it
22 was used as egress for emergency purposes by

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1 people that own property that was adjacent to
2 the alley; is that correct?

3 MR. MOORE: Yes. That's my
4 understanding.

5 CHAIRPERSON MOLDENHAUER: I don't
6 have any further questions at this time.

7 Do any other Board Members have
8 questions?

9 MEMBER SORG: I have one follow-up
10 question for Mr. Moore.

11 Does the new garage affect your
12 access to 15th Street?

13 MR. MOORE: No.

14 MEMBER SORG: Thank you.

15 CHAIRPERSON MOLDENHAUER: It
16 doesn't seem as though there's any additional
17 questions.

18 At this time I will see if Mr.
19 Reitz has any cross-examination questions of
20 Mr. Moore.

21 MR. REITZ: Yes. I have a few
22 points that I'd like to go --

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1 CHAIRPERSON MOLDENHAUER: Before
2 you start, Mr. Keys, if you had any actual
3 questions of Mr. Reitz that I didn't provide
4 you the opportunity to cross-examine, I'll
5 allow that after this is concluded.

6 Mr. Reitz, please go ahead.

7 MR. KEYS: I think we're a little
8 out of order.

9 CHAIRPERSON MOLDENHAUER: We
10 finished our questions of --

11 MR. KEYS: I understand. But if
12 he's cross-examining my client --

13 CHAIRPERSON MOLDENHAUER: Yes.

14 MR. KEYS: -- then I would be able
15 to cross-examine him following that.

16 CHAIRPERSON MOLDENHAUER: Yes. I
17 just indicated that. It is a little out of
18 order; I understand that. But I'm just trying
19 to identify that I wanted to provide time for
20 both parties to cross-examine.

21 We'll go into that now. Thank
22 you.

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1 MR. REITZ: Yes. I just wanted to
2 point out that when the statements were made
3 with regards to using my side yard, that was
4 gated and locked. And the neighbors asked
5 permission and I granted that permission. So
6 there is no side yard right-of-way or easement
7 where I built the garage.

8 Basically, what this is about is
9 that the side yard was easier access for the
10 people behind my house, the two lots and then
11 a third lot --

12 CHAIRPERSON MOLDENHAUER: I'm
13 sorry. Mr. Reitz, this is the point in time
14 where you've already --

15 MR. REITZ: I'm sorry. Just
16 cross?

17 CHAIRPERSON MOLDENHAUER: It's
18 just cross-examination. If you have a
19 specific question?

20 MR. REITZ: I was just trying to
21 point out what the question was.

22 When you used the side property

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1 did you ask permission?

2 MR. MOORE: When I first moved in,
3 that was before you had put the gate up.
4 There were a couple of times where I accessed
5 Harvard Street because it was my understanding
6 that there was an easement there, so I had
7 access without having to ask permission.

8 MR. REITZ: You haven't found any
9 indication of any easement on my side yard,
10 have you; is that correct?

11 MR. MOORE: I'm not sure I
12 understand the question.

13 MR. REITZ: There's no indication
14 of any easement on my side yard, none; is that
15 correct?

16 MR. MOORE: I don't know. There's
17 no sign, if that's what you mean.

18 MR. REITZ: Okay. Then I also
19 wanted to -- let's see. With regards to, I
20 guess, lot occupancy.

21 Can I only restrict my questions
22 to what was made with regards to -- I'm trying

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1 to ask about the percent of lot occupancy and
2 not being able to build on that area; in which
3 case, the neighbors have built onto that
4 easement area.

5 CHAIRPERSON MOLDENHAUER: I kind
6 of see where you're potentially going. Let me
7 make sure I steer you away from anything
8 that's outside of this limited scope. If
9 you're talking about what other people have
10 done in regards to building, that is not
11 relevant for this proceeding.

12 MR. REITZ: Okay.

13 CHAIRPERSON MOLDENHAUER: If
14 that's where your questions are going, that's
15 not something that we will provide an
16 opportunity for you to cross-examine about.

17 MR. REITZ: Okay. Let's see. I
18 guess the idea that -- well, I'm just looking
19 through my notes here with regards to the case
20 that was brought up with regards to Baltimore.
21 It seems that it was a 9-foot wide alley for
22 vehicle access.

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1 I'd just like to state that I
2 don't think that's directly comparable,
3 because that was a situation where it looks
4 like it was made available to the general
5 public. We've indicated that the only times
6 that this access or right-of-way in the back
7 had been used was for emergency purposes, and
8 very seldomly on that account.

9 So for instance, John, how many
10 times have you directly used the backyard, the
11 right-of-way in the back to the 15th yard
12 street -- you've been there since 2004 -- in
13 the 6 years that you've been there; could you
14 give us a number?

15 MR. MOORE: Maybe a dozen times.

16 MR. REITZ: A dozen times over 6
17 years?

18 MR. MOORE: Yes. Because -- yes.
19 That's just a guess.

20 MR. REITZ: I guess that's all
21 that I'll be able to ask directly.

22 There's some other information I'd

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1 like to submit with regards to percent of lot
2 occupancy. For instance, the -- I know I
3 submitted this in my statement.

4 CHAIRPERSON MOLDENHAUER: What
5 we're going to do is we'll allow Mr. Keys to
6 cross-examine, and we'll move forward from
7 there.

8 MR. REITZ: Okay.

9 CHAIRPERSON MOLDENHAUER: Thank
10 you.

11 Mr. Keys?

12 MR. KEYS: I don't think I have
13 any questions for Mr. Reitz.

14 CHAIRPERSON MOLDENHAUER: Okay.
15 Are there any additional questions from the
16 Board Members?

17 At this point in time, both of you
18 have time remaining. So if you have closing
19 statements that you would like to provide, I
20 will give you both 5 minutes for closing
21 statements.

22 Mr. Reitz, you can start.

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1 MR. REITZ: Thanks.

2 With regards to the question of
3 lot occupancy, before John built or bought his
4 house, the previous owner had built a deck.
5 And that deck is a structure, it constitutes
6 a structure. I think in my testimony, it's
7 about -- I think the platform itself is about
8 8 feet off -- well, 7 feet off the ground.
9 As such, it constitutes a structure.

10 Given that large platform, which I
11 provided in the record, his percent lot
12 occupancy is approximately 80 percent lot
13 occupancy with that structure on it. So you
14 have a situation where he's complaining about
15 my going to 70 percent lot occupancy when his
16 percent lot occupancy is not in conformance
17 with the codes and regulations. He's well
18 over 80 percent lot occupancy.

19 MR. KEYS: Madam Chair, excuse me.
20 You've already ruled that kind of
21 consideration out of order for this
22 proceeding.

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1 MR. REITZ: Hold your statements,
2 I believe.

3 CHAIRPERSON MOLDENHAUER: I agree
4 with Mr. Keys. That's not relevant to the
5 current issues and questions that we have that
6 are going on today.

7 MR. REITZ: The only reason that I
8 bring it up -- part of that reason is that
9 part of that --

10 CHAIRPERSON MOLDENHAUER: Again,
11 it does --

12 MR. REITZ: -- is encroaching upon
13 that 4-foot right-of-way. So that is
14 relevant, I would think.

15 CHAIRPERSON MOLDENHAUER: It's not
16 relevant and it's not something that we have
17 jurisdiction over.

18 MR. REITZ: Okay.

19 CHAIRPERSON MOLDENHAUER: And it's
20 not anything that we are hearing today. So if
21 you have any additional issues that you'd like
22 to bring up during your closing, I would

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1 recommend you do that.

2 MR. REITZ: Yes. When the fire
3 department did the initial review, they said
4 it is often common where there is no actual --
5 certain blocks exist in the District of
6 Columbia where there is no backyard access at
7 all. So safety, the fire department, if you
8 look at the previous testimony, did say that
9 they wanted ways to access the houses in a
10 block without having to go through the
11 backyards. Just a point of reference in the
12 original testimony.

13 I just would reiterate that there
14 has been no indication, to the case made here,
15 that it was public versus general right. That
16 does not necessarily mean it's a public
17 easement. I'd still say it was for private
18 purposes, for the people and the beneficiaries
19 of only those lot occupants of the lot.

20 There are safety and security
21 concerns. The block has decided to lock those
22 gates. I did present in my testimony that

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1 there have been things stolen in the backyard
2 recently when there wasn't a gate provided,
3 and that we have had also a front break-in
4 attempt in my neighbor's house in broad
5 daylight through the front door. So by making
6 the back door and the back part of the lot
7 more open, that would be a case of safety and
8 security concerns for the block.

9 I think that's about it for me.

10 CHAIRPERSON MOLDENHAUER: Thank
11 you very much.

12 Mr. Keys?

13 MR. KEYS: Madam Chair, I think
14 the matter is pretty clear. The easement
15 exists. I think your questions will run to
16 the question of the character of the easement.
17 I think it is distinguishable from the
18 easement you faced in No. 17631.

19 The public/private distinction is
20 not a useful one at this point. I think it's
21 a question of, how limited is the easement in
22 its purpose?

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1 The easements in that case were
2 very specific and very narrow, serving only to
3 provide a means of direct access and to
4 certify an access requirement and a parking
5 requirement for a particular piece of
6 property. It was delimited that way. It was
7 an easement agreement among the lot owners to
8 create those.

9 I think that is classic in a
10 private easement, and I think that is the
11 basis on which you are able to distinguish
12 this from the list of cases that you
13 referenced in that decision and order that
14 went the other way.

15 I think courts in many
16 jurisdictions -- Vermont, Connecticut, New
17 Jersey, Maryland are the ones I've found --
18 all went the other way based on a similar
19 fact, and based on a zoning ordinance that
20 defined a lot in much the same way that we
21 define a lot. Which is not surprising, since
22 most of the Zoning ordinances that came to be

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1 developed in the 1920s, 1930s, 1940s, and
2 1950s looked to other jurisdictions as their
3 templates and models. Language gets tracked
4 and used in common.

5 I think the fact that so many
6 jurisdictions in this region reached a
7 different conclusion than you did in No. 17631
8 is suggestive that those circumstances, the
9 different factual context, required.

10 You have raised a question of
11 whether or not we can identify and find the
12 source document. We can certainly make an
13 effort to do so before your decision meeting
14 to try to produce something that would satisfy
15 that concern you have.

16 CHAIRPERSON MOLDENHAUER: Thank
17 you very much. I think there's been a long
18 time frame in regards to your requests for
19 submitting additional information between the
20 initial hearing, the appeal, and then this
21 current limited hearing. So I think that if
22 you have not found it to date, I don't believe

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1 I would require additional information in that
2 regard.

3 Are there any additional questions
4 from the Board regarding any closing remarks
5 made by both the parties?

6 Seeing none, what we'll do is we
7 will set this for a decision.

8 Mr. Moy, would you have a date for
9 decision that would be recommended based on
10 our calendar?

11 MR. MOY: Yes. I would, Madam
12 Chair. I would suggest, depending on the
13 Board's work schedule, a decision either on
14 July 13 or July 20. Of course, there's July
15 27 if you want to go that long.

16 CHAIRPERSON MOLDENHAUER: Let's
17 set this for decision in the morning on July
18 20.

19 MR. MOY: Very good.

20 CHAIRPERSON MOLDENHAUER: Thank
21 you both very much. We will be deciding this,
22 as I said, on the morning of July 20. Thank

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1 you.

2 Okay. The parties for this next
3 case, you can come and take a seat at the
4 table. Once everyone gets seated we'll go
5 through introductions for the record. It
6 looks like we have a large group.

7 Why don't we start on my left and
8 we'll work our way through in regards to
9 introductions.

10 MR. MCALLISTER: Hi. I'm Brett
11 McAllister with Airport Council International-
12 North America. I am the Chief Financial
13 Officer. We represent the interested property
14 here at 136 D Street, Southeast. My business
15 address is 1775 K Street, Northwest, Suite
16 500.

17 MR. AGUGLIA: My name is Richard
18 Aguglia. I'm with the law firm of Hutton &
19 Williams. I'm representing ACI-NA in this
20 case. We're located at 1900 K Street,
21 Northwest, in Washington.

22 MR. GARRISON: Good afternoon.

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1 I'm David Garrison. I am the Chair of ANC-6B
2 and the Commissioner for ANC-6B01.

3 MR. WILSON: Good afternoon. My
4 name is Michael Wilson. I reside at 134 D
5 Street, Southeast, which is adjacent to the
6 subject property which is at issue today,
7 together with my wife and our two children.

8 MR. LEGRANT: Good afternoon.
9 Matthew LeGrant. I'm the Zoning
10 Administrator.

11 MR. SURABIAN: Good afternoon.
12 This is Office of the Attorney General's Jay
13 Surabian on behalf of DCRA.

14 MS. BOLLING: Good afternoon.
15 Melinda Bolling, General Counsel for DCRA.

16 CHAIRPERSON MOLDENHAUER: Okay.
17 Thank you very much.

18 We have a couple of preliminary
19 matters in this case.

20 First is, Mr. Aguglia, there was a
21 motion to request intervener. As the property
22 owner of the property that's in question,

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1 there is no need to actually be intervened.
2 You are automatically a party. We will
3 recognize you as a party in this case and move
4 forward in that regard.

5 The second issue is that we have
6 two separate motions, one from the property
7 owner and one from the District, for a motion
8 to dismiss based on timeliness.

9 So what we will do is we will --
10 I'm actually going to look to the appellant to
11 present a case as to why this application is
12 timely and this appeal is timely. And then
13 we'll go from there.

14 I'm sure you've read all of the
15 documentation that's currently been provided
16 in both motions that articulate their motion
17 to dismiss based on timeliness. So if you can
18 address those issues, we'll first address the
19 issue to dismiss. Thank you.

20 MR. WILSON: Madam Chair, if I
21 might first, please -- I had submitted
22 actually an application for party status back

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1 on May 28. I'm not sure if that's a matter
2 that needs to be formally ruled upon at this
3 point.

4 CHAIRPERSON MOLDENHAUER: One
5 moment, please.

6 Mr. Williamson, it would have to
7 be an application to intervene for this. We
8 don't have any records of that.

9 Do any of the other parties in
10 this case have -- did you file that with the
11 Office of Zoning?

12 MR. WILSON: I did. I came on May
13 28 and received a file stamped copy of an
14 application for party status based upon
15 Section 3106.02 of your regulations. To the
16 extent necessary I will make a formal --

17 CHAIRPERSON MOLDENHAUER: Do you
18 have a copy?

19 MR. WILSON: I don't have a copy
20 with me, unfortunately.

21 CHAIRPERSON MOLDENHAUER: You
22 don't have a copy of the --

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1 MR. WILSON: I left it with the
2 receptionist across the hall.

3 CHAIRPERSON MOLDENHAUER: You said
4 that you had a stamped copy so I thought maybe
5 you --

6 MR. WILSON: I did. I was given
7 a --

8 CHAIRPERSON MOLDENHAUER: --
9 actually took a second one with you to have a
10 copy yourself.

11 MR. WILSON: No. She refused to
12 file stamp the one I had with me. She had to
13 make a copy, file stamp that, and give that to
14 me. She could not file stamp what she
15 represented to be an original. She had to
16 give me a file stamped copy.

17 CHAIRPERSON MOLDENHAUER: Okay.
18 But you have a file stamped copy somewhere in
19 your personal files?

20 MR. WILSON: I do.

21 CHAIRPERSON MOLDENHAUER: Do you
22 have it with you today?

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1 MR. WILSON: I do not.

2 CHAIRPERSON MOLDENHAUER: You do
3 not? Okay.

4 MR. SURABIAN: That was never
5 served on DCRA. I've never seen it.

6 MR. AGUGLIA: It was never served
7 on us either.

8 MR. WILSON: There's nothing in
9 there about serves. It said it has to be
10 filed under Section 3106.02.

11 To the extent necessary, I make a
12 formal request today to intervene pursuant to
13 Section 3112.15.

14 CHAIRPERSON MOLDENHAUER: Let
15 me --

16 MR. MOY: Madam Chair, just for
17 the record, I have staff checking the record
18 file for that filing. We're not coming up
19 with that for the moment. So it doesn't
20 appear that -- well, I'm not saying it was not
21 filed. But it's not in our records.

22 MR. WILSON: I would be happy to

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1 submit it after the hearing.

2 CHAIRPERSON MOLDENHAUER: Would
3 there be opposition from the additional party
4 members to grant a motion to intervene by Mr.
5 Williamson?

6 MR. WILSON: For the record, it's
7 Wilson.

8 CHAIRPERSON MOLDENHAUER: Sorry.
9 Wilson. Thank you.

10 MR. SURABIAN: Well, I think we
11 need to hear -- if he's saying anything
12 different than what the ANC is saying, I just
13 don't see it as being necessary. So I would
14 object to it.

15 CHAIRPERSON MOLDENHAUER: Mr.
16 Aguglia, I'm looking at you to provide -- are
17 you going to object to it also?

18 MR. AGUGLIA: He is a nextdoor
19 neighbor. I'm not going to object to it.

20 CHAIRPERSON MOLDENHAUER: Okay.
21 Then I think what we'll do is since we first
22 have the issue of timeliness, and while Mr.

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1 Wilson will now be a party, you obviously did
2 not file the initial claim in regards to
3 timeliness. So that issue is still on the ANC
4 to present why this appeal was timely.

5 Obviously, you would be able to
6 testify as to any knowledge you have in that
7 regard. But it's still the ANC's burden to
8 address that issue.

9 We will go back again now, turning
10 to Mr. Garrison to address the issue of
11 timeliness.

12 MR. GARRISON: Madam Chair, in
13 order to get Mr. Wilson's testimony about the
14 timeliness question on the record, do I need
15 call him as a witness or may I ask him
16 questions during my direct; how would that
17 proceed?

18 CHAIRPERSON MOLDENHAUER: Well,
19 right now we're not into the merits of the
20 case yet.

21 MR. GARRISON: No. I understand.

22 CHAIRPERSON MOLDENHAUER: Okay.

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1 MR. GARRISON: This is as to
2 timeliness.

3 CHAIRPERSON MOLDENHAUER: As to
4 timeliness? If you'd like to call a witness
5 to get facts, first I'd like to hear your
6 statements. Provide general statements of
7 facts --

8 MR. GARRISON: No, that's fine. I
9 understand.

10 CHAIRPERSON MOLDENHAUER: If you
11 get to a certain threshold where then we need
12 to have a factual debate and you say, "I have
13 a witness," we'll get to that point then. But
14 let's first start off with some of the basic
15 issues. Because I think that both of the
16 motions have laid out some significant
17 questions that you have.

18 MR. GARRISON: Right. I
19 appreciate that, Madam Chair.

20 CHAIRPERSON MOLDENHAUER: So let's
21 address those first.

22 MR. GARRISON: I'm the only non-

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1 lawyer here at the table so I'm throwing
2 myself on the mercy of the court in that
3 regard. I appreciate your help.

4 Let me begin by saying that on
5 February 28 -- 23, excuse me -- 2010, at our
6 regular monthly meeting of the ANC-6B, which
7 was properly noticed and with a quorum
8 present, ANC-6B voted unanimously 9-0 to
9 appeal the decision of the Zoning
10 Administrator to grant a construction permit
11 to the Airport Council International to
12 renovate its property at 136 D Street as a
13 "private club."

14 ANC-6B requested that the BZA
15 withdrawal the permit on the grounds that the
16 Zoning Administrator incorrectly applied DC
17 law and regulations by approving the permit.

18 Now, addressing the timeliness
19 question, on December 8, 2009, ANC-6B was
20 informed that construction was under way at
21 136 D Street, Southeast. The Commission was
22 alerted through an email from Michael Wilson,

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1 the homeowner of the abutting property at 138
2 D Street, Southeast.

3 Mr. Wilson advised the Commission
4 that he had contacted DCRA, and had been
5 informed that the permit was issued on the
6 grounds that it would be used as a private
7 club with a variety of use.

8 Mr. Wilson reported further that
9 the permit had not been posted when it was
10 issued on September 16, 2009.

11 Mr. Wilson informed the Commission
12 by an email on January 14, 2010 that the
13 permit was posted at the property in early
14 January 2010, well after construction had
15 commenced.

16 ANC-6B holds its monthly meetings
17 on the second Tuesday of each month. On the
18 first Tuesday of each month, the Commission's
19 Planning and Zoning Committee meets to review
20 the cases docketed for that month and to
21 formulate its recommendations to the
22 Commission. ANC-6B's Executive Committee sets

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1 the agenda for the month at its meeting the
2 last Tuesday in the prior month.

3 When we heard from Mr. Wilson on
4 January 14 that the permit had been posted
5 earlier that month, the Commission's Executive
6 Committee had its meeting on January 26,
7 placed the issue on the Commission's February
8 docket, and invited both Mr. Wilson and ACI to
9 come to the February 2 Planning and Zoning
10 Committee Meeting to discuss the case.

11 Mr. McAllister and Counsel came
12 before the Committee to describe the project.
13 Mr. Wilson was also heard on the matter.

14 Our regular February Commission
15 Meeting was scheduled for February 9. As you
16 know, the city and the region was hit by a
17 massive snowstorm prior to the 9th and the
18 city was effectively closed for the second
19 week of February. The Commission postponed
20 its meeting until February 23.

21 At that meeting, the Planning and
22 Zoning Committee recommended that the

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1 Commission appeal the decision of the Zoning
2 Administrator. After taking further testimony
3 that evening from both ACI and Mr. Wilson, the
4 Commission approved the Committee's
5 recommendation on a 9-0 unanimous vote.

6 Shortly thereafter on March 15,
7 the Commission sent its formal letter to the
8 BZA requesting the appeal of the permit.
9 Acting in my role as Chairperson, I filled out
10 the BZA's online appeal form on March 17.

11 As the Board knows, the Advisory
12 Neighborhood Commissions are made up of
13 elected, unpaid volunteers. All of the
14 deliberations of our Committees and our
15 Commission take place in public meetings that
16 are noticed well in advance to the community.

17 Although we have an ability to act
18 relatively quickly in emergency situations, it
19 is not a small matter to do so given our need
20 to secure a suitable meeting space outside of
21 our normal cycle, and to identify a time and
22 place when a quorum of Commissioners can

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1 attend.

2 I submit that the situation
3 presented by the 136 D Street case did not
4 warrant emergency treatment, and that the
5 Commission acted appropriately and in a timely
6 way by placing the matter on its February
7 docket.

8 Moreover, since the information
9 provided to our Commission by Mr. Wilson was
10 that the permit was posted on the 136 D Street
11 property sometime in early January, we had no
12 way of knowing for sure when the Board's 60-
13 day clock had begun.

14 I'm going to stop at that point.

15 CHAIRPERSON MOLDENHAUER: At this
16 point in time I will turn to the District to
17 present their opposing motion.

18 MR. SURABIAN: Thank you. I've
19 laid out pretty clearly in the prehearing
20 statement I filed with the Board some of the
21 details. I understand that the Airport's
22 Counsel has brought some witnesses today that

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1 may be able to flesh out some of the facts.

2 At the very least from what we're
3 hearing, they were aware as of December 8 that
4 the proposed use was that of a private club,
5 that construction was under way, that a permit
6 had been issued by DCRA.

7 If they were unaware of the
8 language in the permit, the construction being
9 under way would have been cause for them to
10 investigate the matter, which they were
11 supposed to have done already, to let them
12 know that there may be a potential Zoning
13 issue.

14 The 60 days by my count is January
15 21. They filed March 22, which is well over.
16 And if the permit was posted in early January
17 and they want to use that date as the date
18 that they found out, that's still over 60
19 days.

20 If we take some testimony, I think
21 the evidence is going to come out that they
22 found out long before. I mean, all this

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1 information was available publicly; they're on
2 DCRA's Web site or on the notifications DCRA
3 sends out to all the ANCs about issued
4 building permits.

5 Additionally, it appears that Mr.
6 Wilson had been following this issue rather
7 closely since early 2008 or middle 2008. I
8 think that if we hear testimony, we'd see that
9 the parties were well aware of what going on
10 with the private club in March-May 2008.

11 So I think they're just clearly
12 untimely. Thank you.

13 CHAIRPERSON MOLDENHAUER: Mr.
14 Aguglia?

15 MR. AGUGLIA: Yes. Thank you.

16 ANC-6B is appealing from the
17 decision of the Zoning Administrator to lift
18 the hold on the construction permit for use as
19 a private club for the subject property.

20 Mr. LeGrant lifted that hold on
21 April 29, 2009. Yet it's almost 11 months
22 later that they filed their appeal on March

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1 22, 2010, which is the actual date that it was
2 stamped in by the BZA. March 22, 2010, so an
3 11-month delay.

4 Mr. Garrison has admitted in
5 testimony today, as well as in their
6 prehearing statement to their application,
7 that they were on notice on December 8 that
8 construction was taking place on the subject
9 property and that the construction involved
10 the use of the property as a private club. He
11 just stated that in his testimony and that's
12 in his prehearing statement.

13 The appeal that they filed was 104
14 days after that admission; 104 days is
15 obviously more than the 60-day. So that
16 standing alone is grounds for this Board to
17 dismiss that appeal as untimely.

18 What we are going to present to
19 you is a timeline of events by Mr. McAllister,
20 who is the CFO of ACI-NA. I also have with us
21 the contractors, Mr. Tuzzio and Mr. Benavidas,
22 as well as the architect, Mr. Maiden, who will

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1 be here to answer any questions that you may
2 have so we don't duplicate testimony.

3 I would ask -- would you give the
4 Board the timeline of events, please, with
5 copies to the opposing side?

6 In BZA Case No. 17468, the Board
7 had a very similar case where ANC-6A -- this
8 is 6B --

9 MR. WILSON: Excuse me. Can I
10 object to this? There's no foundation for
11 this document. If he wants to put on
12 testimony about the facts in this document,
13 that's fine, and we can cross-examine. But at
14 this point there's no evidence to support any
15 of these purported facts in this document.

16 MR. SURABIAN: I think you need to
17 be a party to make an objection.

18 CHAIRPERSON MOLDENHAUER: I
19 believe that we have admitted Mr. Wilson.

20 Just a side note here, we have
21 done a thorough review of our office
22 documentation and we do not have any record of

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1 Mr. Wilson's documentation. Obviously, our
2 office keeps immaculate -- I have to say, we
3 have a great office here. So if Mr. Wilson
4 could provide us a copy at a later date, we
5 have already addressed the issue.

6 He is a neighbor. He is a party.
7 We have accepted his oral request to be a
8 party at this time. He can make an objection.

9 However, I think that we have a
10 lot of the documentation in regards to dates.
11 I already have my own little cheat sheet of
12 dates in my record. For efficiency, we can go
13 through it.

14 If there is any date that a party
15 objects to in regards to challenging whether
16 or not a date is accurate, as the testimony
17 comes forward I'll accept objections at that
18 time in regards to the potential inability to
19 prove via testimony that a date is incorrect
20 on this.

21 Based on that statement, we'll go
22 forward.

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1 MR. WILSON: Thank you, Madam
2 Chair.

3 CHAIRPERSON MOLDENHAUER: Thank
4 you.

5 MR. AGUGLIA: Thank you, Madam
6 Chair.

7 Again, as I was saying, in BZA
8 Case No. 17468, I'd like to look at the
9 sequence of events to see if there was
10 substantial knowledge on the part of the ANC
11 and whether or not they appealed timely.

12 Mr. McAllister, would you please
13 state your name for the record and your
14 position?

15 MR. MCALLISTER: Brett McAllister
16 of Airport Council International-North
17 America. I'm the Chief Financial Officer.

18 MR. AGUGLIA: Would you please go
19 through the -- as the Chair pointed out, many
20 of these dates are already in my memory. But
21 in the request to dismiss this case as
22 untimely, the substantial exhibits are all

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1 marked.

2 Would you start, please, Mr.
3 McAllister?

4 MR. MCALLISTER: Yes, thank you.

5 In March 2008, we got our Board
6 approval to go forward to find a house for use
7 as a social club, a private club, and we hired
8 a realtor.

9 On March 21, we actually located
10 the property at 136 D Street, made an offer
11 over the Easter Weekend which was accepted.

12 On May 8 we closed on the
13 property. At that point in time, Mr. Wilson
14 faxed a note to us objecting to the use of the
15 property. That's the first time he came on
16 record.

17 MR. AGUGLIA: Was it a note or a
18 letter?

19 MR. MCALLISTER: It was a letter.
20 Subsequent to that, our president reached out
21 to Mr. Wilson and did hold a meeting with him
22 to discuss the use of the house.

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1 MR. AGUGLIA: What date was that,
2 please?

3 MR. MCALLISTER: May 28, 2008. We
4 had a tenant in the basement at the time. We
5 told him we would honor that lease to its full
6 term.

7 On August 29, we sent a letter of
8 a notice to inspect upon termination of the
9 lease.

10 Then in September 2008, we
11 actually met with our Board. Our Board only
12 meets once a year. At that point in time we
13 amended our bylaws to include use of a private
14 club.

15 In October 2008, the tenant had
16 vacated which enabled us to move forward with
17 the renovation of the basement.

18 In December 2008 I actually
19 visited the house, at which time Mr. Wilson
20 came over the fence. And was telling me that
21 the use of the house was not in alignment with
22 the deed of the mortgage, mortgage

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1 requirements, covenants, and that also we were
2 not following the laws. I assured him that
3 the house would be used as per the laws under
4 DCRA.

5 In February 2008 we actually
6 contracted with Mr. Maiden, who is behind me.

7 MR. AGUGLIA: February of what
8 year, please?

9 MR. MCALLISTER: February 2009,
10 sorry. We contracted Mr. Maiden to help us
11 with the design and permitting process of the
12 renovation to the basement.

13 He sent out a crew later that
14 month to actually take measurements. At which
15 time, they were approached by a neighbor that
16 they indicated came from the right of the rear
17 of the house, which is 134 D, who formally
18 have no right to be there.

19 MR. WILSON: Objection to what
20 you're saying.

21 MR. MCALLISTER: In March of --

22 CHAIRPERSON MOLDENHAUER: There's

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1 an objection stated. Can Mr. Maiden respond
2 to the objection?

3 MR. MCALLISTER: Mr. Maiden is
4 here.

5 MR. AGUGLIA: Mr. Maiden can
6 testify to that to that fact.

7 CHAIRPERSON MOLDENHAUER: Okay.
8 Then we'll have Mr. Maiden testify to that
9 exact fact?

10 MR. AGUGLIA: Yes.

11 CHAIRPERSON MOLDENHAUER: Just so
12 we don't have to have objections like crazy,
13 we don't follow absolute rules of evidence.
14 We do have a more lenient standard.

15 I will say, please, any party, you
16 are permitted to object at any point in time.
17 But if the objections become a little
18 overwhelming in regards to efficiency, we'll
19 have to address that at that point in time.
20 I'm just kind of making that known as we go
21 forward.

22 Please continue.

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1 MR. MCALLISTER: In March 2009,
2 Mr. Maiden applied for the demolition permits
3 for use as a private club. That was the use
4 that was listed on it. At that time we
5 learned that there was a hold on the property,
6 and that the property was viewed to be used as
7 a private club and it was not within the
8 residential use.

9 Mr. Maiden then was told by Mr.
10 LeGrant that if we removed the use of the
11 private club that we would be able to go ahead
12 with the demolition portion of the permitting
13 process.

14 MR. AGUGLIA: So it's your
15 testimony that in March 2009 when ACI, through
16 Mr. Maiden and the expediter, applied for the
17 permit use as a private club, there was
18 already a hold placed on the property for that
19 use?

20 MR. MCALLISTER: Yes.

21 MR. AGUGLIA: In March 2009?

22 MR. MCALLISTER: Correct.

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1 MR. AGUGLIA: On March 26 Mr.
2 Aguglia, our Counsel, met with Mr. LeGrant
3 regarding the private club. He checked his
4 computer and was informed indeed that there
5 was a hold on the property for construction
6 for a private club.

7 On April 9 we received the
8 demolition permit.

9 On April 29, based on Mr.
10 Aguglia's memo dated March 27, 2009, Mr.
11 LeGrant indicated that he would lift the hold
12 on the property and the use for it as a
13 private club.

14 In May 2009, we put the demolition
15 permit on the English basement doors.

16 In June, Mr. Maiden's expediter
17 filed for the building permit for use as a
18 private club. Again, the renovations are only
19 taking place to the basement unit downstairs.
20 Two floors are not being renovated at the
21 home.

22 In June, Mr. Tuzzio was here with

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1 Mr. Benavidas. They completed the demolition
2 part. And we actually received the permit
3 application approval from the various
4 departments which went through HRB, CFA for
5 electric, mechanical, and plumbing. And then
6 we actually went ahead and started -- we
7 actually received the permit.

8 All approvals were done by
9 September 15 for everything through Zoning,
10 all for a private club. Then on September
11 16 --

12 MR. AGUGLIA: Were those approvals
13 between June and September 2009 readily
14 available to the public on the DCRA Web site?

15 MR. MCALLISTER: Yes. They had
16 been posted on the Web site.

17 MR. AGUGLIA: That is one of my
18 exhibits, to my memory, and it also clearly
19 indicates that the approval is for use as a
20 private club.

21 Okay. Please continue.

22 MR. MCALLISTER: On September 16

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1 the permit was issued. We actually got a
2 check. I remember as the CFO I signed the
3 check. It was dated September 11. Mr. Maiden
4 was notified that the permit was available and
5 that it must be posted and be visible from the
6 street.

7 At that point the contractor, Mr.
8 Benavidas, came by the office and picked up
9 the permit along with the check that I had
10 signed for him. That's how I have a record of
11 it because I was there when it was cashed.

12 The permit was then posted by
13 September 28, 2009.

14 MR. AGUGLIA: Would you please --
15 for the Board we have a picture of the posting
16 of the permit.

17 CHAIRPERSON MOLDENHAUER: Please
18 make sure to provide copies to the other
19 parties.

20 MR. AGUGLIA: Absolutely.

21 All right. Would you please
22 identify the picture?

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1 MR. MCALLISTER: This is a picture
2 of the front of 136 D Street. The neighbor
3 who is here today is located at 134 D Street,
4 which is the red brick building to the left of
5 the house.

6 This photo was actually obtained
7 through a 2009 version of Google Earth that
8 shows the permit being posted. If you look to
9 the right of the blue door home, in the window
10 you can see a piece of paper in that window.

11 MR. WILSON: Objection, calls for
12 speculation as to what the contents of that
13 paper is.

14 MR. AGUGLIA: Again, we will have
15 testimony from the contractors that they
16 posted the permit on that window in that
17 picture.

18 CHAIRPERSON MOLDENHAUER: Okay.
19 If he doesn't have personal knowledge that he
20 saw that or if he doesn't have personal
21 knowledge that he actually put it up himself
22 and knows that that was there, then we'll wait

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1 to enter this into evidence until somebody
2 else can testify.

3 MR. AGUGLIA: Do you have personal
4 knowledge that this permit was posted on the
5 subject property?

6 MR. MCALLISTER: Yes, I do. I
7 actually made a couple of visits. There were
8 some issues that we had to review in the
9 planning process. Both Mr. Maiden and Mr.
10 Tuzzio met at the house at the time, and the
11 permit was posted in the window at that time.

12 MR. AGUGLIA: Can you give us a
13 time frame?

14 MR. MCALLISTER: We met in
15 October. Mr. Maiden was there October 14. We
16 also met subsequently to that time frame
17 before Thanksgiving. I went back and the
18 permit was still posted there.

19 MR. AGUGLIA: All right.

20 MR. MCALLISTER: Then in December
21 2009, there was an anonymous call made to DCRA
22 from an unknown source that we were working

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1 outside the scope of our building permit.

2 On December 14, an inspector
3 actually arrived at the home.

4 MR. AGUGLIA: An inspector from
5 what agency?

6 MR. MCALLISTER: DCRA.

7 MR. AGUGLIA: Okay.

8 MR. MCALLISTER: He arrived at the
9 home, actually inspected all of the permits,
10 and actually went through all of the plans.
11 He met with Mr. Tuzzio, who is here today, and
12 chatted with him in detail about the
13 construction and that everything was in
14 accordance.

15 Then as stated by Mr. Garrison on
16 March 22, 2010, ANC-6B filed an appeal with
17 the BZA.

18 MR. AGUGLIA: The rest of the
19 comments are basically a summary of the
20 testimony that he's already given, the key
21 points.

22 So basically, we have knowledge as

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1 early as May 2008. We have the evidence that
2 when we applied for the demo permit in March,
3 there was already a hold on the property for
4 use as a private club; that all the
5 information was available on the Web site from
6 June through September 2009 of DCRA.

7 The DCRA inspector even visited
8 the property in December. That coincides with
9 Mr. Garrison's testimony that on December 8
10 they were made aware of the construction and
11 that it was for use as a private club.

12 I think it's a logical surmise to
13 say that the inspector was called out as a
14 result of that knowledge. On December 14 the
15 inspector went there, saw the permit, checked
16 the plans, checked the construction, and
17 approved it.

18 Therefore the filing of the appeal
19 by the ANC on March 22, 2010 by all accounts
20 is too late, whether you look at the sequence
21 of events or just the plain admission.

22 CHAIRPERSON MOLDENHAUER: Thank

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1 you very much. Mr. Aguglia, do you additional
2 testimony at this point in time?

3 MR. AGUGLIA: At this point, if
4 the Board desires, Mr. Maiden or the
5 contractors can confirm everything that Mr.
6 McAllister has stated.

7 CHAIRPERSON MOLDENHAUER: I don't
8 think that's necessary. I think right now
9 where I am, and I can look to my Board Members
10 for a confirmation, it seems as though the
11 timing is definitely untimely.

12 But now the question is, it seems
13 from my review of what Mr. Garrison stated,
14 Mr. Garrison, you are putting forward evidence
15 that there were some sort of exceptional
16 circumstances in regard to the procedure of
17 the ANC or in regards to the snowstorm.

18 I'm going to put it back to you to
19 try to provide some additional focus -- I'm
20 looking at my Board Members now to see if
21 they're in agreement with that statement, and
22 I believe they are.

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1 Look at the issue as, why would
2 this Board be willing to provide you with an
3 extension of time based on some sort of
4 extenuating circumstances? Obviously, it's a
5 question of when should you have reasonably
6 known of this permit.

7 I'll put it back to you. Thank
8 you.

9 MR. GARRISON: All right. Thank
10 you.

11 Needless to say, in retrospect,
12 had we known on December 8 that a permit was
13 posted we would have, at least I think I would
14 have as the Chair, recommended to our
15 Executive Committee that we put this on our
16 January agenda.

17 But because at the time that we
18 were notified by Mr. Wilson that there was no
19 permit posted, at that point it wasn't clear
20 to me that we had sufficient notice at that
21 stage to proceed. We went into, in a sense,
22 an investigating mode to try to figure out

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1 what was going on.

2 I'm not sure it's relevant to the
3 Board's discussion, but you know from seeing
4 ANC people come here on a regular basis that
5 we're a busy bunch with lots of cases going
6 on, trying to sort them all out at once.
7 We're not as efficient as we might want to be.

8 But nevertheless, had I known I
9 think -- in retrospect, easy for me to say.
10 But had I known on December 8 that there was
11 actually something up in the window that said
12 this was officially under way, I think we
13 would have proceeded at that stage. Now, that
14 may be a rationalization, Madam Chair, and I
15 can see the point.

16 But as I reconstruct events, we
17 didn't take the matter on as a matter we
18 needed to act on until we were notified by the
19 neighbor that there was a permit posted.
20 That's the point at which we began our
21 activity formally to get it on a docket and
22 have the hearing.

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1 That's the best explanation I can
2 give you for the sequence that we followed.

3 CHAIRPERSON MOLDENHAUER: I guess
4 I just have a couple of questions in that
5 regard. We do see a lot of ANCs and obviously
6 ANC-6 is a very educated -- we see people
7 coming forward.

8 At the time that you said you were
9 doing your due diligence as of December to
10 start trying to figure out -- I know it's the
11 holiday time frame -- did anybody on the ANC
12 Board or one of your Subcommittees for Zoning
13 go and say, "Okay. I'm going to walk by and
14 see if a permit is posted"?

15 MR. GARRISON: This property
16 happens to be in my Single Member District, so
17 I'm the guilty party. I did not go over to
18 check it out. I took Mr. Wilson's word that
19 there was nothing posted. I was familiar with
20 the property because I know where Mr. Wilson's
21 house is and I know what the block looks like,
22 so I didn't feel the need to go over. But

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1 obviously, in retrospect, I should have but I
2 did not.

3 CHAIRPERSON MOLDENHAUER: Did you
4 check the Web site to see if there was a
5 permit issued and see that it wasn't on the
6 Web site?

7 MR. GARRISON: I did not, no.

8 CHAIRPERSON MOLDENHAUER: Okay.

9 MR. GARRISON: As you know, we get
10 a monthly list of thousands and thousands of
11 permits. And we don't -- I mean, I'd look
12 through it if I had the time to do so in the
13 midst of all my other duties. But I didn't
14 happen to do so at that time.

15 CHAIRPERSON MOLDENHAUER: Okay.
16 Do any other Board Members have questions?

17 VICE CHAIR DETTMAN: Mr. Garrison,
18 you had mentioned that on December 8 you were
19 informed by Mr. Wilson that construction had
20 started at the subject property.

21 I take it that that would be the
22 construction authorized through the demolition

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1 permit; is that correct?

2 MR. GARRISON: Well, I'm not sure
3 I was clear, Mr. Dettman, as to what that
4 construction was about at that moment. All I
5 knew was that Mr. Wilson had notified us that
6 there was something going on at the adjacent
7 property and it didn't appear to be
8 appropriate. If I may say so --

9 Madam Chair, you stop me if I'm
10 wandering off here.

11 The context within which this
12 conversation is occurring, Mr. Dettman, is one
13 where we have a whole series of problems with
14 properties in these blocks. So we're on a
15 high alert for inappropriate uses of
16 properties by corporations basically using
17 these places for lobbying purposes.

18 It was in that context that I
19 received this information and we began our
20 modest investigation to see if we could figure
21 out what was going on.

22 VICE CHAIR DETTMAN: Okay. I'm

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1 just trying to match up your testimony to the
2 timeline that provided to us by Mr. Aguglia.

3 I see you being informed of
4 construction could have been demolition, or it
5 could have been construction authorized by the
6 September 16, 2009 permit.

7 MR. GARRISON: Right.

8 VICE CHAIR DETTMAN: When you were
9 informed in December 2008 of the construction,
10 did you take any action; did you contact DCRA
11 to find out what kind of determination had
12 been made?

13 MR. GARRISON: No. I began a
14 conversation with my colleagues on the ANC
15 given the facts that had been presented to us
16 by Mr. Wilson. Through our email process, we
17 went back and forth about what we had going on
18 here, what options we had in front of us. We
19 began to form a strategy. But we didn't act
20 on the strategy until in January when we were
21 told by Mr. Wilson that there was now a permit
22 posted on the garage.

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1 VICE CHAIR DETTMAN: Were you
2 given any indication that there was an actual
3 posting of the permit in the window on the
4 property, or was it simply, "I heard
5 hammering"?

6 MR. GARRISON: He just told us
7 that the permit had been posted.

8 VICE CHAIR DETTMAN: So in
9 December 2009 you weren't just told that
10 there's construction going on, that there's
11 hammering and nailing; it was actually that
12 the permit had been posted?

13 MR. GARRISON: No. In December he
14 told us that construction was under way but no
15 permit had been posted.

16 VICE CHAIR DETTMAN: Okay. Thank
17 you.

18 MR. GARRISON: It was not until
19 mid-January that he notified us that a permit
20 had now been posted, at which point we began
21 our formal process.

22 VICE CHAIR DETTMAN: Okay. But

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1 you had not visited the property to confirm
2 that, and you had not contacted DCRA or gone
3 to their Web site to determine whether or not
4 a permit -- okay.

5 Did the ANC meet at its January
6 12, 2010 meeting?

7 MR. GARRISON: Yes. We had a
8 series of meetings in January. That's
9 correct.

10 VICE CHAIR DETTMAN: Was there an
11 extenuating circumstance that prevented you
12 from actually taking action on filing an
13 appeal at that meeting?

14 MR. GARRISON: In retrospect, no.
15 Except my sense was we weren't exactly clear
16 what was happening, and so we weren't prepared
17 to docket it at that stage. Obviously, we
18 should have done so. If would have been
19 better for everybody involved in this
20 conversation. But at the time, we did not
21 because we weren't certain what we had on our
22 hands at that point.

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1 It was a complicated matter
2 because it's not a routine undertaking.
3 Unlike most of our activity, which is driven
4 by actual requests for approvals for people
5 who go through the special exception and
6 variance process for the BZA, going through
7 Historic Preservation for Historic
8 Preservation issues, public spacing matters,
9 or ABC matters with ABRA -- those matters come
10 to us and they initiate it. We respond to
11 requests.

12 This case was coming to us as a
13 matter where we would need to take action.
14 There was nothing forcing action. So in that
15 sense it was an unusual transaction. We don't
16 often have that. In my brief time, 4 or 5
17 years, on the ANC it's the first time
18 something like this had occurred where in
19 order for us to act on a case, we actually had
20 to take the affirmative step to begin the
21 process.

22 VICE CHAIR DETTMAN: Okay. Thank

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1 you, Mr. Garrison.

2 CHAIRPERSON MOLDENHAUER: Now that
3 you've been provided an opportunity to focus
4 on the issue of extraordinary circumstances,
5 I'm going to go back to both parties.

6 If you would not like to say
7 anything, that's fine. But you may in regards
8 to any response to the specific issue on
9 extraordinary circumstances.

10 MR. SURABIAN: You just want a
11 rebuttal, just briefly?

12 CHAIRPERSON MOLDENHAUER: Yes.
13 Any response, if you have it. If you don't,
14 we can move on.

15 MR. SURABIAN: Mr. Garrison
16 testified that they have concerns about
17 lobbying activities occurring in his ANC. It
18 seems to me that when he learned that ACI
19 purchased the property and that construction
20 was under way, he would check it out, and then
21 he didn't. It also seems that when they were
22 informed on December 8, they would have had a

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1 January meeting to discuss this.

2 Also, he was saying that it was
3 the being told by Mr. Wilson of the posting of
4 the permit that got them to docket it. It
5 seems to me more logically that if they
6 thought there was unpermitted construction
7 going on in their area, that would be
8 something the ANC would be concerned about.

9 I don't see any exceptional
10 circumstances based on his testimony.

11 CHAIRPERSON MOLDENHAUER: Mr.
12 Aguglia?

13 MR. AGUGLIA: Just a few points.
14 Obviously from my timeline, Mr. Wilson was all
15 over this construction --

16 MR. WILSON: Objection.

17 MR. AGUGLIA: -- as early as May
18 2008.

19 Secondly, you've asked Mr.
20 Garrison for some extenuating circumstances.
21 He's not giving you any. He said he could
22 have brought up the construction matter at

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1 their January 12 meeting; he did not. He said
2 they did not bring it up until February 9 but
3 that was delayed by the snow.

4 However, the 60 days had already
5 run from December 8 before the February 9 ANC
6 meeting which was delayed by snow. It had
7 already run.

8 Further, Mr. Garrison is the SMD
9 for this ANC. Mr. Wilson called him on
10 December 8 and said, "Hey, this construction
11 is going on. It's not authorized and it's for
12 private club use." And in fact, DCRA sent out
13 an inspector to confirm that or not, to see
14 what they were doing.

15 Mr. Garrison could have easily
16 walked over and confirmed Mr. Wilson's
17 statement that there was no posting of the
18 building permit on the premises.

19 The demo permit was posted in May
20 2009. The construction permit was posted on
21 that window, as my picture indicates and
22 testimony, September 28, 2009. You see

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1 there's leaves on the trees --

2 MR. WILSON: Objection,
3 mischaracterizes prior testimony.

4 MR. AGUGLIA: -- so it's
5 clearly -- it was clearly in the fall of 2009.
6 Mr. Garrison cannot put his head in the sand
7 and say, "I just didn't know."

8 MR. WILSON: Madam Chair, I
9 understand it's the burden here of the ANC to
10 prove the timeliness of the appeal.

11 I was, however, hoping that given
12 the unusual circumstances, the Board would
13 entertain actual facts from someone who served
14 the facts, who was on-site virtually every
15 day, who witnessed what was going on, and who
16 to some extent engendered this proceeding. So
17 again, I was hoping that we could actually
18 have some facts on the record rather than a
19 lot of hearsay and speculation.

20 CHAIRPERSON MOLDENHAUER: What
21 I'll do is I will allow you -- we've entered
22 you in as a party, even though at the end I'd

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1 actually like to have a copy of that
2 documentation that you said you had a stamped
3 copy of. But as a party I'll provide you with
4 some time right now to address some of the
5 issues, and just to simply articulate some of
6 the facts as you see on the issue of
7 timeliness.

8 MR. WILSON: Thank you, Madam
9 Chair. I would encourage the Board as I talk
10 to look at Exhibits B and C to the District of
11 Columbia's prehearing statement, which are
12 respectively a building permit dated April 9,
13 2009 and a building permit dated September 16,
14 2009.

15 I'll take a few steps back from
16 that. As I indicated early on, my wife and I
17 and two daughters at this point live at 134 D
18 Street, Southeast. As Mr. Garrison alluded
19 to, we are concerned about ongoing uses in the
20 neighborhood that we consider unpermitted and
21 inappropriate commercial uses of property.

22 In March 2008, we learned from our

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1 nextdoor neighbors that they were putting
2 their house on the market, a very attractive,
3 modest little three-bedroom house with a
4 basement apartment for Capitol Hill on the
5 market for \$1.25 million.

6 Two days later they received their
7 asking price from ACI, who told their broker
8 that ACI intended to use the property as a
9 satellite office for lobbying. That was
10 repeated at closing.

11 I sent a letter to ACI on May 8,
12 2008 expressing my concerns and telling them
13 that using the property as an office would not
14 permitted --

15 MR. AGUGLIA: I'm going to object
16 to this testimony because he's not going to
17 the merits of what we'd use it for. The
18 question on the table is timeliness.

19 MR. WILSON: But you can't
20 separate the two, Madam Chair.

21 CHAIRPERSON MOLDENHAUER: Mr.
22 Wilson, I can. The issue specifically that

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1 you can testify to right now, Mr. Wilson, and
2 provide additional facts for us, and we would
3 appreciate any facts that you have, is to your
4 communications with the ANC. Because it's the
5 ANC's appeal here and their timeliness.

6 Any information you have as to
7 providing them information as to when they
8 knew or should have known of the use, and then
9 their appeal or any extenuating circumstances
10 which could have potentially delayed that
11 appeal. That's the issue for the motion that
12 we're discussing right now.

13 MR. WILSON: Thank you. I
14 understand.

15 The building permit that was
16 posted on the property on December 8, 2009 was
17 a building permit marked as Exhibit B, a
18 demolition permit which states interior
19 repairs for basement of existing row house.

20 The reason I know that is as
21 follows. My wife was home with complications
22 from the pregnancy of our second child. She

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1 called me and said, "The walls of the house
2 are shaking. What's going on next door?" I
3 said, "I don't know. Go look in the window."

4 She walked down, looked in --
5 actually, let me withdraw that. I'm going to
6 focus on the September time period.

7 My wife called me on September 16
8 saying, "The house is shaking. Something is
9 going on." I said, "Go next door, take a
10 look, see what's going on inside the house."
11 She apparently walked over. She called me
12 back and said, "I don't know. The shades are
13 drawn."

14 I said, "Are there any new permits
15 on the window?" Because before that time,
16 there was only one permit posted which was the
17 demolition permit. And again, I'm talking now
18 as of December 8, 2009. She said, "There are
19 no new permits posted."

20 MR. AGUGLIA: Of course, for the
21 record, the same hearsay objection that he
22 made, I'm making.

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1 MR. WILSON: Fair enough and point
2 well taken.

3 That evening when I arrived home
4 the first thing I did was park my car in the
5 rear, walk to the front of the house, walked
6 around, walked into the property, and looked
7 at the basement apartment door, as well as the
8 second story where there were permits posted.
9 The permit on the basement door was the
10 demolition permit.

11 The following day I called DCRA
12 and was told a new permit had been issued, and
13 that they wanted to use the basement apartment
14 as a private club. That was the first mention
15 anyone had ever made to us of a private club
16 use.

17 Now, if you look at the permit
18 which was eventually posted in January 2010 --
19 I apologize for not being able to pin it down
20 any further than the first week of January.
21 But I can assure you, I walk by that house
22 every day with my two daughters and I look at

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1 the permits that are posted on that building
2 every day, including the one I can't see up on
3 the second floor, to make sure I know exactly
4 what's going on there.

5 This building permit --

6 VICE CHAIR DETTMAN: Mr. Wilson,
7 just very quickly, you had said that you
8 called DCRA and you were informed that a new
9 building permit had been issued?

10 MR. WILSON: Correct.

11 VICE CHAIR DETTMAN: Was that
12 September?

13 MR. WILSON: I was told it was
14 issued in September, correct.

15 VICE CHAIR DETTMAN: You made the
16 phone call and you found out in September?

17 MR. WILSON: I made the phone call
18 on December 8, 2009.

19 VICE CHAIR DETTMAN: Okay. Thank
20 you.

21 MR. WILSON: Now, if you look at
22 the building permit, what does the building

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1 permit say? It says interior alteration
2 repairs for existing basement apartment for
3 use as a private club.

4 I submit to you today, if you look
5 at the building permit and you look at the
6 application that was originally filed, that is
7 not what is going on here. I will be happy to
8 hand -- I don't know if this is getting beyond
9 the scope at this point. I would be happy to
10 hand out the application to you.

11 CHAIRPERSON MOLDENHAUER: I'm
12 going to limit the testimony again.

13 MR. WILSON: Okay. I'll go back
14 to --

15 CHAIRPERSON MOLDENHAUER: Because
16 right now it's a matter of, when were
17 documents posted and when was the appeal
18 filed? So if we get past this point then
19 obviously you can get into other --

20 MR. WILSON: To the best of my
21 recollection, again, having that refreshed and
22 recollected by reviewing an email I sent to

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1 Mr. Garrison on January 14, the first time I
2 observed the permit posted on the basement
3 apartment door at 136 D Street -- that is what
4 I'll call the construction permit, the change
5 of use permit -- was the first week of
6 January. My family was in town.

7 Again, we walked by that. And
8 every time I walked by I looked at that
9 basement door to make sure I knew what was
10 going on, and I continued to do so on a daily
11 basis.

12 I contacted Mr. Garrison on
13 January 14, 2010. I said, "I don't understand
14 what's going on here. I had been told in
15 December, as I informed you previously, that
16 DCRA issued a permit in connection with some
17 kind of private club. I don't know what that
18 means."

19 I've gone down to DCRA. I've asked
20 for copies of the permit in the application
21 file. I was given a copy of the demolition
22 permit in December. I did not realize it was

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1 the incorrect permit they provided me and I
2 was actually seeking the change of use permit.
3 DCRA was not actually able to obtain a copy of
4 the application file and the relevant
5 documents until the end of January.

6 I had no idea and the ANC had no
7 idea that what I consider to be
8 misrepresentations were made to the Zoning
9 Administrator and DCRA. We had no idea what
10 we were appealing.

11 In the ordinary world, if this is
12 a change of use as a matter-of-right, you
13 would appeal from an issuance of a Certificate
14 of Occupancy. There was no indication from
15 the permit that, (1) there's been approval of
16 a change of use for the entire property; or
17 (2) that there's been a change of use
18 preliminarily, contingently, or however you
19 want to characterize it, for use of any
20 portion of it as a private club.

21 Again, I'll refer you to the
22 building permit. There are vacant fields for

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1 existing use. There are vacant fields for
2 posed use. There are vacant fields for
3 existing dwelling units. There are vacant
4 fields for proposed dwelling units. Permit
5 type alteration and repair,
6 conditions/restrictions, interior work only.

7 There was nothing on the face of
8 the permit that gives fair notice consistent
9 with due process that they have received any
10 sort of preliminary, tentative, or other type
11 of approval to use the basement apartment or
12 the entire property as a private club. We had
13 no idea what we were appealing from.

14 We did not learn until February 2
15 that apparently Mr. Aguglia had sent an email
16 back to the Zoning Administrator, going back
17 to March 2009. Again, all this was going on
18 behind the scenes, unbeknownst to us. We had
19 no notice of it.

20 The best we could do were operate
21 upon the facts that were before us, and that
22 was the permit was posted in January. We

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1 finally found out at the end of January when
2 DCRA was able to locate the file. They still
3 haven't been able to locate the plans with the
4 application, what exactly was going on here.

5 And to put the onus on us as an
6 adjacent property owner or as an ANC person to
7 do anything above and beyond what I think is
8 minimal due diligence -- that is, go to the
9 DCRA Web site.

10 The DCRA Web site says exactly the
11 language I'm quoting here. Interior
12 alterations and repairs for existing basement
13 apartment for use as a private club. That is
14 not fair notice. The Zoning Administrator has
15 approved the use of the property as a private
16 club.

17 Again, I'm a layman here. I may
18 be a lawyer but I'm a layman and I'm a
19 neophyte. It seems to me that it's
20 extenuating circumstances, which we can get
21 into in further detail perhaps on the merits.
22 But we were hoodwinked and we were hoodwinked

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1 intentionally.

2 Mr. McAllister, I can cross-
3 examine him and he can testify that there's a
4 permit on the window, but he can't testify
5 what that permit says. He didn't look at that
6 permit. He doesn't know whether it's permit
7 A or permit B or permit C. He just knows
8 there was a permit in the window that showed
9 on Google Earth. That doesn't establish which
10 permit it is.

11 Thank you.

12 CHAIRPERSON MOLDENHAUER: Thank
13 you very much, Mr. Wilson.

14 At this point in time, unless
15 anybody has strenuous desires to cross-examine
16 anybody else, I think what we're going to do
17 is we're going to take a 15-minute recess.
18 We'll be back at 3:30.

19 (Whereupon, at 3:17 p.m. off the
20 record until 3:34 p.m.)

21 CHAIRPERSON MOLDENHAUER: The
22 Board has reviewed all of the documentation in

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1 our record, considered and discussed all the
2 testimony that we heard this afternoon, and we
3 are at the point where we are going to start
4 deliberations.

5 Based on the documentation that
6 we've received and the testimony, the
7 requirements of the BZA is that any appeal
8 under Section 3112.2 must be filed in 60 days
9 from the date in which the person appealing
10 the Administrator's decision had notice or
11 knowledge of the decision or should have had
12 knowledge of the decision, whichever is
13 earlier.

14 Here, we find that the ANC had
15 knowledge as of December 8, 2009, at which
16 time Mr. Wilson contacted the ANC and informed
17 them that construction had started. At that
18 time, Mr. Garrison or another member of the
19 ANC should have done their due diligence.

20 In addition to that Mr. Wilson had
21 some additional knowledge, as was presented by
22 the property owner, in regards to the history

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1 of the property which the ANC could have
2 inquired into or potentially could have had
3 knowledge of at that time.

4 Thus, it was their obligation to
5 either provide some sort of emergency
6 procedures or to inquire to DCRA, obtain
7 copies of the permits via the Web site, or
8 just simply walk over to the property and take
9 a look at the permit to determine exactly what
10 was posted. Seeing that there was a
11 significant period of time between that date,
12 we do not see any exceptional circumstances
13 here.

14 The ANC indicated that they had a
15 high awareness, as DCRA pointed out at one
16 point in time, on this block of potential
17 issues. Again, there was considerable
18 knowledge of the potential use from prior
19 dates which the ANC could have obtained from
20 discussions from Mr. Wilson.

21 Based on that, I feel that I would
22 vote to grant the motion to dismiss for lack

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1 of timeliness.

2 I'll open up the floor to other
3 Board Members to provide additional
4 deliberations.

5 MEMBER SORG: I'll just jump in to
6 say that I agree entirely, Madam Chair, with
7 your assessment here. Also, to point out that
8 the timeline you put forward, I'm in agreement
9 with your opinion on that and what we've heard
10 today.

11 As well as pointing out that
12 reasonable knowledge, in my opinion and as
13 we've seen, doesn't necessarily correspond
14 with the posting of permit. I think we can
15 see in this case that there were other factors
16 that would have led the appellant to be aware,
17 or should have been reasonably aware about the
18 construction and the use of this property.

19 VICE CHAIR DETTMAN: Madam Chair,
20 I am in agreement with you and Ms. Sorg. I
21 don't really have much to add.

22 There was one question in my mind

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1 as to whether or not, as testified to by Mr.
2 Wilson, they really had no idea what they
3 would be appealing. Hence, the question mark
4 pertaining to how this property was going to
5 be used.

6 But later on in Mr. Wilson's
7 testimony, he testified that he had received
8 or made a phone call to DCRA in December 2009,
9 and was informed that a new permit other than
10 the building permit had been issued although
11 it had not been posted on the property at that
12 point yet, and had been issued for a private
13 club.

14 Presumably during that time in
15 December 2009, it was the same time that Mr.
16 Wilson informed the ANC that construction had
17 started. So I think reasonable knowledge
18 existed with respect to the intended use of
19 this property as a private club. And I think
20 at that time, the clock started to tick.

21 CHAIRPERSON MOLDENHAUER: Thank
22 you, Mr. Dettman. I think you brought up a

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1 really good point. There were questions that
2 were brought up by Mr. Wilson of the ambiguity
3 of the building permit, and whether or not
4 that would provide some sort of exceptional
5 circumstance due to confusing language.

6 In reasonable circumstances, I
7 think that most people in the District would
8 read the entirety of it. This building permit
9 does state in the body of it that it would be
10 for the use of a private club. While it was
11 pointed out that there were blanks in the
12 prior use and in the proposed use, that really
13 doesn't create any ambiguity when the language
14 was clear in the narrative section of the
15 permit.

16 And here more so than in other
17 circumstances, Mr. Wilson had past
18 correspondence and knowledge of the potential
19 use, that the owners were potentially
20 intending to use this property as a private
21 club.

22 Based on the testimony, that

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1 obviously was then communicated to the ANC.
2 And as we stated, that was potentially
3 communicated in December 2009. So I don't see
4 that that potential ambiguity could not have
5 been resolved within a reasonable period of
6 time to then have a timely appeal filed.

7 Based on that, if there's no
8 further deliberation, I will submit a motion
9 to grant the motion to dismiss Application No.
10 18070 for failure to timely file and for a
11 lack of jurisdiction.

12 Do I have a second?

13 VICE CHAIR DETTMAN: Second.

14 CHAIRPERSON MOLDENHAUER: The
15 motion's been made and seconded.

16 All those in favor, say aye?

17 ALL: Aye.

18 CHAIRPERSON MOLDENHAUER: Mr. Moy,
19 could you please read back the vote?

20 MR. MOY: Yes, Madam Chair. The
21 staff would record the vote as 3-0-2. This is
22 on the motion of the Chair to grant the motion

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1 to dismiss due to lack of timeliness and lack
2 of jurisdiction. Seconded by Mr. Dettman.
3 Also in support, Ms. Sorg. No Zoning
4 Commissioner or other participating Board
5 Members.

6 Again, the vote is 3-0-2.

7 CHAIRPERSON MOLDENHAUER: Thank
8 you very much.

9 Thank you everybody for coming
10 today.

11 (Whereupon, at 3:41 p.m. the
12 hearing was concluded.)

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