

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

DECEMBER 1, 2009

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC D. LOUD, Chairman
SHANE L. DETTMAN, Vice Chair (NCPC)
MERIDITH H. MOLDENHAUER, Board Member

ZONING COMMISSION MEMBER PRESENT:

KONRAD SCHLATER, Commissioner

OFFICE OF ZONING STAFF PRESENT:

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

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

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.
MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from the Public Meeting held on December 1, 2009.

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T-A-B-L-E O-F C-O-N-T-E-N-T-S

Opening Remarks 4

APPLICATION NO. 17696-A 6

APPLICATION NO. 17999 17

VOTE: 4-0-1 to deny application.... 30

APPEAL NO. 17971 32

VOTE: 4-0-1 to deny relief for second
 floor landing..... 48

VOTE: 3-1-1 to deny ZA's decision
 on rooftop addition..... 74

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

2 10:02 a.m.

3 CHAIRPERSON LOUD: Good morning,
4 and let me welcome everyone back from what I
5 hope was an enjoyable Thanksgiving break.

6 This meeting will come to order.

7 Good morning, ladies and
8 gentlemen. This is the December 1st Public
9 Meeting of the Board of Zoning Adjustment of
10 the District of Columbia.

11 My name is Marc Loud, Chairperson.

12

13 And I'm going to ask my colleagues
14 to introduce themselves.

15 VICE CHAIRMAN DETTMAN: Good
16 morning. Shane Dettman, Vice Chair,
17 represent NCPC.

18 MEMBER MOLDENHAUER: Good morning.
19 Meridith Moldenhauer, Mayoral appointee.

20 SECRETARY MOY: Good morning. My
21 name is Clifford Moy. I'm the Secretary of
22 the Board of Zoning Adjustment.

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1 MS. GLAZER: Sherry Glazer, Office
2 of Attorney General.

3 MS. BAILEY: Good morning.
4 Beverley Bailey, staff, Office of Zoning.

5 CHAIRPERSON LOUD: Good morning to
6 everyone.

7 Copies of today's meeting agenda
8 are available to you and are located to my
9 left in the wall bin near the door.

10 We do not take any public
11 testimony at our meetings, unless the Board
12 asks someone to come forward.

13 Please, be advised that this
14 proceeding is being recorded by a Court
15 Reporter and is also webcast live.
16 Accordingly, we must ask you to refrain from
17 any disruptive noises or actions in the
18 hearing room. Please, turn off all beepers
19 and cell phones.

20 Does the staff have any
21 preliminary matters?

22 MR. MOY: Not at this time, Mr.

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1 Chairman.

2 CHAIRPERSON LOUD: Thank you, Mr.
3 Moy.

4 Then I think we can proceed with
5 calling our, I believe it's our sole decision
6 case for the morning calendar.

7 SECRETARY MOY: Yes, sir. Just
8 for the record, Mr. Chairman, we have this
9 one solo case for the Public Meeting in the
10 morning, and at 1:00 the Public Meeting will
11 continue with two other decision cases. And
12 that's at 1:00 p.m.

13 This case before the Board is a
14 motion by the applicant to extend to the
15 validity of the Order to Application No.
16 17696-A of Hines VAFII, 200 M Street, L.P.
17 This is pursuant to 3130 of the Zoning
18 Regulations. The original application was
19 approved by the Board of Zoning Adjustment on
20 December 18, 2007. And that was a Bench
21 Decision.

22 I'm not going to read the

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1 advertisement of December 2007, Mr. Chairman.

2 I will add that the hearing on the original
3 application was held, as I said, for December
4 18, 2007. It was a Bench Decision, Summary
5 Order was issued December 20, 2007.

6 As I said, the applicant filed on
7 October 23, 2009. That filing is identified
8 in the case folders as Exhibit 32.

9 Pursuant to subsection 3130.6(a)
10 the applicant's required to serve the parties
11 and there was no responses to the filing
12 within that 30 day period.

13 The Board is to act on the merits
14 of the request pursuant to provisions of
15 3130.6.

16 And that concludes the staff's
17 briefing. Mr. Chairman.

18 CHAIRPERSON LOUD: Thank you, Mr.
19 Moy.

20 I believe that with respect to the
21 request for relief, we've had a number of
22 these come up in the last six months or so

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1 and generally have looked favorably upon
2 those that meet the requirements of 3130.6,
3 which nearly all of them do and put enough in
4 our record to allow us to vote in support of
5 it. However, the Board went through a slight
6 transition period over the last, I would say
7 three to five months, where we were without a
8 full compliment of BZA Board members and were
9 shuffling Zoning Commission members here so
10 that we could make up our quota.

11 It so happens that in this case
12 our rules require that at least three persons
13 read the full transcript in order to
14 participate in the decision and the vote on
15 the matter. And in the underlying case Board
16 members participated that are no longer
17 available to participate. And so we have to
18 have an additional Board member read the
19 record in to move forward with respect to
20 making a decision on it. That's 3105.15 of
21 our Rules.

22 So I think what we would like to

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1 do is to continue it, try to get it for the
2 first available date that meets everyone's
3 needs.

4 And I think Mr. Dettman had some
5 additional issues to raise with respect to
6 what might be needed to fill out the record
7 completely.

8 VICE CHAIRPERSON DETTMAN:

9 Certain, Mr. Chairman. Thank you.

10 Just with respect to the evidence
11 that was provided by the applicant to
12 demonstrate compliance with the provisions of
13 3130, as you've stated we've of recent
14 received several of the effected applications
15 for extensions of Board orders. And because
16 of the amended 3130 the standard is a little
17 bit higher than what it used to be in that
18 the provisions state that substantial
19 evidence needs to be provided to the Board.

20 So as we find a date to reschedule
21 this decision, perhaps we need a little bit
22 more information in the record in that there

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1 were some references to Exhibits in the
2 filing on Exhibit 32 which were not included.

3 So we definitely need those.

4 But in addition to that, because
5 these standard's been raised a little bit,
6 again stating that the new provision states
7 that substantial evidence needs to be
8 provided, I think that what's been provide
9 thus far hasn't met that standard. And
10 though the Board is trying to set a new
11 standard and in kind of trying to set the
12 expectations for applicants to meet, we've
13 accepted recently a letter from the bank that
14 indicates that financing was pursued and
15 hasn't been able to be acquired. We've
16 accepted a sworn affidavit from the
17 applicant: Information pertaining to
18 inability to acquire the necessary permits
19 from the D.C. Governments.

20 So we've accepted a range of
21 information to meet that substantial
22 standard. And again, as I stated, I don't

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1 think that that standard has been met thus
2 far.

3 CHAIRPERSON LOUD: So it sounds as
4 if, perhaps, an affidavit in the record as
5 opposed to representation from counsel, not
6 that there's anything about representation
7 from counsel that raises any questions, it's
8 just in order to be consistent with all of
9 the cases that we've handled under the new
10 Rule 3130.6 we're requiring this affidavit or
11 bank letter, or something that would make the
12 record a little more full. And we've done it
13 because in moving from the old standard to
14 the new standard the Zoning Commission added
15 the word "substantial" evidence to our test.

16 And so, again, just to be consistent and be
17 fair across the Board.

18 Ms. Moldenhauer, did you have
19 anything to add?

20 MEMBER MOLDENHAUER: I think that
21 you both provided a valid summary of what
22 we're looking for. I think Shane provided

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1 some examples. And I think with those
2 additional documents, we would be able to
3 rule on the case whenever its rescheduled.

4 CHAIRPERSON LOUD: Okay. I
5 believe that's the counsel in the audience.
6 And, you know, we want to get this back on
7 the calendar as soon as we can so we can vote
8 on this. If the additional information that
9 we've requested can be provided within the
10 next couple days, I don't see any reason why
11 we couldn't do this for December 8th.

12 Mr. Moy, do you see any reason why
13 we could not do this on December 8th?

14 SECRETARY MOY: I think that would
15 be a reasonable accommodation, Mr. Chairman.

16 CHAIRPERSON LOUD: Okay.

17 SECRETARY MOY: Certainly if the
18 filing is not into the office by the end of
19 the week, the Board would have the
20 flexibility to put that off for the following
21 week on the 15th. I think it's a good choice
22 for December the 8th.

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1 CHAIRPERSON LOUD: Okay. So let's
2 go ahead and get this back up so we can vote
3 on it.

4 And again, we don't have a
5 decision. It doesn't look like we have a
6 decision in the morning for next week. So we
7 could make it the first decision in the
8 morning.

9 SECRETARY MOY: That's correct.

10 CHAIRPERSON LOUD: Okay. Is there
11 anything further on this case?

12 SECRETARY MOY: No, sir.

13 CHAIRPERSON LOUD: Okay. Then
14 with that, I would like to adjourned the
15 morning Decision Meeting. And call the
16 morning Hearing Calendar.

17 (Whereupon, at 10:12 the Decision
18 Meeting was adjourned to reconvene at 1:34
19 p.m. this same day.)

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1 to everyone.

2 Copies of today's meeting agenda
3 are available to you and are located to my
4 left in the wall bin near the door.

5 We do not take any public
6 testimony at our meetings, unless the Board
7 asks someone to come forward.

8 Please, be advised that this
9 proceeding is being recorded by a Court
10 Reporter and is also webcast live.
11 Accordingly, we must ask you to refrain from
12 any disruptive noises or actions in the
13 hearing room. Please, turn off all beepers
14 and cell phones.

15 Does the staff have any
16 preliminary matters?

17 MS. BAILEY: Mr. Chairman, it's my
18 understanding that the Board will be starting
19 with the Special Public Meeting.

20 CHAIRPERSON LOUD: That's correct.
21 So we need Mr. Moy. Do you mind, Ms. Bailey
22 or Ms. Nagelhout?

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1 Good afternoon, Mr. Moy. We were
2 just getting ready to get into the afternoon
3 decision cases.

4 I think where we were, we were
5 asking regarding any preliminary matters.

6 SECRETARY MOY: Yes, we do, Mr.
7 Chairman. And we should take that on a case-
8 by-case.

9 CHAIRPERSON LOUD: Okay. Then I
10 think what we'll do is start with the Newcomb
11 case and then we'll go to Outerbridge from
12 there.

13 SECRETARY MOY: Very good. In
14 that case, that would be Application No.
15 17999 of Newcomb Child Development Center,
16 pursuant to 11 DCMR § 3104.1 and this is for-
17 -

18 CHAIRPERSON LOUD: Sorry, Mr. Moy.

19 Let me just say to the parties
20 that are approaching the table. Because this
21 is a decision meeting we do not take any
22 testimony from parties. So you are free to

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1 remain in the audience.

2 Sorry, Mr. Moy.

3 SECRETARY MOY: No. That's quite
4 all right.

5 Again, that would be this
6 application is for a special exception to
7 continue a child development center and the
8 request is for 70 children and 14 staff.
9 And, of course, this was last approved by BZA
10 Order No. 17280, dated March 4, 2005. The
11 request is pursuant to section 205, in the R-
12 5-A District at premises 541 Newcomb Place,
13 Southeast. The property is Square 5985, Lot
14 818.

15 As the Board will recall on
16 November 17, . 2009 the Board completed public
17 testimony, closed the record and scheduled
18 its decision on December 1st of this year.

19 The Board requested additional
20 information to supplement the record from
21 both the applicant and the District of
22 Columbia Office of the State Superintendent

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1 of Education. There are a number of filings
2 into the records of these parties, Mr.
3 Chairman, the first being from the applicant.

4 And there are, as a matter of fact, two
5 filings from the applicant which was part of
6 my delay this afternoon, Mr. Chairman.

7 First, which is already in your
8 case folders as Exhibit 28, dated Monday,
9 November 30th. We just received a
10 supplemental filing from the applicant just
11 now which would be identified in the case.
12 Well, I think it's just been handed out to
13 you, which will be Exhibit 30, which is
14 additional photographs attached to the
15 filing. And I believe they're colored
16 photographs.

17 The last two filings include a
18 filing from the Office of the State
19 Superintendent of Education identifying their
20 case folders as Exhibit 27, dated November
21 19, 2009.

22 And the last filing is from ANC,

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1 Advisory Neighborhood Commission 8-C which
2 was submitted yesterday, November 30th in
3 your case folder its identified as Exhibit
4 29.

5 The Board is to act on the merits
6 of the special exception and request.

7 And that completes the staff's
8 briefing, Mr. Chairman.

9 CHAIRPERSON LOUD: Thank you, Mr.
10 Moy. I think, I guess initially in terms of
11 what we left the record open for we did leave
12 the record open for a supplemental report
13 from the OSSE Office, correct, which would be
14 our Exhibit 27?

15 SECRETARY MOY: That's correct.

16 CHAIRPERSON LOUD: And we also
17 left it open for the ANC to follow-up. I
18 believe they were going to either walk the
19 site, take some photographs of the site, the
20 center.

21 SECRETARY MOY: That's correct.

22 CHAIRPERSON LOUD: So that would

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1 be our Exhibit 29.

2 And we did not leave it open for
3 supplemental from the applicant, or did we?

4 SECRETARY MOY: Well, the
5 applicant was allowed --

6 CHAIRPERSON LOUD: Did we? Okay.

7 SECRETARY MOY: -- to file
8 photographs in conjunction with a member from
9 the ANC or someone from the community.

10 CHAIRPERSON LOUD: Okay.

11 SECRETARY MOY: And that would be
12 your Exhibit 28. And what we've just
13 received momentarily just now is your Exhibit
14 30, which I would assume is an addition to
15 the photographs. And we just filed it under
16 a separate exhibit number and identify it as
17 Exhibit 30.

18 CHAIRPERSON LOUD: Okay. I see
19 what we have before us.

20 So clearly three of these were
21 requested and, arguably, one was also
22 requested.

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1 Do Board members have any
2 objections with our allowing all four of
3 these documents into the record? All right.

4 So why don't we formally make these four
5 exhibits an official part of our record. I
6 think we've all had an opportunity to review
7 them.

8 And I think we're ready to
9 deliberate. And I believe Ms. Moldenhauer
10 will lead us off.

11 MEMBER MOLDENHAUER: This
12 applicant is before us for a special
13 exception relief to expand an existing child
14 development center to allow 70 students, it
15 currently has 39 students, under section 205.

16 The current Certificate of
17 Occupancy, just to give some background, was
18 issued in February 9, 2007. The applicant
19 testified that because entered into the block
20 of "expiration date," it identified none,
21 that they did not realize that under the
22 description of use it specially stated

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1 expiration date of March 3, 2008 per BZA
2 Order No. 17280. So they came before us to:
3 1: Obtain a new term for the fact
4 that they don't have an existing or a valid
5 Certificate of Occupancy currently, and;
6 2: Also in conjunction with that
7 to expand their use to 70 children.

8 Last time our focus of the review
9 under 205 really was on the point of 205.2
10 which states "That the center shall be
11 capable of meeting all applicable code and
12 licensing requirements." And so we have to
13 look to the Office of the State
14 Superintendent of Education. And that time
15 we had what is marked as our Exhibit 22,
16 which is a letter from OSSE on October 27th
17 which stated that they did not recommend the
18 applicant to be granted special exception
19 because of their continuous noncompliance.

20 We questioned the applicant about
21 that and they provided us with some
22 statements that these were minor

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1 noncompliance issues and that they had
2 corrected those. That their individual
3 investigator that was assigned to their
4 location hadn't come back out. We asked the
5 applicant to itemize what different types of
6 concerns had been identified at the property.

7 And she did not provide us with an accurate
8 statement, in my opinion.

9 We received a new Exhibit 27 from
10 OSSE pursuant to our request, which is dated
11 November 19, 2009 and it again states that
12 they do not recommend approval of this
13 request because the facility currently has
14 had back in 2009 received different types of
15 noncompliant report including concerns of 15
16 fire code violations, inadequate children
17 health records, criminal background checks
18 missing for six staff members, inadequate
19 staffing for adult and children ratio were
20 not meet and numerous other environmental
21 deficiencies.

22 We also left the record open for

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1 the ANC who was in support of keeping the
2 applicant open, but not for the increased
3 number to go back and take a look at the
4 facility to see if they had an opportunity to
5 improve it.

6 We did receive Exhibit 29 from the
7 ANC which said that there was 110 percent
8 increase in the appearance of the property.

9 And we had strongly recommended
10 recommended to the applicant:

11 1: To improve the property, but
12 also to consider modifying their application,
13 not to the 70 but to the 39 current students
14 because we felt that based on the OSSE's
15 letter they could not satisfy section 205.2
16 for the 70 students.

17 In their additional statement,
18 which I believe is marked. I believe it's
19 marked as Exhibit 28 for us. There's a
20 statement on top of the pictures they
21 provide. They say that the Newcomb's request
22 for an increase of children from 39 from 70

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1 is still outstanding, so they did not take
2 the opportunity to potentially argue in the
3 alternative or to modify their application
4 from increasing to 70, but rather to request
5 a special exception for the existing 39 since
6 their Certificate of Occupancy has expired
7 pursuant to the prior order.

8 Based on this I feel that they
9 still, based on the recent OSSE letter, don't
10 satisfy the element of showing us that
11 they're able to meet their licensing
12 requirements. And based on that, I would
13 recommend a denial of the application.

14 CHAIRPERSON LOUD: I thank you,
15 Ms. Moldenhauer. That was an excellent recap
16 of both the standard, we're looking at the
17 evidence in the record, the continuation to
18 allow for a supplementation of the record,
19 and I think where we are today.

20 Let me ask Board members if they'd
21 like to -- I should say, Mr. Dettman who is
22 the only other Board member along with myself

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1 participating in this case. And I think we
2 may have an absentee ballot from Mr. Turnbull
3 who participated. Mr. Dettman?

4 VICE CHAIRPERSON DETTMAN: Mr.
5 Chairman, I have nothing further to add. I
6 agree with Ms. Moldenhauer's analysis and
7 conclusion.

8 CHAIRPERSON LOUD: Thank you, Mr.
9 Dettman.

10 I too agree with your analysis. I
11 agree with your conclusion. Initially when
12 the case was heard I had a number of concerns
13 about the applicant's meeting section 205.2,
14 which is the provision you talked about. But
15 out of an abundance of being open to being
16 persuaded that that criteria could be met, I
17 supported granting an extension for the
18 record to be supplemented.

19 I think at the time of the hearing
20 the Director testified in terms of the
21 specific violations that she could recall
22 that it included things like a cabinet being

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1 without a lock, not having certain
2 authorizations for the children filed
3 appropriately, there being a half door in the
4 children's bathroom I think instead of a full
5 door trim around the door, and the light.
6 And to learn from our Exhibit 27 there were
7 violations that were a little more serious
8 than that; criminal background checks not
9 being made for some of the employees and fire
10 code violations, et cetera, I think that
11 under 205.2 I feel obligated to not support
12 the application. And I'll be joining your
13 motion.

14 MEMBER MOLDENHAUER: At this time
15 I will make a motion. I motion to deny BZA
16 Application 17999 for special exception
17 relief to expand an existing child
18 development center to allow 70 children and
19 17 staff under section 205.

20 CHAIRPERSON LOUD: Motion
21 seconded.

22 Motion's been made and seconded.

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1 Is there further deliberation?

2 Let me just add in terms of
3 further deliberation, that as you know we did
4 a report from the ANC, initially Exhibit 23.

5 And Commissioner Cuthbert did testify at the
6 hearing. And I believe Commissioner
7 Cuthbert's testimony reflected what the ANC
8 voted on. And Commissioner Cuthbert I think
9 also testified that it wasn't her desire
10 necessarily to see the facility closed, but
11 rather to see improvements made and quality
12 improvements visible.

13 Notwithstanding the support of
14 Commissioner Cuthbert, I do believe that the
15 applicant has a burden to meet 205.2 and all
16 of the other provisions of 205. And in this
17 case I'm not persuaded, given Exhibits 22 and
18 27 by the Office of the State Superintendent
19 of Education, OSSE I always call them, that
20 they've met that burden. So that would be
21 the reason that I would be voting in support
22 of the motion, notwithstanding the ANC report

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1 and similar reasoning with respect to the
2 Office of Planning report. It did recommend
3 approval upon certain conditions. But again,
4 seeing this really glaring report from the
5 OSSE office and that our rules require us to
6 take that into consideration, those are the
7 distinctions that I'm making with respect to
8 those reports.

9 So motion's been made and
10 seconded. Is there further deliberation?
11 Hearing none, all those in favor say aye.

12 ALL: Aye.

13 CHAIRPERSON LOUD: All those who
14 oppose? Are there any abstentions?

15 SECRETARY MOY: Yes, sir. Mr.
16 Chairman, before I give a final vote, as you
17 mentioned there is an absentee ballot vote
18 from another participant who is Michael
19 Turnbull. And his absentee vote is to deny
20 the application.

21 So that would give a final vote of
22 four-to-zero-to-one on the motion of Ms.

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1 Moldenhauer to deny the application. Second
2 by the Chair, Mr. Loud. Also supporting the
3 motion Mr. Dettman and no other member
4 participating.

5 So again, that's four-to-zero-to
6 one.

7 CHAIRPERSON LOUD: Thank you, Mr.
8 Moy.

9 Is there anything further in this
10 case?

11 SECRETARY MOY: No, sir.

12 CHAIRPERSON LOUD: Okay.

13 When you are ready, then you can
14 call our next case?

15 SECRETARY MOY: Yes. That would
16 be Appeal No. 17971 of Outerbridge and
17 Georgina Horsey, pursuant to 11 DCMR § 3100
18 and 3101, from a determination of the Office
19 of the Zoning Administrator, Department of
20 Consumer and Regulatory Affairs to allow
21 additions to a one-family dwelling by
22 Building Permit Nos. B0902028 and B0905289,

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1 in the R-3 District. This is at premises 3046
2 N Street, Northwest. The property is in
3 Square 1209, Lot 854.

4 On November 3, 2009 the Board
5 completed public testimony, closed the record
6 and scheduled its decision on the 1st of
7 December. The Board did not request any
8 supplemental information for the record.
9 With that, the Board is to act on the merits
10 of the appeal.

11 CHAIRPERSON LOUD: Thank you, Mr.
12 Moy. I believe we have a full record on this
13 case. And we are ready to deliberate. And I
14 will lead us off in our deliberations this
15 afternoon.

16 First let me thank both of the
17 parties for the briefing, the legal
18 argumentation, the cases cited and the
19 presentations of cases. It was a very strong
20 presentation on both sides.

21 With respect to the appellant in
22 this case who cited about 13 cases, they

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1 raised I think three principle arguments.
2 And I'm going to run through them as quickly
3 as I can.

4 First, that any addition to a
5 property that is already nonconforming as to
6 lot occupancy requires a BZA special
7 exception under 2001.3(a).

8 Secondly, that the roof deck in
9 this case was an addition and increasing --
10 this is how I understood the argument. That
11 increased or created a rear yard
12 nonconforming by extending the deck to within
13 18.98 feet of the rear property line. Twenty
14 feet is required in the R-3, and therefore
15 was in violation of section 2001.2(b)(2).

16 Thirdly, that the second floor,
17 what was called variously a landing or a
18 deck, or a floor. With the second floor I'm
19 going to call it a landing, is not part of a
20 stair because the building code defines
21 landing as a separate element from the stair
22 that pertinent Zoning Regulations, namely

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1 2403.4 omit the term landing as part of what
2 is included in a stair and thus, is not
3 allowed to occupy the required rear yard as a
4 matter-of-right.

5 And those are, more or less,
6 summaries of the appellant's argument. But
7 in response to those arguments, the DCRA
8 argued the following, and they cited three
9 cases:

10 They did not directly address the
11 first argument of the appellant that any
12 addition to a property that's already
13 nonconforming as to lot occupancy requires a
14 BZA special exception. If they did respond
15 to that directly, I stand to be corrected by
16 my colleagues.

17 The second argument, the roof deck
18 argument, DCRA argued that a roof deck is not
19 an addition. It does not increase the rear
20 yard. It does not increase the FAR, floor
21 area ratio. It's not enclosed. It complies
22 with the 20 foot setback. It did not add to

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1 lot occupancy because the roof was already
2 part of the area calculated for lot
3 occupancy. And that under the testimony of
4 Mr. LeGrant Zoning Administrator, it didn't
5 increase the available space, it just made it
6 walkable.

7 Thirdly, the DCRA argued that a
8 landing is a component of a stairway under
9 2503.4, thus it can occupy a required rear
10 yard when it connects an access door to the
11 main level of the home with the stairs
12 leading to the grade. They cited a number of
13 cases in support of their position. They
14 also noted that the building code requires a
15 landing or a floor at the top and the bottom
16 of every stair. That was brought out in
17 cross examination of Mr. Horsey.

18 Further, that the landing has been
19 interpreted as a component part of a stair
20 for at least 3½ years under Mr. LeGrant's
21 supervision of the Office of the Zoning
22 Administrator. That the landing must be

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1 related to a doorway and path of travel, and
2 that in this case Mr. LeGrant felt that it
3 was. And further, that Mr. LeGrant in
4 reviewing the plans that were presented for
5 this project noted that there was a double
6 door, I believe a French door. And that if
7 the plans change subsequent to that, it would
8 be an enforcement issue but that from his
9 perspective he made his decision based on the
10 plans that were submitted.

11 Finally, the ANC did submit a
12 report. They did not submit any cases in
13 their report. And from my review of their
14 report, which I believe is Exhibit 15, they
15 raised issues very generally as to lot
16 occupancy, rear yard loss, the number of
17 stores on the property and the negative
18 impact on adjacent neighbors but they did not
19 analyze any of those issues. It was more a
20 supportive letter for the appellant.

21 In terms of the question of the
22 second story rooftop deck, the appellant and

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1 DCRA offered different definitions of
2 addition.

3 The appellant, because addition is
4 not defined in our regulations, turned to
5 *Webster's Unabridged Dictionary*. That was
6 their Exhibit 16, page 5 and they make
7 reference to it as well throughout the
8 hearing and noted a couple of definitions:
9 That it improves or increases the value; that
10 it unites one thing to another; that it's the
11 part added to a building to increase the
12 available space.

13 The DCRA definition of addition
14 differed. Their definition, again it's not
15 everyone in agreement that it's not part of
16 our regulations that a landing is not an
17 addition for purposes of lot occupancy, but
18 rather its a part of the stairway and
19 generally along those lines disputed the
20 definition proffered by the appellant.

21 I think with respect to furthering
22 our deliberation, I'd like to start with the

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1 landing which connects the stairs that lead
2 from the door in the rear of the main
3 entrance to the below grade part of the
4 house, which was referenced, I think, by
5 Building Permit B0905289, which was the
6 revised permit that resulted in a significant
7 portion of what was originally described as
8 an inappropriate deck being made into, what
9 was later described by Mr. LeGrant, as a
10 landing.

11 With respect to that issue,
12 colleagues, I believe that the position taken
13 by the DCRA that a landing is a component
14 part of a stairway under 2503.4 was found by
15 me to be persuasive, in particular the
16 testimony of Mr. LeGrant that -- well a
17 combination of the testimony of Mr. LeGrant,
18 the testimony of Mr. Horsey, the exhibits in
19 the record that the landing was found to be a
20 part of the whole functional utility of the
21 stairway and it connected the stairs to the
22 rear door, which in this case were double

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1 doors or French doors. And that would tend to
2 both satisfy a requirement that the building
3 code has for there to be some form of landing
4 or floor that connects the top of the stairs
5 to a door, and that floors the bottom of the
6 stairs. So there's a requirement that there
7 be a landing. I don't think there was any
8 dispute about that. I think there was a
9 dispute about when a landing becomes a deck
10 by virtue of dimensions.

11 I think in this case the landing
12 that we're talking about was about four feet,
13 as I understand it, and not in my opinion
14 large enough to really be recreational space
15 or to really be anything other than a
16 connection between the stairs and the rear
17 double doors. So I was persuaded by the
18 argument of DCRA that absent some very
19 specific language in the regulations that
20 define what landing was, that the whole
21 emphasis on it being utilitarian, the whole
22 emphasis on there being a connection between

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1 this landing serving as a pathway of travel
2 from the stairs to the rear, and the
3 dimension of this landing, the fact that it
4 was revised and reduced in size, convinced me
5 that this was in fact a landing.

6 And from a policy standpoint, this
7 is just my opinion on it, but from policy
8 standpoint it would seem to me to be
9 burdensome on our citizens to exempt them
10 from BZA review when they place the stairs in
11 a required rear yard as a part of section
12 2504.3, but then force them to come to the
13 BZA for that part of the stair that's the
14 landing. So at least in the case of these
15 nonconforming properties, they're going to
16 always have to come to BZA for relief on the
17 landing or the so called landing part of it,
18 but never under 2504.3 on the stairs. It
19 just seems like a disconnect in policy. So I
20 was not persuaded by the argument made by the
21 appellant on that.

22 And I'll open it up to colleagues.

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1 And then I think we can resume with the
2 other part of the case.

3 MEMBER MOLDENHAUER: I have to
4 agree with you on the lower landing. There
5 was a lot of discussion back and forth about
6 -- let me give you some context.

7 Initially the back location had a
8 design where it was going the entire width of
9 the property. And the ZA ended up going back
10 and correcting that to have it as a smaller
11 landing. And I think that in regards to
12 reviewing that, obviously if the landing
13 extended the entire area, that would
14 definitely not conform and would not be
15 permitted as a matter-of-right. However, we
16 have to give deference in that the smaller
17 aspect of it to whether or not that would be
18 sufficient to provide access into the
19 building. And I think the terms of replacing
20 in kind there has to be a little more
21 latitude provided to that. And I think that
22 since it is a smaller section there going to

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1 a door, that it does not qualify as anything
2 more than a landing.

3 There's no definition specifically
4 of how long a landing has to be until it then
5 transforms into something larger. The
6 appellant tried to provide that there is a
7 required minimum and then apply that. And I
8 was not persuaded by that because the minimum
9 has to do more just with safety issues and
10 making sure the landing is large enough, such
11 as the width of a stair. That stair has to
12 be large enough to put your foot on for
13 safety issues.

14 So I think that we have to give
15 deference to the ZA in order for him to make
16 a decision as to whether or not a landing,
17 where that gray area. And I don't believe
18 that it was so egregious that we need to jump
19 in since it was not the full length of the
20 building, or was not I think even longer than
21 could be determined, you know that the gray
22 area pushes more forward towards where we

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1 would potentially have to review the ZA's
2 decision.

3 COMMISSIONER SCHLATER: Mr.
4 Chairman, I tend to agree with your analysis
5 of the situation here.

6 The question for me, the landing
7 is certainly part of the stair, which is
8 allowed. The question for me is was this
9 landing too big, you know. Ultimately, could
10 the landing have been smaller? And I think
11 the landing could have been smaller. They
12 could have located the door closer to the
13 stair. But is there wiggle room?

14 I mean, I don't think there is a
15 defined size of what the landing needs to be,
16 or a maximum size of what a landing needs to
17 be.

18 And from an architectural
19 standpoint, I think it's reasonable for the
20 homeowner, in this case, to want to put their
21 door -- you know have French doors exiting
22 out onto the stair and locating the doors

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1 where they did. I think it's within reason.

2 And I think it functions as a landing. It
3 doesn't function as a deck.

4 And I feel comfortable with the
5 Zoning Administrator's interpretation here.

6 VICE CHAIRPERSON DETTMAN: I guess
7 I agree with my colleagues here, and
8 especially the remarks just made by Mr.
9 Schlater.

10 You know, just in approaching the
11 lower level construction and then looking at
12 what we'll eventually get on to discuss, the
13 upper level construction and what constitutes
14 an outside balcony and what doesn't, we asked
15 the asked the Zoning Administrator about
16 that, and typically he says he considers an
17 outside balcony something that doesn't have
18 anything underneath it. Its cantilevered out
19 from the building as opposed to maybe a roof
20 that's underneath it.

21 And so taking what the ZA said and
22 looking at this lower level construction and

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1 stair landing discussion, I agree with Mr.
2 Schlater that there's a certain level of
3 discretion that we need to look to and rely
4 upon the ZA to have in making this
5 determination.

6 I think that, again I agree with
7 Mr. Schlater, the landing could have been
8 smaller. I think the provision 2503.4 which
9 exempts stairs in required open spaces, I
10 think that the spirit of that provision is
11 very utilitarian. You know, you're allowed
12 to do the bare minimum in order to make up a
13 difference in grade in getting from a door
14 down to a required open space.

15 And so looking at what was
16 constructed and listening to the ZA's
17 testimony that he uses discretion, and when
18 he looked at this he didn't find that it went
19 so far beyond the utilitarian aspect of
20 getting from the upper level down to the open
21 space that would constitute it as an outside
22 balcony. I think the ZA did not error in

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1 determining that what was constructed and
2 what was approved is beyond what would be
3 considered a stair and a landing.

4 CHAIRPERSON LOUD: Thank you,
5 colleagues.

6 Let me ask a question of Ms.
7 Nagelhout in terms of proceeding forward.

8 Are we able to separate these two
9 claims and vote on them separately?

10 MS. NAGELHOUT: I think you could
11 do that if that's your preference.

12 CHAIRPERSON LOUD: Okay. Then I'd
13 recommend to colleagues that we do that,
14 okay?

15 I'd like to move that we dismiss,
16 I guess, or deny the application for relief,
17 that is an appeal from the ZA's decision,
18 with respect to the second floor landing.

19 I don't know if that's clear
20 enough. With respect to the second floor
21 landing as embodied in Permit No. B0905289.

22 Is there a second. All right.

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1 Motion has been made and seconded.

2 Is there further discussion?

3 Hearing none, all those in favor say aye.

4 ALL: Aye.

5 CHAIRPERSON LOUD: All those who
6 oppose?

7 And, Mr. Moy, can you read back
8 the vote for us?

9 SECRETARY MOY: Yes, sir. The
10 staff would record the vote as four-to-zero-
11 to-one based on the motion of the Chair, Mr.
12 Loud, to deny that part of the appeal as
13 attendant to the second floor landing.

14 Seconded by Mr. Schlater. Also in
15 support of the motion Mr. Dettman and Ms.
16 Moldenhauer.

17 Again, that vote is four-to-zero-
18 to one.

19 CHAIRPERSON LOUD: Thank you, Mr.
20 Moy.

21 Moving from there to the second
22 issue in the case, namely the rooftop deck, I

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1 tend to agree and was persuaded by the
2 appellant that what was created on top of the
3 second story roof was -- I'm sorry. Let me
4 back track.

5 What was created on top of the
6 second story roof and what has been carried
7 variously an addition, not an addition a
8 modernization and some other terms, I think I
9 tend to agree with the reasoning and the
10 testimony of Mr. LeGrant that that's not an
11 addition. It's not an addition because it
12 does not tend to increase the rear yard
13 because it makes no additional space
14 available that was not already available to
15 the owner of the property, that it's not
16 enclosed.

17 The regulations not having a
18 definition of addition, we turn to *Webster's*.

19 But *Webster's* was just as unclear as not
20 having a definition in the regulations
21 because some of the phrases that were used
22 for addition in *Webster's* if taken literally

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1 would mean that if you upgraded your kitchen,
2 I think Mr. LeGrant testified to this, that
3 that could be considered an addition because
4 it adds value.

5 There's also been a history here
6 at the BZA of rooftop desks like what was
7 discussed and completed in this case, not
8 being described as an addition. And I
9 believe there's a case that I'm going to make
10 reference to in a moment when I can find it.

11 So I think it's unfortunate that
12 there's no definition in the regulations,
13 first.

14 Secondly, I don't think that
15 unlike some other terms that we bandy about
16 in land use and zoning, I don't think that
17 *Webster's* definitions for addition really
18 contour to Zoning and what Zoning means by
19 addition.

20 Thirdly, I think that in this case
21 because what was constructed and what was
22 presented to the Zoning Administrator did not

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1 increase lot occupancy, it did not increase
2 FAR. It really did not add anything to the
3 property other than some increased walkable
4 area that it would not come within the
5 definition of addition.

6 I think there was also testimony
7 from the Zoning Administrator regarding how
8 his office has treated these projects over
9 time. And the idea of lending some
10 consistency to members of the public as to
11 how these are going to be viewed by both the
12 Zoning Administrator and subsequently by the
13 BZA all tend to, in my mind, support the
14 interpretation for addition that the Zoning
15 Administrator reached in this case.

16 And so with that, I know there are
17 probably different perspectives on this, I'll
18 open it up to other Board members.

19 MEMBER MOLDENHAUER: Chairman
20 Loud, I'm a Board member that unfortunately
21 does not agree with your assessment.

22 I think that there's a sliding

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1 scale in regards to, especially in instances
2 where the Zoning Regs. are slightly
3 ambiguous. Here we have an issue of an
4 addition. The word "addition" is not defined
5 by the Zoning Regs, so people would go to
6 *Webster's*.

7 And, as you said, it was brought
8 out in the testimony by the ZA well an
9 addition could be, you know even adding
10 something very small like changing a window
11 or doing something to that effect. And I
12 think that in that sliding scale you have
13 something small, where obviously the ZA's
14 discretion is very clear to us: While it may
15 technically be a change, it wouldn't actually
16 qualify as an addition. As you go down that
17 sliding scale there becomes a gray area. And
18 I think that this case definitely is within
19 that gray area, but I believe it is just at
20 the edge where it would be considered
21 something that would definitely be an
22 addition and thus, we should rule in favor of

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1 the applicant.

2 I think that a space by 10 by 20
3 adding such a large new use, a nonconforming
4 use is something that is exactly what it is:

5 It is the conforming of the prior use. That
6 prior use of the top area of the lower
7 section of that house was never used as a
8 deck. By changing that use they are
9 providing an addition of a nonconforming
10 space. And they're changing the use
11 previously from, yes whereas the space was
12 there before, they're changing it from being
13 a open nonwalkable, nonenjoyable space to now
14 being an area where you can walk out of a
15 door, walk onto a large patio, or deck, or
16 balcony or however one would define it, and
17 sit out there and use it.

18 *Webster's*, as is provided by the
19 applicant and discussed, you know states that
20 an addition is anything that would add space
21 or the process of adding. And I think that
22 while this may create some conflict with how

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1 things have been done in the past, I think
2 that there is a question of how large is the
3 deck, how large is the addition. And in this
4 case it tips on the favor of the fact that it
5 should at least come before the Board under a
6 223.

7 CHAIRPERSON LOUD: Thank you, Ms.
8 Moldenhauer.

9 Let's hear from other Board
10 members.

11 VICE CHAIRPERSON DETTMAN: Mr.
12 Chairman, with respect to this question, I'm
13 in agreed with Board Member Moldenhauer for
14 the reasons that she set forth.

15 And in addition, really this came
16 down for me rather whether or not what was
17 constructed added gross floor area to this
18 property. And just simply looking at the
19 definition of gross floor area, it says:
20 "The sum of the gross horizontal areas of the
21 several floors of all buildings on the lot
22 measured from the exterior faces of exterior

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1 walls and from the centerline of walls
2 separating two buildings." The definition
3 goes on further to say "The term GFA shall
4 not include cellars and outside balconies
5 that do not exceed a projection of six feet
6 beyond the exterior walls of the building."
7 This, I believe -- I don't know the exact
8 dimensions, but I know that from the exterior
9 wall of the third floor to the edge of the
10 construction was, I think, ten feet. S it's
11 beyond six feet.

12 And so for me in this case, you
13 know to calculate the GFA for this property,
14 the GFA of the third floor measured from its
15 exterior walls is smaller than that of the
16 second floor because you have this kind of
17 bump out at the second floor level which
18 exposes the roof.

19 And so if you are to construct
20 anything that projects beyond the exterior
21 walls of the third floor in excess of six
22 feet, to me that says that its considered to

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1 add useable GFA o the entire property. And
2 to me adding the additional GFA is, in my
3 mind, considered an addition to the property.

4 And since its nonconforming as to lot
5 occupancy, it would be required to come to
6 BZA under 223.

7 So I agree with Ms. Moldenhauer
8 that I would consider this an addition to the
9 subject property.

10 COMMISSIONER SCHLATER: Mr.
11 Chairman, I tend to agree with you on this
12 topic. I don't believe that the roof deck
13 expands is a nonconforming lot occupancy of
14 the property.

15 I don't believe that the roof deck
16 expands or adds gross floor area to the
17 building.

18 In my mind when I think of
19 addition and when I read the definition in
20 the dictionary of what addition is, I
21 actually tend to think that what they're
22 speaking of, and I agree that it's a gray

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1 area so we're really trying to interpret
2 something that's a little gray, but is it an
3 addition of the interior useable space of the
4 building? No, I don't think that that's what
5 we're looking at here.

6 It is certainly a roof deck. I
7 don't think it meets what my standard of a
8 balcony would be. If it was protruding from
9 the exterior face of the building with
10 nothing under it, I would think it might
11 qualify as a balcony at that point.

12 So when I look at this I don't
13 think we're looking at an addition. We're
14 merely taking basically the roof of the
15 kitchen and, you know, it is certainly an
16 improvement. But as an addition, I don't
17 think so.

18 So that's where I come out on it.

19 CHAIRPERSON LOUD: Thank you.

20 It seems like we're at a bit of a
21 loggerheads. I think my colleagues have made
22 excellent points all the way around.

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1 In terms of the whole adding to
2 FAR issue, I see it a little differently. I
3 recall part of the exchange I think that may
4 have been had with Mr. LeGrant regarding the
5 whole balcony issue and the FAR and the other
6 part of it I read the transcript. Because I
7 was not here for the hearing. And I, like
8 Commissioner Schlater, I don't think that
9 what was constructed as a part of that
10 rooftop deck would meet the definition of
11 balcony because it does not extend from the
12 facade of the building. That is directly
13 underneath it you have the existing rooftop
14 and the structure underneath that.

15 So I wasn't necessarily persuaded
16 by that argument.

17 I will add that previously the BZA
18 has addressed this issue. And in one of the
19 cases in which it was addressed, the Board
20 made a determination that a rooftop deck like
21 this was a modernization under 2001.2, which
22 is specifically excluded from the remaining

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1 provisions of 2001.

2 And I think that this project
3 would be on almost all fours very similar to
4 what happened in the previous case. And that
5 was, I'm just to read the case into the
6 record.

7 It was the case of Application
8 17341 of Simon Bell and John Roegner, which I
9 don't believe was cited. But I could be
10 wrong. I don't believe this was cited by
11 either party in this case. Again, I could be
12 wrong. It was brought to our attention by
13 the Office of Attorney General.

14 And so I think that would again
15 tend to give our citizens some clear sense of
16 what they can expect from the BZA and from
17 the Zoning Administrator with respect to
18 these types of projects. And I think we
19 ought to be consistent across the board so
20 that our citizens have a reasonable
21 expectation that is based in our practice and
22 that we follow through regardless of the type

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1 of project that comes before us.

2 So with that, perhaps we can have
3 one additional round and then I'd like to
4 suggest a possible way out of this, if
5 there's a need for an additional round.

6 Then what I would suggest because
7 there are strong positions for it and very
8 strong positions against it. And we'd be
9 deadlock where we to attempt to vote, and
10 we're currently short a Board member, a
11 Mayoral appointee. And this is a very local
12 issue. This is neighbor and neighbor. That
13 we perhaps table the vote on this. We should
14 have a new Board member within a week or two,
15 perhaps three at the latest. And then allow
16 that third person to come on and review the
17 record, it's not an extensive record, and
18 weigh in on the discussion. And that way
19 we'd have -- unless that person just couldn't
20 make their mind at all, we'd have a clear
21 vote one way or the other on it.

22 So that's what I would suggest to

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1 colleagues.

2 MEMBER MOLDENHAUER: That would be
3 fine with me. I mean, I think that right now
4 we're deadlocked and we would be then denying
5 the application. I'm for granting the
6 appellant's motion in this regard, so I would
7 obviously be for instead of denying it
8 outright as would maybe you, Mr. Schlater,
9 would be willing to do. Maybe give it the
10 opportunity for another Board member to
11 review the transcript and see what their
12 opinion would be.

13 COMMISSIONER SCHLATER: One other
14 alternative, perhaps, is to decide on the
15 appeal today and then maybe seek further
16 clarity or gain further clarity on what an
17 addition is instead of using precedent, which
18 seems to be potentially all over map on this.

19 So once and for all fix the definition of
20 addition so that we all have clarity on it
21 might be one way.

22 I think if the problem, if

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1 citizens don't know which way the BZA is
2 going to decide on these cases moving forward
3 and what we have now it would seem is a
4 situation where the BZA has decided one way
5 in one case and another way in other cases.
6 And that sort of uncertainty doesn't serve
7 anyone well.

8 VICE CHAIRPERSON DETTMAN: I agree
9 that there's this need for consistency. The
10 case that Chairman Loud has quoted, we don't
11 know -- I think the language in the order is
12 fairly clear that the Board determined that
13 whatever was being proposed didn't need
14 relief. But what we don't know, which to me
15 is a key point there, is whether or not what
16 was being proposed is replacing a roof deck
17 that was already there. It's a summary order.

18 Mr. Schlater, in terms of getting
19 clarity, is that something that we might get
20 from the Zoning Commission?

21 COMMISSIONER SCHLATER: I guess
22 that's what I'm proposing is perhaps we

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1 pursue a text amendment just to nail this
2 down once and for all.

3 VICE CHAIRPERSON DETTMAN: I think
4 that that's a way to approach it. I even
5 think that perhaps without even a text
6 amendment, that if the Zoning Commission
7 would be able to provide us with some clarity
8 on whether or not what was constructed on the
9 upper level here should be considered an
10 outside balcony or not.

11 MEMBER MOLDENHAUER: Well, I think
12 whether or not that we look to the Zoning
13 Commission for a text amendment, I think that
14 in this case we still need to decide. And I
15 think it would be good essentially postpone
16 this until another Board member can review
17 the case.

18 COMMISSIONER SCHLATER: I guess my
19 discomfort with that is we've got a property
20 owner who built this roof deck with a certain
21 assumption of what the rules were. We have a
22 Zoning Administrator that has been

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1 interpreting those rules in a fairly
2 consistent manner over the last number of
3 years. And then for us to change course, I
4 cannot predict what the new nominee, how they
5 will vote, but I guess it personally gives me
6 discomfort to grant the appeal. Because I
7 feel like it's changing the rules in the
8 middle of the game. And I wouldn't feel
9 comfortable doing that.

10 So, I'd be okay today rejecting
11 the appeal and then pursuing further clarity
12 in the form of a text amendment or guidance
13 from the Zoning Commission.

14 CHAIRPERSON LOUD: I guess I was
15 leaning more in the direction of what Board
16 member Moldenhauer suggested, which would be
17 a both/and. That is instead of either/or,
18 instead of moving forward decisively with a
19 vote today, but not ever getting clarity from
20 the Zoning Commission, perhaps allowing a
21 fifth member to weigh in on what we've been
22 reviewing and then still move forward with

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1 some sort of text amendment separately. Just
2 because the issue needs to be resolved.

3 I don't necessarily -- and I don't
4 know in terms of Zoning Commission's
5 procedures, whether they could just take up
6 the issue after this case has been decided.
7 But I think in setting up the BZA, I think it
8 was late, late 1930s, perhaps early 1940s,
9 the idea was that you would have a group of
10 peers that would review these applications.
11 I mean, we're not supposed to be trained
12 professionals up here. We're supposed to be
13 everyone's neighbors taking a look at the
14 special exceptions and variances.

15 And so missing that one neighbor,
16 I mean there are four of us up here, but
17 there really should be five. Missing that
18 one neighbor means that for this appellant he
19 doesn't really get the benefit of the full
20 compliment of BZA persons, particularly since
21 it would be a Mayoral appointee. And again,
22 this is a very local, very neighbor kind of

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1 issue. My life's being impacted. I think in
2 this case there were allegations of a really
3 wonderful garden or something that sounded
4 like it may have been part of the driver for
5 this.

6 So again, it's a long-winded way
7 of saying is it possible to do both? Is it
8 possible to allow time for a fifth member to
9 decide this case based on the current state
10 of affair status quo when this applicant
11 filed, but still move forward and clarify
12 this addition and what that is supposed to
13 mean?

14 COMMISSIONER SCHLATER: I think,
15 Mr. Chairman, certainly a way to proceed.

16 I have some discomfort with the
17 idea that the appeal would be granted and
18 that there would be an impact on this
19 property owner and then a couple of months
20 later the Zoning Commission comes along and
21 clarifies that they didn't, in fact, consider
22 this an addition. And I think it would be

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1 really burdensome on the property owner in
2 that case.

3 So that's why, particularly after
4 the property owner has gone down a long path,
5 sought guidance from the Zoning
6 Administrator. I think by postponing this
7 for the final District appointee to weigh in
8 on this is just extending the uncertainty,
9 which I don't think should be there.

10 MEMBER MOLDENHAUER: I mean, I
11 just -- I don't know how much uncertainty
12 there is. I just want a point of clarity.

13 The property owner has not
14 presented any arguments in this case. They
15 have been completely silent. You know they
16 have obviously allowed the Zoning
17 Administrator to present their case for them,
18 but at the same time I mean we don't have a
19 owner who is sitting before us or has
20 presented any argument saying I would be
21 prejudiced by an additional time being
22 presented here.

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1 So I think because of that, you
2 know, it leans in favor towards at least
3 waiting and allowing another person to weigh
4 in.

5 We can probably agree to disagree.

6 And maybe let's see if Chairman Loud would
7 allow us to vote on the issue.

8 COMMISSIONER SCHLATER: Well,
9 maybe I could ask one question of OAG, which
10 is if the appeal is granted ultimately, so we
11 delay this decision. The fifth BZA member
12 comes on board and the appeal is granted,
13 what then happens with respect to the roof
14 deck?

15 MS. NAGELHOUT: Well, there is the
16 ten day period before the order becomes
17 effective. And the Zoning Commission could
18 act in the meantime. Otherwise, I suppose
19 that the property owner would have to come in
20 and ask for relief under 223, or whatever
21 provision the BZA decides is appropriate.

22 COMMISSIONER SCHLATER: And if the

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1 relief wasn't granted?

2 MS. NAGELHOUT: DCRA would have to
3 pursue enforcement action, I suppose.

4 CHAIRPERSON LOUD: Before
5 proceeding further, let me just ask Board
6 members has any part of the exchange resulted
7 in any change in position from any of the
8 previous positions before? Because this
9 would be really the right time to speak up
10 and say that before we do our level best to
11 try to resolve this issue.

12 VICE CHAIRPERSON DETTMAN: Based
13 on the discussion that we've had thus far,
14 Mr. Chairman, on this one issue, you
15 referenced that BZA case where the Board
16 found that whatever was being proposed didn't
17 require relief. I think it say the proposed
18 roof deck was found to be a modernization and
19 did not require relief or something to that
20 extent.

21 Again, I mentioned that we don't
22 know what the existing condition in that case

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1 was. But going off of the language of the
2 summary order I could assume that this was a
3 proposal for a new roof deck and that the
4 Board found it to be a modernization, which
5 would be allowed as a matter of right under
6 2001.

7 Listening to Mr. Schlater's
8 suggestions and comments about the Zoning
9 Commission and getting clarity, you know
10 there have been cases most recently, the
11 Harris Teeter where the Board had an appeal.

12 We rendered a decision and then not too long
13 after that prompted by DCOP the Zoning
14 Commission passed a recent text amendment
15 providing clarity, the use prohibition.

16 So it's not uncommon where the
17 Board renders a decision on something and
18 that the Zoning Commission follows up with
19 providing clarity in the Zoning Regulations.

20 I suspect that if we were to
21 decide this appeal today, if the Zoning
22 Commission felt that we struggled with this

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1 to the extent where we needed clarity, they
2 could do that.

3 If the Zoning Commission felt that
4 we erred, that the Zoning Administrator was
5 actually correct, they could actually sua
6 sponte review our decision if they wanted to.

7 So I think that I could actually
8 see it your way in order for us to get past
9 this discussion and move on to a vote on the
10 appeal, on the second issue of the appeal and
11 feel comfortable that there are enough
12 mechanisms in place through sua sponte review
13 or perhaps a text amendment and clarity on
14 what constitutes an exterior balcony, perhaps
15 handed over from OP to the Zoning Commission;
16 whatever it may be. I think that that kind
17 of clarity or amendment to the Zoning
18 Regulations is necessary.

19 And with all that being said, I
20 can see it your way in terms of this
21 questions. And I think that we can move on
22 to a vote.

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1 CHAIRPERSON LOUD: Thank you,
2 Board member Dettman.

3 Just ask this question of
4 Commission Schlater in terms of the sua
5 sponte. So the case would be that regardless
6 of the time lapse between the decision of BZA
7 and when the Zoning Commission takes up the
8 issue, the Zoning Commission could still sua
9 sponte the case and retroactively render a
10 decision.

11 VICE CHAIRPERSON DETTMAN: I'm not
12 sure of that to be honest with you.

13 CHAIRPERSON LOUD: Okay.

14 VICE CHAIRPERSON DETTMAN: I think
15 that's a question for OAG mechanically how
16 that would work.

17 CHAIRPERSON LOUD: Let me turn to
18 OAG and just ask for clarification on that.

19 MS. NAGELHOUT: I don't have the
20 provision right in front of me, but there's a
21 ten day period before the BZA order goes into
22 effect and the Zoning Commission has to

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1 exercise its sua sponte review in that ten
2 day period, which I think he was just saying
3 we're going to review this. And then there's
4 some period after that in which the Zoning
5 Commission can either affirm what the BZA
6 did, reverse it, or take some third option.

7 CHAIRPERSON LOUD: Okay. And the
8 BZA order goes into effect when the written
9 decision is issued?

10 MS. NAGELHOUT: It goes into
11 effect ten days after the written decision is
12 issued.

13 CHAIRPERSON LOUD: Ten days after?
14 Okay. All right. I think that --

15 MS. NAGELHOUT: So they have sua
16 sponte in that ten days.

17 CHAIRPERSON LOUD: Okay. Then in
18 light of her answer to that question, I'm
19 comfortable moving forward then with a motion
20 on the second part of the case before us,
21 which namely is the rooftop addition. And
22 given where my comments have been, I'd like

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1 to move with respect to the second issue here
2 that the appellant's motion to appeal the ZA
3 be denied for all the reasons that I've
4 articulated earlier regarding this not being
5 an addition and so on and so forth.

6 Is there a second?

7 VICE CHAIRPERSON DETTMAN: I'll
8 second that motion.

9 CHAIRPERSON LOUD: Motion has been
10 made and seconded. Is there further
11 discussion? Hearing none, all those in favor
12 say aye.

13 ALL: Aye.

14 CHAIRPERSON LOUD: All those who
15 oppose? Are there any abstentions?

16 And can you read back the vote?

17 SECRETARY MOY: Yes, sir. Staff
18 would record the vote, as best I heard it,
19 was to two-to-two-to one, I believe. And
20 that was on the motion of the Chair, Mr.
21 Loud, to deny that aspect of the appeal
22 attendant to the rooftop deck.

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1 VICE CHAIRPERSON DETTMAN: The
2 vote, actually, I think was three-one-zero.

3 SECRETARY MOY: It was three-one-
4 zero?

5 CHAIRPERSON LOUD: Yes.

6 MS. BAILEY: Three-one-one.

7 SECRETARY MOY: Okay. So that
8 vote then was three-to-one-to-one on the
9 motion of the Chair, Mr. Loud. Seconded by
10 Mr. Schlater. In support of the motion then
11 was Mr. Dettman. And we have a member not
12 participating.

13 So again, that was three-to-one-
14 to-one.

15 CHAIRPERSON LOUD: Okay. Thank
16 you.

17 I think, you know not only have we
18 reached a decision here today, that gives
19 some certainty to members of the public. I
20 think we've also left the door open to try to
21 get this issue resolved in a meaningful way
22 in terms of what an addition is and to do

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1 that in a way that would have some real
2 impact on this case, too.

3 So with that being said, is there
4 anything further for the Decision Calendar?

5 SECRETARY MOY: No, that completes
6 it, Mr. Chairman.

7 CHAIRPERSON LOUD: Okay. Then the
8 Decision Calendar is adjourned.

9 (Whereupon, at 2:39 p.m. the
10 Decision Meeting was adjourned.)

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