

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY

OCTOBER 23, 2007

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER Chairperson
MARC D. LOUD Board Member
SHANE DETTMAN Board Member (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

GREGORY N. JEFFRIES Vice Chairman
CURTIS L. ETHERLY, JR. Commissioner
MICHAEL G. TURNBULL Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
BEVERLY BAILEY Sr. Zoning Specialist
JOHN NYARKU Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.
JANICE SKIPPER, ESQ.

The transcript constitutes the minutes from the Special Public Meeting held on October 23, 2007.

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P R O C E E D I N G S

(10:41 p.m.)

CHAIRPERSON MILLER: This meeting will please come to order.

Good morning, ladies and gentlemen. This is the October 23rd morning public meeting of the Board of Zoning Adjustment of the District of Columbia.

My name is Ruthanne Miller. I'm the Chair of the BZA.

Joining me today to my right is Vice Chair -- no -- I guess he's now Commissioner Curtis Etherly, to my right, and also Commissioner Greg Jeffries with the Zoning Commission, and to my left is Shane Dettman with NCPC, and Cliff Moy, Office of Zoning, and Janice Skipper with Office of Attorney General and Beverly Bailey with Office of Zoning. I'm sorry, I'm trying to rush through here a little bit. I'm sorry to have kept everyone waiting today.

Copies of today's meeting agenda

1 are available to you and are located to my
2 left in the wall bin near the door.

3 We do not take any public
4 testimony at our meetings unless the board
5 asks someone to come forward. Please be
6 advised that this proceeding is being recorded
7 by a court reporter and also being Webcast
8 live.

9 Accordingly, we must ask you to
10 refrain from any disruptive noises or actions
11 in the hearing room. Please turn off all
12 beepers and cell phones.

13 Does the staff have any
14 preliminary matters?

15 MR. MOY: If we do, we ought to
16 take that on a case by case basis, Madam
17 Chair.

18 CHAIRPERSON MILLER: Thank you.
19 Then let's proceed with the agenda.

20 MR. MOY: Good morning, Madam
21 Chair, members of the board. The first case
22 for decision is a Motion for Reconsideration

1 of Application No. 17537-A of Victor Tabbs,
2 pursuant to Section 3126 of the Zoning
3 Regulations. The original application was
4 pursuant to 11 DCMR 3104.1 for a special
5 exception under section 223, not meeting the
6 lot occupancy requirements, section 403, to
7 construct a four-story rear addition to a
8 flat, two-family dwelling at premises 740 13th
9 Street, S.E., and that's in Square 1045, Lot
10 97.

11 If the board will recall, on
12 August 8th, 2007, the office received a Motion
13 for Reconsideration of the board's decision
14 and a request for a stay from ANC 6B, which is
15 identified as Exhibit 50.

16 The board scheduled their decision
17 for September 4th, 2007. On that date, the
18 board acted on the Motion for Reconsideration
19 and the request for a stay.

20 Basically, the board voted to
21 grant the Motion for Reconsideration, denied
22 the request for a stay, and three, amended the

1 application because the variance relief on the
2 limitation on the number of stories was not
3 required under section 400.1.

4 In granting the reconsideration,
5 the board scheduled a limited public hearing
6 on October 2, 2007, to address the narrow
7 issue of impacts on light and air. At the
8 conclusion of the limited hearing on October
9 2nd, the board closed the record and scheduled
10 its decision at a special public meeting on
11 October 23rd.

12 The board allowed the property
13 owner, Victor Tabbs, to submit revised
14 photographs which were filed on October 2,
15 2007, and that is identified in the case
16 folder as Exhibit 56.

17 The staff will conclude by saying
18 that the board is to act on the merits of the
19 testimony and to determine the board's
20 decision of the January 23rd, 2007, as
21 reflected in its order issued on July 27,
22 2007.

1 CHAIRPERSON MILLER: Thank you,
2 Mr. Moy. I just also want to make a few
3 background comments, and to the extent they're
4 not redundant.

5 The board did limit the
6 reconsideration in this case to the question
7 of whether applicant's project would cause
8 adverse impacts to neighboring properties'
9 light and air based on shadow studies
10 submitted by the ANC.

11 We asked the ANC why they didn't
12 submit this evidence earlier and they
13 responded that it was costly to do and they
14 thought that the Office of Planning was going
15 to do it.

16 When we looked at the filing, we
17 determined that it raised enough concerns to
18 have a hearing on the issue and allow the
19 applicant the opportunity to respond.

20 The standard for review in this
21 case is under 223, "the addition shall not
22 have a substantially adverse effect on the use

1 or enjoyment of any abiding or adjacent
2 dwelling of property, in particular, the light
3 and air available to neighboring properties
4 should not be unduly affected.

5 So we had this hearing and we
6 heard testimony and reviewed a shadow study
7 that was submitted by the ANC, and we also
8 looked at photographs that were submitted by
9 both the ANC and the applicant, and now we're
10 at the point to decide whether or not
11 applicant met the burden of their not being
12 adverse impacts on neighboring properties, and
13 I think different board members can speak to
14 it, but where I'm at, and I think others may
15 be also, is that the evidence just raised more
16 question and doubt about the impact on
17 neighboring property and I'm not sure whether,
18 just looking at the shadow studies and these
19 photographs, is enough for me now to be clear
20 in my decision making on this question.

21 Others can also address this.
22 Office of Planning did not participate in the

1 Motion for Reconsideration hearing. For some
2 reason they didn't come to the hearing and
3 they didn't file anything in this case, and I
4 think it would be useful to have their input
5 in this as well. They took a position
6 obviously, on the application before, and we
7 give great weight to the Office of Planning,
8 and now we find ourselves with a question
9 where we could use their expertise, and their
10 neutral evaluation and we don't have it.

11 So I would propose that we do open
12 the record for the Office of Planning to
13 "weigh in" on the evidence that has been
14 submitted since the decision and to provide
15 their evaluation of whether or not there are
16 undue adverse impacts on neighboring
17 properties.

18 Others?

19 COMMISSIONER ETHERLY: Madam
20 Chair, I'd like to agree with your comments in
21 this case. This is an incredibly difficult
22 case, obviously for the party involved in

1 terms of the applicant, and of course also
2 from concerns as represented by the ANC.

3 I agree with you, wholeheartedly,
4 that with respect to the evidence that we have
5 in front of us, at the end of the day you
6 have, I believe, a shadow study that was
7 helpful in terms of illustrating the impacts.

8 Clearly, it's arguable as to how
9 you characterize those impacts but I believe
10 the shadow study was helpful in that regard.

11 I think also as evidenced by the
12 photograph submittals from the applicant,
13 clearly, there are other perspectives in terms
14 of how one is to read and view the impacts.

15 I don't think there's an easy
16 answer to this. Very rarely is there an easy
17 answer to any of the cases that come before
18 us. But this is a particularly tough one.

19 I believe, and I don't want to
20 misspeak with regard to representing the
21 applicant's presentation at our rehearing, but
22 I believe the applicant did speak to the

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1 difficulties with regard to responding with a
2 shadow study of his own to perhaps rebut some
3 of the presentation on the part of the ANC.

4 So I think the OP report will be
5 very helpful in terms of one final time,
6 hopefully, illustrating perhaps an additional
7 perspective on how we are to look at the
8 shadow study.

9 I think at the end of the day, it
10 will still, nevertheless, come down to
11 weighing the impacts as they relate to the
12 impact of light perhaps versus the winter,
13 between the winter and the summer seasons.

14 I think there was some credible
15 evidence that spoke to differing impacts but
16 impacts that should be considered by this
17 board.

18 So with that being said, Madam
19 Chair, I think it's an appropriate
20 overabundance of caution, but one which I'm
21 supportive of here, because I think at the end
22 of the day there may not be a right solution

1 to this. It simply is going to be a matter of
2 applying the test and trying to assess what is
3 oftentimes a very difficult term to work
4 through and that is the issue of undue impact,
5 undue impact in terms of use and enjoyment for
6 the neighboring properties.

7 So I'm supportive of this
8 additional step and I'm hopeful that, no pun
9 intended, it will add some additional light to
10 this case as we move towards decision.

11 Thank you, Madam Chair.

12 CHAIRPERSON MILLER: Thank you.

13 Others?

14 MEMBER DETTMAN: I would agree
15 with both your ideas, in terms of referring it
16 to DCOP for comment, as well as all of Mr.
17 Etherly's comments regarding the usefulness of
18 the shadow study and the photograph evidence.

19 And I just wanted to add that in
20 reviewing the shadow study and the evidence
21 that was submitted for purposes of the
22 rehearing, with my limited experience with the

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1 shadow study, I found it useful but I also
2 know that there are assumptions that sort of
3 go along with the shadow study, and one of
4 them is that the shadow study was conducted in
5 the middle of the winter, and the way I read
6 223 in terms of adverse impact with respect to
7 light and air, it's sort of I need to get a
8 better picture of what is the impact over the
9 course of an entire year.

10 I read it as an entire year and
11 not at any specific time in the year.

12 So again, I would agree with Mr.
13 Etherly and yourself, in terms of getting the
14 input from DCOP.

15 COMMISSIONER JEFFRIES: Madam
16 Chair, I actually would agree with the
17 comments of Board Member Dettman. I think
18 that it is somewhat -- I don't want to get
19 into this business of sort of looking at one
20 point in time, meaning a particular season,
21 and making a determination about the light
22 usage, you know, the impacts on light during

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1 that period of time. I'd like to really find
2 out if there's any way that we can really take
3 the year, in totality, and really make some
4 determination about, you know, the impact of
5 light and air that this building has on
6 adjacent buildings.

7 And I know that we probably will
8 not be able to get any technical information,
9 but at this point I'm somewhat comfortable to
10 rely on just what's a general understanding
11 about how the sun works throughout the course
12 of a year and make that determination as to
13 how it impacts on the neighbors.

14 So I think there is, in terms of
15 getting OP's review of this, I think that's a
16 very good thing to do.

17 I'm not certain how much more
18 information we're going to get from them but
19 I think that we should at least take a look
20 and make certain that, before we make any
21 decisions, that we have as much evidence in
22 our possession before making a decision.

1 So I'm willing to go forward with
2 your recommendation.

3 CHAIRPERSON MILLER: Thank you.
4 I think part of my concern also was that
5 because we only have part of the year, we're
6 to be extrapolating from that, from just part
7 of the year, and it certainly would be helpful
8 to have Office of Planning's assistance on how
9 they would interpret that, or how they view at
10 least the most recent evidence, so that we can
11 make the best decision.

12 I think at the hearing we talked
13 about, oh, asking for other shadow studies,
14 perhaps, and we heard that that was kind of a
15 costly venture. So we weren't going to be
16 requiring that from anyone.

17 But we have evidence in the record
18 and it can't hurt to have the Office of
19 Planning take a look at it and get their point
20 in.

21 COMMISSIONER JEFFRIES: So Madam
22 Chair, so the Office of Planning is going to

1 -- what exactly are they going to look at?

2 CHAIRPERSON MILLER: Well, I would
3 suggest that they look at the shadow study,
4 all the evidence that was submitted at the
5 hearing time, I mean since our decision --

6 COMMISSIONER JEFFRIES: Part of
7 the reconsideration.

8 CHAIRPERSON MILLER: -- and I
9 would hope they would look at the hearing, I'm
10 sorry they didn't attend the hearing, but they
11 could certainly listen to the evidence or read
12 the transcript. I wouldn't want to limit them
13 but I want them to "weigh in" again on this
14 application, just on that question, though, of
15 adverse impact on light and air.

16 Before we had their input in the
17 case but it really wasn't based on much
18 evidence, that they didn't really point to
19 evidence. I think it was based on observation
20 or whatever, and so this would just be a
21 little more substantive also.

22 COMMISSIONER JEFFRIES: So their

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1 review is going to be somewhat narrow as it
2 relates to what has been presented, you know,
3 during the hearing for reconsideration, all
4 the evidence that was submitted.

5 CHAIRPERSON MILLER: Right, and
6 does it change their view or support that they
7 expressed earlier.

8 COMMISSIONER JEFFRIES: Okay.
9 Thank you.

10 CHAIRPERSON MILLER: And I think
11 we would also give the ANC an opportunity to
12 respond to that briefly, in writing.

13 COMMISSIONER JEFFRIES: But this
14 is the end of the road.

15 CHAIRPERSON MILLER: Yes. There
16 always has to be an end of the road.

17 COMMISSIONER JEFFRIES: This is
18 the end of the road so -- yes -- cause, you
19 know, Mr. Tabbs, I like your name but I'm just
20 sort of tired of seeing it. It's time that,
21 you know, we quickly, you know, once we get
22 this information, we can make a decision and

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1 move forward.

2 CHAIRPERSON MILLER: Okay. I
3 would suggest that we give Office of Planning
4 until November 6th to submit a supplemental
5 report and allow the parties until November
6 13th to respond, and that we set this for
7 decision making November 20th, and I would ask
8 that Office of Planning would need to serve
9 the ANC by the 13th. I mean, they would need
10 to have that in hand, you know, some way, so
11 they have a week to respond.

12 Okay. Any other comments?

13 [No response]

14 CHAIRPERSON MILLER: Okay. I
15 don't think we need a motion for that. I
16 think that's the consensus of the board.
17 We're going to continue our decision making
18 until the 20th of November and allow the
19 Office of Planning and the ANC to file
20 accordingly. Okay. Thank you.

21 MR. MOY: Very good.

22 The next action of the board is to

1 Appeal No. 17667 of Minshall Stewart
2 Properties, LLC, pursuant to 11 DCMR 3100 and
3 3101, from the April 20th, 2007 decision of
4 the Zoning Administrator, that the buildings
5 on the subject single lot constitute two
6 buildings for zoning purposes in the C-3-C and
7 R-5-E Districts at premises 2175 K Street,
8 N.W. and 1099 22nd Street, N.W., Square 73,
9 Lots 83, which are multiple condominium lots,
10 883 and 884.

11 On October 9th, 2007, the board
12 completed public testimony, closed the record
13 and scheduled its decision.

14 On October 23rd, the board
15 requested a number of post-hearing documents
16 by October 19th, 2007.

17 Those filings were submitted on
18 that date from the appellant and from the
19 opposition party. Exhibit 32 and Exhibit 33,
20 respectively, in your case folders.

21 Madam Chair, we also have a third
22 filing that was submitted this morning from

1 the appellee, which is DCRA, which is a motion
2 for enlargement of time.

3 So finally, the board is to act on
4 the merits of the appeal, and on the motion to
5 dismiss, on the basis that -- well, let me
6 add, that at the October 9th hearing, the
7 attorney, Steve Gell, representing Florence
8 Harmon and Tom Shultz of the opposition party,
9 orally requested a motion to dismiss on the
10 basis that the appellant must be the property
11 owner.

12 That completes the staff's
13 briefing, Madam Chair.

14 CHAIRPERSON MILLER: Thank you,
15 Mr. Moy. Okay. The first issue, then,
16 preliminary issue I think we should deal with
17 is the motion for enlargement of time by DCRA
18 to file a brief in this case.

19 That the board just received this
20 morning, and the basis for that motion is that
21 the transcript wasn't available for them in
22 time, or for the filing deadline of October

1 19, 2007.

2 I would comment that the other two
3 parties did manage to file their briefs in a
4 timely fashion and they're quite thorough, and
5 I think that DCRA's presentation in the
6 hearing was also quite thorough. So I would
7 not be inclined to extend the time because I
8 think that would then mean extending the time
9 for decision making in this case, and I don't
10 think that is necessary for us to make or for
11 me to make an informed deliberation on the
12 matter.

13 Others?

14 MEMBER LOUD: I would agree with
15 you, Madam Chair. I think we have enough
16 information to move forward.

17 CHAIRPERSON MILLER: Okay. Any
18 other comments?

19 [No response]

20 CHAIRPERSON MILLER: So the
21 consensus of the board, to deny the motion for
22 enlargement of time by DCRA. Okay.

1 Then moving on to the next
2 preliminary matter, which I think was
3 identified by Mr. Moy, and that is the motion
4 to dismiss by the intervenors on the grounds
5 that the appellant is not the owner of the
6 building, that they are representing to be
7 owner of the whole building which is -- this
8 whole case is about one building or two
9 buildings and what do we refer to it as.

10 In any event, with respect to that
11 issue, whether or not they're the owner of the
12 building and that they're not, that they
13 therefore should be denied the opportunity to
14 file this appeal, I would suggest that we
15 would deny that motion because appeals, which
16 are set forth at 3112 of our regulations,
17 allow any person aggrieved by any order,
18 decision, determination, etcetera, to file an
19 appeal, and that is different from bringing an
20 application for a special exception or a
21 variance, in which case you need to be the
22 owner, and the regs specifically refer to the

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1 owner with respect to applications and for
2 variances and special exceptions, which this
3 is not.

4 Are there any other comments by
5 board members on that issue, whether to
6 dismiss because the appellant is not the owner
7 of both buildings?

8 [No response]

9 CHAIRPERSON MILLER: Okay. Then
10 it's the consensus of the board to deny the
11 motion to dismiss.

12 So then we get into the -- oh,
13 there's one other preliminary question, it's
14 not exactly a motion, I don't think, but I
15 want to address it, up front, before we get
16 into the merits, and that is that the
17 appellant is arguing that the ANC letter dated
18 October 9, 2007 not be afforded great weight.

19 We afford the ANC great weight
20 when it meets the requirements set forth in
21 the statute and our regulations for great
22 weight, and one of the requirements is notice,

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1 and then the other aspect of this argument is
2 that they filed late. They didn't file seven
3 days in advance of a hearing.

4 I would say with respect to the
5 late filing, that it is common practice of
6 this board, I would say that we often waive
7 the seven days, particularly for ANCs because
8 we want to get the input of the community's
9 representative body, and usually there's no
10 prejudice to doing that and I don't believe
11 there's prejudice in this case.

12 The other aspect is the notice
13 question. Apparently they did not put on
14 their agenda notice of this particular
15 application. And I think that it's good
16 practice to put on an agenda certainly the
17 notice of the applications that the ANC is
18 going to be hearing. That gives the applicant
19 or the appellant, or whoever, the opportunity
20 to see that it's being considered by that
21 body, and be allowed to -- and the opportunity
22 to go and hear what's being said, and, in

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1 fact, perhaps to participate.

2 It also gives the community an
3 opportunity, those people in the community who
4 may not be following, per se, this case, to
5 see that, oh, this is coming up, and they want
6 to go and they want to "weigh in" as well.

7 However, I do find it persuasive,
8 there's a letter from Mr. Gottlieb Simon, from
9 the office of the ANC, that notice is not
10 required, and therefore, they're not in
11 violation of it. So I don't think that there
12 is a case for denying the ANC its great weight
13 in this case, and that means addressing the
14 issues that they raise.

15 I would say that when I reviewed
16 the letters -- and we can go back to this
17 later, though. Their later letter refers to
18 an earlier letter that addresses the variance
19 application and they actually address a lot of
20 issues such as adverse impacts, etcetera, and
21 they don't actually get into, too much, to the
22 legal question which is before this board, is

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1 this one building or two?

2 Any comments about the "great
3 weight" issue? Okay.

4 So this is an appeal of the Zoning
5 Administrator's decision on a question asked
6 by the appellant. According to the ZA
7 decision, or letter, which is Exhibit No. 4,
8 the question was:

9 You have asked me for
10 determination of whether the structures
11 referred above, paren (2175 K Street and West
12 end Place) constitute one building or two for
13 the purposes of the applicability of section
14 1709.20 of the zoning regulations of the
15 District of Columbia.

16 And the Zoning Administrator
17 answered that they constituted two buildings
18 and found that just because two buildings were
19 permitted on one permit, that that wasn't
20 controlling.

21 He looked to the definition of
22 building in our regulations set forth at 199

1 and found that was controlling, and in this
2 case these buildings had no above-grade
3 communication which is referenced in our
4 definition, which 'm sure we'll get into
5 later, and found that the communication that
6 existed was below grade and below the main
7 floor of the building, and that either
8 building could be raised without affecting the
9 other.

10 So the question before us is
11 whether the Zoning Administrator erred in
12 deciding that these structures were two
13 buildings, and I think it is appropriate, at
14 least for us to look at the definition of
15 building in evaluating this and that's at 199,
16 and in part it says when separated from the
17 ground up or from the lowest floor up, each
18 portion shall be deemed a separate building
19 except as provided elsewhere in this title.

20 The existence of communication
21 between separate portions of a structure below
22 the main floor shall not be construed as

1 making the structure one building.

2 This structure does consist of two
3 -- I don't want to put much weight on my
4 words, building structures, but it's two
5 parts, and one is residential and one is
6 office, and one of the questions is is there
7 a connection, and does that connection
8 constitute communication under the regs.

9 it was the subject of a BZA order
10 in 1980. Is that order controlling? There
11 are a lot of questions floating around on this
12 and so I want to try and see if we can focus
13 on some of them in order.

14 I think the first place we might
15 want to look is that BZA order in 1980, and
16 that was BZA Order No. 13148 in which the
17 board granted a variance and special exception
18 related to the original construction, in which
19 it treated the structure in certain, in ways,
20 by getting at this variance and special
21 exception relief, and the appellant argues
22 that in that order it was clear -- I think the

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1 appellant thinks it clear that these two parts
2 were treated as one building and DCRA and the
3 intervenors argued that that order is not at
4 all clear, that it was treating these two
5 parts as one building.

6 And if you look at the words of
7 that order, it refers to the situation in all
8 different ways. It refers to the project. It
9 refers to portion of the structure. It refers
10 to building.

11 Also I think it might be useful --
12 199 also defines structure as anything
13 constructed, including a building, the use of
14 which requires permanent locations on the
15 ground. So I think our first task would be to
16 look at that order and see whether we thought
17 it was definitive as treating this as one
18 building, and what did the board rely on?
19 Because I think that the other very
20 significant question here is that there was
21 reference to a connection above the main floor
22 of the building, which that board most likely

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1 relied on, if it did in fact treat it as one
2 building.

3 There's a transcript of that
4 hearing in which a board member was talking
5 about how it was a single building because it
6 was connected at the third floor.

7 It was Board Member McMann and he
8 said the balcony in one of the units extends
9 past the zoning line, which complies with the
10 zoning requirements to join two structures.
11 That connection was never built.

12 So we have before us a building
13 that is out of compliance, actually, with the
14 order that authorized it, and it seems that
15 the appellant is arguing that we adopt "as a
16 given" that this is one building, because of
17 the order authorizing the building, when in
18 fact it wasn't built according to plans.

19 And he says, the appellant has
20 said that we do that, because all these
21 building permits, and certificate of
22 occupancy, was issued on the presumption it

1 was one building.

2 So why don't we just discuss that
3 issue right now, whether or not we think we
4 should consider this one building based on the
5 previous board order, when it was not built in
6 compliance with that order, in particular, the
7 aspect of the order that could be -- if any
8 part of it could be argued that it was one
9 building, it was relying on this connection
10 that was never built. And I would also say
11 that the board order didn't address this "head
12 on" at all, but, you know, we've looked to the
13 transcript for that.

14 Mr. Etherly.

15 COMMISSIONER ETHERLY: Thank you
16 very much, Madam Chair. I think you're
17 absolutely right to hit this particular
18 question head on, because I think it really
19 focuses the lens, if you will, on this
20 particular case.

21 At the outset of this case, I was,
22 just putting it bluntly, I was perhaps ready

1 to be squarely in the camp of the appellant
2 here on this particular issue.

3 I think upon closer inspection, as
4 you look specifically at the language of the
5 transcript, the language that's utilized, I
6 would tend to believe that the BZA, in the
7 course of its deliberative, or at least in the
8 course of its discussion, did contemplate the
9 issue of this particular balcony. I think
10 perhaps at best it's arguable, whether or not
11 that ultimately made it into the final ruling
12 of the BZA in that regard.

13 But the stumbling block that I
14 think ultimately sinks this particular
15 argument is the issue that the balcony simply
16 wasn't built.

17 One of the issues that kept kind
18 of emerging in my mind as we listen to the
19 testimony was the issue of what do you do with
20 the fact that the balcony isn't there now and
21 what does that mean for how you treat this
22 building, and, in particular, how you view it

1 in light of the 1980 decision.

2 I am one who is always a firm
3 believer, where possible, in the absence of
4 glaring error, and oversight, to stand by
5 existing orders, especially orders that have
6 stood for so long.

7 But I think in this particular
8 instance, the distinguishing factor here is
9 the fact that that balcony simply wasn't
10 built. It creates a huge, huge issue in this
11 case, that I think is very hard to get around.

12 Clearly, there was some discussion
13 about other connections. I think it's fairly
14 demonstrable, that those connections don't
15 rise to the appropriate level, in terms of
16 being above the main level. They are
17 communications that appear elsewhere. I think
18 were they above the main level, and of course
19 we can get into further discussion on that,
20 they would probably be more than sufficient,
21 regardless of which definition you chose,
22 whether it's meaningful access for functional

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1 purpose or just some type of connection or
2 communication.

3 But I believe with respect to the
4 question as you framed it, the appropriate
5 question, my outcome on that particular issue
6 is by virtue of the fact that the balcony was
7 not constructed, that that puts this board, I
8 think, in the position of having to view this
9 case through a lens of 2007 as opposed to a
10 lens of 1980.

11 CHAIRPERSON MILLER: Any other
12 comments on this point? Yes, Mr. Turnbull.

13 COMMISSIONER TURNBULL: Thank you,
14 Madam Chair. Let me first say, for the
15 record, that although I was not here for the
16 last hearing on this, I have read the
17 wonderful epistle that was generated by it.
18 We have a conundrum here, I think, on many
19 levels, and I agree with Mr. Etherly, that
20 looking back at a previous BZA order is
21 difficult at best, and we do have the rather
22 confusing aspect of the garage and the loading

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1 dock intermixed in this, but -- and I think,
2 as Mr. Etherly has really -- according to the
3 strict definition of how we look at a
4 building, we're really looking at something
5 above grade, and with the exclusion of the
6 balcony during construction, and sort of the
7 miss at the time of issuing of the COO, you
8 hate to go back and compound something.

9 And you want to look favorably
10 upon the former BZA order, but I think in
11 looking at the fact that the balcony was not
12 built, I think we are troubled, we find
13 ourselves compounding something that isn't
14 correct and going forward, and just simply
15 glossing over it.

16 So I think that is a key issue,
17 that there was an error, that somebody missed
18 it in issuing the C of O, but I don't think
19 that we can go back and simply say, well,
20 that's too bad. I think we have to look at it
21 in 2007 eyes also, and look at what's actually
22 there, and how we actually look at these

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1 buildings today.

2 So I would go along with the fact
3 that we're looking at two buildings.

4 CHAIRPERSON MILLER: I think if we
5 look at it in today's standards, we're not
6 actually reversing the BZA order, because the
7 BZA order, first of all, didn't really address
8 that issue, head on, and second of all, this
9 building is not in accordance with that order.

10 So it would be like rewarding this
11 building for unlawfulness by continuing to
12 treat it that way for its own purposes, and I
13 think -- we can get into this later -- but
14 sometimes, where there's been a mistake, or
15 whatever, we look at the equities, and I think
16 in this case the equities don't fall in favor
17 of continuing to treat it as one building for
18 the purpose of TDR, certainly.

19 That's where I think the ANC comes
20 in as far as, you know, equities go, and what
21 it would mean would be not looking at adverse
22 impacts on the community if it were to build

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1 additional floors, or whatever additions it
2 wants to do. That it would just have, do as
3 a matter of right, almost, based on its having
4 built this building out of compliance with the
5 board order. So I certainly don't think we're
6 bound by that.

7 MEMBER LOUD: I don't think
8 there's very much I could add but I also agree
9 with each of you, and I think that from the
10 transcript that sort of undergirded the
11 earlier order, there was some degree of
12 discussion about the two structures not being
13 one building, and then some of the
14 commissioners asked questions about the third
15 floor balcony, and I'm paraphrasing -- said,
16 you know what? I'm kind a sold on the idea
17 that this is one building, even if it's a
18 technicality, because this balcony connects
19 the two buildings, and as we obviously
20 learned, the balcony was never built.

21 So the order seems to have been
22 premised upon something that never occurred

1 and the whole argument that it is a single
2 structure is kind a built on sand.

3 So I'm in agreement with each of
4 you on this point.

5 CHAIRPERSON MILLER: Okay. So
6 that leads us to the Zoning Administrator's
7 looking at the building, or building today,
8 and finding that there are two buildings
9 because they don't have any above-grade
10 communication, and looking to the definition
11 of building in 199, which defines as one
12 building when there are two different
13 structures, if they have the above-grade
14 connection, or communication. Communication.

15 So we heard evidence in the
16 hearing about what kind of connections or
17 communication exists between these two
18 structures, and I believe that the evidence
19 showed that they did not have that kind of
20 communication or -- well, let me hear from
21 others.

22 I mean, we certainly heard about

1 you know, connections maybe are access below
2 grade, such as in the parking garage, but I
3 don't believe that there was any above the
4 main level.

1B 5 I mean, if my memory serves me
6 correctly, we don't even necessarily have to
7 determine whether there's access or anything
8 like that. I think that there wasn't even a
9 connection above the main floor.

10 Do others recall the evidence
11 similarly?

12 COMMISSIONER ETHERLY: And just to
13 be certain that we're talking about all of the
14 relevant connections, as I recall from our
15 testimony, clearly, the fire doors and the
16 parking garage, it was undisputed that those
17 two connections were clearly not above the
18 main level.

19 I believe there was the issue of
20 the -- and I want to be sure I'm correct in
21 terms of referring to it -- there was the
22 issue of the loading dock and there was

1 substantial discussion about the walkway or
2 ledge, however you might want to characterize
3 it, and I am not certain if it was resolved
4 that that ledge area was clearly below the
5 main level.

6 I think that was clearly the
7 position of the appellant, based on what you
8 used as your starting point, your measuring
9 point, if you will.

10 So I just want to be sure that my
11 colleagues are in agreement on those two
12 points as well.

13 CHAIRPERSON MILLER: Okay. I've
14 been looking, right now, at West End Place
15 Condominium Association's post-hearing
16 memorandum at page 4, page 4E, and they say,
17 and I think this is how I recollect it, figure
18 14 of intervenor's exhibits is simply a plaza
19 or patio adjacent to the condominium building
20 that stops at a brick wall of the office
21 building. It fails as a connection or
22 communication, for several reasons.

1 First, this plaza does not provide
2 an access to the office building because there
3 is no opening in the office building at that
4 level.

5 Second, is not covered as required
6 under the prevailing definitions of
7 connection, citing the McBride case.

8 But third, it is on a level below
9 the level of the first floor of the
10 condominium building and two floors below the
11 first floor of the office building and one
12 story below the grade level of the condominium
13 entrance on 22nd Street.

14 I mean, it seems to me if it's
15 below, it fails on that reason alone.

16 MEMBER DETTMAN: Madam Chair, if I
17 may add something, and like Mr. Turnbull, I
18 was not present during the hearing. However,
19 I have read the record in its entirety.

20 And while we're on the subject of
21 what communications, what connections we're
22 going to consider in looking at this case in

1 a 2007 lens, which I agree with, I believe,
2 while going through the transcript, there was
3 some reference to the ventilation shaft and
4 the grates that cover the ventilation shaft,
5 and the roof cap, I think it was called, on
6 the roof that covers the ventilation shaft,
7 and I think it was sort of -- that was couched
8 in a way that was another connection that
9 could be considered in deciding this case.

10 CHAIRPERSON MILLER: I just want
11 to note, also, though, that in the appellant's
12 post-hearing submission, that the first thing
13 they say is the only relevant question in this
14 appeal is whether the Zoning Administrator
15 responsible for issuing the building permit
16 and certificates of occupancy for the original
17 structure, in 1981 through '92, determine that
18 the structure was a single building for zoning
19 purposes based on the definition of building
20 in effect at the time of BZA approval in May
21 1980.

22 If that's the only question, then

1 we don't even have to go into all this, the
2 issues about is there access? Is there
3 communication? However, you know, I think
4 that we can, and I think that certainly that
5 first -- the original BZA order didn't rely on
6 any kind of ventilation or anything to that
7 extent, that we're talking about here.

8 COMMISSIONER ETHERLY: I would
9 agree, Madam Chair. I think the importance of
10 figuring out kind of how you deal with the
11 1980 order speaks to -- again, I kind of used
12 the expression, lens. But this may be an
13 arguable point and I don't think it's
14 necessary for us to get here today, kind a
15 given where we are. But I think part of the
16 discussion was what was the standard in 1980
17 around connection, and, in particular, this
18 idea of functional purpose or meaningful
19 access, if you will, and we talked, at some
20 length, about kind of interpretations of the
21 Goto case, if you would. I tended to think
22 that the Goto case, although it didn't speak

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1 at length on this issue, and we got into
2 conversations about dissenting opinion,
3 concurring in part, dissenting in part. To an
4 extent, I was willing to buy, I think, part of
5 the argument that the appellant was making
6 with respect to the type of connection that
7 existed between the buildings. I think had
8 the balcony been built, that would have been
9 more than sufficient.

10 I think there's perhaps still a
11 need to talk about this issue of -- as you
12 indicated, the plaza or patio, as the
13 intervenor speaks to at page four, in terms of
14 making sure we're clear about finding that
15 that is indeed below grade, because I think if
16 I'm clear on the appellant's argument, there
17 is an argument that that is not in fact below
18 grade.

19 that if you take your starting
20 point from another street, then you in fact
21 are at the appropriate to interpret that. If
22 I'm correct.

1 Now I'm not saying that's the
2 right outcome, but again, as was indicated in
3 the intervenor's motion -- and I'm reading
4 from page four at a point, what would be 3E,
5 where it reads, quote:

6 "Since appellant has always
7 claimed that the two buildings are a single
8 building that takes its height from the K
9 Street entrance, appellant cannot now claim
10 that the first floor of this alleged single
11 building is at the level of the entrance of
12 the condominium building, a story below the K
13 Street grade."

14 So I just want to make sure that
15 we're kind of clear on what our reading is of
16 that particular argument, cause I think one
17 that impacts how you deal with that patio or
18 walkway area.

19 But I think even if you accept
20 that argument on the part of the appellant, I
21 believe the intervenor's case is still
22 successful in terms of this particular

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1 argument, cause even if you accept that, by
2 today's standards, talking about functional
3 purpose, talking about access, I think that
4 space, that walkway, that patio, wouldn't
5 satisfy the definition of connection by
6 today's standards, even if we were to take
7 that reading in a favorable way.

8 CHAIRPERSON MILLER: I just want
9 to bring to your attention that the definition
10 doesn't talk to grade, it talks to below the
11 main level.

12 COMMISSIONER ETHERLY: Of what?
13 What would be your main level in this
14 particular building?

15 CHAIRPERSON MILLER: I think they
16 looked at both buildings and said it was below
17 the main level of the floor of both buildings.
18 At least that's what is set forth on page four
19 of West End Place Condominium Association's
20 post-hearing memorandum.

21 It says it is a level below the
22 level of the first floor of the condominium

1 building and two floors below the first floor
2 of the office building, and one story below
3 the grade level of the condominium entrance on
4 22nd Street.

5 And in the definition of building,
6 it says the existence of communication between
7 separate portions of a structure below the
8 main floor shall not be construed as making
9 the structure one building.

10 So I don't think we have to get
11 into the grade per se.

12 MEMBER LOUD: As you chew on that,
13 Mr. Etherly, and I know you are --

14 COMMISSIONER ETHERLY: Well, let
15 me --

16 MEMBER LOUD: You want -- okay.

17 COMMISSIONER ETHERLY: At Exhibit
18 19 of the appellant, page eight, where the
19 appellant discusses alternate building
20 connections, the submission reads:

21 The building also includes a
22 second area of communication between the two

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1 structures that is above grade and functions
2 as an alternate connection -- the alternate
3 building connection. the office and
4 residential structures are connected to a set
5 of fire doors off the rear loading dock, a
6 shared loading dock available for use by both
7 the residential and office components.

8 Because the building is
9 constructed on a lot that slopes downward,
10 approximately 10 feet from north to south,
11 this connection is located in a portion of the
12 building that is clearly above the adjacent
13 finished grade and therefore counted in the
14 building's gross floor area.

15 The alternate building connection
16 allows for physical passage between the two
17 structures and enhances communication and
18 connection between them.

19 Now it's still talking about the
20 fire doors, and again, I'm not necessarily
21 saying that I'm swayed by the argument. I
22 just want to make sure that we're clear that

1 we're not accepting that argument, and I
2 wanted to be sure that the same argument
3 wasn't also being made about that patio or
4 walkway connection as well, again because of
5 the downward slope, and if you have a
6 different starting point in terms of where
7 your grade is at -- and I think that's what
8 the intervenor is getting at -- you can't flip
9 and say that you're using your grade from some
10 other location when it's always been for other
11 purposes, K Street.

12 CHAIRPERSON MILLER: What I'm
13 saying is we shouldn't be talking about grade.
14 We should be talking about the main floor, and
15 that's why I don't think this is applicable.
16 Even though they're similar, maybe. But
17 because of slopes, that affects the main level
18 differently, and the reg specifically speaks
19 to below the main floor.

20 COMMISSIONER TURNBULL: You're
21 basically saying the main floor is the lobby
22 entrance, where you come into the building.

1 that's the main level?

2 CHAIRPERSON MILLER: Well, I
3 didn't exactly say that. We were talking
4 about --

5 COMMISSIONER TURNBULL: I just
6 wanted to clarify.

7 CHAIRPERSON MILLER: I don't know,
8 usually it is, but we're talking about two
9 buildings, two --

10 COMMISSIONER TURNBULL: Two
11 buildings; right.

12 CHAIRPERSON MILLER: Or two
13 structures, which gets confusing. But what
14 I'm saying is I don't see it in our evidence
15 that it's above -- there's a connection above
16 the main level.

17 COMMISSIONER TURNBULL: Right.

18 CHAIRPERSON MILLER: Whatever main
19 level may be identified, I don't see it here.

20 COMMISSIONER ETHERLY: I mean,
21 perhaps just to kind of inform my thinking --
22 an again, ultimately, I'm not certain if it

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1 would have an impact, cause again, under
2 today's standards, at least as far as that
3 patio and walkway, that wouldn't be
4 sufficient.

5 But perhaps through the Chair to
6 OAG, I want to make sure that I'm reading the
7 appellant's argument, I'm just focusing on the
8 appellant's argument now, reading that
9 argument correctly in terms of the discussion
10 of the fire door, and maybe the patio.

11 And again, this is perhaps a
12 little bit of an academic conversation but I
13 just want to make sure that we satisfactorily
14 dispose of I think the arguments that the
15 appellant is making about how you interpret
16 the issue of grade and the downward slope.

17 So I just want to make sure I'm
18 not missing it, cause I think there's -- I
19 think the appellant is suggesting that there's
20 a different main floor compared to what the
21 intervenor is arguing.

22 And maybe we don't "buy that." I

1 just want to be sure that we're clear in
2 saying we don't buy that argument.

3 CHAIRPERSON MILLER: I just want
4 to be clear what you're asking OAG, because we
5 don't want to bring OAG into our
6 deliberations.

7 COMMISSIONER ETHERLY: We're not
8 under a motion at this particular point in
9 time, so -- well, no, no, it's a public
10 meeting, so you're correct. But let me
11 clarify what I'm asking.

12 I want to be sure that I am
13 adequately representing the argument that I
14 thought the appellant was making.

15 Ultimately, it may end up still
16 not being, not amounting to "a hill a beans,"
17 because it doesn't, from the standards of
18 today, conform with the idea of what a
19 connection is.

20 But I just want to make sure that
21 we are disposing of the right argument, and I
22 think part of the argument was that those

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1 loading dock connections are in fact above
2 grade from the appellant's perspective, and as
3 such could be viewed as sufficient
4 connections.

5 I think what I'm hearing from my
6 colleagues is that no, they are not, nor is
7 that walkway patio, even if you were to
8 presume that that walkway patio area is a
9 connection, which I'm not suggesting that it
10 is. But perhaps I'm just trying to make sure
11 I'm clear in disposing of that fire door
12 argument.

13 I think part of our discussions
14 were assuming that we all were in agreement
15 that those fire doors are in fact below grade.
16 Below the main floor. Let me put it that way.
17 Below the main floor.

18 So that's what I was seeking
19 clarification from OAG on, more of a, perhaps
20 just an understanding of the appellant's
21 argument for clarity's sake as opposed to, you
22 know, a reading on zoning reg stuff.

1 CHAIRPERSON MILLER: The only
2 thing I'll say is it sounds more like a
3 factual issue to me, where you think they're
4 located. But I will tell you that the
5 definition of building, which is what we're
6 dealing with, says when separated from the
7 ground up or from the lowest floor up, each
8 portion shall be deemed a separate building
9 except as provided elsewhere in this title,
10 and the existence of communication between
11 separate portions below the main floor shall
12 not be construed as making the structure one
13 building.

14 I think you have to determine for
15 yourselves what you think is the main floor or
16 one or both buildings. It's a factual
17 question.

18 COMMISSIONER ETHERLY: Gotcha. So
19 the question to my colleagues is perhaps just
20 drawing out into starker relief here, the
21 issue of, are we all in agreement on what the
22 main floor is?

1 COMMISSIONERR TURNBULL: Is that
2 for the purposes of the discussion around the
3 fire doors or the ledge?

4 COMMISSIONER ETHERLY: Both.

5 COMMISSIONER TURNBULL: Okay.

6 COMMISSIONER ETHERLY: Both.

7 COMMISSIONER TURNBULL: I can see
8 with respect to the ledge, very clearly, that
9 it may affect the analysis somewhat, but, for
10 me, it would not affect the conclusion at all,
11 based on Mr. LeGrand's testimony about
12 functionality and the only purpose for that
13 ledge being to access grades and that -- I'm
14 persuaded by that testimony and the
15 conclusions to be drawn --

16 COMMISSIONER ETHERLY: And I would
17 agree with that. I would agree with that.

18 COMMISSIONER TURNBULL: On the
19 fire door piece, I'm going to defer back to
20 you and maybe hear a little bit more about how
21 that would affect the conclusion.

22 CHAIRPERSON MILLER: And I believe

1 Mr. Etherly, you're looking at an earlier
2 pleading by the appellant, and I just want to
3 note, if I'm looking at this correctly, it
4 doesn't look, in the most recent post-hearing
5 --

6 COMMISSIONER ETHERLY: That
7 there's a reference to that --

8 CHAIRPERSON MILLER: --
9 submission, that, yes, that the appellant is
10 even arguing that point at this juncture in
11 the proceeding. But I believe that the two
12 buildings aren't lined up exactly the same,
13 and therefore the main floor of each one may
14 be a little bit different.

15 But I don't believe in this case
16 there is a connection or communication below
17 the main floor.

18 COMMISSIONER ETHERLY: Thank you,
19 Madam Chair, for the impromptu opportunity to
20 just kind of review a couple a things.

21 I'm still, not, not troubled,
22 cause I think the ultimate outcome, as Mr.

1 Loud indicated, is most certainly not impacted
2 by the ledge or the patio that we've referred
3 to. I am perhaps simply trying to make sure
4 that that fire door issue is dealt with
5 appropriately, because I think from the
6 standpoint of today's standards, in terms of
7 communication, connection between buildings,
8 fire doors, in my opinion, would most
9 certainly satisfy the definition.

10 The issue is, of course, are those
11 fire doors appearing in this structure at the
12 appropriate level? I think the argument, all
13 around, from the intervenor here, is that
14 clearly they do not, and I just simply want to
15 be sure that we're in agreement on that
16 because I recall there was another argument
17 presented by the appellant with respect how
18 you view that.

19 Now again, there's a lot of stuff
20 going on here because part of the argument
21 was, hey, one, we had a decision in 1980,
22 which we relied upon, that clearly viewed this

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1 as one building. I think we've disposed of
2 that question and put that to rest.

3 So the issue is how do you now
4 deal with this issue.

5 Part of the argument, in addition
6 to the 1980 piece on the part of the
7 appellant, was we have other factors which,
8 while they may not satisfy the technical
9 definition, we have other factors which speak
10 to interpreting this as one building. I'm not
11 swayed by that.

12 You know, that's kind of almost
13 like the totality of the circumstances. If
14 you look at the whole building in the context
15 of how it's used and set up, hey, it's one
16 building, and I'm not going there.

17 I'm simply trying to make sure
18 those fire doors are dealt with in the correct
19 way, and in order for those fire doors not to
20 constitute a connection, they would have to be
21 of course below the main level.

22 So I just want to make sure that

1 that question is clearly answered by us.

2 CHAIRPERSON MILLER: I mean, we
3 can look for that, but I think if that were
4 so, if they were above the main level, that it
5 would be in our face, that the appellant would
6 be making that point very strongly, cause
7 that's what we've been talking about.

8 So the fact that we even have to
9 search I think makes it very unlikely -- from
10 my memory of the hearing, I think I remember
11 seeing that you had to go down and through
12 these doors and stuff, and that it was
13 actually below the main level.

14 But we can look for it in the
15 pleadings, if you would feel, you know, more
16 comfortable.

17 COMMISSIONER ETHERLY: No. I
18 mean, I don't think it's a -- you know, I
19 don't feel as though I'm the mouse in the
20 labyrinth here. I mean, I think it's clear at
21 page eight. Now granted it's --

22 CHAIRPERSON MILLER: Page --

1 COMMISSIONER ETHERLY: I'm looking
2 at page 8 of Exhibit 19, of what is the
3 appellant's statement in support of its
4 appeal.

5 Now when you compare that to what
6 was submitted by the appellant at Exhibit No.
7 32, which is the post-hearing submission,
8 there most certainly is -- thank you very
9 much, Mr. Turnbull. I'm stealing some of Mr.
10 Turnbull's documentation.

11 There is clearly not a major
12 placement of that argument, up front and
13 center, and i agree with you -- there's not
14 fanfare with respect to discussion about the
15 fire doors off the rear loading dock.

16 At page five, under conclusion,
17 there is a reference again, to kind of that
18 overall totality of the circumstance, i.e.,
19 the building -- and I'm reading verbatim.

20 "The building has not been
21 substantially modified since its original
22 construction and it continue to exist as a

1 single building on a single record lot with a
2 single roof, featuring multiple roof
3 structures, shared courts and rear yards,
4 shared parking access, shared parking and
5 loading, and a shared measuring point, which
6 are all relevant indicia for zoning purposes."

7 Again I understand, or at least I
8 tend to agree with I think the direction of my
9 colleagues, that that argument perhaps isn't
10 as compelling as the appellant might want it
11 to be in terms of especially looking at what
12 wasn't built as a result of that 1980
13 decision.

14 I just want to simply make sure
15 that we're just doing with those fire doors ,
16 and, you know, I don't want to "beat a dead
17 horse," or for that matter, even a horse that
18 might not necessarily factor in the race at
19 the end of the day.

20 But I just want to make sure that
21 we're clear, that if we're not counting those
22 fire doors as connections, it's because we're

1 finding that they are in fact below the main
2 level.

3 COMMISSIONER TURNBULL: Madam
4 Chair, Mr. Etherly, I was just going back
5 through the record for the October 9th
6 hearing, and at that point Ms. Harmon
7 testified, and I'm just going to read her
8 comment.

9 "And I have to tell you, I never
10 knew about the below-ground fire doors. I
11 never knew where they went. There is an alarm
12 on them, so the residents do not use them.
13 Similarly, tenants of the office building
14 cannot gain access to the condominium
15 building. There is no passageway between the
16 two buildings. So I think even though there
17 is a theoretical connection with the fire
18 doors, they're really for an emergency exit
19 only, from that level. It's in a utilitarian
20 level and I think, again, as part of a main --
21 it's not a main connection. In fact it's
22 really not an accessible access or

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1 communication between the two buildings, which
2 I think, if you're really looking at
3 connection, you're really looking at something
4 that people are going to be using.

5 CHAIRPERSON MILLER: But it's also
6 below the main floor.

7 COMMISSIONER TURNBULL: It's also
8 below the main floor.

9 CHAIRPERSON MILLER: Right.

10 COMMISSIONER ETHERLY: That's the
11 point. If we're all in agreement that it's
12 below the main floor, the fine. I just want
13 to make sure I understand that. That, to me,
14 is still not clear. Again, I apologize for
15 this meandering kind a 20 minute, you know,
16 kind of conversation on this particular point,
17 especially because I didn't highlight it to my
18 colleagues in executive session.

19 But I just want to make sure that
20 we're all clear that the main floor is where
21 and what.

22 CHAIRPERSON MILLER: How do you

1 define main floor?

2 COMMISSIONER ETHERLY: Exactly.
3 What are you using as the main floor? I think
4 that it's just an important point, that I want
5 to be sure is not left as an unspoken
6 assumption, that we just -- you know, the main
7 floor is something different.

8 MEMBER DETTMAN: Madam Chair,
9 perhaps I'm looking at Exhibit E -- yes --
10 Exhibit E of BZA's Exhibit 19, which shows
11 sort of a section of the building. Page three
12 of that exhibit. And it appears that the
13 office portion of the building is labeled --
14 there's a label that says "office, ground
15 level," and on the residential portion of the
16 building there is a "residential, ground
17 level."

18 And so if we could sort of swap
19 the term ground level with main floor, which
20 I think would be a safe thing to do, you'll
21 notice that the residential ground level is
22 lower than the office ground level.

1 And so if we were able to find
2 somewhere in the testimony, somewhere in the
3 record, that the location of the fire doors is
4 below the residential ground level, I think
5 that may allow us to draw the conclusion that
6 this actually is the fire doors, the
7 connection to the fire doors is actually below
8 the ground level.

9 CHAIRPERSON MILLER: Okay. Could
10 I interrupt you for a second?

11 MEMBER DETTMAN: Sure.

12 CHAIRPERSON MILLER: I'm actually
13 surprised to find that main floor is defined
14 in our definitions as the floor of the story
15 in which the principal entrance of the
16 building is located. Does that help? It
17 helps me.

18 COMMISSIONER ETHERLY: So what's
19 your principal entrance?

20 CHAIRPERSON MILLER: It's not the
21 underground parking garage. It would be --
22 normally, yes, it would be probably the lobby,

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1 or the first main floor of a apartment
2 building or office building. Yes. Where the
3 principal entrance is. That's usually -- the
4 principal entrance is usually at the lobby.

5 COMMISSIONER ETHERLY: If you look
6 at -- and I apologize for not having an
7 exhibit number -- but my colleagues will
8 recall the transparent binder of photograph
9 submissions that was provided by the opponent,
10 and there are a number of pictures which refer
11 to the fire doors to which I am referencing.

12 And in particular, it's at figure
13 14, a view showing below-grade fire doors in
14 alley beneath terrace. Then figure 15, a view
15 showing below-grade fire doors in alley
16 beneath terrace. And then also figure 16,
17 same caption view, showing below-grade fire
18 doors in alley beneath terrace

19 I'm comfortable finding that those
20 are below the main level. I mean, perhaps
21 I've just been a little too doggedly committed
22 to just making sure we're clear on that. I

1 mean, I don't know, maybe I'll blame it on Mr.
2 Tabbs in his absence, just because, you know,
3 these two cases are where -- I mean, all cases
4 are where you're trying to just make sure we
5 get the right outcome, and I just want to make
6 sure I'm not "missing the boat" on those fire
7 doors.

8 But I'm comfortable moving
9 forward, Madam Chair, and simply finding that
10 those fire doors occur below the main lobby
11 level and we can move forward.

12 MEMBER LOUD: I think also, Mr.
13 Etherly, if you look at the exhibits you just
14 pointed to, in concert with Mr. LeGrand's
15 testimony, that he went out to the building
16 on, I think it was September the 6th, and he
17 viewed the bottom portion of the residential
18 building, he walked through the lobby, he
19 personally observed the fire doors below
20 grade, and I'm lifting his testimony directly.
21 That would just further support I think what
22 you're highlighting about the photographic

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1 exhibit.

2 I don't know if that sort a hits
3 you right where it needs to be, where you need
4 to be hit, but I do recall him testifying to
5 that effect.

6 COMMISSIONER ETHERLY: No, you're
7 absolutely correct, and that is indeed, you
8 know, reflected in my notes as well. So the
9 "hit" is very much on target. I'm comfortable
10 moving forward, Madam Chair. I think we've
11 more than adequately discussed it.

12 I'm not hearing any compelling
13 interpretations to the contrary with respect
14 to that particular interpretation, you know,
15 so I'm comfortable moving forward.

16 CHAIRPERSON MILLER: Okay. Are
17 there any other comments? I guess we were
18 talking about whether there are any
19 communications above the main level of the
20 floors, and I think the conclusion is that
21 there aren't, and that's what the definition
22 of building refers to when it's talking about

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1 two structures becoming one building.

2 Are there other comments in
3 general? Or I can go through some other
4 points.

5 Okay, that was the main point of
6 the zoning administrator's determination. The
7 other point that he stated was that each
8 building could be raised without affecting the
9 other, and that doesn't seem to even be an
10 issue in this case, okay, so I don't think we
11 even have to go there.

12 If we go to finding that we don't
13 have to rely on what was built because of the
14 1980 order, even though it was built not in
15 accordance with that order, and then whether
16 the ZA was correct in using today's standards,
17 even though I'm not even clear that 199
18 building definition, I believe that was in
19 existence in 1980, so I think they actually
20 were probably looking at the same definition,
21 and, in fact, one of the board members was
22 also commenting about access.

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1 So I'm not even sure that it's so
2 different right now, even though we have some
3 case law on that question.

4 I just want to touch briefly on
5 the question about the roof structures, and I
6 just would note that the applicant also said,
7 you know, they only treated the roof structure
8 special exception relief because it was
9 treated as one building. But I don't know.
10 I mean, I don't think we have to decide that.
11 But when I was looking at the roof structures,
12 regulations, they also refer to building or
13 structure, etcetera.

14 So I don't think that that's
15 definitive. For instance, 411.2 says:

16 When located below, at the same
17 roof level, with or above the top story of any
18 building or structure, penthouses shall be
19 subject to the provisions of, etcetera.

20 And finally, I think that
21 applicant raises the question, equitable
22 arguments, that, you know, because they've

1 been given all these certificates of occupancy
2 and building permit, that they should now be
3 treated as one building for equitable reasons,
4 and I find that kind of hard to swallow, in
5 that here's a building that is unlawful, in
6 the sense that it was built out of compliance
7 with the board order, and so I don't think
8 equities favor that.

9 And then the question was also in
10 the context of the TDRs, 1709.2, well, to
11 consider it for purposes of applicability of
12 section 1709.20, and it seems to me th
13 equities would favor having the board take a
14 look at any adverse impacts that might occur
15 as a result of the additional building. The
16 equities would not favor giving matter-of-
17 right status and the benefits of no review to
18 a building that was built, again, out of
19 compliance with the order.

20 Any other comments?

21 [No response]

22 CHAIRPERSON MILLER: With respect

1 to giving the ANC great weight, I think I said
2 this earlier, but basically the ANC's reports,
3 if you've looked at and do give great weight
4 to, go to the adverse impacts that may result
5 as a result of relief that might be granted in
6 another case.

7 So I don't think we really should
8 address those issues today because they're not
9 relevant to this legal question.

10 Any other comments?

11 [No response]

12 CHAIRPERSON MILLER: Okay. At
13 this point, then, I would move to deny the
14 Appeal No. 17667 of Minshall Stewart
15 Properties, LLC, pursuant to 11 DCMR sections
16 3100 and 3101, from the April 20, 2007
17 decision of the Zoning Administrator that the
18 buildings on the subject single lot constitute
19 two buildings for zoning purposes.

20 Do I have a second?

21 COMMISSIONER TURNBULL: Second.

22 CHAIRPERSON MILLER: Okay. I

1 would just add that based on our analysis
2 today and the evidence in the record, I would
3 suggest that the Zoning Administrator did not
4 err in his conclusion that these constitute
5 two buildings for zoning purposes.

6 Any other comments?

7 [No response]

8 CHAIRPERSON MILLER: All those in
9 favor say aye.

10 [Chorus of ayes]

11 CHAIRPERSON MILLER: All those
12 opposed? All those abstaining?

13 MR. MOY: The staff would record
14 the vote as five to zero to zero. This is on
15 the motion of the Chair, Ms. Miller, to deny
16 the appeal, seconded by -- I heard two voices
17 -- it's either Mr. Turnbull or Mr. Etherly.
18 I'll leave that to the Chair to decide.

19 CHAIRPERSON MILLER: Mr. Turnbull,
20 thank you.

21 MR. MOY: Thank you very much,
22 Madam Chair. In support of the motion, then,

1 Mr. Etherly, Mr. Loud and Mr. Dettman.

2 The next action of the board goes
3 to the Appeal 17615 of William J. Harnett,
4 pursuant to 11 DCMR 3112 from the November
5 17th, 2006 administrative decision of the
6 Zoning Administrator, Department of Consumer
7 and Regulatory Affairs, to issue Building
8 Permit no. 101019, permitting the alteration
9 and repair, including striping five new
10 parking spaces in the owner's parking garage,
11 identified in yellow as spaces P-1 through P-
12 5.

13 The subject property is located in
14 the W-3 District at premises 3030 K Street,
15 N.w., and that's in Square 1173, Lot 102.

16 At the scheduled meeting on
17 October 2nd, 2007, the board convened, and in
18 preliminary matter acted on the appellee's,
19 which is DCRA's, motion for an enlargement of
20 time for the parties to respond to their late
21 filing, which is Exhibit No. 40.

22 The board granted the motion and

1 rescheduled its decision to October 23rd. The
2 parties were allowed to respond to DCRA's
3 proposed findings of fact and conclusions of
4 law by October 16th.

5 There is a filing, Madam Chair, in
6 your case folders from the appellant titled
7 memorandum in response to District of Columbia
8 proposed findings of fact and conclusions of
9 law, and that is identified as Exhibit 41.

10 The board is to act on the merits
11 of the appeal and the staff will conclude its
12 briefing at this point.

13 CHAIRPERSON MILLER: Okay. We
14 have before us, certainly, an appellant who
15 has been aggrieved by changes to parking
16 spaces that took place in his condominium's
17 parking garage.

18 What I think I'd like to do is
19 first, you know, highlight what the violations
20 are before we get into them, and then we can
21 look at them one by one and also talk about
22 one of the generic issues before us, and that

1 is required versus unrequired parking.

2 But just to highlight the specific
3 parking violations that we're talking about.
4 One is violation of 2100.2. The appellant
5 alleges that the owner of the condominium
6 didn't provide a parking plan showing the
7 location, dimensions and grades of all parking
8 spaces and approaches to it.

9 That the aisle between parking
10 spaces P-11 and P-12, and parking spaces P-2
11 and P-3 is less than 17 feet, in violation of
12 11 DCRM section 2117.5.

13 That parking space five does not
14 maintain a minimum vertical clearance of at
15 least six feet, six inches, as required by
16 2115.5. Originally, there was an allegation
17 that this was true about parking spaces one
18 and four, but at the hearing, it was
19 stipulated that only parking number five was
20 being challenged.

21 Four. Parking spaces two and
22 three encroach on a walkway because drive

1 aisle is also a walkway, and parking two and
2 three do not have end stripes or wheels, in
3 violation of 11 DCMR section 2117.7.

4 And five. Parking space -- it
5 says two and three do not furnish reasonable
6 and convenient parking facilities for the
7 occupants.

8 And then also the appellant makes
9 the general argument about violation of
10 2100.2, .3, and 2117.1 and 2117.3, that
11 there's a logical progression in these
12 regulations, and looking at them altogether,
13 you can't reconfigure or alter a parking
14 garage after you originally get your approval
15 and a matter-of-right form from the Zoning
16 Administrator.

17 Okay. So I think it would be
18 useful to look at them seriatim, and I would
19 also say I found all of the -- there were a
20 lot of pleadings on this issue, so we
21 certainly have all the arguments before us,
22 and I would note that, in particular, that the

1 Zoning Administrator also went through each
2 one and explained the basis for his
3 determination and since this is a challenge to
4 the Zoning Administrator's decision, that was
5 very useful as well.

6 Okay. So violation of 2100.2. I
7 want to get my parking regs in front of me
8 also. Okay. 2100.2 says no application for
9 a building permit, for a building or structure
10 to be erected, on or after May 12th, 1958,
11 shall be approved, unless there is included
12 with the plans for the building or structure
13 a parking plan showing the location,
14 dimensions and grades of all parking spaces
15 and approaches thereto in accordance with the
16 provisions of this chapter.

17 Now my understanding is that the
18 alleged violation goes to when Mr. Crews was
19 approving the permit for the additional
20 spaces, for the most recent configuration of
21 the lot, and this regulation, according to
22 DCRA, was not violated, because it only comes

1 into play when the building is constructed.

2 Do you have comments on that?

3 [No response]

4 CHAIRPERSON MILLER: Let me just
5 refresh everybody that the appeal goes to the
6 Zoning Administrator's permitting the
7 alteration and repair, including striping five
8 new parking spaces in the owner's parking
9 garage, identified in yellow as spaces P-1
10 through P-5. So we're talking about that
11 permitting.

12 So I mean, I would tend to agree
13 with that interpretation, I think that that's
14 a reasonable one, that this type of parking
15 plan is required when the building's built,
16 but not at this point in time.

17 Comments?

18 [No response]

19 CHAIRPERSON MILLER: Okay. Let's
20 go to the next one, 2117.5. Except as
21 provided in 2115.9 through 2115.18 and 2117.6,
22 when required parking spaces are so arranged,

1 that an aisle is required for accessibility or
2 maneuvering space between rows of two or more
3 parking spaces, or between a row of two or
4 more parking spaces and the perimeter of the
5 area devoted to parking spaces, the aisle
6 shall have a clear width of not less than 20
7 feet or 90 degree angled parking, and not less
8 than 17 feet for angled parking that is 60
9 degrees, or less, as measured from the center
10 line of the aisle.

11 Okay. This is the first parking
12 violation regulation that raises the question
13 about required parking.

14 In this case, the Washington
15 Harbor had 48 parking spaces but was only
16 required to provide twelve, according to the
17 parking table. In 2004, it added the five
18 spaces involved here. The table of parking is
19 identified as -- look at 2100.

20 Okay. In looking to see what
21 required means, you look at 2101 which is
22 called the Schedule of Requirements for

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1 parking spaces, and at the top of the chart it
2 says number of parking spaces -- it says Uses
3 and then Number of Parking Spaces Required.

4 DCRA has argued that the required
5 spaces refers to the number that's required.
6 So in this case that would be twelve, and that
7 when regulations talk about obligations for
8 required spaces, they're only talking about
9 those twelve. And the appellant's arguing
10 that you can't just pick twelve, you can't
11 just designate which ones are required, and
12 because they didn't even designate which ones
13 were required, that they all should be treated
14 as required spaces.

15 However, I think that the regs do
16 distinguish between required and not required
17 and we have to make a distinction in
18 interpreting it, and the way, I think this
19 board has always interpreted required spaces
20 is that it does go to a certain number
21 identified in that table or otherwise, and
22 those are the ones -- that number's required

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1 to comply with the regulations.

2 So if you have twelve out of 35
3 and only twelve are required, that twelve
4 comply with those regulations referring to
5 required spaces.

6 So I think that there's a
7 reasonable and, if not correct, interpretation
8 by the Zoning Administrator. So I believe
9 that the -- okay. So then we look at the
10 allegation again, and that is that the aisle
11 between parking space P-111 and P-112 and
12 parking spaces P-2 and P-3 is less than 17
13 feet, in violation of 2117.5, and I believe
14 the DCRA said that those are not required
15 spaces, and so they don't have to comply with
16 that regulation.

17 Okay. Another alleged violation
18 was that P-5 does not maintain a minimum
19 vertical clearance of at least six feet, six
20 inches, as required by 2115.5. Okay. I don't
21 think I need to read that. That's what 2115
22 requires, and that applies to all parking

1 spaces.

2 Okay. So basically, DCRA has
3 stated that they believe the evidence that
4 this clearance is not six feet, six inches,
5 has not been made, has not been presented by
6 the appellant, that it's the appellant's
7 burden to prove that it did not meet this
8 requirement.

9 And also that the Zoning
10 Administrator is not obligated to do a site
11 visit in approving a parking plan, and that he
12 can rely on the representations made by the
13 applicant. And I think we explored that, you
14 know, what is the practice, and then that is
15 the case, that the ZA doesn't have the
16 resources do all these kind of inspections, to
17 double-check what's provided to Zoning
18 Administrator, and if there is a
19 misrepresentation made, that that's something
20 else. I mean, that's an enforcement action.

21 So when I looked at the evidence,
22 I don't recall seeing a clear case that this

1 was proven, that -- at least in this case --
2 that the minimum vertical clearance was not
3 met.

4 I think the evidence did show that
5 the parking plan that the Zoning Administrator
6 relied on, that was approved during
7 construction of the building, showed locations
8 of new spaces and showed a junction box, a
9 vertical clearance of six feet, eight inches.
10 That's what they say. So I didn't see
11 evidence, when I went through the pleadings,
12 that countered that.

13 Okay. Are you ready to move on?
14 Okay. The fourth one was that parking spaces
15 two and three encroach on a walkway because
16 the drive aisle is also a walkway and parking
17 spaces two and three do not have end stripes
18 or wheels in violation of 11 DCMR section
19 2117.7.

20 Okay. What DCRA said that they
21 weren't walkways designated on the approved
22 plans that were recorded in the Office of the

1 Surveyor, but there is a walkway that is
2 protected from encroachment by a wheel stop,
3 and I think that the appellant was trying to
4 make a point that this other drive aisle was
5 used as a walkway. But to me, it didn't get
6 to the point where it was a walkway under the
7 definition that was required to have that
8 wheel stop.

9 2117.7 says: The public rights of
10 way as well as private walkways and driveways
11 shall be protected from vehicular encroachment
12 from all parking spaces by wheel bumper
13 guards, curb guards, rails or screening,
14 between the property line and the perimeter of
15 the parking area. Parking shall be designed
16 so that no vehicle or any part thereof shall
17 project over any lot line or building line.

18 That's again the appellant's
19 burden of proof to show and I didn't see that
20 it was met. I did see that there was a
21 walkway and that was protected by a wheel
22 stop.

1 All right. Number five. Parking
2 spaces two and three do not furnish reasonable
3 and convenient parking facilities for the
4 occupants as required by 2116.8.

5 Okay. This is where we get into
6 the question of whether 2116.8 basically
7 stands on its own or whether it is a part of
8 what's done in the context of special
9 exception. 2116.5 provides that the BZA can,
10 pursuant to 3104 for special exceptions, open
11 parking spaces accessory to any building or
12 structure located anywhere on a lot upon which
13 the building or structure is located, or
14 elsewhere, except in the case of the one
15 family dwelling, etcetera.

16 Okay. So that's the beginning of
17 this special exception authority, to locate
18 accessory, open parking spaces accessory to a
19 building or structure.

20 And then it proceeds down, I
21 believe, to say what the board can determine
22 in that context. 2616.6 talks about the board

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1 shall determine whether it's practical or not,
2 to locate the spaces in accordance with 2116.2
3 for certain reasons, and then talks about when
4 the accessory parking spaces are to be located
5 elsewhere, the lot upon which the building or
6 structure they're intended to serve is
7 located, then certain things can happen and
8 etcetera.

9 So the long and short of this is
10 that this isn't really required by this
11 parking lot, that it's not a lot that was
12 authorized by special exception, that this was
13 a matter of right, and therefore 2116.8
14 doesn't apply. Do you read that that way?
15 Okay. It goes, actually, from 2116.5 to
16 2116.9, which the appellant also raises, that
17 we should impose conditions on this lot.

18 And for the same reasons I don't
19 believe that we can, that that's imposing
20 conditions in the context of a special
21 exception proceeding, not in the context of an
22 appeal.

1 Okay. Next. This is the more
2 general one. Violation of 2100.2, 2100.3,
3 2117.1 and 2117.3. According to the
4 appellant, the logical progression is set up
5 by these sections for application,
6 construction, occupancy and maintenance of
7 parking spaces, and that this has been
8 violated by reconfiguration or alteration at
9 a later time.

10 All right. As I said, 2100.2, we
11 referenced this earlier, it talks about
12 application for building permit or structure
13 to be erected on or after May 12th.

14 It says: No application for a
15 building or structure to be erected on or
16 after May 12, 1957 shall be approved, unless
17 there is included with the plans for the
18 building structure a parking plan showing the
19 location dimensions and grades of all parking
20 spaces and approaches thereto in accordance
21 with the provisions of this chapter.

22 I think that that provision really

1 only comes into play when the building is
2 constructed, and that it does not come in
3 later with respect to maintenance. Do you?
4 I mean, I would think that this parking plan
5 would be, you know, on file for always; but
6 that's about it.

7 No certificate of occupancy shall
8 be issued for the use of the building or
9 structure erected on or after May 12, 1958,
10 unless the required parking spaces have been
11 provided in accordance with the parking plan
12 provided for in the approved building permit.

13 That's 2100.3, and I think DCRA
14 said, and I would agree, that we don't have at
15 issue a certificate of occupancy being issued.

16 So then we go to 2117.1. Access,
17 maintenance and operations. 2117.1. The
18 parking spaces required by this chapter shall
19 be provided and maintained so long as the
20 structure that the parking spaces are designed
21 to serve exist.

22 And 2117.3 says: All required

1 parking spaces shall be clearly striped and
2 lined according to the dimensions specified in
3 2115. Durable materials that are all-weather
4 impervious shall be used. Striping shall be
5 maintained for as long as the parking spaces
6 requiring the striping are in existence.

7 Both of these regulations refer to
8 required parking spaces and I think that
9 that's not at issue in this case, that the
10 required spaces comply with the regs as the
11 rest of the other spaces.

12 I think we covered the specific
13 parking regulations which are kind of dry, and
14 were not that hard to determine, once we
15 separated required and unrequired, and special
16 exception regulations and matter of right.

17 I think it appears that what's
18 happened certainly is that the owner of the
19 lot has reconfigured it and the appellant in
20 this case has some serious grievances about
21 what's happened to his parking space.

22 I just think that I don't see

1 violations of the zoning regulations per se.
2 I understand that this appellant is also
3 pursuing his grievances in another forum and
4 that's, you know, maybe more likely where he
5 will get relief.

6 But our job is just to look at the
7 regulations, imperfect as they are, and see
8 whether the Zoning Administrator erred in
9 applying them, and based on my analysis, it
10 looks like the Zoning Administrator actually,
11 you know, applied them in a very thoughtful
12 manner, looking at the zoning regulations.

13 So I would say that the Zoning
14 Administrator did not err.

15 COMMISSIONER ETHERLY: I'll agree
16 wholeheartedly with your analysis, Madam
17 Chair. I would trust that members of the
18 audience won't take our silence as perhaps
19 evidence of the fact that we are somewhat
20 exhausted from a very vigorous discussion on
21 the prior issue, the prior case before us,
22 but, rather, it is absolutely the alternative

1 conclusion.

2 This was a very -- after listening
3 to the facts, going through what was
4 absolutely going on in that garage, and
5 looking at the relevant zoning regulations,
6 this turned into a complex set of facts with
7 a very clear-cut zoning rationale underlying
8 the decision of the Zoning Administrator, in
9 particular as it relates to the issue of
10 required versus nonrequired spaces. There was
11 a lot of discussion about how that's treated,
12 how that's dealt with in the zoning regs, and,
13 in particular, the issue of whether the zoning
14 regs speak to specific locations for parking
15 of that nature, and I think, in particular,
16 DCRA's submittal was very instructive.

17 The Zoning Administrator's
18 testimony was very instructive on that
19 particular issue, that there is in no way
20 shape or form an interpretation of the zoning
21 regs that results in a particular location
22 being accorded to required versus nonrequired

1 spaces.

2 When you look at other aspects of
3 the appeal as related to vertical clearance,
4 which you discussed, and as it related to the
5 issue of pedestrian walkways, on the vertical
6 clearance piece, a very straightforward
7 rationale with respect to the issue, that
8 there simply was not any evidence suggested to
9 speak to any violations of the six foot six
10 clearance issue.

11 And then finally with respect to
12 the pedestrian walkway. Again, this, at the
13 outset, had a very complicated set of facts
14 that this board had to wade through, and as is
15 indicated, there is indeed other steps
16 underway in another venue to perhaps deal with
17 other grievances, that may very well exist in
18 this particular instance, but with respect to
19 the zoning regulations, I can't say clearly
20 enough, that I think that the decision of the
21 Zoning Administrator, especially as
22 represented in the proposed findings of fact

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1 and conclusions of law, are right on target as
2 relates to the interpretation of required and
3 nonrequired spaces.

4 Thank you.

5 CHAIRPERSON MILLER: Thank you.

6 MEMBER LOUD: I think if I add
7 anything, I would just be redundant, but I
8 wanted to commend both the parties on the
9 briefings, and I tended to listen
10 significantly to the testimony that was
11 offered in both Mr. Crews' and Mr. LeGrand's
12 testimony regarding the lack of a requirement
13 to designate spaces that are not required, and
14 some of the other testimony about the 20 foot
15 aisle between P-11 and 2, P-11 and 3, and some
16 of the other spaces, was just very helpful to
17 me, particularly as a newer board member, and
18 I think pretty much everything that you guys
19 have already said speaks to where I come out,
20 so --

21 CHAIRPERSON MILLER: Okay. At
22 this point, then, I think we're ready for a

1 motion. I would move to deny Appeal No. 17615
2 of William J. Harnett, pursuant to 11 DCMR
3 section 3112, from the November 17, 2006
4 administrative decision of the Zoning
5 Administrator, DCRA, to issue Building Permit
6 No. 101019 permitting the alteration and
7 repair, including striping five new parking
8 spaces in the owner's parking garage,
9 identified in yellow as spaces P-1 through P-
10 5.

11 Do I have a second?

12 COMMISSIONER ETHERLY: Second,
13 Madam Chair.

14 CHAIRPERSON MILLER: Further
15 deliberation?

16 [No response]

17 CHAIRPERSON MILLER: All those in
18 favor say aye.

19 [Chorus of ayes]

20 CHAIRPERSON MILLER: All those
21 opposed? Those abstaining. Okay; go ahead.

22 MR. MOY: Staff would record the

1 vote as three to zero to two. This is on the
2 motion of the Chair, Ms. Miller, to deny the
3 appeal, seconded by Mr. Etherly. Also in
4 support of the motion, Mr. Loud. We have no
5 Zoning or other board member participating.

6 CHAIRPERSON MILLER: I think what
7 the board would like to do is take a very
8 brief break. We are still in the meeting and
9 I know that a hearing, hearings were set for
10 10:30. The next two cases that we're going to
11 be deciding should go fairly rapidly compared
12 to these. I just wanted to give you a "heads
13 up" on that at least, if you're here for the
14 hearing.

15 So we will be starting those
16 shortly. We're going to be taking a little
17 break right now, and so I guess what I expect
18 is then when we come back and finish these two
19 decisions, we can roll into the next hearing.

20 I think we'll be about five
21 minutes or so.

22 [Whereupon, a brief recess was

1 taken from 12:29 p.m. to 12:42 p.m.]

2 CHAIRPERSON MILLER: Okay. We're
3 back on the record. We have two more cases to
4 do, quickly, in our decision meeting.

5 MR. MOY: Thank you, Madam Chair.
6 With that, the next action of the board is to
7 act on the Motion for Stay to Appeal No. 17532
8 of AppleTree Institute for Education
9 Innovation, Inc.

10 This motion is to the original
11 appeal, which was pursuant to 11 DCMR 3100 and
12 3101 from the administrative decision of the
13 Zoning Administrator, DCRA, to require BZA
14 special exception approval for a proposed
15 addition to an existing building to
16 accommodate a public charter school use.

17 The appellant alleged that the
18 Zoning Administrator erroneously relied upon
19 the Zoning Commission's February 13, 2006
20 emergency rulemaking to require additional on-
21 site parking spaces.

22 The subject property is located in

1 the R-4 District at premises 138 12th Street,
2 N.E., Square 998, Lot 820.

3 Very briefly, this was originally
4 scheduled for October 2nd, 2007. Noting the
5 lack of a quorum and a concurring majority
6 vote on the members of the board, pursuant to
7 section 3125.1, the board rescheduled its
8 decision to October 23rd. So with that, the
9 staff will just say that the board is to act
10 on the merits for the request for a stay.

11 CHAIRPERSON MILLER: Thank you,
12 Mr. Moy.

13 Mr. Etherly.

14 COMMISSIONER ETHERLY: Thank you,
15 Madam Chair. I'd like to take this
16 opportunity to perhaps remind, although I'm
17 fairly certain that my colleagues will have no
18 need to be reminded, this is a case that has
19 had a long and, in some instances, tortuous
20 history with this board, especially in recent
21 months.

22 I wanted to remind my colleagues

1 of this board's action on a Motion for
2 Reconsideration on the part of ANC 6A as it
3 pertained to this board's decision, and with
4 regard to a couple of specific grounds, chief
5 amongst which for our concerns today were
6 concerns regarding disclosure issues and/or
7 bias or recusal issues by virtue of my
8 participation on the case.

9 This board I think in very clear
10 and excruciating detail, but necessarily so,
11 found in the alternative with regard to that
12 motion. I nevertheless, for purposes of this
13 motion for stay before us today, wanted to
14 nevertheless raise that issue again, highlight
15 to my board members that there does exist this
16 past history, if you will.

17 I will note for the record,
18 although I am sitting in this case in my
19 capacity as a participating Board of Zoning
20 Adjustment member, subsequent questions about
21 the particular alleged conflict of interest
22 matter did come before my attention pursuant

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1 to my Zoning Commission confirmation process.

2 So I wanted to again highlight
3 this for my board members. I continue to
4 stand by this board's decision of some weeks
5 back with regards to the finding that there
6 were absolutely no grounds for a recusal.
7 there were no grounds with respect to bias as
8 illustrated by the ANC in that particular
9 matter, and I think those same facts continue
10 to apply today.

11 For the sake of the record, I will
12 disclose that I was a former charter school
13 chairperson with respect to Washington Math,
14 Science and Technology Public Charter High
15 School. At one point in its earlier
16 existence, Washington Math Science was
17 affiliated with AppleTree Institute.

18 It is no longer the case, and has
19 not been affiliated with that institution for
20 many years. But I want to make that
21 disclosure.

22 As my colleagues will recall, one

1 of the concerned alleged by ANC 6A with
2 respect to its Motion for Reconsideration also
3 involved the advocacy, if you will, of an
4 organization which I serve on as a board
5 member, an organization which participated
6 with regard to some advocacy efforts around
7 the Zoning Commission's deliberations on this
8 matter.

9 Those advocacy efforts were
10 unknown to me, I was not involved in those
11 advocacy efforts, in any way, shape or form,
12 nor was my name or any other reflection of my
13 personage, if you will, employed in those
14 advocacy efforts.

15 Nevertheless, I wanted to
16 highlight that background for the benefit of
17 my colleagues. I believe, continue to believe
18 that I can sit impartially on any and all
19 matters as they relate to AppleTree Institute
20 and this particular matter, in particular, but
21 wanted to highlight it again for my
22 colleagues, because I think at this particular

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1 point it's perhaps just most important to be
2 sure that all of this is front and center, in
3 front of this board as we continue with
4 further action on this case, and clear in
5 front of the public, so should there be any
6 concerns that my colleagues may have, as we're
7 sitting in a decision meeting at this point,
8 if there are any concerns or questions that my
9 colleagues may have, I would be more than
10 happy to make myself available to answer any
11 questions at this point before proceeding on
12 the substance of the matter before us today.

13 Thank you, Madam Chair.

14 CHAIRPERSON MILLER: Thank you,
15 Mr. Etherly. I have absolutely no questions
16 for you.

17 MEMBER LOUD: Neither do I, Mr.
18 Etherly.

19 CHAIRPERSON MILLER: Okay. Thank
20 you. So I think we can proceed to address the
21 motion for stay pretty expeditiously. I would
22 note that it is filed by individuals who are

1 not individually before the board in the
2 proceedings below, but they were a part of a
3 larger party that was the Northeast Neighbors
4 for Responsible Growth, and therefore I think
5 that can consider this Motion for Stay unless
6 anyone has any other concerns.

7 Okay. I would also -- it's a stay
8 of our Order 17532, and I would like to note
9 that it's a stay pending appeal before the
10 Court of Appeals, and this party has also
11 filed the same stay before the Court of
12 Appeals, and the Court of Appeals has already
13 denied the motion for a stay on the basis of
14 Barry v. Washington Post Company and I would
15 suggest that we do the same.

16 I don't know if anyone wanted to
17 make comments. In general, the grounds for a
18 stay are a substantial likelihood that the
19 appellant will succeed on the appeal, whether
20 the denial of the stay would result in
21 irreparable injury to the appellant, whether
22 granting a stay would prejudice other parties

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1 and where lies the public interest.

2 And the only prong of that test
3 which the motion addressed was irreparable
4 injury and the movant is saying that it would
5 be irreparable injury because our order would
6 allow the issuance of permits which would then
7 lead to construction and then it would be an
8 extraordinary remedy for AppleTree to have to
9 tear down the work if the Court of Appeals
10 ruled the other way.

11 So I don't believe that that's
12 ever been, that scenario has been found to be
13 irreparable in the context of a stay.

14 So that's the only thing I want to
15 say specifically about the facts alleged here.
16 I'm ready to deny it. Others?

17 [No response]

18 CHAIRPERSON MILLER: Okay. I
19 think it's fairly sufficient, if not very
20 sufficient, that the court has already ruled
21 before us on this and found that a stay should
22 not be granted. So we would agree with the

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1 court in that matter and defer to the court.

2 All those in favor -- wait a
3 second. I didn't move it yet. I would move
4 to deny the appeal to stay Order 17532,
5 pending appeal to the Court of Appeals. Do I
6 have a second?

7 MEMBER LOUD: Second.

8 CHAIRPERSON MILLER: Further
9 deliberation?

10 [No response]

11 CHAIRPERSON MILLER: All those in
12 favor say aye.

13 [Chorus of ayes]

14 CHAIRPERSON MILLER: All opposed?
15 All those abstaining?

16 MR. MOY: The staff will record
17 the vote as three to zero to two. This is on
18 the motion of the Chair, Ms. Miller, to deny
19 the Motion for Stay, seconded by Mr. Loud.
20 Also in support of the motion, Mr. Etherly.
21 We have no Zoning or other board member
22 participating.

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1 The next and last action before
2 the board in the special public meeting is the
3 board's action on the Emergency Motion to Stay
4 BZA Appeal Order No. 17504.

5 This is to the original Appeal No.
6 17504 of JMM Corporation, pursuant to 11 DCMR
7 3100 and 3101, from the administrative
8 decision of Administrative Law Judges,
9 Department of Consumer and Regulatory Affairs,
10 for a revocation of certificates of occupancy
11 and the issuance of a cease and desist order
12 directed at Fun Fair Video for operating a
13 sexually-oriented business. The subject
14 property is located in the DD/C-2-C District
15 at premises 919 5th Street, N.W. That's in
16 Square 516, Lot 825.

17 On October 9th, 2007, the
18 appellant, JMM Corporation, filed a Motion to
19 Stay the final order of the board, the board's
20 decision of October 1st, 2007, which is
21 Exhibit 40. Since that date, the Office of
22 Zoning has received two subsequent filings.

1 On October 17th, 2007, one is from DCRA, which
2 is the D.C. opposition to the appellant's
3 emergency Motion To Stay, identified in the
4 case folder as Exhibit 42.

5 The second filing is an affidavit
6 of Department of Consumer and Regulatory
7 Affairs investigator Clement Stokes. The
8 document has been identified as Exhibit 43.

9 And finally, we also have a filing
10 from ANC 6C, Chairperson Karen Wert, dated
11 October 18th, 2007, and that document is
12 identified as Exhibit 44. The board is to act
13 on the merits of the Motion for Stay.

14 CHAIRPERSON MILLER: Thank you,
15 Mr. Moy. I'm not sure if you said this yet or
16 not, but I think it's very relevant here as
17 well, that the movant has also moved for a
18 stay before the Court of Appeals and that was
19 denied by the Court of Appeals, and also there
20 has been litigation in the Superior Court, and
21 the Superior Court recently ordered Fun Fair
22 to close.

1 So what's before us is a stay of
2 our order, so that Fun Fair can continue
3 operation, and applying the same standards
4 that I just articulated before, substantial
5 likelihood of success on the merits, denial of
6 the stay, whether it would result in
7 irreparable injury, granting a stay would
8 prejudice other parties or not, and where lies
9 the public interest.

10 Just touching upon this briefly,
11 first of all, I would defer to the courts,
12 that they've already decided that this place
13 should not stay in operation, and therefore I
14 believe it would be contrary to public
15 interest for us to grant the stay in this
16 case, and the irreparable injury that is being
17 argued here is, you know, money from not being
18 able to continue the business, and I don't
19 even think we really need to go through all
20 the factors. It just seems to me so clear,
21 that this operation, we found to be not in the
22 public interest, to begin with, and so

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1 therefore weighing how the community would be
2 affected versus this operation, certainly we
3 did rule in favor of the community and I see
4 no reason to grant a stay of our order.

5 Does anyone have any other
6 opinions on this?

7 MEMBER LOUD: Just to add that the
8 movant has the burden, I mean, very clearly,
9 and without going through the four-prong test,
10 the burden wasn't met in this case, if you
11 just looked at the very first element
12 regarding likelihood of success on the merits
13 and their pleading. Their pleading responds
14 to that element by saying hi, and then directs
15 the board to arguments made in the pleading,
16 and then you look in the rest of the pleading
17 and it says we incorporate by reference all of
18 our previous arguments in the whole case.

19 So that kind of analysis was
20 undertaken with respect to all of the elements
21 and, again, the movant has the burden of
22 really articulating why the board should

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1 afford that extraordinary remedy, and in this
2 case just didn't do it.

3 CHAIRPERSON MILLER: Okay. So
4 everyone ready to vote on this? Okay. I
5 would move to deny appellant's emergency
6 Motion to Stay BZA's final order.

7 COMMISSIONER ETHERLY: Seconded,
8 Madam Chair.

9 CHAIRPERSON MILLER: Further
10 deliberation?

11 [No response]

12 CHAIRPERSON MILLER: All those in
13 favor say aye.

14 [Chorus of ayes]

15 CHAIRPERSON MILLER: Opposed?
16 Abstaining?

17 MR. MOY: Staff would record the
18 vote as three to zero to two on the motion of
19 the Chair, Ms. Miller, to deny the emergency
20 Motion to Stay, seconded by Mr. Etherly. Also
21 in support of the motion, Mr. Loud, and no
22 Zoning or other board member participating.

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CHAIRPERSON MILLER: Thank you.

Does that conclude today's agenda
for the board's public meeting?

MR. MOY: Yes, ma'am. It does.

CHAIRPERSON MILLER: Okay. Then
this meeting is adjourned and I will call the
public meeting momentarily.

[Whereupon, at 12:58 p.m., the
special public meeting was adjourned]