

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY,

OCTOBER 9, 2007

+ + + + +

The Public Hearing 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
CURTIS ETHERLY, JR. Vice-Chairperson
MARC D. LOUD Board Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
BEVERLEY BAILEY Sr. Zoning Spec.
JOHN NYARKU Zoning Spec.

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.
SHERRY GLAZER, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

MAXINE BROWN-ROBERTS
JOHN MOORE

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minutes from the Public Hearing held on
October 9, 2007.

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

10:24 a.m.

CHAIRPERSON MILLER: Good morning, ladies and gentlemen. This is the October 9th Public Hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Ruthanne Miller. I'm the Chair. Joining me today to my right is the Vice Chair, Mr. Curtis Etherly, to my left is mayoral appointee, Marc Loud, and also joining us is Sherry Glazer from the Office of Attorney General and Beverley Bailey from the Office of Zoning.

Copies of today's hearing agenda are available to you and are located to my left in the wall bin near the door. Please, be advised that this proceeding is being recorded by a Court Reporter and is also webcast live. Accordingly, we must ask you to refrain from any disruptive noises or actions in the hearing room.

When presenting information to the Board, please, turn on and speak into the

1 microphone, first, stating your name and home
2 address. When you are finished speaking,
3 please, turn your microphone off, so that your
4 microphone is no longer picking up sound or
5 background noise.

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

14 The order of procedure for special
15 exceptions and variances is: One, statement
16 and witnesses of the applicant. Two,
17 Government reports, including Office of
18 Planning, Department of Public Works, DDOT,
19 etcetera. Three, report of the Advisory
20 Neighborhood Commission. Four, parties or
21 persons in support. Five, parties or persons
22 in opposition. Six, closing remarks by the
23 applicant.

1 The order of procedure for appeal
2 applications will be as follows: One,
3 statement and witnesses of the appellant.
4 Two, the Zoning Administrator or other
5 Government official's case. Three, case for
6 the owner, lessee or operator of the property
7 involved, if not the appellant. Four, the ANC
8 within which the property is located. Five,
9 intervenor's case, if permitted by the Board.
10 Six, rebuttal and closing statements by
11 appellant.

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

20 These time restraints do not
21 include cross examination and/or questions
22 from the Board. Cross examination of
23 witnesses is permitted by the applicant or

1 parties. The ANC within which the property is
2 based is automatically a party in a special
3 exception or variance case.

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

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

17 The Sunshine Act requires that the
18 Public Hearing on each case be held in the
19 open before the public. The Board may,
20 consistent with it's rules of procedure and
21 the Sunshine Act, enter Executive Session
22 during or after the Public Hearing on a case
23 for purposes of reviewing the record or

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1 deliberating on the case.

2 The decision of the Board in these
3 contested cases must be based exclusively on
4 the public record. To avoid any appearance to
5 the contrary, the Board requests that persons
6 present not engage the Members of the Board in
7 conversation.

8 Please, turn off all beepers and
9 cell phones, at this time, so as not to
10 disrupt these proceedings.

11 The Board will now consider any
12 preliminary matters. Preliminary matters are
13 those which relate to whether a case will or
14 should be heard today, such as requests for
15 postponement, continuance or withdrawal or
16 whether proper and adequate notice of the
17 hearing has been given. If you are not
18 prepared to go forward with a case today or if
19 you believe that the Board should not proceed,
20 now is the time to raise such a matter.

21 Does the staff have any
22 preliminary matters?

23 MS. BAILEY: Madam Chair, Members

1 of the Board, to everyone, good morning. Yes,
2 it has to do with the new Macedonia Baptist
3 Church and Christian Academy, Application No.
4 17666. The application was withdrawn, Madam
5 Chair.

6 CHAIRPERSON MILLER: And there is
7 no action required on the Board. Is that
8 correct?

9 MS. BAILEY: None is required.

10 CHAIRPERSON MILLER: Okay. Thank
11 you. And that is it for preliminary matters,
12 right?

13 MS. BAILEY: Just to swear the
14 witnesses in.

15 CHAIRPERSON MILLER: Okay. Then
16 would all individuals wishing to testify
17 today, please, rise to take the oath?

18 MS. BAILEY: Would you, please,
19 raise your right hand?

20 (Whereupon, the witnesses were
21 sworn.)

22 MS. BAILEY: Thank you.

23 CHAIRPERSON MILLER: Thank you,

1 Ms. Bailey. Would you call the first case,
2 please?

3 MS. BAILEY: Application No. 17669
4 of Winnie C. Foster, pursuant to 11 DCMR
5 3104.1, for a special exception to construct
6 a deck addition at the rear of a one-family
7 semi-detached dwelling under section 223. The
8 project does not meet the lot occupancy,
9 section 403, rear yard, section 404, and side
10 yard requirements at section 405. The
11 property is Zoned R-1-B and it's located at
12 6606 Blair Road, N.W. It is also known as
13 Square 3346, Lot 831.

14 The Board is in receipt of a
15 request for party status in this application,
16 Madam Chair.

17 CHAIRPERSON MILLER: Thank you.
18 Good morning. I'm sorry to keep you waiting.
19 Would you identify yourself for the record,
20 please?

21 MS. FOSTER: My name is Winnie
22 Carolyn Foster. I reside at 6606 Blair Road,
23 N.W., Washington, D.C.

1 CHAIRPERSON MILLER: Thank you.

2 MS. WHEELER: I'm Faith Wheeler.
3 I'm the ANC Commissioner in the Single Member
4 District 4B02.

5 CHAIRPERSON MILLER: Okay. And we
6 do have one party status application from, it
7 looks like, I don't know if I can pronounce
8 this name, Jusline Pallio. Anyway, is there
9 anyone here who filed a party status
10 application in this case? Okay.

11 Okay. Not seeing anyone here to
12 participate as a party and also looking over
13 this party status application, it doesn't
14 appear that this person really made a showing
15 that he was impacted in a way differently than
16 the public from this application, so
17 therefore, I would suggest that we deny party
18 status. Okay. And that's the consensus of
19 the Board.

20 Ms. Foster, it appears to us,
21 having looked over the written materials in
22 this case, that you have a very solid case for
23 a 223. And, Ms. Wheeler, am I correct that

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1 the ANC supports the application?

2 MS. WHEELER: That's correct. We
3 voted unanimously to support it, yes.

4 CHAIRPERSON MILLER: Okay. And
5 there is also a petition, if I could call it
6 that, that we have marked as Exhibit 24. It's
7 a list of neighbors that also have indicated
8 their support for the application.

9 MS. WHEELER: That's correct.

10 CHAIRPERSON MILLER: Okay. And I
11 think that the Office of Planning -- oh, let
12 me just go back to the ANC. We do have your
13 report, which is our Exhibit No. 22, and it's
14 a letter dated September 6, 2007, indicating
15 that ANC-4B voted unanimously to support a
16 request for the special exception to build a
17 deck in the rear of 6606 Blair Road and that
18 there was a quorum and it appears to meet the
19 requirements.

20 I just wanted to ask you what is
21 your quorum?

22 MS. WHEELER: The quorum at that
23 point was five.

1 CHAIRPERSON MILLER: I mean, how
2 many Members do you have?

3 MS. WHEELER: We have eight.

4 CHAIRPERSON MILLER: Okay. Good.
5 Okay.

6 MS. WHEELER: One was not
7 available.

8 CHAIRPERSON MILLER: Okay. Thank
9 you. And Office of Planning has done a very
10 thorough evaluation, I think, of this case
11 finding that it meets the requirements for
12 223. Is there anything you would like to add,
13 in particular? We don't need you to go
14 through your whole case, because it is well-
15 documented here.

16 MS. FOSTER: No, I just think that
17 I kind of met the requirements and tried to
18 present all the information that was
19 requested.

20 CHAIRPERSON MILLER: Okay. Any
21 questions from Board Members? In which case,
22 I think that we can turn to Mr. Moore with the
23 Office of Planning. Good morning, Mr. Moore.

1 MR. MOORE: Good morning, Madam
2 Chair and Members of the Board. I'm John
3 Moore with the Office of Planning and we stand
4 in support of the application as presented.

5 CHAIRPERSON MILLER: Mr. Moore,
6 it's an excellent report and certainly guided
7 the Board through all the elements to meet the
8 223. I just wanted to ask you one question
9 and that is the ZA referred Ms. Foster for
10 223, also noting noncompliance with the side
11 yard requirement and I noticed that you didn't
12 address that. And I believe you didn't
13 address that because there is no increase in
14 the side yard noncompliance. Is that correct?

15 MR. MOORE: There is no increase
16 nor is that an issue. There is an 8 foot side
17 yard to the property now.

18 CHAIRPERSON MILLER: Right. Okay.
19 Is there anything else you wanted to add?

20 MR. MOORE: No, ma'am.

21 CHAIRPERSON MILLER: Any Board
22 questions? Any questions for the Office of
23 Planning? Okay. Okay. Ms. Wheeler, did you

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1 want to say anything with respect to this
2 application, other than what we have already
3 said?

4 MS. WHEELER: No. I think we have
5 done well and I urge you to approve the case.

6 CHAIRPERSON MILLER: Okay. Any
7 closing remarks, Ms. Foster?

8 MS. FOSTER: No, other than thank
9 you for listening to my application and I hope
10 that I have met the requirements that have now
11 been requested.

12 CHAIRPERSON MILLER: Okay. Any
13 other questions, Board Members? All right.
14 Then I, at this point then, would like to move
15 approval of Application No. 17669 of Winnie C.
16 Foster, pursuant to 11 DCMR 3104.1, for a
17 special exception to construct a deck addition
18 at the rear of a one-family semi-detached
19 dwelling under section 223, not meeting the
20 lot occupancy, section 403, rear yard, section
21 404, and side yard, section 505, requirements
22 at premises 6606 Blair Road, N.W.

23 Do I have a second?

1 BOARD MEMBER LOUD: Second, Madam
2 Chair.

3 CHAIRPERSON MILLER: Okay. I
4 think what I would like to do is be really
5 brief with this. I know that we have kept
6 people waiting today and I would suggest that
7 we grant approval of this application based on
8 the analysis set forth in the Office of
9 Planning's report, which specifically
10 addresses and thoroughly addresses all the
11 elements in this case.

12 VICE CHAIR ETHERLY: I would have
13 no objection, Madam Chair. I'll just note for
14 the record you indicated in your motion the
15 reference to the side yard, which we
16 determined was not necessary for relief in
17 this application. So I would just note that
18 for the record.

19 CHAIRPERSON MILLER: Okay. Yes, I
20 just threw it in also, this is what was
21 applied for. There is no increase, but I
22 believe that it's not in compliance, and
23 that's why the ZA recommended that it also be

1 included. Either way, it's under 223 and
2 that's what we're granting approval under 223.

3 BOARD MEMBER LOUD: I would agree
4 with both of you and also agree that the OP
5 report was done very well and we can adopt it
6 and incorporate it by reference as our
7 analysis.

8 CHAIRPERSON MILLER: Okay.
9 Finding that the requirements are met and
10 there is no adverse impact, I think we can
11 vote on this.

12 All those in favor say aye.

13 ALL: Aye.

14 CHAIRPERSON MILLER: All those
15 opposed? All those abstaining? And would you
16 call the vote, please?

17 MS. BAILEY: Madam Chair, the vote
18 is recorded as 3-0-2 to approve the
19 application. Mrs. Miller made the motion, Mr.
20 Loud seconded, Mr. Etherly supports the
21 motion. The NCPC representative and a Zoning
22 Commission Member are not present, at this
23 time.

1 CHAIRPERSON MILLER: Thank you.
2 And I would also suggest that this be a
3 summary order, as there is no opposition in
4 this case.

5 MS. BAILEY: Thank you.

6 CHAIRPERSON MILLER: Okay. Thank
7 you very much. Good luck.

8 MS. BAILEY: Are you ready, Madam
9 Chair, for the next case?

10 CHAIRPERSON MILLER: Yes, we're
11 ready for the next case when you are.

12 MS. BAILEY: Madam Chair, the next
13 case is Application No. 17668 of the Latin
14 American Youth Center. Prior to reading the
15 advertisement, I must indicate that the
16 applicant did amend the application, so I will
17 be reading the amended application.

18 Again, Application of the Latin
19 American Youth Center, pursuant to 11 DCMR
20 3104.1, for a special exception under section
21 334.1, to continue operating a community
22 service center, and under section 2116.5, to
23 continue providing off-site parking. The

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1 property is located in the R-5-B District and
2 it's -- I'm sorry, let's do that again.

3 The off-site parking will be
4 located at 1419 Columbia Road, N.W. Is that
5 correct? No.

6 MR. FREEMAN: The off-site parking
7 is at 1347 Harvard Street.

8 MS. BAILEY: But your property is
9 located at 1419 Columbia Road, N.W.?

10 MR. FREEMAN: Yes, ma'am.

11 MS. BAILEY: Thank you. Excuse
12 the confusion. The property is Zoned R-5-B,
13 let's see, it is also known as Square 2672,
14 Lot 633. Sorry, Madam Chair.

15 CHAIRPERSON MILLER: Okay. Good
16 morning. Could you identify yourselves for
17 the record, please?

18 MR. FREEMAN: Good morning. My
19 name is Kyrus Freeman. I'm an attorney at the
20 Law Firm of Holland and Knight here on behalf
21 of the Latin American Youth Center.

22 MS. FERNANDEZ: And I'm Mai
23 Fernandez, the legal and strategy director, at

1 the Latin American Youth Center.

2 CHAIRPERSON MILLER: Okay. I just
3 want to make sure I understand how your
4 application, as amended, is reading now. Do
5 you want to -- I know Ms. Bailey read it, but
6 I understand that it is seeking a special
7 exception under 334.1, you say to continue
8 operating as a community service center. Is
9 that correct? And 2116.5 to continue
10 providing off-street parking?

11 MR. FREEMAN: Yes. Madam Chair,
12 our prehearing statement, which is marked as
13 Exhibit No. 29 of the record of this case, the
14 first paragraph goes through a little bit of
15 the case background as well as the relief we
16 are currently seeking.

17 But in short, we're looking for a
18 special exception to continue operating a
19 community service center under section 334.1
20 and a special exception under 2108 to reduce
21 the amount of required parking. And finally
22 a special exception under section 2116.5 to
23 continue providing off-site parking for the

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1 subject property. And that off-site parking
2 is currently provided at 1347 Harvard Street.

3 CHAIRPERSON MILLER: Okay. I
4 know. Just on this wording, it seems -- I
5 know that the center has been in operation, so
6 it's going to be continuing its operation.
7 That's clear. With respect to the relief
8 that's being sought, just as far as getting it
9 accurate, it hasn't, well, this is just my
10 opinion and correct me if I'm wrong, been
11 operating as -- well, it hasn't been under --
12 it hasn't been authorized to be operating as
13 a community service center. So it seems to me
14 you are seeking relief to operate it as a
15 community service center under 334.1.

16 MR. FREEMAN: By way of the
17 background --

18 CHAIRPERSON MILLER: Would that be
19 inaccurate?

20 MR. FREEMAN: Back in 1995, the
21 Latin American Youth Center filed an
22 application under section 209 of the Zoning
23 Regulations for a community center for the

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1 subject property.

2 CHAIRPERSON MILLER: Um-hum.

3 MR. FREEMAN: And that application
4 was granted with a 10 year term. We initially
5 filed an application to renew, if you will,
6 that previous approval. However, in
7 subsequent conversations with the Office of
8 Planning, we decided to make sure we had the
9 correct zoning classification for the subject
10 property, which is why we amended our
11 application for a community service center
12 under section 334.

13 And at that point, we added the
14 parking relief as well, because we are
15 currently providing the parking off-site. We
16 have been providing the parking off-site since
17 the Latin American Youth Center has been in
18 its current facility.

19 So in short, we are not looking to
20 change any of the operations at the Latin
21 American Youth Center. We are just adding in
22 some slight tweaks of the conditions included
23 in that 1995 approval. But we are just trying

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1 to get the correct zoning relief, so that when
2 they go to get the Certificate of Occupancy,
3 we can have all of the required relief in our
4 BZA order.

5 CHAIRPERSON MILLER: Right. All
6 right. We have read all of that. Do you have
7 any objection were it to be characterized as
8 to operate as a community service center as
9 opposed to continue operations as a community
10 service center? Is there a distinction there
11 that's necessary that you believe it should be
12 phrased as to continue?

13 MR. FREEMAN: We --

14 CHAIRPERSON MILLER: It's not a
15 big deal.

16 MR. FREEMAN: -- don't have any
17 objection.

18 CHAIRPERSON MILLER: Okay.

19 MR. FREEMAN: We just put
20 continue, so that it would be clear to the
21 Board and anyone looking at our application
22 that we are not applying to put a new use in
23 the current property.

1 CHAIRPERSON MILLER: Right.

2 MR. FREEMAN: But just to continue
3 the current use of the site.

4 CHAIRPERSON MILLER: Right.

5 MR. FREEMAN: Which --

6 CHAIRPERSON MILLER: Okay. Did
7 your special exception expire, at some point?

8 MR. FREEMAN: Yes, Madam Chair,
9 our previous special exception, which was
10 granted in 1995, was for a 10 year term.

11 CHAIRPERSON MILLER: From the date
12 of the Certificate of Occupancy?

13 MR. FREEMAN: Date of the
14 issuance --

15 CHAIRPERSON MILLER: Is that
16 correct?

17 MR. FREEMAN: -- of the order. So
18 it expired about two years ago.

19 CHAIRPERSON MILLER: Okay. And do
20 you have any explanation for the gap?

21 MR. FREEMAN: Well, we can -- at
22 that -- Mai can talk more about that.

23 CHAIRPERSON MILLER: I don't want

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1 to dwell on it too much, but just for the
2 record.

3 MS. FERNANDEZ: Mea culpa.

4 CHAIRPERSON MILLER: Okay.

5 MS. FERNANDEZ: Other than we were
6 doing our operations and we looked up one day
7 and we went we got to do this, we hadn't
8 realized and that was -- that's the reality.

9 CHAIRPERSON MILLER: Okay. And I
10 know that you have been operating in the
11 community for all this time without any
12 objections and it seems apparent that you are
13 serving a great service to the community.
14 Okay. We have a -- just to go through the
15 housekeeping a little bit, we do have an
16 application for party status. It's Exhibit 26
17 from Dale Commercial, LLC. Is Mr. Marcus
18 here?

19 Okay. I'm not sure if you have
20 seen this. Okay.

21 MR. FREEMAN: Yes, Madam Chair.

22 CHAIRPERSON MILLER: All right.

23 Well, it seems that Dale Commercial, LLC is in

1 support of the application, but Mr. Marcus is
2 not here and it's not clear, most likely he
3 did not intend to participate as a party and
4 cross examine and all those kinds of things,
5 and so I would suggest that we treat this as
6 testimony and take it into the record as
7 testimony in support of the application.

8 Okay. Okay. I also want to note
9 that your application has the support of
10 Council Member Jim Graham, that's Exhibit No.
11 28, as well as the support of many community
12 groups. I'm just going to mention for the
13 record Unity Healthcare, CentroNia, Columbia
14 Heights, Shaw Family Support Collaborative
15 Manna.

16 And Mr. Etherly has just brought
17 to my attention that the ANC report just came
18 in this morning, in which they said that they
19 voted 9-0 in favor of the application.

20 MR. FREEMAN: To specifically and
21 overwhelmingly recommend approval of all of
22 our requested relief.

23 BOARD MEMBER LOUD: Sounds like

1 you crafted that language, counsel.

2 CHAIRPERSON MILLER: Okay. Yes, I
3 mean, it's clear that there is great support
4 for your organization and so I don't think we
5 have to get into that issue, that's not at
6 issue at all. So I think we might want to get
7 into the conditions. I don't need to also --
8 I mean, if you want to make a whole big --
9 okay. Because we have read the file.

10 Again, we have read the file and
11 there is a clear case for you to continue your
12 operations. It is well-supported in the
13 community. You have been operating without
14 adverse impacts. And Office of Planning has
15 done again an extensive evaluation and we can
16 turn to them.

17 I think what we might want to look
18 at are the conditions that you are signing on
19 to. Let me just backup. I just want to note
20 and I don't know whether you have something,
21 Mr. Freeman, the ANC report which is quite
22 glowing, our's isn't signed. The copy we
23 have. Do you have a signed copy?

1 MR. FREEMAN: I just have a copy
2 that was faxed to me on Friday with the typed
3 name in here.

4 CHAIRPERSON MILLER: Same thing.
5 Same thing.

6 MR. FREEMAN: I understand from
7 Commissioner Hogan that he faxed and mailed a
8 hard copy and I'm not sure if that has hit the
9 file yet, but I have not seen anything other
10 than this letter.

11 CHAIRPERSON MILLER: Okay.
12 Anyway, we will probably -- that will probably
13 come in. And I haven't had a chance to
14 thoroughly go through this and so you may be
15 more familiar with it. I don't believe that
16 there are issues to be addressed in the ANC
17 report. If there are, we should address them.

18 MR. FREEMAN: No, Madam Chair.

19 CHAIRPERSON MILLER: They are just
20 totally in support of the application.

21 MR. FREEMAN: The ANC is totally
22 in support of the project.

23 CHAIRPERSON MILLER: Yeah.

1 MR. FREEMAN: And they did comment
2 on one of the conditions that was included in
3 the previous 1995 approval, which called for
4 the setup of a community liaison, but the ANC
5 said that was not necessary in this case,
6 because they have a good relationship with the
7 Latin American Youth Center.

8 CHAIRPERSON MILLER: Okay. Right.
9 Okay. Good. Let me ask you, do you want to--
10 is there anything in particular that you want
11 to address or would you -- we can just
12 continue to get questions from the Board in
13 areas.

14 MR. FREEMAN: The applicant is
15 willing if it is the Board's desire to rest on
16 the record. We clearly have a presentation
17 ready to proceed full speed ahead, but in the
18 interest of time, we are happy to just respond
19 to any questions that you might have. We do
20 have one -- we thank the Office of Planning
21 for their report and we did have one minor
22 comment that we would like to make with
23 respect to one of the conditions, but we are

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1 fine with all of the other conditions.

2 CHAIRPERSON MILLER: Okay. What's
3 that one?

4 MR. FREEMAN: With respect to
5 Condition No. 7, which currently reads "A
6 minimum of 22 parking spaces to serve the site
7 shall be located at 1347 Harvard Street." We
8 would like to add or paraphrase that to say
9 "Shall be located at 1347 Harvard Street or "
10 and I'm just throwing out words, "any other
11 site within a two block radius of the site,"
12 just in case within a year from now we might
13 be able to get better parking at another
14 location and we wouldn't necessarily want to
15 have to come back and go through the entire
16 process just to change the location of our
17 parking, which we talked to the Office of
18 Planning about and I'm not sure what their
19 position is on that. But we think that's a
20 reasonable request.

21 CHAIRPERSON MILLER: That actually
22 was one of the conditions the Board was also
23 concerned about and was going to ask you

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1 whether it was safe to tie yourself to that
2 one particular lot, like if you didn't have a
3 10 year lease, I assume that that lot --

4 MR. FREEMAN: We certainly have
5 been providing parking at 1347 for a
6 significant amount of time and we expect that
7 to continue indefinitely. We have a great
8 relationship with Columbia Heights Properties,
9 but in the event that we can get cheaper
10 parking at some place closer, we would like to
11 be able to act upon that offer without
12 necessarily having to come back to the Board
13 and go through the ANC process, the posting
14 process, the entire BZA process --

15 CHAIRPERSON MILLER: Right.
16 Exactly.

17 MR. FREEMAN: -- to change that.

18 CHAIRPERSON MILLER: And there the
19 two block radius is appropriate in this case
20 and sufficient?

21 MR. FREEMAN: Yes, we believe so.

22 CHAIRPERSON MILLER: Okay. It
23 seems to me that Condition No. 1 isn't quite

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1 right. It reads "Approval shall be for a
2 period of 10 years from the issuance of the
3 Certificate of Occupancy." It's not from the
4 Certificate of Occupancy. Wouldn't it be from
5 the date of the issuance of the order?

6 MR. FREEMAN: The -- I'm not sure
7 how long it will take to get a C of O from --
8 assuming it was approved today, I'm not sure
9 how long it would take to get a C of O, so I
10 think 10 years from the Certificate --
11 issuance of the C of O.

12 CHAIRPERSON MILLER: Oh, you're
13 getting another C of O?

14 MR. FREEMAN: We have to get a new
15 Certificate of Occupancy, because the current
16 one has expired.

17 CHAIRPERSON MILLER: Oh, okay.
18 Then you did intend to say that. I thought
19 that was just a carryover from the last order.

20 MR. FREEMAN: No, we are okay with
21 that language.

22 CHAIRPERSON MILLER: Okay. Can
23 you tell us, I think there is an increase in

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1 the number of clients at the premises.

2 MR. FREEMAN: We have asked for
3 flexibility to increase the number of clients
4 up to 200. We're not currently at 200 now,
5 but just as the need for space continues to
6 grow and more students in the neighborhood
7 come to Latin American Youth Center, we want
8 to have that flexibility built-in over the 10
9 year life of this approval.

10 Granted, we can't, obviously, grow
11 too much, because we are limited by the space
12 of the existing structure and the space
13 requirements and code requirements, but we
14 think that the 200 number is pretty much where
15 they would cap out at. But now, I think we
16 are at about how many?

17 MS. FERNANDEZ: We're probably
18 serving about 150 per day in the facility.

19 CHAIRPERSON MILLER: So does the
20 200 represent 200 at one time or just a
21 population of 200 that you serve?

22 MS. FERNANDEZ: It would be
23 probably 200 throughout the day. There is

1 rarely 200 people or 200 youth in the facility
2 at any one time, but there is -- from the time
3 we open the doors to the time we close them,
4 there is probably about 200 going through.

5 CHAIRPERSON MILLER: And how about
6 the staff? There's a big increase in staff,
7 also.

8 MS. FERNANDEZ: We have had an
9 increase in programs and in increase in
10 students and so we have had to have the staff
11 that can serve them and that's why there has
12 been an increase.

13 CHAIRPERSON MILLER: And has there
14 been -- what are you up to now?

15 MS. FERNANDEZ: We're at 85 full
16 and part-time staff.

17 CHAIRPERSON MILLER: That means
18 including, total?

19 MS. FERNANDEZ: Yes.

20 CHAIRPERSON MILLER: Okay. And
21 there has been no problem with parking and
22 traffic?

23 MS. FERNANDEZ: None, since we are

1 right next to the Metro, we employ a lot of
2 very young people who don't even have cars, so
3 they commute by Metro.

4 CHAIRPERSON MILLER: Okay. How
5 about the change in restriction on events?
6 You were doing, I think, no more than two
7 events per year -- per month and with a
8 maximum of 200 persons and you are changing to
9 two events per year with the maximum of 300
10 persons. How --

11 MS. FERNANDEZ: We have two very
12 large events. One is at Christmas time and
13 one is at Thanksgiving where we basically feed
14 the community. So at that -- those are the
15 two sort of big events that we would want to
16 make sure that we are allowed to do what we
17 are doing.

18 CHAIRPERSON MILLER: Well, how
19 about smaller events? I mean, I just -- you
20 know, we're also on the lookout for conditions
21 that might restrict you from serving the
22 community and we don't want that to happen
23 either, as long as there is no adverse impact.

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1 So I hear what you are saying about the really
2 large events. If you are having smaller
3 events, I want to make sure that this doesn't
4 interfere with that.

5 MR. FREEMAN: I think the smaller
6 events, Madam Chair, would fit under No. 3.

7 MS. FERNANDEZ: It would. I mean,
8 like I said it's rare that we have 200 youth
9 at one time in the building, but on the
10 occasion that we have a party, that's probably
11 the maximum number we would ever have. It's
12 usually less than that.

13 CHAIRPERSON MILLER: Okay. We
14 might want to make 6 clearer. So you mean
15 that No. 6 refers to events where there are
16 between 200 and 300 people. Is that correct?

17 MS. FERNANDEZ: Correct.

18 CHAIRPERSON MILLER: Okay. Any
19 questions from the Board?

20 BOARD MEMBER LOUD: Just sort of
21 not to beat this horse over and over again,
22 but No. 3, Condition No. 3, you are reading
23 the word "clients" to be interchangeable with

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1 the persons that would come to a special
2 event?

3 MS. FERNANDEZ: Our clients come
4 to our special events, but some of our clients
5 don't come to our special events. Our clients
6 are there from everything from getting a GED
7 class to a computer class, but they could also
8 come for a special event which would be a
9 party or a graduation or that kind of thing.

10 BOARD MEMBER LOUD: I'm just
11 trying to support the Chair's effort, and my
12 own really, to make sure that this is flexible
13 enough for you.

14 MR. FREEMAN: I think what it
15 sounds like it should say is the number of
16 clients and visitors at the premises.

17 BOARD MEMBER LOUD: Um-hum.

18 MR. FREEMAN: At any given time
19 shall not exceed 200, just because sometimes
20 the visitors might not actually be clients.
21 They might be friends or family.

22 BOARD MEMBER LOUD: That's what I
23 was thinking if I showed up at one of the

1 events.

2 MS. FERNANDEZ: Please, do.

3 BOARD MEMBER LOUD: I wouldn't be
4 a client. And then with the additional
5 persons that you are planning on taking on,
6 you don't see that some of the events might
7 evolve, like a Cinco de Mayo type event or
8 something else where you would need additional
9 flexibility over the next say 10 years.

10 MS. FERNANDEZ: I mean, I think
11 the capacity, we couldn't hold more than 300
12 people in the building, so I think that if we
13 went above that, we would be bursting at the
14 seams.

15 BOARD MEMBER LOUD: Okay.

16 MS. FERNANDEZ: So I think the 300
17 is fine. But thank you.

18 BOARD MEMBER LOUD: But your Cinco
19 de Mayo type event, just to carry out the
20 analogy, would be covered by No. 3?

21 MS. FERNANDEZ: Ah --

22 BOARD MEMBER LOUD: You mentioned
23 that you had two specific events right now.

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1 And if it evolved to include other types of
2 events, as, for example, a Cinco de Mayo, that
3 would be covered by --

4 MS. FERNANDEZ: We might want an
5 increase under No. 6 and make it, you know,
6 for special events.

7 BOARD MEMBER LOUD: Okay. Again,
8 we just don't want you to have to come back.

9 MS. FERNANDEZ: I appreciate it.

10 BOARD MEMBER LOUD: Or worry about
11 this.

12 CHAIRPERSON MILLER: Let me just
13 ask you. I don't think the ANC is here, are
14 they? Okay. Is that a change that you
15 believe would be a concern to the ANC in the
16 conditions that may have been presented to
17 them?

18 MR. FREEMAN: I don't think the --
19 we went through the conditions --

20 CHAIRPERSON MILLER: Okay.

21 MR. FREEMAN: -- of the Office of
22 Planning report, but I'm pretty sure they
23 would not be -- have any problem with any of

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1 the -- again, I can't speak for the ANC, but--
2 for any of the three or four changes we just
3 discussed.

4 CHAIRPERSON MILLER: Okay. Mr.
5 Etherly?

6 VICE CHAIR ETHERLY: No, I'm
7 comfortable with the direction that we're
8 going in and I think the case is very strong.
9 With respect to the issue of full and part-
10 time staff, kind of going in the same
11 direction that Mr. Loud was heading in with
12 regard to making sure that you have more than
13 enough flexibility to account for any
14 additional program increases that might
15 necessitate additional staff, is the '95
16 number sufficient based on your experience at
17 the center?

18 MS. FERNANDEZ: Yes.

19 VICE CHAIR ETHERLY: Okay.
20 Thanks. Thank you. Thank you, Madam Chair.

21 CHAIRPERSON MILLER: I guess my
22 question is I gather since you have been in
23 operation as long as you have, I would guess

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1 that these conditions, like such as the times
2 and the number of staff and everything are
3 conditions that you are comfortable with,
4 because you have been operating so long, you
5 know what the needs are. And so it's not like
6 this is going to -- you're going to come out
7 of compliance. We don't want you to come out
8 of compliance, basically. We want to set
9 reasonable conditions.

10 MS. FERNANDEZ: No, I think that
11 these are absolutely fine. We can live well
12 within these guidelines. Thanks. Or
13 actually, conditions, there we go.

14 CHAIRPERSON MILLER: Um-hum, okay.

15 MS. FERNANDEZ: Thank you.

16 CHAIRPERSON MILLER: Okay.

17 Anything else for the applicant right now?

18 VICE CHAIR ETHERLY: Just one
19 final question.

20 CHAIRPERSON MILLER: Um-hum.

21 VICE CHAIR ETHERLY: On the issue
22 of parking, which I have no concerns with, but
23 just from the standpoint of getting a little

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1 bit of a sense of what you are experience has
2 been with the current satellite parking space
3 that you have. You have been operating with
4 22 spaces up to this point. What has your
5 experience been in terms of the frequency with
6 which you had to really access all 22 of those
7 spaces, either for staff or guests or
8 visitors, fairly rarely? I'm just trying to
9 get a sense of whether that has been
10 sufficient for your needs.

11 MS. FERNANDEZ: It has been
12 sufficient and we really had no problems. The
13 22 has been sufficient.

14 VICE CHAIR ETHERLY: Okay. Thank
15 you. Thank you, Madam Chair.

16 CHAIRPERSON MILLER: Okay. Ms.
17 Brown-Roberts, good morning.

18 MS. BROWN-ROBERTS: Good morning.
19 Good morning, Madam Chairman and Members of
20 the Board. I'm Maxine Brown-Roberts from the
21 Office of Planning. And I will just go ahead
22 and stand on the record as presented in the
23 report. And I'll just make, I think, maybe

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1 about three brief comments.

2 Regarding the conditions that are
3 outlined here, I just want to state that these
4 were worked out with the applicant and between
5 OP and the applicant and so these are really
6 their conditions and not our's so much.

7 Regarding No. 1, the issuance of
8 the Certificate of -- tying them to the
9 Certificate of Occupancy, that was something
10 that was included in the original approval,
11 but again, that Certificate of Occupancy is
12 going to expire. And so they do need a new
13 one, so that's why we continued with -- in
14 this.

15 Regarding No. 3, I think there is
16 going to be some amendments talking about
17 clients and visitors and that's fine with us.

18 No. 6, calling for, I think, maybe
19 about four special events, again, that's fine
20 with us.

21 Regarding No. 7, on the parking, I
22 think we would support, you know, giving them
23 the flexibility of parking somewhere else if

1 they need to move, because we know that there
2 is a lot of development going on in that area
3 and, you know, that's empty space, I don't
4 know how much is tied to the apartment
5 building that they have there.

6 However, there is just a lot of
7 caution that usually when we do an analysis
8 regarding the location of off-site parking
9 spaces, there are other things that we do take
10 into consideration. There are impacts that we
11 look at. When I took a cursory look at it on
12 Friday afternoon and I didn't see anything,
13 you know, popping out at me, but that was --
14 that is something that we take into
15 consideration and I also did not talk to DDOT
16 about it and I haven't seen a report from them
17 either.

18 But that's just -- so we will go
19 ahead and support anything, an amendment that
20 would sort of make sure that the parking is
21 not done somewhere say outside of the 200 foot
22 radius of the site or something like that. So
23 based on that, we recommend approval of the

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1 application for the community service center,
2 the off-site parking, the reduction in parking
3 with the conditions as stated. Thank you,
4 Madam Chairman.

5 CHAIRPERSON MILLER: Thank you. I
6 notice you used the measurement of 200 foot
7 radius and I believe the applicant used the
8 measurement of a two block radius. Do you
9 have a comment? Is either one acceptable to
10 you?

11 MS. BROWN-ROBERTS: I think either
12 one is acceptable.

13 CHAIRPERSON MILLER: Okay. And
14 just for my knowledge, can you tell me like
15 why would their Certificate of Occupancy
16 expire?

17 MS. BROWN-ROBERTS: Usually there
18 is --

19 CHAIRPERSON MILLER: What does
20 that tie to?

21 MS. BROWN-ROBERTS: On a
22 Certificate of Occupancy, there is a date
23 there. If there is in the order, sometimes if

1 there is an order that has a time limit, then
2 the Certificate of Occupancy will also have
3 that sometimes.

4 CHAIRPERSON MILLER: Oh, so if we
5 put a 10 year term on this, the Certificate of
6 Occupancy will also say 10 years, most likely?

7 MS. BROWN-ROBERTS: Right, yes.

8 CHAIRPERSON MILLER: Okay.

9 MS. BROWN-ROBERTS: Um-hum.

10 CHAIRPERSON MILLER: And you
11 recommended the 10 year term, correct?

12 MS. BROWN-ROBERTS: Yes, um-hum.

13 CHAIRPERSON MILLER: Because even
14 though they have been operating for a long
15 time in the community, they will be increasing
16 staff and faculty?

17 MS. BROWN-ROBERTS: Yes. I think
18 why --

19 CHAIRPERSON MILLER: And
20 compliance.

21 MS. BROWN-ROBERTS: -- we still
22 continued the time limit was that the increase
23 is not very significant, but there was a

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1 significant, somewhat significant amount of
2 increase in both the kinds that are becoming
3 there and the staff and so we thought it
4 appropriate to continue with that and the
5 applicant agreed.

6 CHAIRPERSON MILLER: Thank you.
7 Any Board questions for the Office of
8 Planning? Any questions from the applicant?

9 MR. FREEMAN: No, we just want to
10 thank the Office of Planning for their
11 participation in this application.

12 MS. FERNANDEZ: Thank you, all of
13 you, for hearing our case.

14 CHAIRPERSON MILLER: I think that
15 the two block radius makes sense. Do you
16 still think that's the right guideline?

17 MR. FREEMAN: Yes. Yes, Madam
18 Chair.

19 CHAIRPERSON MILLER: Okay. Is
20 there anybody here in the audience who wishes
21 to testify in support or in opposition to this
22 application? Okay. Not seeing anybody come
23 forward -- okay. It was just brought to our

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1 attention there is a discrepancy between the
2 Office of Planning's recommended hours of
3 operation and the applicant's.

4 And I have a feeling that it was
5 unintended by Office of Planning, but we
6 should and we can double check with you before
7 we go into this. No. 5, on Exhibit 36, of
8 Office of Planning's report in the first page
9 it says the regular hours of operation shall
10 be from 10:00 a.m. to 8:00 p.m., Monday
11 through Friday, and 9:00 a.m. to 5:00 p.m. on
12 Saturday.

13 And in the applicant's proposal it
14 says 9:00 a.m. to 8:00 p.m., Monday through
15 Friday.

16 MR. FREEMAN: Actually, Madam
17 Chair, I think we asked for 8:00 to 8:00,
18 Monday through Friday.

19 MS. FERNANDEZ: It should be 8:00
20 to 10:00.

21 MR. FREEMAN: And then --

22 CHAIRPERSON MILLER: Okay. Let's
23 get this right before we go into deliberation.

1 8:00 to 8:00 and what on Saturday?

2 MS. FERNANDEZ: I think it
3 actually should be --

4 CHAIRPERSON MILLER: 8:00 to 9:00,
5 would you say?

6 MS. FERNANDEZ: It should be 8:00
7 a.m. until 10:00 p.m.

8 CHAIRPERSON MILLER: 10:00 p.m.,
9 okay.

10 MS. FERNANDEZ: And then the 9:00
11 a.m. until 5:00 p.m. on Saturdays is fine.

12 CHAIRPERSON MILLER: Okay. And
13 it's closed on Sunday?

14 MS. FERNANDEZ: Yes.

15 CHAIRPERSON MILLER: Okay. Ms.
16 Brown-Roberts, is that acceptable to you?

17 MS. BROWN-ROBERTS: Yes, that is.
18 I'm sorry.

19 CHAIRPERSON MILLER: Okay. Thank
20 you, Ms. Bailey.

21 MS. FERNANDEZ: Thank you.

22 CHAIRPERSON MILLER: Okay. Is
23 there anything else that you would like to

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1 add?

2 MR. FREEMAN: If we could, at some
3 point, just go through to make sure we have
4 the wording of the conditions properly? I
5 don't know if you want to do that now or at a
6 subsequent point.

7 CHAIRPERSON MILLER: Now is fine.

8 MR. FREEMAN: So the amendments
9 are: No. 3 should read "the number of clients
10 and visitors." No. 5 should read "The hours
11 of operation shall be from 8:00 a.m. until
12 10:00 p.m." No. 6 should say "No more than
13 four special events." And No. 7 should say "A
14 minimum of 22 parking spaces to serve the site
15 shall be locate at 1347 Harvard Street or any
16 other site within a two block radius of the
17 site."

18 CHAIRPERSON MILLER: I forget if
19 this was asked, but I think Mr. Etherly might
20 have inquired, that you have a requirement for
21 22 parking spaces. Is that correct or that's
22 what you are seeking?

23 MR. FREEMAN: We're seeking to

1 provide 22 parking spaces.

2 CHAIRPERSON MILLER: Yeah. Are
3 you filling those 22 spaces or how is that?
4 Do you have a demand for any more than that or
5 is the demand less or how?

6 MS. FERNANDEZ: We're usually just
7 about at, you know, 20, 21, 22 spaces that are
8 needed.

9 CHAIRPERSON MILLER: And who uses
10 those spaces?

11 MS. FERNANDEZ: Staff.

12 CHAIRPERSON MILLER: Okay.

13 VICE CHAIR ETHERLY: And if I may,
14 Madam Chair, just as a quick follow-up, I have
15 no concerns with the change in hours compared
16 to the Office of Planning's report, but just
17 to kind of round out our discussion, was there
18 a specific discussion at the ANC with respect
19 to your specific hours of operations?

20 Again, I haven't seen anything in
21 the record to indicate that there would be any
22 cause for concern, but in other cases hours of
23 operation sometimes tend to be a very

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1 electrical issue, if you will. So could the
2 applicant speak a little bit to that? Any
3 concerns that you recall hearing from the ANC
4 on that issue?

5 MS. FERNANDEZ: We didn't -- there
6 was no concerns from the ANC.

7 VICE CHAIR ETHERLY: Okay.

8 MS. FERNANDEZ: That were brought
9 up during the meeting or in any other meeting.

10 VICE CHAIR ETHERLY: Okay. To
11 your recollection, were you fairly clear that
12 those were the hours of operation that you
13 would be seeking before the Board?

14 MR. FREEMAN: I don't think the
15 issue was discussed, but just to be clear, the
16 SMD rep lives directly, not directly, but
17 across the street from us.

18 VICE CHAIR ETHERLY: Okay.

19 MR. FREEMAN: So he is pretty
20 familiar with the operation.

21 VICE CHAIR ETHERLY: There would
22 be some familiarity with any concerns, if
23 there had been any. Okay. Thank you. Thank

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1 you, Madam Chair.

2 BOARD MEMBER LOUD: Similarly to
3 Mr. Etherly's question, which I liked a lot,
4 I'm also in support of expanding the hours and
5 allowing our young people to have as many
6 services around the clock if we could. And so
7 I have no concerns about you doing that. But
8 with respect to the parking issue, is there
9 any additional issue created around parking by
10 expanding the hours from 8:00 p.m. to 10:00
11 p.m.?

12 MS. FERNANDEZ: No.

13 BOARD MEMBER LOUD: Okay.

14 MS. FERNANDEZ: Really and truly,
15 what we would be doing there in later hours is
16 serving youth probably in some sort of
17 congregate kind of situation watching movies,
18 playing games, that's not -- you don't need a
19 ton of staff there when that kind of stuff --
20 I mean, you need enough to supervise, but you
21 don't have individual programs going on and
22 administrative staff and computer staff there
23 while those kind of events are going on.

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1 You need enough to supervise the
2 young people. And the young people come by
3 foot, because they can't drive. And so all
4 you need is enough people to be there to
5 supervise.

6 BOARD MEMBER LOUD: Okay. Thank
7 you.

8 CHAIRPERSON MILLER: I just want
9 to ask one more thing for the record about the
10 22 spaces, how they were arrived at. I
11 understand under the regulations the way that
12 Office of Planning did the analysis that 38
13 spaces were what is required and then under
14 2108.2, you could have a 50 percent reduction.

15 So the 22 spaces, you know, met
16 that regulation. How did you arrive at 22
17 spaces? Is that what your need is or is that
18 -- I don't know.

19 MS. FERNANDEZ: Pretty much that's
20 what we have been renting from Columbia
21 Heights Village on a consistent basis, so
22 that's how we came up with that number.

23 CHAIRPERSON MILLER: And it's

1 working and it's working -- you are close to
2 the staff that you are seeking, the number
3 that you are seeking anyway, correct? Well,
4 for instance, it's what you have had and what
5 has been working, but you're doing an increase
6 in staff now. But it sounds like not a great
7 increase from what you are actually -- what
8 you actually have right now.

9 MS. FERNANDEZ: The parking spaces
10 and the staff have pretty much worked out. We
11 have complaints about other things from staff.
12 Usually it has not been the parking, so I
13 think for -- that's usually a pretty good
14 indication that it's working.

15 CHAIRPERSON MILLER: Okay. Fine.
16 If you don't have it, they find other ways to
17 get there. Is that it?

18 MS. FERNANDEZ: Like I said, we're
19 on a bus route.

20 CHAIRPERSON MILLER: Um-hum.

21 MS. FERNANDEZ: We're right next
22 to the Metro. A lot of our -- the people who
23 work there also live in the community, so they

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1 walk.

2 CHAIRPERSON MILLER: Okay. Thank
3 you. Any other closing remarks?

4 MR. FREEMAN: We just want to
5 thank everybody, the Office of Planning, the
6 ANC and the Board for your attention to our
7 case. As I stated earlier, the Certificate of
8 Occupancy is pretty much in a state of limbo
9 now, so we would ask for your review or action
10 on this case at your earliest convenience.
11 Thank you.

12 CHAIRPERSON MILLER: I think we
13 could do this right now. Okay. Let me see if
14 I can phrase it correctly though. I would
15 move approval of Application No. 17668 of
16 Latin American Youth Center, pursuant to 11
17 DCMR 3104.1, for a special exception to
18 operate as a community service center,
19 pursuant to section 334.1, for off-site
20 parking pursuant to 2216 and for reduction in
21 parking pursuant to 2108.

22 VICE CHAIR ETHERLY: Second it,
23 Madam Chair.

1 BOARD MEMBER LOUD: Madam Chair, I
2 just wanted to point out that I believe I
3 heard you say BZA Application No. 17688 or 8A,
4 I'm not certain.

5 CHAIRPERSON MILLER: I thought I
6 said 668.

7 BOARD MEMBER LOUD: Okay. I just
8 wanted to make sure.

9 CHAIRPERSON MILLER: Okay.

10 BOARD MEMBER LOUD: Out of an
11 abundance of caution.

12 CHAIRPERSON MILLER: Okay. And
13 actually, I would add as conditioned by
14 Conditions 1 through 7 of the Office of
15 Planning report, as modified today. I think
16 I'll read them, because I think that's the
17 critical part of this application.

18 "Approval shall be for a period of
19 10 years from the issuance of the Certificate
20 of Occupancy," that's No. 1.

21 No. 2, "The applicant shall keep
22 the premises clean and free of debris."

23 No. 3, "The number of clients and

1 visitors at the premises, at any one time,
2 shall not exceed 200."

3 No. 4, "The number of full and
4 part-time staff at the premises, at any one
5 time, shall not exceed 95."

6 No. 5, "The regular hours of
7 operation shall be from 8:00 a.m. to 10:00
8 p.m., Monday through Friday, and 9:00 a.m. to
9 5:00 p.m. on Saturday."

10 No. 6, "No more than four special
11 events per year shall be held at the facility
12 with no more than 300 persons in attendance.
13 The special event shall not continue beyond
14 11:00 p.m."

15 No. 7, "A minimum of 22 parking
16 spaces to serve the site shall be located at
17 1347 Harvard Street, N.W., or at any other
18 site within a two block radius of the site."

19 Got a second?

20 VICE CHAIR ETHERLY: Second it,
21 Madam Chair.

22 BOARD MEMBER LOUD: I hate to
23 sound like a lawyer up here, they always

1 compound things, but when you read No. 2,
2 Condition No. 2 -- I'm sorry, Condition No. 3
3 now and then you read Condition No. 6, they
4 seem to be inconsistent. So I would just --
5 that's the way I'm reading it. If no one else
6 reads it like that, then maybe we don't have
7 a problem. But if it does sound a bit
8 inconsistent, I would just add some language
9 to Condition No. 3 that says except as
10 provided in paragraph 6 below.

11 CHAIRPERSON MILLER: Sure. Except
12 as provided in Condition No. 6?

13 BOARD MEMBER LOUD: In Condition
14 No. 6.

15 CHAIRPERSON MILLER: Yes. Good.

16 BOARD MEMBER LOUD: Thank you.

17 CHAIRPERSON MILLER: Um-hum.

18 Okay. Okay. I don't want to belabor this one
19 either, because we have kept people waiting
20 this morning, we got out here late, but I
21 would say that the Office of Planning did a
22 thorough and extensive evaluation of the
23 requirements under 334.1, 2216 and 2108, and

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1 I would move that we adopt those as our
2 findings as well.

3 And note the community support in
4 this case from the ANC, the Council Member Jim
5 Graham, the community groups and neighboring
6 property owners. There is no opposition. And
7 I think all the elements have been met. Do
8 others want to make comments?

9 VICE CHAIR ETHERLY: No, I would
10 agree, Madam Chair. I'll just note for the
11 record, as was indicated by counsel for the
12 applicant, that the ANC was specifically and
13 overwhelmingly recommending support of the
14 application. But in all seriousness, if there
15 ever were an organization that satisfies the
16 contours of 334.1, it would be the Latin
17 American Youth Center.

18 The work that the center has done
19 over its 10 years and beyond has been by far
20 very visionary, very aggressive in terms of
21 its innovation around programming. So I think
22 with respect to the terms of 334.1, .2 and et
23 seq., clearly all of those terms are met in

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1 terms of an organization that is providing
2 service to members, residents of the
3 community.

4 With respect to the parking issues
5 at 2116.5 and .4 and then also 2108, clearly
6 there are limitations with respect to the
7 existing building that prevent the applicant
8 from locating any parking on the specific site
9 and that's been indicated by the applicant
10 both in testimony and written submittals, the
11 proximity to Metro, the number of your patrons
12 that are coming from the immediate
13 neighborhood, your staff members are coming
14 from the immediate neighborhood and/or using
15 public transportation.

16 I think all of the relevant terms
17 of 2108 and 2116 have been met in this case.
18 So I just can't say congratulations enough to
19 the work that you are doing and I wish you
20 continued success. Thank you, Madam Chair.

21 MS. FERNANDEZ: Oh, thank you very
22 much.

23 MR. FREEMAN: If I could just

1 note, I'm sorry, one final correction? The OP
2 report says 2216 and I think, Madam Chair, you
3 mentioned it as well. It's actually 2116.5 to
4 provide the off-site parking. I just wanted
5 to make sure that was noted for the record.
6 It's 2116.5.

7 CHAIRPERSON MILLER: Okay. So we
8 haven't voted on this yet, so it would be
9 relief from 2116. Right. I was reading from
10 the Office of Planning report. Thank you very
11 much. Okay. Other comments?

12 I would just note that this
13 update, this new order would set forth
14 conditions which would then control the
15 property and take the place of the previous
16 conditions in the previous order. That should
17 be obvious, but just for clarification.

18 Okay. Any other comments? Okay.
19 Then all those in favor say aye.

20 ALL: Aye.

21 CHAIRPERSON MILLER: All those
22 opposed? All those abstaining? Would you
23 call the vote, please?

1 MS. BAILEY: Madam Chair, the vote
2 is recorded as 3-0-2 to grant the application,
3 as modified and as conditioned. Mrs. Miller
4 made the motion, Mr. Etherly seconded it, Mr.
5 Loud supported the motion. The NCPC
6 representative or the Zoning Commission
7 representatives are not here today.

8 CHAIRPERSON MILLER: Thank you.
9 And I would recommend that this also be a
10 summary order, since there's no opposition in
11 this case. Okay.

12 MS. FERNANDEZ: Thank you.

13 CHAIRPERSON MILLER: That's the
14 consensus of the Board. Okay. Well, thank
15 you very much.

16 MS. FERNANDEZ: Thank you very,
17 very much.

18 MR. FREEMAN: Thank you.

19 CHAIRPERSON MILLER: Thank you for
20 your great service. I don't know if the
21 parties have any setup to do. We're going to
22 take just a two minute break here, so you are
23 happy to set up if you need to.

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1 (Whereupon, at 11:23 a.m. a recess
2 until 11:34 a.m.)

3 * MS. BAILEY: Appeal of Minshall
4 Stewart Properties LLC, Appeal No. 17667.
5 Madam Chair, I'm not sure if all the parties
6 were here when we initially swore them in. If
7 not, does anyone need to be sworn in at this
8 time? Would you, please, stand? Please,
9 raise your right hand.

10 (Whereupon, the witnesses were
11 sworn.)

12 MS. BAILEY: Thank you.

13 CHAIRPERSON MILLER: Good morning.
14 Would you identify yourselves for the record,
15 please?

16 MR. EPTING: I'm John Epting with
17 Pillsbury Winthrop Shaw Pittman and Dave
18 Avitabile is with me.

19 MR. TAYLOR: Dennis Taylor,
20 Assistant Attorney General, representing the
21 District of Columbia. With me is the Acting
22 Zoning Administrator, Matthew Le Grant.

23 CHAIRPERSON MILLER: Good morning.

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1 MR. HITCHCOCK: Good morning.
2 Corn Hitchcock for the West End Place
3 Condominium Association.

4 MR. GELL: Steve Gell representing
5 two of the unit owners, Florence Harmon and
6 Thomas Scholz.

7 MR. HITCHCOCK: Madam Chair, as a
8 preliminary matter, we have an expert we are
9 proffering, William Hasselman. Would the
10 Board like to deal with that qualification now
11 or wait until our turn?

12 CHAIRPERSON MILLER: I think wait
13 until your turn.

14 MR. HITCHCOCK: Okay. Thank you.

15 CHAIRPERSON MILLER: So this case
16 has been continued and my understanding --
17 well, stay here for a second. My
18 understanding is that we have established
19 parties in this case and that's set and now we
20 are ready to proceed with the appeal.

21 Okay. Before the appellant makes
22 or presents his case, I just wanted to follow
23 up on a question that I asked last time and

1 that is this seems somewhat schizophrenic in
2 that, this is to the appellant, but perhaps
3 others will comment afterwards, the appellant
4 is purporting to bring this appeal on behalf
5 of the owner of the building which the
6 argument is before us that these two
7 structures are one building.

8 Yet, it appears that there are
9 parties representing different parts of this
10 building, in fact. And so, Mr. Epting, I had
11 wanted you to address how you are representing
12 one building.

13 MR. EPTING: Well, if I may, Madam
14 Chair, it's one building for zoning purposes.
15 It's on one record lot.

16 CHAIRPERSON MILLER: Is this a
17 zoning purpose of an appeal before the Zoning
18 Board?

19 MR. EPTING: Yes.

20 CHAIRPERSON MILLER: Okay.

21 MR. EPTING: The structures, the
22 residential commercial structures are
23 separately owned by Assessment and Taxation

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1 Lot, so they are actually -- we are here on
2 behalf of the office structure portion of the
3 one total building. So we are, in fact, the
4 owner of the commercial office building, the
5 West End Condo would be the owner of the
6 residential building.

7 And if you notice, it has two
8 assessment taxation lots, 800 lots, but the
9 underlying record Lot 73 is still in place.
10 83 I mixed it up with the square.

11 CHAIRPERSON MILLER: Okay. I
12 understand that there are two separate
13 taxation recordation lots. I just want to get
14 this ownership and authorization
15 representation straight. You are representing
16 the office portion of the building, even
17 though you are saying it is all one building.
18 Is that correct?

19 MR. EPTING: That's correct. We
20 only own the office building.

21 CHAIRPERSON MILLER: Right. Okay.
22 And that's represented in your Exhibit H, I
23 think.

1 MR. EPTING: The Portsmouth case,
2 yes.

3 CHAIRPERSON MILLER: There is a
4 Certificate of Occupancy dated August 27th.

5 MR. EPTING: Yes, yes.

6 CHAIRPERSON MILLER: Okay. You
7 only own one building, but you are saying that
8 the two structures --

9 MR. EPTING: We own a portion of
10 the building.

11 CHAIRPERSON MILLER: You own a
12 portion of the building.

13 MR. EPTING: Right.

14 CHAIRPERSON MILLER: Okay.

15 MR. EPTING: Zoning doesn't go to
16 ownership. Zoning goes to regulatory controls
17 under the Zoning Regulations. Those are
18 record lots. We have record Lot 83.

19 CHAIRPERSON MILLER: But would --
20 okay. So you are not binding the whole
21 building as a whole in your presentation here?
22 I mean, you are seeking to bind both parts of
23 the building, correct?

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1 MR. EPTING: For zoning purposes,
2 yes. I mean, as we will explain, this
3 building has to comply with zoning on one
4 record lot. The empty lots have nothing to do
5 with that. They are mere ownership parcels.
6 The buildings can be individually owned in
7 multiple partnerships and divided. You could
8 have buildings that are divided vertically, so
9 that you could own the first floor. I could
10 own the second floor, but it's still one
11 building for zoning purposes.

12 CHAIRPERSON MILLER: Okay. But
13 anybody owning whatever portion of that
14 building could bring an appeal, basically that
15 would affect the designation of the whole
16 building for zoning purposes.

17 MR. EPTING: For zoning purposes.
18 That's my belief, yes.

19 CHAIRPERSON MILLER: Okay. You
20 are saying you don't have to own the whole
21 building in order to bring an appeal affecting
22 the whole building's designation.

23 MR. EPTING: Nor do you have to --

1 if this was a vacant lot, we could build
2 without their permission also.

3 CHAIRPERSON MILLER: What do you
4 mean?

5 MR. EPTING: If this was a --
6 let's say this building didn't exist or in any
7 other situation and we had a separate
8 assessment taxation lot, as long as we
9 complied with zoning, we could build a
10 building.

11 CHAIRPERSON MILLER: Okay. Any
12 other -- does DCRA have any comments on that?

13 MR. TAYLOR: Not at this time,
14 Madam Chair.

15 CHAIRPERSON MILLER: Okay. Okay.
16 Did the intervenors?

17 MR. HITCHCOCK: No, Madam Chair.

18 CHAIRPERSON MILLER: Okay. All
19 right. Thank you. Any other questions by
20 Board Members? Okay. Then I turn it over to
21 you to make your case.

22 MR. EPTING: Thank you, Madam
23 Chair. Good morning, I'm John Epting with

1 Pillsbury Winthrop Shaw Pittman and as I
2 indicated, Dave Avitabile is with me. We're
3 going to be fairly brief, like 30 minutes or
4 so, so while you may hear a great deal of
5 testimony today, this appeal is actually quite
6 simple.

7 The residential and commercial
8 structures are owned -- are one building for
9 zoning purposes and cannot be separated
10 without serious violation of the Zoning
11 Regulations and the 1910 Height Act. They are
12 physically attached at all levels. The
13 applicant in connection with BZA Application
14 17594 sought confirmation from the Zoning
15 Administrator that the two structures located
16 on Lot 83, the record lot, the zoning lot,
17 which were approved and constructed as one
18 building for purposes of zoning, continue to
19 be one building for purposes of zoning.

20 In a letter dated April 20th, which
21 we know about and we included as Exhibit A,
22 the Zoning Administrator determined that the
23 office and residential structures located on

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1 the Lot 83 are two buildings for purposes of
2 zoning. The ZA's determination was based upon
3 three reasons, stated reasons. Although the
4 two structures were admitted on one building
5 permit, this is not controlling. The two
6 structures have no above-grade connection and
7 either structure could be raised without
8 affecting the other.

9 BOARD MEMBER LOUD: Mr. Epting,
10 I'm sorry to interrupt you. Could you repeat
11 your first representation of DCRA's position?

12 MR. EPTING: Although the two
13 structures were permitted on one building
14 permit, this is not controlling. Are you
15 fine, Mr. Loud?

16 BOARD MEMBER LOUD: Yes, sir.
17 Thank you.

18 MR. EPTING: Okay. We believe the
19 issue here is that the building was approved
20 and built as one building for zoning purposes.
21 C of Os were issued and those C of Os are
22 still in place today. And I believe none of
23 the reasons underlying the Zoning

1 Administration's determination have any basis
2 and fact or law.

3 Number one, the two structures
4 were not just permitted as one building. They
5 were explicitly approved by this Board as one
6 building for purposes of zoning. They
7 received multiple building permits as one
8 building and were issued C of Os as one
9 building. And the C of Os are in place today.

10 The two structures have multiple
11 above-grade communications and are physically
12 attached from bottom to top. One of those
13 above-grade communications was explicitly
14 discussed and approved by the BZA while the
15 Zoning Administrator was in attendance and
16 that was in 1980.

17 At the time of permitting an
18 approval, the building's compliance with both
19 the Zoning Regulations and the 1910 Height Act
20 was evaluated based upon the promise -- the
21 premise that this was a sufficient connection
22 between the office and residential components.
23 The connection is essential to establishing

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1 the building's conformity with the Zoning
2 Regulations and the Height Act.

3 Finally, in terms of reasons the
4 Zoning Administrator erred, the two structures
5 cannot be separated into two separate record
6 lots. The regulations require that each
7 building be located on a separate record lot.
8 If the two structures were separate, the
9 resulting lots would violate the yard, court
10 and height provisions of the Zoning
11 Regulations.

12 And more importantly, the
13 residential component would violate the Height
14 Act and we'll go through this and we have
15 exhibits to show you. For these reasons and
16 consideration of all the facts relevant today,
17 we respectfully request that the Board reverse
18 the determination of the Zoning Administrator
19 and find that the office and residential
20 structures located on Lot 83 are one building
21 for purposes of zoning.

22 The Board has the authority to
23 hear appeals under 3100.2 and we allege that

1 the Zoning Administrator erred in his decision
2 in administrating -- in enforcing the Zoning
3 Regulations.

4 I just want to go through briefly
5 how the -- how we got to where we are in terms
6 of how these buildings were approved. There
7 are multiple indicia that prove that the
8 structures are one building for zoning
9 purposes.

10 Building connection. The office
11 and residential structures are connected in
12 multiple locations, including at least one
13 connection that qualified as a connection
14 under the Zoning Regulations, such that the
15 Board of Zoning Adjustment determined it was
16 one building for purposes of zoning in
17 Application 1348, and that order is attached
18 as Exhibit B of our exhibit we submitted.

19 The permitting officials then
20 approved the structures as one building for
21 purposes of zoning. And the permits are
22 attached as Exhibit F of our exhibit. And
23 then, singly compliance with zoning,

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1 Certificates of Occupancy were issued and
2 those are attached as Exhibit G. And we have
3 recently obtained a new C of O for the office
4 building to reflect the change in ownership.

5 Importantly, the building height
6 is measured from the K Street frontage and is
7 detailed on the Zoning Computation Sheet
8 attached as Exhibit D. And if you actually
9 turn to Exhibit D, it actually tells you the
10 height of the building is 90 feet and it tells
11 you that the office building is at an
12 elevation of 62.82 feet and that the
13 residential building is at 56.54 feet.

14 That both were measured from K
15 Street. Where the two buildings are actually
16 physically separated into two record lots, the
17 residential structure would exceed the 90 feet
18 as measured from the frontage on either 22nd
19 Street or L Street and violate the 1910 Height
20 Act. And we're going to discuss a little bit
21 about Exhibit E in a minute.

22 And actually, I think, Mr. Gell's
23 filing of November 5th actually helps us here.

1 He talks about the DOT Building, which was
2 approved by the Zoning Commission. That
3 building has no above-grade connection,
4 because the buildings are physically separated
5 and they are on two record lots. And
6 actually, Mr. Gell quotes that the Zoning
7 Commission said that those east and west
8 office buildings are actually two separate
9 buildings and each building has its own
10 measuring point pursuant to the Zoning
11 Regulations and the Height Act.

12 Therefore, the height of each
13 building must be determined and measured
14 separately. That's page 1 through 3 of the
15 DOT order, which we have for you, and we could
16 submit. So even in Mr. Gell's theory, if the
17 residential structures were on a separate
18 record lot, it would have to be measured
19 separately, either along 22nd Street or L
20 Street and, therefore, it would violate both
21 the Height Act and the Zoning Regulations,
22 because it would be too tall.

23 Lot control. The structures were

1 approved and constructed as one building on a
2 single record lot. Were the two structures
3 separate buildings, relief from the building
4 lot control would have been required. As we
5 will discuss in Exhibit E, the structures
6 share one rear yard. The rear yard along L
7 Street. As shown in Exhibit E also, the
8 structures share one open court located off of
9 22nd Street. The structures share

10 CHAIRPERSON MILLER: Can I ask
11 you --

12 MR. EPTING: Sure.

13 CHAIRPERSON MILLER: -- a couple
14 of questions?

15 MR. EPTING: Sure.

16 CHAIRPERSON MILLER: I'm sorry, I
17 hope it doesn't break your train of thought.

18 MR. EPTING: That's fine.

19 CHAIRPERSON MILLER: Did you
20 finish with, first of all, the connection or
21 the communication?

22 MR. EPTING: I'm going to get back
23 to it all.

1 CHAIRPERSON MILLER: Oh.

2 MR. EPTING: I just want to
3 summarize all.

4 CHAIRPERSON MILLER: Okay.

5 MR. EPTING: Is that okay?

6 CHAIRPERSON MILLER: So you didn't
7 get into what it was yet. I wanted to make
8 sure I didn't miss it. Okay.

9 MR. EPTING: I've got an exhibit
10 showing it.

11 CHAIRPERSON MILLER: So you are
12 highlighting and then you're going to get back
13 to more detail?

14 MR. EPTING: That's correct.

15 CHAIRPERSON MILLER: Okay. Go
16 ahead.

17 MR. EPTING: The structures share
18 one parking garage. I'm just going through
19 the indicias of why this acts and feels like
20 one building. That parking garage is actually
21 accessed from L Street and that was approved
22 by the BZA in the order. The structures share
23 loading. The building has two roof structures

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1 of unequal heights and they received BZA
2 approval to have two roof structures. If they
3 were separate buildings, you would not have
4 needed BZA approval, because each building
5 could have had its own penthouse.

6 There is an elaborate easement
7 system between the two buildings. The
8 structures were considered one building by the
9 original applicants, who applied to construct
10 them as one building. At the time of zoning
11 and permitting approval, multiple District
12 agencies, including the BZA and the Office of
13 the Zoning Administrator, evaluated and
14 approved the structures as one building. And
15 the Certificates of Occupancy were issued for
16 offices and residential uses within the
17 building.

18 I think importantly, and I
19 actually have up for Board section 101.5 and
20 101.6 of the Zoning Regulations. We have it
21 here. When I went through the material about
22 how the multiple indicia that these are one
23 building, under intervenor's issue, you would

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1 have to separate them out as two record lots
2 for them to be two buildings.

3 101.6 tells you that "Where a lot
4 is divided, the division shall be effected in
5 a manner that will not violate the provisions
6 of this title for yards, courts, open space,
7 minimum lot width, minimum lot area, FAR, lot
8 occupancy, parking spaces or loading berths
9 applicable to that lot or any lot created."

10 I'm going to come back to that
11 section also.

12 I want to talk briefly about what
13 the BZA did in 1980, a long time ago. The
14 original developers of the property testified
15 that the construction included two separate
16 structures, a residential component and an
17 office component combined to constitute a
18 single building by means of an above-grade
19 connection.

20 And the transcript which we have
21 attached is Exhibit C at pages 83 and 89 and
22 we have actually included that here for you to
23 see, but the original testimony was that they

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1 were one building. The applicant's architect
2 described the building as a single structure,
3 based on the floor plan, connected at the
4 third floor, Transcript 89.

5 And we have that for you also.
6 According to the architect, the balcony of one
7 of the units extends past the zoning line,
8 which complies with the zoning requirements to
9 join the two structures. And so it is
10 technically one building, operationally it is
11 two buildings. That's the transcript at page
12 89 again.

13 Interestingly, Members of the BZA
14 actually questioned the applicant's architect
15 on the nature and sufficiency of the
16 connection. Specifically, the Zoning
17 Commission representative on the Board asked
18 whether there would be access between the two
19 structures. And the applicant's architect
20 responded "It is difficult to join access from
21 apartments." That's transcript at page 89.

22 The applicant's architect later
23 clarified that the floors do not line up

1 except at a level where the connection takes
2 place, transcript 109 through 110. The Zoning
3 Administrator -- the Zoning Commission
4 representative, not giving up, asked again "So
5 you technically comply with connecting the
6 building?" And the architect complied "That's
7 right." Transcript at 110.

8 The Zoning Commission
9 representative later confirmed that it was one
10 building. "Okay. We're allowing you to build
11 one building. All we're going to do is allow
12 you to build one building on two kinds of
13 zoning, because they are separately zoned, and
14 really two distinct uses, but you still call
15 it one building." That's transcript 116
16 through 117.

17 The applicant's architect
18 continued "There are many reasons to make it
19 one building." Transcript 118. Then the Vice
20 Chair of the BZA, so there was a lot of
21 discussion about this, asked whether the
22 reason for construction of the building -- as
23 one building was because of a problem with

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1 parking. The architect replied "You not only
2 have a problem with parking, but rear yard,
3 courts, building height, all sorts of issues
4 that come into it. It's not just parking."
5 Transcript at 118. These potential problems
6 continue to exist today and we will discuss
7 them more in a minute.

8 Following that order, it makes it
9 clear that both the applicant and the BZA
10 clearly considered the structures as one
11 building. But for the fact that the
12 structures were one building, developers would
13 need it to include a request for -- from
14 building lot control, as noted above.

15 And but for the fact that the
16 structures were one building for purposes of
17 zoning, the BZA would not have needed to allow
18 the application to be amended to permit roof
19 structures on the same roof with enclosing
20 walls of unequal height. And I think that's
21 important. If these were two separate
22 buildings, you would not have needed BZA
23 relief for two separate penthouses. And those

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1 two penthouses continue today.

2 It goes further, after the BZA
3 approval, the developer filed an application
4 for a building permit in 1980 for one office
5 residential building. The primary building
6 permit was issued in 1981 to erect one new 11
7 story office/retail building as per plans.
8 Per the evidence of the permit, it was one
9 building. It's noted on the permit
10 application that it's Zoned R-5-D, which it
11 was then zoned and C-3-B which was then zoned
12 and to be occupied as office/residential.

13 The applications and the permits
14 in 1981 are attached as Exhibit F for your
15 review. Then, after the permits were issued
16 and the building was constructed, valid C of
17 Os were issued in 1982 for both the office and
18 residential uses. And those are attached for
19 your review at Exhibit G.

20 These applications for C of O also
21 referenced the zoning as R-5-D and C-3-B. The
22 C of Os, to us, are prima facie evidence that
23 the building was constructed according to the

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1 approved plans and, therefore, according to
2 the Zoning Regulations.

3 Pursuant to the Zoning
4 Regulations, 110.12 of the applicant as the
5 new owner received a new C of O for the office
6 structure to reflect the change in ownership.
7 That's attached as Exhibit H. And this
8 affirms to the validity of the prior C of Os
9 as evidence that the building was constructed
10 in accordance to the Zoning Regulations.

11 As noted above, Members of the
12 Board explicitly considered a question as to
13 whether the project was one building for
14 zoning purposes and confirmed "We're allowing
15 you to build one building." Transcript at
16 116. This transcript also indicates that
17 members of the Office of Zoning Administrator
18 were present for this discussion during the
19 building permit review process.

20 The Zoning Administrator prepared
21 a computation sheet that indicated the project
22 was evaluated as one building. I've discussed
23 it before, it's Exhibit D. Specifically, that

1 zoning computation sheet only considers one
2 rear yard, one open court, shared loading and
3 parking for the building. The building's lot
4 occupancy and gross floor area are
5 cumulatively considered, because they are one
6 building.

7 More importantly, that computation
8 sheet indicates the structures were measured
9 together for height as one building with a
10 measuring point from the opposite structure
11 elevation of 62.82. Whether or not the office
12 and residential structures might be
13 interpreted as one building by today's
14 standards -- I'm going to start over on that.

15 Whether or not the office and
16 residential structures might be interpreted as
17 one building by today's standards, they were
18 clearly considered to be one building at the
19 time of review, approval and construction over
20 25 years ago. The collective understanding of
21 the owners and the District officials was that
22 two structures were constructed as one
23 building, as evidenced by the issuance of the

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1 permits and especially the Certificates of
2 Occupancy.

3 The D.C. Court of Appeals has
4 found that certificates of Occupancy, in
5 particular, enjoy a presumption of validity.
6 Burka v. Aetna Life Insurance Company, 944
7 F.Supp. 313, (1996). The presence of
8 Certificates of Occupancy for the office and
9 residential structures serve as prima facie
10 evidence that the structures were validly
11 interpreted as one building for purposes of
12 zoning.

13 The Zoning Administrator also
14 incorrectly states that the properties lack an
15 above-grade connection and, therefore, cannot
16 be considered as one building. First, the
17 Zoning Administrator ignores the first part of
18 the definition in the 199 of a building, which
19 talks about the building being physically
20 attached at all levels, which this building
21 is.

22 The building includes multiple
23 above-grade connections, including that

1 windows were explicitly considered to be
2 sufficient at the of permitting and approval.
3 Moreover, the building's compliance with the
4 Zoning Regulations and the Height Act was
5 based upon the premise that that connection
6 was sufficient and they were accordingly one
7 building for zoning purposes.

8 This connection is essential to
9 establishing the building's conformity with
10 the Zoning Regulations and the Height Act as
11 detailed below. The approved building
12 connection will be discussed next.

13 As discussed at the hearing, the
14 floors of the office and residential portions
15 of the building do not line up, except for the
16 third floor of the residential portion and
17 second floor of the office portion. Further,
18 as noted by the building's original architect,
19 it is difficult to join access from
20 apartments.

21 However, as indicated at the
22 hearing, the building explicitly included a
23 connection that complied with the Zoning

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1 Regulations. The connection is a balcony on
2 the third floor and it extends past the zoning
3 line and, therefore, met the then accepted
4 definition of connection. Members of the BZA
5 accepted that applicant's testimony that this
6 technically complied with the connecting
7 building.

8 According to the project as it was
9 approved, permitting construction with the
10 building -- for the approved building
11 connection and this connection continues
12 today. And we have taken from the BZA plans
13 what that connection is. And Mr. Avitabile
14 will point it out to you, but it shows it
15 crossing the zone line into where the office
16 portion of the building is. And that
17 connection is actually shown on the approved
18 building -- the approved BZA plans.

19 The building also includes a
20 second area of communication between the two
21 structures, that is above-grade and functions
22 as an alternate connection. The office and
23 residential structures are connected through

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1 a series of fire doors off the rear loading
2 dock. Because the building is constructed on
3 a lot that slopes downward, approximately, 10
4 feet from north to south, this connection is
5 located in a portion of the building that is
6 clearly above the adjacent finish way and,
7 therefore, counted in the building's gross
8 floor area.

9 This alternate building connection
10 allows for physical access between the two
11 structures and enhances the communication and
12 connection between them. In addition, the
13 building includes many other areas of
14 communication that while not significant --
15 sufficient for establishing the structures as
16 one building under the Zoning Regulations,
17 nevertheless provide evidence of the intent
18 that this building was technically one
19 building for zoning purposes.

20 I would like to get to the
21 problems that would occur if you actually
22 separated these buildings out as intervenor
23 suggests. And I would go back to the Zoning

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1 Administrator's letter. He erroneously states
2 that either building could be raised without
3 affecting the other. That's patently false.
4 They were permitted as one building on a
5 single record lot.

6 The structures continue to exist
7 on the single record lot. And I have already
8 talked about the DOT case where you would need
9 to have separate record lots and separate
10 height measurements. The building continues
11 to share all of the features that led to their
12 consideration as one building, including
13 shared courts, yards, parking, loading and
14 most significantly a shared measuring point.

15 As a consequence to the existence
16 of the structures as one building for zoning
17 purposes, it's essential for compliance with
18 the Zoning Regulations and the Height Act. If
19 they were two buildings, you would need a
20 separate height measurement.

21 The Zoning Administrator's
22 conclusion that the buildings could be raised
23 without affecting each other is not supported

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1 by the public records. The buildings were
2 designed and constructed on a single record
3 lot and they contain certain elements required
4 under the Zoning Regulations as shared,
5 including measuring point, yards, courts,
6 parking and loading.

7 As indicated on the comp sheet and
8 I've talked about it before, Exhibit D, the
9 structures share a measuring point on K Street
10 in which the office structure and the
11 residential structure measure from 90 feet and
12 that measuring point is right here. That's K
13 Street.

14 The comp sheet indicates that the
15 elevation of the residential structure's front
16 facade is 56.54 feet, which is 6 feet below
17 the elevation of the office structure's front
18 facade. You can see that here. You can see
19 the K Street elevation. You can see the 22nd
20 Street elevation.

21 Due to the downward slope of the
22 site an independent residential building and
23 lot would fail to conform with the 90 foot

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1 height limit in the R-5-E Zone, as shown in
2 the section that attaches to Exhibit E. If
3 you measure it from here, the building is too
4 tall and we have run a red line through the
5 top portion of the building that would violate
6 the zoning and would need to come down.

7 The buildings share one rear yard.
8 The rear yard, K Street is the front of the
9 building, is measured from the center of L
10 Street, which is indicative to me that it's
11 one building. There is no other rear yard.
12 If you separated the structures into two
13 independent buildings and lots, you would
14 eliminate the ability for the properties to
15 take their rear yard from the center line of
16 L Street and would leave both structures
17 without a rear yard. Going back to 101.6, you
18 would violate that section.

19 They share one open court in this
20 location. If you separated them into separate
21 buildings, you would create nonconforming
22 courts. Parking, and this is interesting, the
23 structures share one parking garage, which is

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1 accessed off L Street. They got specific
2 approval for that, because that's a
3 Residential Zone. If you separated the
4 structures into two lots, the office building
5 would actually lack access to its parking
6 garage.

7 In additional, the residential
8 structure would lack the means to access the
9 lower levels of its parking garage, because
10 it's under the commercial structure. And
11 that's transcript at 85 through 86.

12 Because they are one building,
13 they also share loading. Division of the
14 structures into separate buildings would not
15 affect the office loading, but the residential
16 structure would lack the required loading.

17 In addition, other features of the
18 building provide evidence that the project was
19 conceived and approved as one building and not
20 independent structures. And I've talked about
21 this briefly. There was no relief sought for
22 separate lot control. And they specifically
23 sought relief to do two roof structures, which

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1 even though it would not need to do if it was
2 two separate buildings.

3 Beyond the Zoning Regulations. If
4 you divided the buildings into two independent
5 structures, it would ruin the structure --
6 residential structure non-compliant with the
7 Height of Building Act, as well as 1910 and
8 trigger an enforcement action to bring it into
9 compliance. While arguably you could seek a
10 variance to go above 90 feet for zoning, you
11 cannot violate the Building Height Act of
12 1910. That's an absolute requirement, unless
13 Congress was to change the law.

14 Presently, the building's height
15 is measured from the office front facade on K
16 Street at an elevation of 62.82. K Street, of
17 course, is a wider street. As evidenced by
18 the Zoning Computation Sheet, Exhibit D, and
19 shown plan at Exhibit E, which we have
20 discussed, if you separate them out, the
21 residential structure could no longer use the
22 K Street frontage. It is using this frontage.
23 It would have to use the 22nd Street frontage,

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1 that's 6 feet below.

2 Given the Zoning Administrator's
3 ruling that the two structures are separate
4 buildings, we believe that the District of
5 Columbia is now obligated to pursue an
6 enforcement action against the owners of the
7 residential structure that could require the
8 removal of a portion of the top floor of the
9 building, absent of the relief.

10 Conclusion. Regardless of whether
11 the present day Zoning Administrator believes
12 that the approved above-grade connection,
13 which was approved by the BZA, approved by the
14 Zoning Administrator, is no longer sufficient,
15 even with valid C of Os, we believe he is
16 bound by the decade old determination of his
17 predecessors, as is this Board.

18 The District has long held an
19 interest in maintaining consistent
20 administrative interpretations for all
21 agencies involved in weighing these decisions.
22 The D.C. Court of Appeals has repeatedly held
23 that claims of error regarding zoning

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1 determinations are barred if they are
2 unreasonably delayed and prejudicially of the
3 subject building. Goto v. DC Board of
4 Adjustment and Week v. DC Board of Adjustment.

5 Indeed, it would be patently
6 unfair for the District to informally impose
7 and enforce a series of land use restrictions
8 based on one interpretation of the regs from
9 1980. Yet, reverse that interpretation 25
10 years later to impose a different restriction,
11 that the project would not be subject to under
12 the first impression.

13 Here, the District cannot on the
14 one hand consider the residential and office
15 structures as one building at the time of
16 permitting, so that the residential structure
17 may measure its height from K Street to evade
18 the 90 foot height limit and then reinterpret
19 the structures as two buildings 25 years
20 later. Such a change, based upon a claim that
21 the original permitting approval was somehow
22 in error, would undermine public interest and
23 administrative liability in a thin basic

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1 principal's equity.

2 And I wouldn't want to get into
3 the Zoning Administrator going around to all
4 the buildings in the city that are 30 or 40
5 years old and relooking at them and saying
6 well, I would have done it differently. If
7 the office and residential structures were
8 reviewed as one building on one lot, then they
9 must be one building for purposes of zoning
10 today.

11 They have specifically designed
12 and approved together. They had a
13 communication. They share a measuring point.
14 They share yards, courts, parking and loading.
15 This was explicitly reviewed by the BZA. And
16 as I said from the transcript, they went over
17 these connections. Permits were issued.
18 Contrary to the Zoning Administrator's
19 assertion that the two structures cannot be
20 separated without creating a per se violation
21 of the 1910 Height Act.

22 So the Board should overrule the
23 Zoning Administrator's determination as error

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1 and find that the office and residential
2 structures as one building for zoning on one
3 record lot.

4 And I would like to actually
5 address briefly intervenor's September 25th
6 opposition filing, which he has provided to
7 you. He cites two BZA cases and both support
8 our position. The first is the Row Dot case.
9 And while it was dismissed as untimely, it's
10 clear in that decision that there you have two
11 buildings on two record lots and, therefore,
12 you do not need a connection between the two,
13 that's page, 4, Note 3 of the BZA Order.

14 The second one is the LDJA
15 decision. That case is much like this one.
16 We have one building on one record lot. You
17 have an office component and a residential
18 component. You can tell it's one building on
19 one record lot by looking at Findings of Fact
20 2, 4, 6 and 13. Even more clear, they needed
21 like we did here, relief, BZA relief to have
22 two roof structures on one building. Just
23 like 2175 K Street did. So those orders

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1 actually support our position.

2 So with that, I would like to
3 conclude. That's our direct testimony. We do
4 have some rebuttal possibly, but we -- and we
5 have a closing statement. And I would be
6 happy to answer any questions.

7 VICE CHAIR ETHERLY: Thank you,
8 Madam Chair. Just a couple of brief
9 questions, Mr. Epting.

10 MR. EPTING: Sure.

11 VICE CHAIR ETHERLY: I think
12 you've presented quite a bit to digest, both
13 in terms of the written testimony and, of
14 course, your oral summary of it. So I'm going
15 to kind of work slowly through it. But just
16 a couple kind of, shall we say, preliminary
17 questions. On the issue of the balcony
18 connection, it's noted in one of the
19 opposition submittals that that connection, in
20 fact, does not exist. What's the situation
21 with that balcony connection as it exists
22 today?

23 MR. EPTING: I have a couple of

1 answers to that. And actually when we see
2 their exhibits on rebuttal, we'll show you
3 where another potential connection is. But I
4 don't think we need to go there. I think in
5 1982, this building was built. The Zoning
6 Administrator went out there, issued a C of O.
7 They determined then that sufficient
8 connection was there.

9 And I don't think 25 years later
10 the Board or Zoning Administrator should go
11 around saying well, I don't like what they
12 did. And it's almost like a court giving you
13 deference in terms of like well, I would have
14 done something different. I think you've got
15 to rely upon what has been done, particularly
16 in this situation where the C of Os have been
17 continuously reissued and they are still in
18 place.

19 VICE CHAIR ETHERLY: But is it a
20 different inquiry if the question is focused
21 on whether or not that connect is, in fact,
22 there?

23 MR. EPTING: I think it would be

1 hard, to the naked eye, to tell whether that
2 connection is there or not. I believe -- I
3 have looked at it. I think I see it. I do
4 see one on the first floor.

5 VICE CHAIR ETHERLY: Um-hum.

6 MR. EPTING: But you are in the
7 speculation about what was approved 25 years
8 ago and that's a very difficult position for
9 me to be in. I mean, I --

10 VICE CHAIR ETHERLY: But you
11 recognize the position, potentially, that your
12 response puts us in, it's almost as if it is
13 suggesting there is a connection on paper, but
14 in actuality it's perhaps a phantom at best.

15 MR. EPTING: Well, if that's true,
16 then the C of O should not have been issued.
17 And if it was issued, it should have been
18 appealed in a timely manner 25 years ago.

19 VICE CHAIR ETHERLY: Okay. I
20 understand the response. I think it's
21 definitely going to be something that I'll
22 have to continue working through to kind of
23 understand it, because I think it's a little

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1 bit of a rock and a hard place, so I think
2 it's going to merit some additional
3 discussion.

4 Let me perhaps just tee up a
5 little bit this issue of Chapter 17 and the
6 impact, if any, on your argument of Chapter
7 17's promulgation in the aftermath of the 1980
8 case.

9 MR. EPTING: Um-hum, um-hum.

10 VICE CHAIR ETHERLY: Part of the
11 argument potentially, I'm just paraphrasing a
12 little bit for the intervenor here, is Chapter
13 17's spirit, if not outright intent, was meant
14 to get at this very issue. And in order to
15 move forward with what the applicant is --
16 with what the appellant, what you are seeking
17 to do would, essentially, frustrate the intent
18 of Chapter 17. Therefore, there should be a
19 different approach that the BZA takes in the
20 here and now, notwithstanding what the BZA may
21 have done in 1980 with the first case.

22 What are your thoughts with that?

23 MR. EPTING: Well, I think that

1 would be true if the building was being
2 constructed today. But again, you have 25
3 years of interpretation that this building is
4 one building. Also, the DD Regs were in place
5 in '91, 10 years after this building was
6 built. And they did not try to say this was
7 two buildings back then. I just don't see how
8 the DD Regs -- I mean, at best, perhaps the
9 building could be grandfathered, but the DD
10 Regs certainly can't change the fact that the
11 C of O exists for this building on one record
12 lot.

13 VICE CHAIR ETHERLY: And then
14 finally, with the issue of some of the
15 alternative above-grade connections, the issue
16 of the fire doors. For their to be a
17 communication or a connection between two
18 buildings, do those connections have to be
19 fully functional and accessible on a -- at any
20 given point of time or is it simply the fact
21 that those fire doors are there that creates
22 the communication?

23 MR. EPTING: Well, that's not up

1 to me to determine. It's up to the Zoning
2 Administrator, I think. And in 1980, the
3 architect specifically described what was
4 there. The fire doors, in my experience, do
5 often serve as a connection. I think in this
6 case, Mr. Crews thought that they were below
7 the level of the main floor, so therefore he
8 didn't count them as a connection, even though
9 they counted FAR, which is a very odd
10 situation.

11 And I think if -- I was going to
12 wait until later, but I think if you turn to
13 Figure 14 of the intervenor's exhibit, you can
14 see yet another connection above the fire
15 doors where there is a balcony wall at the
16 first floor level that extends into the office
17 building. And again, that's what makes this
18 so difficult, you know, to look 25 years later
19 at what they may have considered to be a
20 connection.

21 I mean, I wasn't out there when
22 the Zoning Administrator issued the C of O,
23 but there is -- clearly, if you look at page

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1 14, you can see the residential building is on
2 the right. You can see the vent shaft which
3 divides the buildings.

4 VICE CHAIR ETHERLY: Um-hum.

5 MR. EPTING: That's the property
6 line.

7 VICE CHAIR ETHERLY: Um-hum.

8 MR. EPTING: And you can see the
9 connection to the office building. Now, is
10 that sufficient? Well, it seemed to be
11 sufficient back then. You know, the fact that
12 it may not be sufficient now, I don't know
13 what to do.

14 VICE CHAIR ETHERLY: And just to
15 be sure I'm looking at the same portion of
16 that picture of the office building, the
17 connection that you are referencing is this
18 area here?

19 MR. EPTING: That's correct.
20 That's correct. It doesn't have to be
21 covered.

22 MR. AVITABILE: It's similar.

23 MR. EPTING: Talk in here.

1 MR. AVITABILE: Similarly, that's
2 the same connection that was shown. The
3 balcony that crosses over and touches the
4 office building.

5 VICE CHAIR ETHERLY: Shown in the
6 original 1980 case?

7 MR. AVITABILE: Yes.

8 VICE CHAIR ETHERLY: And plan?

9 MR. EPTING: Yes.

10 VICE CHAIR ETHERLY: Okay. That
11 concludes my questions for now, Madam Chair.

12 MR. EPTING: It's interesting and
13 I have spent a lot of time worrying about
14 this, but, you know, I wasn't out there that
15 day when the C of O was issued.

16 VICE CHAIR ETHERLY: And I
17 understand the point. Part of it is we -- you
18 have an interpretation or treatment of the
19 plans done by a prior body in 1980 and to an
20 extent, for the sake of stability and
21 consistency, that interpretation should be
22 stood by, so to speak.

23 MR. EPTING: Right.

1 VICE CHAIR ETHERLY: Should be
2 upheld. But to an extent, there is, I think,
3 some tension between what is going on now and
4 what is happening now and what exists now
5 versus perhaps that reading back in 1980. But
6 I'm still trying to work through that.

7 MR. EPTING: Right.

8 VICE CHAIR ETHERLY: So I
9 appreciate those answers to those opening
10 questions.

11 MR. EPTING: And I understand
12 that. If I could say one more thing and
13 that's why I also wanted to say if you go the
14 other way, then you have all these zoning
15 issues.

16 VICE CHAIR ETHERLY: That arise
17 between the separate buildings.

18 MR. EPTING: Right.

19 VICE CHAIR ETHERLY: Height, rear
20 yard, what have you.

21 MR. EPTING: Right.

22 VICE CHAIR ETHERLY: Okay.

23 MR. EPTING: Right.

1 VICE CHAIR ETHERLY: Thank you,
2 Madam Chair.

3 MR. HITCHCOCK: Madam Chair, a
4 question on procedure. I didn't mean to
5 interrupt, if the Board has any questions. If
6 I understood Mr. Epting correctly, I think he
7 mentioned he has some other connections he is
8 going to talk about on rebuttal? I mean,
9 would it be possible to find out --

10 MR. EPTING: I just -- I was going
11 to let them show their plan first, but since
12 Mr. Etherly asked about it, I figured I would
13 go ahead and show it.

14 MR. HITCHCOCK: Okay.

15 MR. EPTING: I didn't want to take
16 your exhibits out of order.

17 MR. HITCHCOCK: No, I appreciate
18 that. I just wanted to make sure.

19 MR. EPTING: I mean, it clearly
20 shows an additional connection.

21 CHAIRPERSON MILLER: Okay. Mr.
22 Epting, I want to make sure I understand you
23 correctly.

1 MR. EPTING: Okay.

2 CHAIRPERSON MILLER: Is it your
3 position that if the BZA in 1980 relied on
4 plans showing a balcony connection for their
5 conclusion that these two structures made up
6 one building, that where -- this Board is
7 bound by that same conclusion, even if the
8 balcony was never constructed?

9 MR. EPTING: Ms. Miller, I mean,
10 clearly, something was constructed enough for
11 the Zoning Administrator to issue a permit and
12 then to issue a Certificate of Occupancy.
13 They go out and do zoning inspections. They
14 would have looked at the building in 1982 and
15 they would not have issued the C of O if
16 whatever connection was there wasn't
17 acceptable to them.

18 CHAIRPERSON MILLER: You're saying
19 that the Board is bound by the ZA's conclusion
20 as opposed to the Board's initial conclusion?

21 MR. EPTING: I think both, because
22 the Board accepted a connection argument. The
23 Zoning Administrator then accepted that

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1 argument. The building was built and then a
2 Certificate of Occupancy was issued and that
3 Certificate of Occupancy is still in place
4 today. So you would be --

5 CHAIRPERSON MILLER: Yeah, but
6 we're looking -- we can't see with our own
7 eyes. If the Board, and I'm not saying this
8 is the case, but just, in 1980 looked at plans
9 and said okay, yeah, we're going to grant this
10 application based on the conclusion it's one
11 building, because of what we see in this
12 drawing and then that's never done, would a
13 later Board be bound by the conclusion that
14 it's one building if that was never done, what
15 the previous Board relied on?

16 MR. EPTING: Well, if it wasn't
17 done, the Certificate of Occupancy would not
18 have been issued.

19 CHAIRPERSON MILLER: And you're
20 saying --

21 MR. EPTING: The C of O has to be
22 in compliance with the Board of Zoning
23 Adjustment order.

1 CHAIRPERSON MILLER: You're saying
2 that's evidence that it was done, right?

3 MR. EPTING: That's the only
4 evidence you ever have in zoning cases.

5 CHAIRPERSON MILLER: How about our
6 evidence now? You mean, whether it exists or
7 it doesn't exist. Isn't that evidence?

8 MR. EPTING: It could be. But I'm
9 not an authority on what they considered a
10 connection back then.

11 CHAIRPERSON MILLER: Yeah, what is
12 the -- what are you saying the reality is now
13 though? What is this balcony? What is it
14 doing? How is it connected? Is it here? Is
15 it not here? I mean --

16 MR. EPTING: Well, there is
17 clearly one at -- shown on Figure 14 of
18 intervenor's exhibit. You can see a wall
19 crossing over and it actually connects to the
20 commercial office building.

21 CHAIRPERSON MILLER: Is this what
22 you are saying is you don't know whether this
23 crossing over connection is what was before

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1 the Board?

2 MR. EPTING: Well, there was -- I
3 mean, we have shown a plan showing an exact
4 similar connection that was presented to the
5 BZA. Now, they talked about it at the third
6 floor. This one happens to be on the first
7 floor. Again, I can't speculate why it was
8 not built on the third floor or why they
9 decided -- maybe the Zoning Administrator
10 asked for it to be on the first floor. I
11 mean, that's the kind of speculation I can't
12 get into.

13 CHAIRPERSON MILLER: So but it's
14 not in accordance with the plans that BZA
15 approved. Is that correct? If the BZA
16 approved plans showing a balcony connecting on
17 the third floor and this isn't it, then we're
18 looking at something different.

19 MR. EPTING: But then that should
20 have been appealed in 1982, because that would
21 have been the time frame for appealing that
22 issuance of the Certificate of Occupancy. But
23 the Zoning Administrator may have made a

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1 different interpretation then. I mean, also
2 if you go here, then you are asking the Zoning
3 Administrator to go around and look at every
4 building that was developed many years ago and
5 say well, I would have done it differently.

6 CHAIRPERSON MILLER: But we are
7 here because of action that the owner that you
8 want to take with respect to your building.

9 MR. EPTING: But let's go back to
10 the definition of 199 of building, because it
11 actually has two components, which the Zoning
12 Administrator and the intervenors ignore. The
13 first part of that, which I think is also very
14 important is that the buildings are physically
15 attached, not physically separated. And here,
16 clearly, anybody can see they are physically
17 attached. So that's the first portion.

18 And then there is supposed to be a
19 connection. The connection is not defined
20 above the main level. A connection in the
21 past, I mean, in my experience, has been
22 walls. I think now the Zoning Administrator
23 doesn't accept walls, but in my 30 years of

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1 experience, walls have been considered to be
2 connections.

3 CHAIRPERSON MILLER: But they say
4 communication, don't they? In the definition,
5 it doesn't say connection. It says
6 communication. "The existence of
7 communication between separate portions of
8 structures."

9 MR. EPTING: Yes. But this type
10 of communication was specifically talked about
11 in the BZA.

12 CHAIRPERSON MILLER: It was
13 supposedly talked about in the order or the
14 transcript?

15 MR. EPTING: In the transcript.

16 CHAIRPERSON MILLER: Okay. So not
17 in the order?

18 MR. EPTING: No.

19 CHAIRPERSON MILLER: What about
20 the question of access? Do you believe the
21 communication means access or just connection?

22 MR. EPTING: Until recent years,
23 it never meant access. Apparently, there is

1 an understanding now that I think the term is
2 meaningful connection, but that's a term that
3 has arisen over the last few years.

4 Connection to me means some sort of bridge
5 between the two buildings, coupled with the
6 fact that they are not separated from the
7 ground up. I mean, here they are clearly
8 intertwined from the ground up.

9 So you've got to look -- I mean,
10 to me, you've got to look at both parts of
11 that definition of building.

12 CHAIRPERSON MILLER: Okay. But
13 let's just look at the communication part.

14 MR. EPTING: Um-hum.

15 CHAIRPERSON MILLER: Are you
16 saying that the interpretation, I think there
17 is one out there, that it means access is a
18 recent interpretation?

19 MR. EPTING: Yes.

20 CHAIRPERSON MILLER: But this
21 Zoning Commissioner was talking about access
22 in the transcript.

23 MR. EPTING: Yes, and they said it

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1 was hard to provide access between a
2 residential building -- a residential
3 structure and the BZA accepted that.

4 CHAIRPERSON MILLER: So it wasn't
5 a totally foreign concept at that time,
6 though, but it's just that that BZA found it
7 not necessary to define access.

8 MR. EPTING: Right, right. And
9 when you walk around, you can see many similar
10 other -- I mean, I use the word "connections"
11 like this from that period of time.

12 CHAIRPERSON MILLER: Is there
13 access between these two structures?

14 MR. EPTING: There is access, but
15 it's at that lower level between the two fire
16 doors.

17 CHAIRPERSON MILLER: So the access
18 that --

19 MR. EPTING: But the --

20 CHAIRPERSON MILLER: -- you are
21 describing is where the first balcony attaches
22 to the building, I mean, the first floor
23 balcony attaches to the building in Exhibit 14

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1 of the intervenor's exhibits? Is that it?

2 MR. EPTING: That's a
3 communication between the separate portions of
4 the structure.

5 CHAIRPERSON MILLER: Okay. How is
6 it a communication?

7 MR. EPTING: There's an actual
8 bridge or intrusion that goes from the
9 residential building crosses the property line
10 and touches the office building.

11 CHAIRPERSON MILLER: It's a wall
12 that touches another wall?

13 MR. EPTING: Yes.

14 CHAIRPERSON MILLER: To access,
15 you don't have to be able to --

16 MR. EPTING: It goes beyond. It
17 actually crosses the property line. It
18 crosses the commercial property line and goes
19 into the commercial property, because the
20 property line is where that vent shaft is that
21 you can see. So it is protruding over as
22 shown on the plans that were part of the BZA.
23 You can see it crossing over.

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1 CHAIRPERSON MILLER: So what does
2 access mean then, in your view?

3 MR. EPTING: It doesn't say
4 access. It says the existence of
5 communication between separate portions of the
6 building.

7 CHAIRPERSON MILLER: I know. But
8 we're talking about what does communication
9 mean. And some -- I think there has been some
10 interpretation that communication means
11 access. You don't think so?

12 MR. EPTING: But again --

13 CHAIRPERSON MILLER: I guess my
14 question is is there access here?

15 MR. EPTING: There's no access
16 here.

17 CHAIRPERSON MILLER: No access.
18 Okay.

19 MR. EPTING: But the Board
20 reviewed that issue specifically in multiple
21 questions and decided that this type of
22 connection was appropriate. And Dave has got
23 one more comment.

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1 MR. AVITABILE: The only comment I
2 wanted to add in terms of how this definition
3 or understanding of what communication means,
4 it has evolved over time and the evolution has
5 been to add the term meaningful. And that's
6 what has happened in recent years is the idea
7 that it has to be a meaningful communication.
8 But at the time that this building was
9 reviewed and approved, it was simply
10 communication and communication could have
11 consisted of simply as here a balcony and its
12 wall crossing over the property line to touch
13 the adjacent structure.

14 VICE CHAIR ETHERLY: And again,
15 it's your argument that the viewpoint, the
16 lens though which we look at this has to be,
17 essentially, th 1980 lens, not the 2007 lens?

18 MR. EPTING: I think so, because
19 otherwise you are really going in a direction
20 of, one, you have a valid C of O here and what
21 do you do with that if you go the other way?
22 And two, do you start going to every building
23 that the Zoning Administrator may say well, I

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1 would have done it differently and review that
2 building?

3 CHAIRPERSON MILLER: But we're not
4 talking about that here, because --

5 MR. EPTING: I think we are.

6 CHAIRPERSON MILLER: Well, you
7 have brought an application and that's what
8 got the Zoning Administrator involved,
9 correct? It wasn't like your building just
10 happened to be here and the Zoning
11 Administrator decided to check it out.

12 MR. EPTING: That's correct, but
13 building owners can -- I mean, often seek
14 interpretations from the Zoning Administrator
15 about the status of their building. So that
16 part is not unusual. And that's it.

17 CHAIRPERSON MILLER: Are you
18 making a distinction between meaningful
19 communication and access or are you saying
20 that that's basically what you mean? What do
21 you mean by communication and meaningful
22 communication?

23 MR. EPTING: Meaningful connection

1 -- let's go to 199, which is on page 1-13. It
2 says "The existence of communication between
3 separate portions of the building," that's
4 what it says. The Board in this case deemed
5 this to be a communication, whether you would
6 have done that or not doesn't matter, they
7 did. And communication -- they talked about
8 access. They decided that access wasn't
9 required.

10 CHAIRPERSON MILLER: Well, they
11 didn't say that in their order, that's what
12 the conclusion you reach.

13 MR. EPTING: Well, it's in the
14 transcript. We can go back over the
15 transcript. I can't read beyond the order if
16 something's not there, but it was accepted.

17 MR. AVITABILE: And also, the
18 order implies that the connection was
19 appropriate, because it approves it as one
20 building on one record lot and but for that,
21 they would not have needed relief for the
22 multiple roof structures. So implicit in the
23 Board's granting of approval for multiple roof

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1 structures, is approval of the entire -- the
2 combination of structures as one building for
3 purposes of zoning.

4 MR. EPTING: So I mean, I guess I
5 think of it as implicit if they had not
6 accepted that connection, they would not have
7 approved the case. They would not have needed
8 to say there is two roof structures.

9 CHAIRPERSON MILLER: Okay. And
10 the connection they accepted we will find in
11 the description in the transcript or in the --
12 or will we find it and/or in the plans that
13 were approved by the Board?

14 MR. EPTING: It's in both places.

15 CHAIRPERSON MILLER: Okay.

16 MR. EPTING: And we have given you
17 copies of both.

18 CHAIRPERSON MILLER: But the
19 building doesn't reflect the plans with
20 respect to the access we're talking about?

21 MR. EPTING: It reflects a similar
22 connection.

23 CHAIRPERSON MILLER:

1 Communication.

2 MR. EPTING: Communication. That
3 does appear to be in a separate place than the
4 architect described. But again, that order
5 was not conditioned upon it being in one
6 particular place. And again, that's the issue
7 here. I mean, how do you go back 25 years
8 later and say well, the Zoning Administrator
9 shouldn't have -- they should have made it be
10 up on the third floor. I mean, that's what's
11 difficult for me with this case.

12 And if there were difficulties
13 with that, his decision should have been
14 appealed timely.

15 CHAIRPERSON MILLER: And what's
16 the harm to you if this Board reaches a
17 different decision based on the evidence
18 before us?

19 MR. EPTING: Well, first of all,
20 we would have no rear yard. We would have --

21 CHAIRPERSON MILLER: Well, how
22 would the reality change?

23 MR. EPTING: Excuse me?

1 CHAIRPERSON MILLER: How would the
2 reality change? I mean, the yard is still
3 there. Everything is still there.

4 MR. EPTING: No, it's not. You
5 would have to have separate record lots for it
6 to be a separate building, so if it was a
7 separate --

8 CHAIRPERSON MILLER: Would you
9 have to get a variance or what would you
10 think?

11 MR. EPTING: Well, we would have
12 to get a variance. We would have to get an
13 easement or a variance to access our parking
14 through their building, because it's off of L
15 Street. Our court is okay. Our roof
16 structure may not be setback from the property
17 line, so we would have to get relief from
18 that. They would have to get relief from
19 parking, because some of their parking is
20 underneath the commercial structure. The
21 driveway ramps are under our structure.

22 They would not have a court. They
23 would not have a rear yard and their height

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1 would violate the Zoning Regs and the 1910
2 Height Act. And 101.6 of the Zoning Regs says
3 when you do a subdivision, it has to be in
4 compliance with all of the Zoning Regs. And,
5 you know, arguably, you could variance your
6 way out of everything but the Height Act
7 issue. And there's no way around that one.

8 So I mean, as I was talking to Mr.
9 Etherly, I mean, I wasn't there, but they are
10 physically connected. There is -- there was
11 discussion about a connection that's similar
12 to what is provided and if the building is not
13 one building, then you are opening yourself up
14 for all kinds of zoning violations.

15 The residential building wouldn't
16 have a rear yard either. I didn't mention
17 that one, so --

18 CHAIRPERSON MILLER: Were the fire
19 doors discussed in the previous order?

20 MR. EPTING: No.

21 CHAIRPERSON MILLER: No, okay.

22 MR. EPTING: And I honestly don't
23 know why not, but, I mean, they weren't. If

1 I was doing the previous order, I would have
2 done it differently, but that's a different
3 issue.

4 CHAIRPERSON MILLER: I have one
5 aside question.

6 MR. EPTING: Okay.

7 CHAIRPERSON MILLER: In the
8 previous order, there is a Finding of Fact No.
9 7 that says "A covenant has been executed by
10 all parties which restricts development of the
11 site and the number of parking spaces provided
12 in a manner acceptable to the ANC-2A
13 Commissioners." Do you know the status of
14 that covenant?

15 MR. EPTING: Yeah, the covenant
16 was done and we have copies of it and it
17 actually expired on its own terms 25 years
18 later.

19 CHAIRPERSON MILLER: Okay.

20 MR. EPTING: So it is no longer in
21 effect.

22 CHAIRPERSON MILLER: It expired.
23 Okay.

1 MR. EPTING: Yes, it was one of
2 the first things I saw, it scared me to death
3 and we found the covenant and it has expired.

4 MR. AVITABILE: We had actually
5 included a copy of the covenant in the
6 variance case.

7 CHAIRPERSON MILLER: Okay.

8 MR. AVITABILE: And we had
9 addressed that in that case.

10 CHAIRPERSON MILLER: Okay. All
11 right.

12 MR. EPTING: It's one of the few
13 covenants I have ever seen that expired on its
14 own terms.

15 CHAIRPERSON MILLER: Are there
16 other questions? Okay. This is what I'm
17 thinking and you all can comment if you see
18 this differently. That this is an appeal and
19 these seem to be pretty much legal arguments
20 and I don't really see a need for cross
21 examination of an attorney, but I'll hear if
22 parties feel otherwise. Otherwise, I would
23 move to DCRA to make their case. Do you have

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1 any -- anybody have any comments about that?

2 Mr. Gell?

3 MR. GELL: Madam Chair, I think
4 it's appropriate for me to raise some
5 questions with Mr. Epting, specifically
6 concerning the justification for some of the
7 assertions he has made, legal assertions that
8 we don't see any backup for, but would like to
9 ask him and give him a chance to state what
10 those may be. And I had some others, if any
11 of them you feel are out of order, I would be
12 glad to tailor them.

13 CHAIRPERSON MILLER: Any comments
14 from other parties, because this is kind of an
15 unusual thing in the Zoning Board proceedings.
16 I mean, we have here attorneys making
17 statements, but it crosses on fact, questions
18 of fact. Do you have a question of fact that
19 you think that you need to pursue with Mr.
20 Epting that he represented, something as a
21 fact?

22 MR. GELL: Well, I think when
23 we're talking about what the BZA relied on in

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1 1980 to determine whether or not this was one
2 or two buildings, that's a fact question.

3 CHAIRPERSON MILLER: That is, but
4 that -- he doesn't know. I mean, I don't
5 think he spoke from personal knowledge about
6 that. I think he spoke from the -- what's in
7 the transcript, which you could argue from
8 just as easily.

9 MR. EPTING: I referenced the
10 transcript everything I said.

11 MR. GELL: Will we have an
12 opportunity to rebut in writing to the --

13 CHAIRPERSON MILLER: Yeah. I
14 think that we --

15 MR. GELL: -- statements that were
16 made here? Because we may or may not be able
17 to get that into our summary and so forth.

18 CHAIRPERSON MILLER: Well, let me
19 just say this. Yeah, I think it's good to
20 know, at this point, that what we anticipate
21 after we hear all arguments today and giving
22 you the opportunity to submit further
23 arguments or proposed orders or however we

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1 want to call it after the proceedings for us
2 to consider in deliberations. And I think
3 also it's possible that another Board Member,
4 Mr. Dettman, who is not here, may also read
5 the record and all the proceedings and
6 possibly participate as well.

7 So, you know, I just want to make
8 -- I want to be careful. I mean, if there's
9 something that Mr. Epting said out of his own
10 knowledge that you need to cross on, that's
11 one thing. But if it's a legal argument he's
12 making from the record, I don't think we
13 should have cross on that.

14 MR. TAYLOR: Madam Chair, I for
15 one do have a very small number of factual
16 clarifications that relate to what Mr. Epting
17 testified before you as being fact.

18 CHAIRPERSON MILLER: Okay.

19 MR. TAYLOR: And I cannot think of
20 any good way that I could have another witness
21 come in and explain what Mr. Epting meant when
22 he made certain comments.

23 CHAIRPERSON MILLER: Okay. Okay.

1 Why don't we hear that and then if there is an
2 objection, we'll hear that. But yeah, it's
3 possible that he covered some factual issues.
4 Okay.

5 MR. TAYLOR: Okay. Mr. Epting,
6 how many communications do you believe there
7 are between the residential and the office
8 structure?

9 MR. EPTING: I believe there are
10 at least two. And actually, there is three.
11 There is one above the main floor, that's the
12 one shown on Figure 14. There is one that's
13 in FAR, but below the main floor, I believe,
14 that's the fire doors. And there is a
15 connection between the garage levels between
16 the residential and commercial structure,
17 although that's, of course, below the main
18 floor.

19 There is also ventilation shaft
20 connections between the two buildings, which
21 don't count as communication, but they are
22 clearly showing how the building is
23 interconnected.

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1 MR. TAYLOR: Okay. And the
2 ventilation shafts, if I could, just to make
3 sure that I understand what it is you are
4 referencing, in fact, we can do it on Figure
5 14.

6 MR. EPTING: Yes, that's the best
7 one, I think.

8 MR. TAYLOR: The ever popular
9 Figure 14. So the vertical grate that appears
10 to be near the two walls is the attachment
11 that you are referencing and it's the -- and
12 is it correct that behind those grates that
13 vent is all open space?

14 MR. EPTING: That's correct.

15 MR. TAYLOR: And so the only
16 attachment would be the grate on the back and
17 a similar grate on the front?

18 MR. EPTING: That's correct, other
19 than the connection that we talked about
20 that's below that, yes.

21 MR. TAYLOR: Okay. Thank you.
22 Okay. Your Exhibit E, which is blown up over
23 here, that's -- if those were done in 1980,

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1 I'm really impressed by the way the color was
2 done. Are those the actual 1980 application
3 materials or are those a reconstruction?

4 MR. EPTING: Those are a
5 reconstruction based upon the competition
6 sheet -- based upon the computation sheet.

7 MR. TAYLOR: So these are not
8 copies of actual plans that were submitted
9 back then?

10 MR. EPTING: No.

11 MR. TAYLOR: Okay.

12 MR. EPTING: But they do show
13 where the measuring point was from the comp
14 sheet, how the rear yard was done, how the
15 court was done.

16 MR. TAYLOR: Okay. Madam Chair, I
17 think that concludes my factual
18 clarifications.

19 CHAIRPERSON MILLER: Thank you.
20 That was helpful. Yes, Mr. Gell?

21 MR. GELL: I'd follow up with a
22 question, a factual question. Where is the
23 first floor of this building for purposes of

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1 determining the height?

2 MR. EPTING: I didn't understand
3 the question or hear it.

4 MR. GELL: Yes, where do you say
5 the first floor of the building is for
6 determining the height of the building?

7 CHAIRPERSON MILLER: Are we
8 looking at Exhibit --

9 MR. GELL: If it's a single
10 building.

11 CHAIRPERSON MILLER: -- 14?

12 MR. GELL: If it's a single
13 building, where would that first floor be on
14 K Street or on L Street or on 22nd Street or L
15 Street?

16 MR. EPTING: The Zoning
17 Regulations allow you to pick the front of the
18 building for measuring purposes.

19 MR. GELL: Right.

20 MR. EPTING: And in this case, it
21 was clearly picked from K Street, because
22 that's what the Zoning Comp Sheet says. And
23 you can also tell that because the residential

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1 building is measured at 90 feet from K Street.
2 If it wasn't K Street, then the residential
3 building could not be 90 feet tall. It would
4 be beyond 90 feet tall.

5 MR. GELL: Then I would ask you
6 whether the so-called connection that you
7 found at the balcony is at the level of K
8 Street or that at the level of the first floor
9 of the 22nd Street building? In other words,
10 is that not a floor below K Street?

11 MR. EPTING: Again, that would be
12 speculation on my part, but if you look at
13 Figure 14, that connection is clearly at or
14 above the level of the main floor off of K
15 Street. But it's also -- the main floor again
16 is not defined in the Zoning Regulations and
17 arguably this building has two main floors, so
18 it's clearly above the residential main floor.
19 But again, that's not my interpretation. That
20 would have been the Zoning Administrator in
21 1982.

22 MR. GELL: If you could point to
23 that first floor and show how it is below --

1 it is above the level of the first floor or at
2 the level of the first floor on K Street, I
3 think that would shed some light on how -- on
4 why you are turning to that as one of the
5 connections.

6 CHAIRPERSON MILLER: Mr. Gell, are
7 you pointing to a drawing that is in the
8 record or not? Is that in the record?

9 MR. GELL: I assume these are
10 going to be accepted into the record.

11 CHAIRPERSON MILLER: I mean, we
12 don't have them yet, is what I'm saying. Are
13 they an exhibit in the record yet?

14 MR. AVITABILE: That's actually
15 part -- that drawing right there is part of
16 Exhibit A of our September 25th filing. Those
17 are the originally approved BZA plans.

18 CHAIRPERSON MILLER: Okay.

19 MR. AVITABILE: That show that --
20 the connection. That was from where we took
21 our -- or created our color drawing.

22 MR. GELL: Well, I won't belabor
23 it. I think we'll be able to show that that's

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1 a full floor below K Street. I'm going to
2 eliminate any of the legal questions, that's
3 why I'm taking a moment.

4 CHAIRPERSON MILLER: While you're
5 taking a moment, I want to see if we can find
6 this in our papers. Did you say it was
7 Exhibit A to --

8 MR. EPTING: Our September 25th
9 filing.

10 CHAIRPERSON MILLER: Okay.

11 MR. AVITABILE: It should be page
12 2.

13 CHAIRPERSON MILLER: I just want
14 to make sure that no one is waiting for me.

15 MR. EPTING: No.

16 CHAIRPERSON MILLER: We're waiting
17 for Mr. Gell, right?

18 MR. GELL: Well, I -- yes, I would
19 simply add the question can you stipulate, Mr.
20 Epting, that none of the connections that you
21 have alluded to, whether they were built or
22 not built actually provide a means of access
23 from one building to the other? A person

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1 walking through from one building to the
2 other?

3 MR. EPTING: That's correct,
4 because it was accepted by the BZA. As I
5 mentioned the transcript page.

6 MR. AVITABILE: Actually, no,
7 that's incorrect. The only communication that
8 does not provide access is the balcony, which
9 doesn't -- oh, actually, while you enter from
10 the residential into the office, the two fire
11 doors would allow you to pass through from the
12 residential into the office if both were open.

13 MR. GELL: How?

14 MR. AVITABILE: And the garage,
15 obviously, since it's a shared garage allows
16 people to go in between the office and the
17 residential, but again that's below, clearly,
18 the main floor.

19 MR. GELL: And I would --

20 MR. EPTING: But as the architect
21 testified, page 89, and the BZA accepted, it's
22 hard to provide access from a residential
23 building. And that, as far as I know,

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1 argument was accepted, because the case was
2 approved. And so I can't, again, speculate as
3 to what the Board was thinking, but that's on
4 the record. It was -- the question was asked
5 a number of different ways and the Zoning
6 Administrator -- the Zoning Commission Member,
7 Ted Mariani of the BZA sort of summed it up.

8 So basically, we're going to let
9 you call this connection to be considered as
10 one building. And further speculation on my
11 part about that is I don't think helpful. I
12 wasn't there, but the transcript is clear.

13 MR. GELL: Well, the -- I'll save
14 the remarks for later. Thank you.

15 CHAIRPERSON MILLER: Okay. Any
16 other questions from the Board? Okay.

17 BOARD MEMBER LOUD: Let's turn to
18 DCRA then.

19 MR. TAYLOR: Thank you, Madam
20 Chair and Board. I'll wait a moment and let
21 them get all their paper down.

22 CHAIRPERSON MILLER: We're not
23 missing any papers from you, are we?

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1 MR. TAYLOR: Do you have a nice
2 beautiful colored photograph somewhat like
3 this one?

4 CHAIRPERSON MILLER: I think we
5 do.

6 MR. TAYLOR: Okay.

7 CHAIRPERSON MILLER: Should we
8 pull that, get that in front of us?

9 MR. TAYLOR: Yes, ma'am.

10 CHAIRPERSON MILLER: Okay. When
11 was that filed?

12 MR. TAYLOR: Friday.

13 CHAIRPERSON MILLER: Okay. We
14 have it in front of us. I assume the other
15 parties have it as well, correct? Okay.

16 MR. TAYLOR: If they did not bring
17 them, I have extra copies available.

18 CHAIRPERSON MILLER: We're ready
19 for you.

20 MR. TAYLOR: Madam Chair, the
21 Government agrees with the very first sentence
22 that the appellant made. We think that this
23 is a very simple case. In fact, we think it

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1 is a much simpler case than the appellant
2 believes it to be. We don't believe that it
3 is possible to go back and interpret what may
4 or may not have been in the minds of the 1980
5 version of this Board and we believe that the
6 record is rather unclear as to what may have
7 been going through their minds.

8 What we can go through is what is
9 here, what is before us and how the
10 interpretation of what is before us would
11 impact moving forward for the next foreseeable
12 generation. With that in mind, I would call
13 Mr. Matthew LeGrant to testify.

14 Would you, please, state your name
15 for the record?

16 MR. LeGRANT: Yes, It's Matthew
17 LeGrant.

18 MR. TAYLOR: And where are you
19 currently employed?

20 MR. LeGRANT: I'm employed by the
21 Department of Consumer and Regulatory Affairs,
22 Office of Zoning Administrator.

23 MR. TAYLOR: And what position do

1 you have there?

2 MR. LeGRANT: I am the Acting
3 Zoning Administrator.

4 MR. TAYLOR: And do you have --
5 have you had any previous positions with the
6 Office of Zoning Administrator?

7 MR. LeGRANT: I have. I was the
8 Deputy Zoning Administrator from March 2006
9 until July 2007.

10 MR. TAYLOR: And would you,
11 please, describe your previous education,
12 training and experience in the areas of zoning
13 and planning?

14 CHAIRPERSON MILLER: Mr. Taylor,
15 are you doing this for the benefit of the
16 Board to determine whether to give Mr. LeGrant
17 expert witness status or some other reason?

18 MR. TAYLOR: That is Plan A, but
19 also for the benefit of the parties who have
20 not been here for previous hearings.

21 CHAIRPERSON MILLER: Okay. Okay.

22 MR. LeGRANT: Yes, I hold two
23 degrees in city planning, a bachelor's of

1 science in city regional planning from
2 California Polytechnical State University in
3 San Luis Obispo, California. I have a
4 master's in city planning from the University
5 of California, Berkeley.

6 My employment includes 25 years of
7 planning and zoning experience, including 17
8 years in the Office of Zoning for the City of
9 Berkeley, California in which I was, at the
10 conclusion of that, the Zoning Officer for the
11 City of Berkeley. And one year with the City
12 of Alexandria in their Planning Department
13 before coming to the Office of Zoning
14 Administrator here in the District of
15 Columbia.

16 MR. TAYLOR: Madam Chair, at this
17 point, I would like to move Mr. LeGrant to be
18 recognized as an expert in zoning and
19 planning.

20 CHAIRPERSON MILLER: Any
21 objections from the other parties?

22 MR. EPTING: None.

23 CHAIRPERSON MILLER: Okay. Mr.

1 LeGrant has received expert status here
2 previously. There is no issue with that.
3 Okay.

4 MR. TAYLOR: Thank you, Madam
5 Chair. Mr. LeGrant, are you familiar with the
6 April 20, 2000 letter from former Zoning
7 Administrator Bill Crews sent to counsel for
8 the appellant?

9 MR. LeGRANT: I am.

10 MR. TAYLOR: And what do you
11 interpret to be the purpose of that letter?

12 MR. LeGRANT: The letter was a
13 zoning determination to make a decision as to
14 whether the property at 2175 K and 1022 -- or
15 I'm sorry, 1099 22nd Street are one or two
16 buildings.

17 MR. TAYLOR: And what was Mr.
18 Crews' conclusion?

19 MR. LeGRANT: His conclusion was
20 that they are two buildings.

21 MR. TAYLOR: Have you performed
22 your own analysis of appellant's question?

23 MR. LeGRANT: Yes, I have. I have

1 looked at that information separately and
2 reviewed it as well.

3 MR. TAYLOR: And does your
4 conclusion agree with Mr. Crews' conclusion
5 that 2175 K and 1099 22nd are two separate
6 buildings?

7 MR. LeGRANT: I do. I agree with
8 that determination.

9 MR. TAYLOR: Would you, please,
10 walk the Board through your analysis?

11 MR. LeGRANT: Yes, I will. Thank
12 you. One of the thing that the Board has and
13 the parties should have is the graphic before
14 you, which it was generated by the DCRA's
15 geographic information system. This
16 information was developed to help illustrate
17 the Zoning Districts as well as the
18 configuration of the buildings on the site.

19 I'll just point out a couple of
20 things briefly. The two buildings include the
21 office building at 2175 K and then the
22 residential building along 22nd. There is a
23 zoning boundary that separates those from the

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1 C-3-C Zoning to the R-5-E Zoning residential
2 building. The bottom portion of the graphic
3 shows four views, oblique aerial photos to be
4 technical, that show the two structures from
5 different viewpoints and on the smaller
6 version you got it's kind of dark, but the
7 larger graphic, I think, shows that well.

8 And many of the features of the
9 two buildings that were discussed earlier, the
10 plaza that is behind the -- sort of the
11 frontages of those structures along the two
12 streets. And then there is a vicinity map to
13 help give a little context.

14 In looking at this project and
15 looking at Mr. Crews' review, I did visit the
16 site on September 6, 2007 and toured the
17 bottom portion of the residential building.
18 I also walked around through the plaza and
19 through the balcony that has been mentioned as
20 well and went down into the parking garage to
21 look at the fire doors that were noted as well
22 as the connection between the -- at the garage
23 level.

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1 I, with that information, got a
2 good sense of the site. I then looked back
3 over the materials of the applicant and, of
4 course, looked at the code. And I believe the
5 key aspect of this is the definition of
6 building. I'm going to read actually the
7 second sentence of that definition, because I
8 believe it is fairly clear.

9 "The existence of communication
10 between separate portions of a structure below
11 the main floor shall not be construed as
12 making the structure one building." So in
13 looking at the problem of whether this was one
14 or two buildings, I wanted to really see if,
15 in fact, there were any communications between
16 those portions of the two buildings or
17 structures.

18 Clearly, below the main level of
19 the residential building, there is this
20 communication of the fire doors. Clearly,
21 there is, as was noted earlier, the parking
22 garages joined underneath the main floor. And
23 again, this is the main floor of the

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1 residential building. So with that clearly
2 established, I then looked for if there were
3 communications above that level to, in fact,
4 see if these two buildings were -- had a
5 communication.

6 And I think that's the key word
7 here. We have heard the word connection, but
8 I was really looking for communication. And
9 in that, I had the opportunity to look at
10 three cases that were before both the Zoning
11 Commission, the Board and, I believe, the
12 Superior Court, and counsel can correct me if
13 I'm wrong on the latter body.

14 And in Zoning Commission Case 05-
15 36, regarding 200 K Street, from April 2006 --

16 MR. TAYLOR: Excuse me, Mr.
17 LeGrant?

18 MR. LeGRANT: Yes?

19 MR. TAYLOR: I did bring copies of
20 these three decisions, if anyone needs to have
21 a copy.

22 CHAIRPERSON MILLER: I'm sure we
23 would like a copy. We don't necessarily have

1 to have it right this minute, but we would
2 like a copy. I'm sure all the parties would.

3 MR. TAYLOR: Okay.

4 CHAIRPERSON MILLER: If you have
5 them to give out, sure.

6 MR. TAYLOR: Thank you.

7 CHAIRPERSON MILLER: You could
8 give them to Ms. Bailey for us, for the
9 Board's copies. I'm sorry, Mr. LeGrant, you
10 were saying you relied on certain cases?

11 MR. LeGRANT: Yes. Right.

12 CHAIRPERSON MILLER: Yes.

13 MR. LeGRANT: I looked at those
14 cases to help inform my analysis of whether
15 there was a communication above the ground
16 floor, because to me that is what this issue
17 revolved around. And I started mentioning the
18 Zoning Commission Case 05-36, I'm going to
19 just jump down and note an excerpt of that in
20 the Finding of Fact No. 52.

21 It refers to the NCPC, which
22 indicated that two structures shared
23 communication and that comprise two separate

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1 buildings with two different fronts and
2 therefore two distinct measuring points for
3 height. Yet only the third street front was
4 used to measure height. NCPC, therefore,
5 concluded the Commission should either require
6 the applicant to establish a meaningful
7 connection between the two structures, so as
8 to permit the 3rd Street measuring point or to
9 lower the height of the building fronting 2nd
10 and L Streets.

11 And this is -- this term of
12 meaningful connection was raised in this
13 order. So in looking at --

14 CHAIRPERSON MILLER: Which order
15 is that? I'm sorry, what order is that?

16 MR. LeGRANT: This is 05-36 of the
17 Zoning Commission.

18 CHAIRPERSON MILLER: And what's
19 the year on that?

20 MR. LeGRANT: 2006, April 20,
21 2006.

22 CHAIRPERSON MILLER: Let me just--

23 MR. TAYLOR: And, Madam --

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1 CHAIRPERSON MILLER: Can I just
2 interrupt for a second? I'm a little
3 distracted by this point and I want to say it
4 has nothing to do with this case. It's the
5 fact that we are now at 1:00 and some people
6 are here for the 1:00 session and I just want
7 to make an announcement that we're in the
8 third case of the morning, which is our final
9 case of the morning, but I anticipate that
10 this case might go until 2:00 anyway.

11 And with the Board breaking for
12 lunch in between the morning and afternoon
13 sessions, I don't anticipate the afternoon
14 case beginning until 3:00 anyway. So if
15 anybody is here for that case and you want to
16 leave and come back, feel free to do that.
17 Okay. Thank you.

18 MR. TAYLOR: Madam Chair, just to
19 clarify, Case 05-36, a copy of which will be
20 circulated to you shortly, was rendered a
21 decision on April 20, 2006 and this is titled
22 the First Stage and Consolidated PUD and
23 related Map Amendment for 200 K Street, N.E.

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1 And that may reflect -- or excuse me, that may
2 refresh recollections for at least two of you.

3 While I'm in a clarifying mode,
4 the case that Mr. LeGrant is going to be
5 referring to as soon as -- the Goto case in
6 the Court of Appeals from 1980.

7 CHAIRPERSON MILLER: Okay.
8 Thanks.

9 MR. LeGRANT: Okay. Thank you.
10 So this idea of a meaningful connection that
11 to me would help inform if there is a
12 communication. I'm looking back at the
13 subject case and I guess in intervenor's
14 Exhibit 14, which has been referred to several
15 times already, it talks about this grate that
16 -- or it shows this balcony and how the
17 balcony extends across the property line,
18 which when visiting the site, I did not
19 measure it, but it looks like it is,
20 approximately, 18 to 24 inches that one could
21 cross the property line and be front -- in
22 front of that dark colored vent is the only
23 place one can walk between the two properties.

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1 And in looking at that, to me,
2 first of all, it's not covered. It's -- it
3 deadends at a wall. There is no passageway
4 there. And so I'm at a loss to describe that
5 as a meaningful connection. The next --

6 CHAIRPERSON MILLER: Can I ask
7 you, since you went there, this balcony
8 pictured in Exhibit 14.

9 MR. LeGRANT: Yes.

10 CHAIRPERSON MILLER: It ends in a
11 wall or does it end at a balcony going
12 perpendicular to it or what is that?

13 MR. LeGRANT: Yeah, behind the
14 brick wall in the foreground, on the other
15 side of that, it drops down, I would say,
16 maybe 4 feet or so to a walkway. That walkway
17 is then below the windows. It is,
18 approximately, I recall probably 6 to 8 feet
19 wide. And continues then -- and the walkway,
20 if you're walking down that, it would be
21 perpendicular direction of travel to the wall
22 of the office building. I don't know if
23 that's helpful or not.

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1 VICE CHAIR ETHERLY: Just to --
2 the walkway in the picture 14, Figure 14.

3 MR. LeGRANT: Yes.

4 VICE CHAIR ETHERLY: Is the
5 walkway that you are referencing where the
6 blue, shall we say, super cans are?

7 MR. LeGRANT: No, it's the level
8 above.

9 VICE CHAIR ETHERLY: Right here?
10 So there --

11 MR. LeGRANT: Yes.

12 VICE CHAIR ETHERLY: -- appears to
13 be just a little sliver of a green thing here,
14 some kind of plant-life. That's a walkway
15 there?

16 MR. TAYLOR: Mr. Etherly, I
17 believe, and I know that this is going to be
18 difficult to explain in the record, but I
19 believe you were pointing to this section at
20 the very left hand side of this photo. That
21 is a wall for the office space. There is no
22 walkway.

23 VICE CHAIR ETHERLY: Okay. That's

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1 just a sheer wall?

2 MR. TAYLOR: That's just a wall
3 that extends all the way to 22nd Street.

4 VICE CHAIR ETHERLY: Um-hum.

5 MR. TAYLOR: The area where one
6 can walk would be this lower right hand
7 portion or behind this lower right hand
8 portion and there is that 6 to 8 feet between
9 the brick wall showing in the photo and the
10 brick wall in the back where the windows are
11 located.

12 VICE CHAIR ETHERLY: Okay. Okay.
13 Thank you.

14 MR. LeGRANT: Okay. So the next
15 case that I looked at in the handout that was
16 distributed is an appeal before this Body,
17 Appeal No. 16646, which was decided in the
18 year 2000, regarding a two story garage
19 addition and to approve a covered walk
20 connection.

21 Jumping down to the Finding of
22 Fact No. 17, it talked about as Mr. Bello
23 testified that for communication to exist,

1 there must be a functional purpose for the
2 connection and, for example, to provide
3 shelter between the nearest doors of a
4 dwelling and the garage addition.

5 So the next sort of test I have
6 looked at is well, is there a functional
7 purpose to any above the ground floor
8 communications. And again in the case of this
9 balcony to travel 24 inches to hit a wall did
10 not constitute, to me, a functional purpose.
11 It seems to be designed such to allow access
12 to that grate for maintenance purposes, which
13 again the grate separates simply as is the
14 case in many buildings in my career I have
15 seen. You have buildings to keep trash and
16 vermin from going into those areas.

17 The last case that appeared to be
18 -- speak to the issue of communications was
19 the case of Goto v. District of Columbia ,
20 1980. They talked about gas pipes running
21 between a building and a kiln being a
22 communication. There the -- jumping down to
23 the last sentence of that case citation is

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1 "Communication only appears to be used in
2 equivalent term for access."

3 And so looking at whether there is
4 an access component to this balcony area,
5 well, except for the access that I noted to
6 the, perhaps, grate that is clearly between
7 the two buildings, I didn't see any access for
8 the movement of persons or materials like a
9 loading connection.

10 VICE CHAIR ETHERLY: Well, if --

11 MR. LeGRANT: That information --

12 VICE CHAIR ETHERLY: -- I could,
13 Mr. LeGrant?

14 MR. LeGRANT: Yes?

15 VICE CHAIR ETHERLY: Let me ask
16 you this, because I think that's very
17 straightforward. I absolutely get that
18 portion of the analysis. I think part of what
19 is being proffered to us on the part of the
20 appellant is an interpretation that at least
21 in 1980 standards, the understanding of
22 communication perhaps was somewhat different.

23 And to an extent, Mr. Taylor,

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1 listen closely, because this would be more of
2 a you question that a Mr. LeGrant question,
3 because it's getting more into the legal
4 interpretation. Part of what concerns me
5 about Goto is that that portion of the opinion
6 is a dissenting opinion. The Court bought the
7 fact that that pipe connection was sufficient.

8 Now, I think part of what I'm
9 beginning to discern from the testimony from
10 what we probably will hear from the intervenor
11 will be that there has clearly been a move
12 towards more meaningful connections, the
13 functionality that you referenced, both from
14 the Zoning Commission order and from that
15 prior BZA case.

16 So to an extent, I think I have
17 one question for you.

18 MR. LeGRANT: Okay.

19 VICE CHAIR ETHERLY: But the
20 million dollar question probably is going to
21 come to Mr. Taylor. The question for you is
22 based on your experience as a planner, based
23 on your familiarity with the zoning, can you

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1 speak to whether or not it is accurate to
2 state that the 1980 and pre-1980 understanding
3 of communication was perhaps a little less
4 refined than it is today? Can you speak to
5 that? Was there any fundamental difference
6 between the two?

7 MR. LeGRANT: Well, I think we're
8 going to get to that.

9 VICE CHAIR ETHERLY: Okay.

10 MR. LeGRANT: As I'm going to get
11 some more questions there.

12 VICE CHAIR ETHERLY: Okay.

13 MR. LeGRANT: But I think that is
14 a key issue as to what was the knowledge of
15 the Board in 1980 versus the present day. And
16 briefly, if it wasn't clear in 1980, then I
17 today looking at that, I would have to look to
18 those things that would help inform me to
19 interpret that to the present day.

20 And if there has been cases in the
21 intervening time period that well, because
22 it's unclear or maybe it was -- you could read
23 it both ways, then what information can assist

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1 me to interpret it today.

2 VICE CHAIR ETHERLY: Okay.

3 MR. LeGRANT: So that's the
4 approach that I --

5 VICE CHAIR ETHERLY: And that's
6 helpful and I'll definitely, you know, let you
7 continue with your prepared remarks. I'll
8 flag the complimentary question for Mr.
9 Taylor. It will be, for me, at least one of
10 the issues. I'm not sure yet whether it is
11 the dispositive issue, but one of the issues
12 for me is which set of glasses do we need to
13 be looking at this through? The glasses of
14 today's standards or the glasses of 1980?

15 Because I think part of the
16 argument here is we have this case, a Board,
17 the Board of Zoning Adjustment in another
18 form, had this case in 1980, took a position
19 based on, perhaps, an interpretation of what
20 communication between buildings meant at that
21 time and to an extent that is still the
22 communication. That is still the
23 understanding that should govern today's view

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1 of this building, because of some of the
2 subsequent actions that have taken place to,
3 shall we say, cement that interpretation.

4 That, I think, is part of the
5 argument that the appellant is raising. So
6 after we move through Mr. LeGrant's testimony,
7 I think part of what I may want to hear from
8 you, just as one Board Member, is what's your
9 take on that? Is that an accurate read? Is
10 that two slavish a commitment to 1980, as much
11 as I love the '80s being a child of the '80s?
12 You know, do we need to bring it up? Do we
13 need to update our reading and understanding
14 of it?

15 So that's a little bit of what I'm
16 struggling with and why I wanted to just kind
17 of pause there with Mr. LeGrant, because I
18 understand entirely, I think, looking through
19 today's prism this doesn't work. It's just a
20 walkway to nowhere. Maybe the maintenance
21 person gets to it from time to time to get to
22 that vent area, who knows. But, essentially,
23 it's a walkway to a wall. It probably doesn't

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1 satisfy today's understanding of meaningful
2 communication with a functionality of purpose.

3 But by 1980's standards, again
4 that Goto case seemed to suggest that a gas
5 pipe did it. A lowly little gas pipe. So by
6 1980 standards, this might seem to fit the
7 bill. So that's a little bit of context for
8 where my question was coming from. Thank you.

9 CHAIRPERSON MILLER: I just want
10 to say that it's not clear to me, at this
11 point, that in 1980 they weren't aware of the
12 access issue, considering that it was
13 discussed in the transcript. I mean, I would
14 have to go back and study it and see more of
15 how they dealt with it. But I just want to
16 comment. I think I said that to Mr. Epting.
17 It's not like that was a totally foreign
18 concept, because they were discussing it.

19 VICE CHAIR ETHERLY: No, and I
20 agree with that. I just think part of the
21 argument is there is a coloring of that
22 transcript. There is an interpretation that
23 Mr. Epting is offering based on that record on

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1 behalf of his client. And again, it is,
2 indeed, arguable whether the access issue was
3 put aside or wasn't necessarily the
4 consideration that perhaps it is today.

5 So what I'm still kind of trying
6 to get a sense of is what was the practice
7 1980, pre-1980. I think I have a clear sense
8 of where we are today with the question of
9 communication and functionality. But I agree
10 with you, Madam Chair, I think there is still
11 definitely some argumentation to be done on
12 that point, but I'm definitely highlighting
13 for DCRA a desire to compare some discussion
14 from your perspective on how you're dealing
15 with that.

16 MR. LeGRANT: Okay. I guess the--
17 to conclude and look at those cases that again
18 helped inform my decision looking at whether
19 there was a communication above the floor
20 level, the idea of access, functionality,
21 meaningful connection, you know, that led me
22 to conclude that Mr. Crews' determination was
23 correct. And furthermore, I next wanted to

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1 examine the 1980 order and to see if that
2 provided any definitive guidance.

3 And in looking at that, of course
4 I was hopeful for some clear guidance, but I
5 found none and then the fact that, and I'll
6 note several findings of fact, although there
7 is language, language is all over the place,
8 for example in Finding of Fact No. 5, they --
9 it notes that "Applicants purposed a
10 construction office building with offices
11 and/or retail uses on the first floor." And
12 for a cellar on that portion of the site
13 presented Zoned C-3-B, the R-5-D portion of
14 the site will be developed as a condominium
15 part of the same project as the office
16 building.

17 So here is the word "project"
18 introduced. Finding No. 8, "Permanent office
19 uses of the project are designed to function
20 as separate and distinct entities for the
21 purposes of security convenience and
22 conservation." There's the word project
23 instead of the word singular reference to

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1 building.

2 Finally, also No. 14, "The
3 applicants propose a roof structure for the
4 residential portion of the structure to be 13
5 feet 8 inches in height," and so forth. So
6 these terms of project structure and, in some
7 cases, building are used fairly loosely. And
8 I concluded that that 1980 order did not
9 provide a very clear guidance to me.

10 And therefore, looking at the
11 other information I presented and relying
12 again on the key aspect of the definition of
13 a communication, led me to conclude that they
14 are two buildings in this situation and I
15 cannot see how I could conclude -- come to
16 another conclusion.

17 MR. TAYLOR: Okay. Now, Mr.
18 Etherly, I -- this -- while I still have a
19 couple of questions for Mr. LeGrant, this
20 might be a good time for me to do a synopsis
21 answer for your particular question. It is
22 something that will be fleshed out more fully
23 in the post-hearing written materials. But in

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1 essence, if you look at the Goto, I've heard
2 it today as Goto, Goto and Goto.

3 I must admit that I do not know
4 what the correct pronunciation would be. I'll
5 go with your Goto for right now. But in the
6 Goto case, you are correct that the language
7 which was quoted by Mr. LeGrant came from a
8 portion that was not the official opinion.

9 I would dispute that this was
10 language of dissent. The Judge who was not in
11 agreement wrote a concurrence in part dissent
12 in part. And in looking at the actual opinion
13 that the -- on the very last page where he
14 states that "Since CAG did not establish its
15 standing, I would hold that the Board's denial
16 of motion to dismiss for lack of jurisdiction
17 was plainly erroneous." That does not
18 necessarily equate to the language that is in
19 question.

20 And the next thing that I would be
21 pointing out is that certainly the 2000
22 addition of this Board did not read that
23 language as being a dissenting view

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1 contradictory to the law of the time. It read
2 that as being precedential to it.

3 And finally, in looking at the
4 actual language that Judge Kelly wrote, while
5 he is certainly saying that there was an
6 error, he is assessing that error to the Board
7 of Zoning Adjustment of 1980 in holding that
8 those gas pipes were a communication. He
9 clearly states in my judgement the Board's
10 interpretation of the terms building and
11 communication are not only contrary to common
12 sense, but also plainly erroneous and
13 inconsistent with the Zoning Regulations.

14 So for those three reasons, the
15 city is going to be disputing that Judge Kelly
16 was making a non-binding observation. Now --

17 CHAIRPERSON MILLER: I think I
18 would also say that I think the Board has also
19 looked to Goto in the past with respect to
20 that question.

21 MR. TAYLOR: Yes.

22 CHAIRPERSON MILLER: Okay.

23 MR. TAYLOR: Well, I just wanted

1 to give a synopsis. I didn't want to give my
2 entire brief orally.

3 Mr. LeGrant, should this Board
4 find that 2175 K and 1099 22nd are two
5 separate buildings, what enforcement action
6 would you plan to take regarding any issues of
7 record lot, rear yard, courts, height,
8 etcetera?

9 MR. LeGRANT: Well, I would not
10 plan to take any enforcement action unless,
11 first, a complaint came to my attention or if
12 there was an application for a subdivision to
13 a separate record lot, then I think I would
14 have an actionable basis to take action.

15 MR. TAYLOR: So if an application
16 were to come forward from the Condominium Unit
17 Owners Association, where they were going to
18 make a change to their building, then are you
19 saying they would need to make themselves come
20 into compliance with that change?

21 MR. LeGRANT: Yes, that would be
22 the opportunity to bring that into compliance
23 with present day Zoning Regulations.

1 MR. TAYLOR: And would you expound
2 a bit on the principle that -- of whether or
3 not Zoning Regulations contemplate bringing
4 things into compliance versus continuing
5 errors from past?

6 MR. LeGRANT: Well, if something
7 was, for lack of a better term, erroneously
8 approved in the past, then the question for me
9 would be bringing them to compliance to the
10 present day regulations. There is -- if, in
11 fact, the approval was in compliance with the
12 regulations in effect at the time they were
13 first grandfathered in as an existing
14 nonconforming situation, it's the presence of
15 a violation that would require taking the
16 matter into seeking compliance, but not a
17 nonconforming situation.

18 MR. TAYLOR: And finally, Mr.
19 LeGrant, as you have read the appellant's
20 materials and you have listened to appellant's
21 testimony today, have you heard anything that
22 makes you question your conclusion that these
23 are two buildings?

1 MR. LeGRANT: No. I have not.
2 The -- because of the clarity of the Zoning
3 Regulation that I think is determined here or
4 governed, it speaks to my role as Zoning
5 Administrator to enforce the Zoning
6 Regulations so as to be in compliance with the
7 regulations. And if, in fact, there is a
8 preexisting nonconforming situation or a
9 preexisting violation, then the violation, as
10 I mentioned earlier, comes to me in terms of
11 an actionable basis and complaint or a -- the
12 accretion or some change, such as accretion of
13 record lot, then I would have an enforceable
14 basis to go after the -- to look into then
15 bringing the matter into compliance.

16 MR. TAYLOR: Okay. Madam Chair,
17 that concludes my questions.

18 BOARD MEMBER LOUD: Thank you,
19 Madam Chair. Just a couple of follow-up
20 questions, Mr. Taylor and Mr. LeGrant. For
21 Mr. LeGrant, being an expert in the field, are
22 you able to discern when access started
23 creeping into or making its way into the

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1 definition, I guess, of communication?

2 MR. LeGRANT: Well, other than the
3 cases that I cited, there -- our search of the
4 possible precedents that had to do with
5 communication, these are the ones that I
6 found, but those are the ones that I was able
7 to find and locate and inform my decision.

8 BOARD MEMBER LOUD: If, in your
9 expert opinion, a developer wanted for
10 whatever his or her its set of reasons were to
11 advance a project as one building, but had to
12 intentionally create some attachment, some
13 physical connection between two structures to
14 do that, and did that prior to the time that
15 there was this element of access to the
16 definition of communication, and that was the
17 sole reason they did it and they were very
18 candid about that being the only reason that
19 they did it, would that constitute a violation
20 of the definition of a communication?

21 MR. LeGRANT: You're saying that
22 in a design for a building that is proposed or
23 pending an application?

1 BOARD MEMBER LOUD: Well, let's
2 say, in this particular case then.

3 MR. LeGRANT: Okay.

4 BOARD MEMBER LOUD: Let's say in
5 this case where at the time you are advancing
6 a project, there is a requirement that in
7 order to qualify structures as a single
8 building, there has to be a communication or
9 a connection between those buildings and the
10 understanding is that what can qualify as a
11 communication or a connection is some physical
12 touching of building parts, body parts as it
13 were. And that's the only reason you do it.
14 It doesn't make any sense --

15 MR. LeGRANT: Oh, I see.

16 BOARD MEMBER LOUD: -- apart from
17 the fact that you are trying to make the two
18 buildings connect. You have talked about
19 functionality creeping into the definition at
20 a somewhat later point and then access at an
21 even later point than functionality. So I'm
22 taking you back to the point in time where the
23 common understanding was that you -- the two

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1 buildings have to somehow connect, touch,
2 etcetera.

3 MR. TAYLOR: Before we answers the
4 question, I must object to that. The
5 Government does not agree with the premises of
6 your question. If you are asking this in a
7 hypothetical sense of if the Government's
8 understanding at a certain time was the
9 communication only required physical touching,
10 then I think that would be more appropriate as
11 an expert -- as a question. But your question
12 seems to take as a given what the Government's
13 understanding was in 1980. And I'm not sure
14 that was what you were intending to do.

15 BOARD MEMBER LOUD: Let me rewind,
16 because I did start out asking it as a
17 hypothetical.

18 MR. TAYLOR: Okay.

19 BOARD MEMBER LOUD: And then
20 quickly moved it into a specific, so let me
21 just rewind and make it a hypothetical again
22 for Mr. LeGrant, as an expert. And as you
23 know, experts can speak to hypotheticals.

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1 MR. LeGRANT: Well, yes, if,
2 hypothetically speaking, this case or a
3 similar case came and I -- to me and I would
4 apply my tests for communication, if an
5 alteration was such to create that
6 communication, so as to join the buildings,
7 then yes, I could see that would be a cure for
8 the one building problem. I don't know if
9 that speaks to your question.

10 BOARD MEMBER LOUD: That does
11 answer the question. Let me ask about
12 functionality. In this case there is some
13 testimony, I think it might be by you, it
14 might be by Mr. Epting, that the walkway leads
15 to a deadend, but on the other hand it
16 provides an opportunity for maintenance
17 workers to service the ventilation equipment.

18 MR. LeGRANT: Right.

19 BOARD MEMBER LOUD: And at what
20 point are we talking about something becoming
21 functional? If, in fact, what it allows for
22 is the servicing of this ventilation
23 equipment? Does that meet the test of

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1 functionality? Does it have to be a little
2 bit more than that?

3 MR. LeGRANT: Well, I guess, what
4 I would look for in taking that functionality
5 to the sense of a building communication that
6 would allow some movement of persons or things
7 between the actual two physical buildings. If
8 it was the reverse and the building was
9 designed such that the balcony came off an
10 office building, off the office building and
11 came to a deadend wall, you could still access
12 that vent or that membrane between the two
13 buildings and it would -- I would come to the
14 same conclusion that it does not help
15 establish a communication.

16 It is purely for this membrane
17 that is between the two structures. It does
18 not rise to the level of establishing
19 communication, in my opinion.

20 BOARD MEMBER LOUD: And that would
21 be because it does not allow for the transport
22 of persons from building to building?

23 MR. LeGRANT: Persons or if it was

1 handling materials upon dollies or hand trucks
2 or something.

3 BOARD MEMBER LOUD: Okay. Thank
4 you.

5 CHAIRPERSON MILLER: Mr. LeGrant,
6 I just want to ask you a few follow-up
7 questions, also. With respect to the prior
8 BZA order that you were quoting from the
9 findings of facts which refer to project and
10 portion and terms like that.

11 MR. LeGRANT: Yes.

12 MR. TAYLOR: Madam Chair, excuse
13 me, I think that the two of you are
14 miscommunicating on -- which one are you
15 referencing?

16 CHAIRPERSON MILLER: Oh.

17 MR. TAYLOR: No. 13148?

18 CHAIRPERSON MILLER: Yes.

19 MR. TAYLOR: Okay.

20 MR. LeGRANT: Thank you. Yes?

21 CHAIRPERSON MILLER: My question
22 is it appears in the conclusions of law in the
23 first paragraph that the Board referred to

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1 building in the second sentence.

2 MR. LeGRANT: Yes.

3 CHAIRPERSON MILLER: Okay. Did
4 you factor that into your analysis?

5 MR. LeGRANT: Well, yes. I looked
6 at the order in totality, I guess. And
7 because the terms throughout are used somewhat
8 loosely and interchangeably, it -- there
9 wasn't a consistency of saying one building,
10 one building throughout that led me to believe
11 that the -- there was a clear understanding in
12 the Board's mind that this was a singular
13 building.

14 CHAIRPERSON MILLER: And they
15 didn't, in fact, address the issue head on
16 that these two structures made up one building
17 because? Isn't that correct?

18 MR. LeGRANT: I would agree with
19 your -- that statement.

20 CHAIRPERSON MILLER: With respect
21 to the fire doors, how do you conclude that
22 they are below the main level?

23 MR. LeGRANT: I guess there is two

1 things to look at. One --

2 CHAIRPERSON MILLER: The main
3 floor level. I'm sorry.

4 MR. LeGRANT: Yes.

5 CHAIRPERSON MILLER: Which is
6 referenced in our definition of building when
7 we are looking at communication where they
8 make a distinction between below the main
9 floor level and above. Okay.

10 MR. LeGRANT: All right. When I
11 visited the site and entered the residential
12 building, there was an entrance off of 22nd
13 Street in which there was a lobby and those
14 functions of a building that, in my mind,
15 constitute a main level. From there, one can
16 take the elevators up to the upper floors.
17 There is a reception. There is a concierge,
18 I believe.

19 Then taking the elevator and
20 stairs down to the next -- the lower level
21 established in my mind that this was below the
22 main level. Also, the other aspect of this is
23 the office building which I did not enter. I

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1 did not go in the office building, but the
2 office building is at a higher elevation on K
3 Street and slopes down. So it -- in no way
4 can the fire door location be at or above the
5 main level, even taking the cap, that separate
6 office building "main floor."

7 CHAIRPERSON MILLER: Okay. So you
8 established that it's below the main level,
9 floor level, which I asked you about.

10 MR. LeGRANT: Yes.

11 CHAIRPERSON MILLER: Can you just
12 describe where are they that they would
13 provide access from one building to the next
14 building? How do they do that? Is it you go
15 downstairs in the -- did you do that? Did you
16 go through the fire doors?

17 MR. LeGRANT: Well, I did not
18 enter through the fire doors. I viewed the
19 outside of them from this, for lack of a
20 better term, basement level.

21 CHAIRPERSON MILLER: Okay.

22 MR. LeGRANT: And it -- I did not
23 open the door to see what type of passageway

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1 was in between. I did in my visit to the
2 parking garage, as I mentioned, walk between
3 the overhead where the two buildings -- but
4 this was again, I think, a level below the
5 basement level that contained the fire doors.

6 CHAIRPERSON MILLER: Okay.

7 MR. LeGRANT: So those were, again
8 in both cases, below the main level.

9 CHAIRPERSON MILLER: Right. So
10 since it was below, it didn't constitute
11 communication, so therefore you didn't
12 investigate it much further? Is that right?

13 MR. LeGRANT: That's correct.

14 CHAIRPERSON MILLER: Okay.

15 MR. TAYLOR: Madam Chair, lest
16 there be any confusion, if you are looking at
17 Figure 13 from the intervenor's exhibits, and
18 I just pick it and you can also see this from
19 14, but I'll start with 13, you will see the
20 middle of the photograph vertically and,
21 approximately, one-fourth from the left edge,
22 you can see where there is a doorway. And
23 that is where there is a communication.

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1 To put it in perspective, the
2 Dodge Ram in the photo is going to the parking
3 garage, which is the same level.

4 CHAIRPERSON MILLER: Thank you.
5 Mr. LeGrant, with respect to the ramifications
6 were this Board to find that the structures
7 comprise two buildings instead of one, the
8 appellant said that it would raise questions
9 about the Height Act. Can you address that?

10 MR. LeGRANT: Well, I have to
11 profess, the -- I do not know what the relief
12 from the Height Act would be. They allege it
13 would be something beyond the purview of the
14 Board. I have not determined what the height
15 of the residential buildings separately would
16 be so as to see what relief would be
17 necessary.

18 Again, as I mentioned, if the
19 issue were to come before me, then, at that
20 point, I would have to look at what relief, if
21 any, the Board could offer.

22 CHAIRPERSON MILLER: And finally,
23 with respect to, I think it is, 101.6 which

1 the appellant cited, lot division, that an
2 interpretation that these are two buildings
3 instead of one would be contrary to 101.6. Do
4 you have an opinion on that?

5 MR. LeGRANT: Well, again, it
6 starts off as when the lot is divided and that
7 would have to be the case that an application
8 for a subdivision of separating that into two
9 record lots would be -- come before me.

10 CHAIRPERSON MILLER: Would that
11 have to result, if the determination were made
12 that it's two buildings, would there have to
13 be a subdivision application?

14 MR. LeGRANT: No, I don't believe
15 there would have to be, because there are
16 situations in which I'm well aware of the lot
17 control provisions, but if something preceded
18 that and could be grandfathered in, I would
19 have to do that analysis to see if that would
20 apply in this case or not.

21 CHAIRPERSON MILLER: Thank you.

22 All right. Cross?

23 MR. EPTING: I have four questions

1 for Mr. LeGrant.

2 CROSS EXAMINATION

3 MR. EPTING: The first, you
4 testified that there are two separate
5 buildings and you also testified about
6 bringing a building into compliance with the
7 Zoning Regulations. And I assume you are
8 familiar with 3202.3 of the Zoning
9 Regulations?

10 MR. LeGRANT: I believe so, but
11 you can certainly paraphrase it for me.

12 MR. EPTING: That section requires
13 one building on one record lot. Is that
14 correct?

15 MR. LeGRANT: Yes.

16 MR. EPTING: And if you had two
17 separate buildings, then you would need two
18 separate record lots. Is that correct?

19 MR. LeGRANT: Well, as I mentioned
20 earlier, if an application came before me with
21 two buildings on a single record lot, then
22 there would be an issue. But if there was
23 something that preexisted and grandfathered

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1 in, then, in my mind, it would not be an
2 issue.

3 MR. EPTING: Mr. LeGrant, you
4 talked about the 200 K Street Case 05-36,
5 which did not have a meaningful connection,
6 that's how you used it for. But that case
7 also says, and this is a question, that if you
8 have -- that if you don't have a meaningful
9 connection, you would have two measuring --
10 you would have two buildings and, therefore,
11 you would need separate measuring points.

12 And if you need to refer to that,
13 it's Finding of Fact 52. But is that not
14 correct?

15 MR. LeGRANT: I'm well aware of
16 that finding.

17 MR. EPTING: So unless there is a
18 meaningful connection, then that order says
19 you have to have two separate buildings. Is
20 that not correct?

21 MR. LeGRANT: Well, it says -- it
22 talks about two structures who share no
23 meaningful connection and thus comprise two

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1 separate buildings with two different fronts
2 and therefore two different distinct measuring
3 points of height. It does state that.

4 MR. EPTING: Okay. If we could go
5 to Finding of Fact No. 20 in the BZA Order
6 13148, could you read that, since you referred
7 to this, finding for me?

8 MR. LeGRANT: Let me see if I have
9 it. Okay. No. 20, "The site has a difference
10 in elevation between its K Street and L Street
11 frontages of, approximately, 10 feet."

12 MR. EPTING: So could you conclude
13 from that statement if the building, the
14 residential building was not measured from K
15 Street, that it would be, by necessity, lower
16 than the K Street measurement?

17 MR. LeGRANT: Were you referring
18 to the -- on the 22nd Street?

19 MR. EPTING: Well, the 200 K
20 Street case says that if you don't have a
21 meaningful connection, you have to have two
22 separate buildings with separate measuring
23 points. And in the Dot case, which Mr. Gell

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1 presented, also says that. So if the
2 elevation is dropping, would not the measuring
3 point be lower than what it was along K
4 Street? That's the question.

5 MR. LeGRANT: I would agree the
6 measuring point would be lower.

7 MR. EPTING: Also, in terms of the
8 1980 order, why would they be seeking relief
9 from two roof structures if it wasn't one
10 building?

11 MR. LeGRANT: Well, I believe they
12 also had two elevator cores and in, I think,
13 the Finding of Fact No. 9 talks about "The
14 applicant's architect testified that a
15 separate elevator core is required for
16 efficiency servicing the separate residential
17 office/retail functions of proposed
18 structure." And anyone can have separate
19 elevator cores and corresponding penthouses.

20 MR. EPTING: But would you,
21 please, look at the introduction statement to
22 that order? The third from the last -- the
23 fourth. It says "To allow two roof structures

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1 on the same roof," why would it say same roof
2 if it wasn't one building?

3 MR. LeGRANT: Well, I do not know
4 why the Board used that language in 1980.

5 CHAIRPERSON MILLER: Mr. Epting?
6 Excuse me. Can you -- where does it say on
7 the same roof? I'm looking at --

8 MR. EPTING: If you go to the,
9 basically, introductory paragraph and I don't
10 know what you call it.

11 CHAIRPERSON MILLER: Oh, I see,
12 yes, okay.

13 MR. EPTING: It says "To allow two
14 roof structures on the same roof."

15 CHAIRPERSON MILLER: Okay.

16 MR. EPTING: And --

17 CHAIRPERSON MILLER: Got it.

18 MR. EPTING: -- that to me would
19 imply, and again, conjecture that it's one
20 building.

21 MR. TAYLOR: And, Madam Chair, I
22 don't think that Mr. LeGrant is qualified to
23 speak to exactly why that was drafted that

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1 way.

2 MR. EPTING: Mr. LeGrant testified
3 that he went through the order and said he saw
4 nothing in there which would lead him to
5 believe that this was one building. So I'm
6 just trying to say there is something in the
7 order.

8 MR. LeGRANT: Well, to clarify, if
9 I may, what I said is the order had different
10 references to this overall project. And they
11 use the word project, they use the word
12 structure, they use the word building. And so
13 I believe in my testimony I noted that I felt
14 reliance on the order. It was difficult for
15 me to rely on the order because of the way it
16 was referred to as differently throughout it.

17 MR. EPTING: My final question,
18 Mr. Crews' letter says "The controlling aspect
19 of the definition of the building requires an
20 above-grade connection for structures." If
21 you -- would you, please, look at Figure 14
22 for me again? My understanding of gross floor
23 area and above-grade means above adjacent

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1 finished grade. So therefore, is that
2 building connection above adjacent finished
3 grade?

4 MR. LeGRANT: Well, the definition
5 there doesn't mention grade.

6 MR. EPTING: I'm talking about Mr.
7 Crews' letter, which we're appealing. It says
8 in two places "above-grade connection."

9 MR. LeGRANT: Okay. Well, despite
10 the language that Mr. Crews used, I had to, as
11 I have noted, do a separate analysis and my
12 separate analysis, hopefully I made it clear,
13 is to rely on the definition in the code. And
14 that's -- and then as I tested that definition
15 through different -- to see what could inform
16 that, given that the word communication is,
17 for example, not defined in the Zoning
18 Regulations, I looked through some guidance on
19 that and that's how I concluded again relying
20 on the definition, not necessarily Mr. Crews'
21 determination, the language he used in his
22 determination in this letter.

23 MR. EPTING: Okay. That's fair.

1 Then finally, the McBride BZA Case, which we
2 referred to, Mr. Bello talks about a
3 meaningful connection, what was the date of
4 that BZA order?

5 MR. LeGRANT: I believe August 8,
6 2000.

7 MR. EPTING: And what was the date
8 of the BZA order approving this case?

9 MR. LeGRANT: You mean the 19 --
10 the original construction?

11 MR. EPTING: Yes.

12 MR. LeGRANT: February 2, 1980.

13 MR. EPTING: Okay. Thank you.
14 That's all of my questions.

15 CHAIRPERSON MILLER: Okay. Does
16 the intervenor have questions?

17 MR. HITCHCOCK: One quick
18 question. Mr. LeGrant, directing your
19 attention again to Figures 13 and 14 that you
20 discussed before, could you clarify your
21 understanding of where the first floor of the
22 two buildings are?

23 MR. LeGRANT: Well, the -- I guess

1 the simple answer is where the windows are.
2 The -- in Figure 14, there are windows shown
3 sort of a row of large rectangular tinted
4 glass windows for the office building's
5 portion and then there is windows with -- it
6 looks like there is white louvers or something
7 inside in the residential portion. That, to
8 me, represents where the main floor or the
9 first floor of these buildings are.

10 MR. HITCHCOCK: Thank you.

11 VICE CHAIR ETHERLY: Madam Chair,
12 if I may, I would like to come back to a
13 question to Mr. Taylor. A slightly different
14 feel, but let me just kind of broach it. It
15 has been raised, but it's something that I'm
16 just curious about. Any -- now, I pretty much
17 think I can prognosticate what the answer
18 would be on the part of DCRA, but any concerns
19 here about latches or estoppel?

20 MR. TAYLOR: Mr. Etherly, for
21 purposes of this case and the very minor -- I
22 don't want to say minor, but the very small
23 finite issue before us, the answer would

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1 certainly be no. Now, in the -- if one is
2 combining the application with this, and I
3 think that's probably where you are headed
4 with it --

5 VICE CHAIR ETHERLY: Not so much
6 so, because I know that's out there. I'm
7 thinking more just from the standpoint of the
8 1980 order, subsequent C of Os that have been
9 issued for the building to where we are today.
10 Would it be DCRA's opinion, and this is a very
11 subjective answer, because I wouldn't
12 necessarily expect you to say no, but I just
13 thought I would kind of broach it, because
14 part of the unspoken piece here is there is an
15 action that the Board of Zoning Adjustment
16 took in 1980 and it's still, of course,
17 arguable, as Mr. LeGrant's testimony spoke to
18 to an extent.

19 It's arguable as to kind of what
20 the import of that action is from the
21 standpoint of understandings of communication.
22 But if -- would there be a concern on the part
23 of DCRA that the applicant relied on this

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1 Board's actions in 1980, whatever they may be
2 read to stand for, and subsequent permittals
3 by DCRA, such that conceivably the District
4 could be estopped at some point from taking
5 action adverse to what it arguably has already
6 approved over, you know, subsequent steps
7 since 1980?

8 MR. TAYLOR: Okay. If I
9 understand your question correctly, I'm going
10 to have to answer it in two parts. The first
11 being that the question before Mr. Crews, and
12 we don't have before us what the
13 communication, exactly communication was. I'm
14 having to rely on the first paragraph of his
15 letter.

16 VICE CHAIR ETHERLY: That
17 referenced the earlier letter from the
18 applicant.

19 MR. TAYLOR: Yes. And you have
20 asked me for a determination of whether the
21 structures referred to above constitute one
22 building or two for the purposes of the
23 applicability of section 1709.20 of the Zoning

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1 Regulations. The initial answer is that the
2 question does not specify a regurgitation of
3 any previous action.

4 VICE CHAIR ETHERLY: Prior relief.
5 It's more of a perspective.

6 MR. TAYLOR: It is really a
7 question of is this what it is.

8 VICE CHAIR ETHERLY: Okay.

9 MR. TAYLOR: The second answer is
10 well, yes, of course, the District always is
11 concerned when there are misunderstandings
12 about one's status under the law. I would say
13 that the District would be concerned about
14 estoppel and latches if it was trying to, say,
15 enforce the rear yard.

16 Something that was done in 1980 on
17 the reliance of the 1980 opinion, if, and we
18 are now getting into hypothetical areas,
19 because it's not part of this case, but the
20 flip side of that would be that, we were
21 talking about a prospective action which might
22 be taken upon or relied -- used -- taken in
23 reliance upon an erroneous decision from 25

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1 years ago, then the District would not feel
2 bound by estoppel in enforcing the regulations
3 as they are.

4 VICE CHAIR ETHERLY: Okay. And I
5 appreciate that answer and I want to be very
6 careful not to yank you too deeply into
7 hypothetical conversations, especially because
8 there may be -- there are other aspects of
9 this --

10 MR. TAYLOR: Thank you.

11 VICE CHAIR ETHERLY: -- that are
12 still kind of underway. So is it your sense
13 kind of at the end of the day that this is an
14 opportunity for the Board to correct a
15 decision that was in error or, alternatively,
16 change an interpretation that has outlived its
17 usefulness? And again, that may perhaps be
18 somewhat of an unartful question, but I think
19 it kind of gets to the crux of the matter in
20 terms of trying to sort out what exactly we
21 are dealing with here.

22 MR. TAYLOR: Mr. Etherly, I fear
23 you must have been reading facial expressions

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1 when you made your last comment and I'll try
2 to do better on that. First of all, the
3 District is not conceding the premises of that
4 question.

5 VICE CHAIR ETHERLY: Okay.

6 MR. TAYLOR: It is not conceding
7 that there was a definite finding in 1980 --

8 VICE CHAIR ETHERLY: That this was
9 a single building.

10 MR. TAYLOR: -- that this is one--

11 VICE CHAIR ETHERLY: Okay.

12 MR. TAYLOR: -- building for under
13 this regulation. The District believes that
14 that's a little bit loosely addressed.

15 VICE CHAIR ETHERLY: So at best,
16 this may be an opportunity for some
17 clarification?

18 MR. TAYLOR: Certainly, that is
19 correct.

20 VICE CHAIR ETHERLY: I understand.
21 Okay. Thank you. Thank you. Thank you,
22 Madam Chair.

23 CHAIRPERSON MILLER: Your line of

1 questions just has made me think of something
2 I would like to ask Mr. Epting.

3 MR. EPTING: Sure.

4 CHAIRPERSON MILLER: And that is,
5 I mean, I was thinking well, you know, there
6 is the grandfathering and maybe you would be
7 arguing that well, this one building should be
8 grandfathered in if it was found to be one
9 building back in 1980.

10 My question to you is you posed
11 the question to the Zoning Administrator.
12 According to this letter it says "You have
13 asked me for a determination of whether the
14 structures referred to above constitute one
15 building or two for the purposes of the
16 applicability of section 1709.20 of the Zoning
17 Regulations of the District of Columbia."

18 Now, when you get an answer that
19 you don't like, how can you then say that the
20 District isn't entitled to interpret a
21 previous Board order differently or come to a
22 different conclusion than a previous Board
23 order? You posed the question for their

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1 opinion. They gave you an opinion you didn't
2 like.

3 MR. EPTING: Right. But that's
4 exactly why you have the appeal process. If
5 the Zoning Administrator erred in his
6 decision, I should be able to bring that to
7 the Board and show why. So -- and that's the
8 whole part of the appeal process. And if he
9 would have said yes, the other side could
10 appeal the decision also, but there has to be
11 a mechanism for determining zoning answers
12 from the Zoning Administrator.

13 I mean, I can't just make those
14 rulings myself, but I think that's exactly --
15 your question is correct, but that's exactly
16 why there is an appeal process.

17 CHAIRPERSON MILLER: Okay. Yeah,
18 your other choice was to bring the
19 application, which we know is out there.
20 Okay.

21 MR. EPTING: Exactly.

22 CHAIRPERSON MILLER: Okay. Yes?

23 MR. EPTING: I don't think -- I

1 mean, I don't know, Mr. LeGrant has actually
2 responded to one of intervenor's questions.
3 Is it possible for me to ask one more cross
4 exam of Mr. LeGrant based upon that question
5 or do you want me to do that on rebuttal?

6 CHAIRPERSON MILLER: If no one
7 objects, I don't have a problem with it while
8 it is fresh in Mr. LeGrant's mind and
9 everything. Do you have a problem with this?
10 It's just one question, right?

11 MR. EPTING: Yes.

12 CHAIRPERSON MILLER: Okay.

13 MR. EPTING: The question about
14 Figures 13 and 14 was phrased as first floor.
15 The definition in the Zoning Regulations is
16 main floor.

17 MR. LeGRANT: Yes.

18 MR. EPTING: You testified that
19 you visited the residential building. My
20 memory of the residential building entrance is
21 that when you go into the building, you go
22 down quite a good distance. Is that correct?

23 MR. LeGRANT: Well, my

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1 recollection of my September 6th visit is
2 after you enter, you do walk down a few stairs
3 to a level which is the areas that I
4 described, the lobby, the seating and the
5 concierge.

6 MR. EPTING: Would that be the
7 main floor of the residential building?

8 MR. LeGRANT: Yes, I believe so.

9 MR. EPTING: And as we have
10 discussed about the sloping site, that level
11 would surely be lower than the main level of
12 the K Street building?

13 MR. LeGRANT: Yes.

14 MR. EPTING: Thank you. That's
15 all I had.

16 CHAIRPERSON MILLER: Okay.
17 Intervenors?

18 MR. HITCHCOCK: Thank you, Madam
19 Chair. Corn Hitchcock for the Woodley -- I'm
20 sorry, the West End Place Condominium
21 Association. I mentioned earlier Mr.
22 Hasselman is here to testify as an expert. We
23 have the resume I can pass up. I can do Q&A

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1 or I could distribute the resume and summarize
2 it, if that would be easier in light of the
3 hour.

4 CHAIRPERSON MILLER: Yes, that
5 probably would be better, if the other parties
6 agree. If you pass out the resume and we can
7 all look it over and you do a quick summary.

8 MR. HITCHCOCK: Right. I believe
9 we gave it to the appellant some time ago.

10 CHAIRPERSON MILLER: Mr. Gell,
11 what is Mr. Hasselman being offered as an
12 expert in?

13 MR. HITCHCOCK: We're offering him
14 as an expert in construction issues. I would
15 add for the Board's benefit that he has
16 testified as an expert on those categories in
17 several courts in Maryland as well as Virginia
18 and I believe he has testified at one
19 administrative hearing here in the District of
20 Columbia.

21 We're offering him also because he
22 works on engineering and construction issues
23 with respect to the residential building, so

1 he has direct hands-on experience over a
2 period of years with the construction and
3 operations of the building, of the residential
4 building, and can walk through the particular
5 questions about the building that have come up
6 and that both in Figures 13 and 14 as well as
7 some of the others. So he has a direct
8 knowledge that I think will be pertinent to
9 the Board's deliberations.

10 CHAIRPERSON MILLER: Any
11 objections?

12 MR. EPTING: I object unless he
13 was basically at the C of O inspection in 1982
14 or has some knowledge about it in terms of
15 what decision was made then.

16 MR. HITCHCOCK: Well, our position
17 -- well, but that's counsel's view of the
18 case. I mean, if that were the case, I mean,
19 no one was here in 1982, I dare say. Our view
20 is that what's important is what does the
21 building look like now? Is this balcony that
22 was the only element proffered in 1980
23 actually built? And some other things. I

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1 mean, there are a lot of facts that are not in
2 the record and we would like to try to get
3 them into the record, so the Board has its
4 full -- as much information as possible.

5 CHAIRPERSON MILLER: Let me ask
6 you this. I don't see any issue with getting
7 facts into the record, regardless of whether
8 he is an expert or not. So I just want to
9 know why do we need expert testimony?

10 MR. HITCHCOCK: Well, there may be
11 opinions about the feasibility of doing
12 certain things that he would be talking about.
13 If you like, we could perhaps postpone it
14 until the end if he is offering opinions and
15 deal with it later on, just take the
16 testimony.

17 CHAIRPERSON MILLER: No, we need
18 to resolve this.

19 MR. HITCHCOCK: Okay.

20 CHAIRPERSON MILLER: Do you --

21 MR. TAYLOR: Madam Chair, the
22 Government concurs with your understanding.
23 As far as a fact witness, the Government has

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1 no issue at all. The Government has not heard
2 a proffer of where the expert angle would come
3 into this.

4 CHAIRPERSON MILLER: Do you want
5 to do that?

6 MR. HITCHCOCK: I'm sorry, make a
7 proffer?

8 CHAIRPERSON MILLER: Yes.

9 MR. HITCHCOCK: As to the
10 expertise?

11 CHAIRPERSON MILLER: Um-hum.

12 MR. HITCHCOCK: There are certain
13 questions about whether this is one building
14 or two buildings. And his expertise would be
15 -- and there are theoretical statements that
16 have been offered about whether they are one
17 building or two buildings. And he can offer
18 a practical analysis of whether it is one
19 building or two buildings and offer opinions
20 as a result.

21 CHAIRPERSON MILLER: Okay. We
22 don't have a problem with accepting him as an
23 expert witness. I understand that in our

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1 deliberations we will be looking at, you know,
2 different issues, one being whether we are
3 just looking at 1980 and the next being
4 whether we are looking at today.

5 MR. HITCHCOCK: Um-hum.

6 CHAIRPERSON MILLER: So as of now,
7 you know, the record is open for all of that,
8 so I would -- we don't have any problems.

9 MR. HITCHCOCK: All right.

10 CHAIRPERSON MILLER: So he is
11 qualified as an expert.

12 MR. HITCHCOCK: Okay. Thank you,
13 Madam Chair. On behalf of the condominium
14 association, Ms. Harmon and Mr. Scholz were
15 here today in support of the Zoning
16 Administrator's ruling. We have made several
17 filings. We have several witnesses to offer.
18 But the key issue in our view is not what the
19 BZA decided in 1980.

20 There was one and only one
21 connection that was cited and this was the
22 rear third floor balcony. That was the only
23 one that the Board was told of in all of the

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1 citations to the transcript that Mr. Epting
2 read through earlier. In fact, that balcony
3 was not built and there are no connections.

4 Two Zoning Administrators went to
5 the building. They looked, they saw and they
6 concluded that there is no connection or
7 communication. The applicants -- the
8 appellant's argument rests solely on the plans
9 from 1980 and really, in our view, is trying
10 to put too much weight on it.

11 Let's talk about something that
12 has not had much emphasis here today, which is
13 what was the Board asked to do in 1980? This
14 is not a Planned Unit Development. All the
15 Board was asked to do is to approve two forms
16 of limited relief to make the project happen.

17 The first issue was whether there
18 should be a variance to permit the garage to
19 be built to serve both buildings and the
20 second was whether or not there should be an
21 exception to permit two rooftop structures.
22 And I want to come back to that last one,
23 because it's important. The Board realized

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1 that the condominium building would be
2 people's homes, that there would be roof
3 gardens and other uses on the roof that would
4 be inconsistent with strict application of the
5 rules that would have required extra walls,
6 extra height and would have what this Board
7 said in 1980, would be a negative aesthetic
8 impact and would increase shadows to the
9 detriment of the proposed garden.

10 So from our perspective, from the
11 residents' perspective in the building, the
12 appellant is really cherry picking taking the
13 1980 decision to the extent it is helpful, but
14 not dealing with the fact, and it's a
15 considerable irony, that the Board was very
16 concerned about roof level construction of the
17 sort that is being proposed here.

18 We think Minshall Stewart got it
19 right the first time. You need variance
20 relief to build the rooftop addition they
21 want. We don't know why they changed course,
22 but we think that they were correct. And that
23 is why, as I said, it's ironic to say let's

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1 look only at the 1980 decision that focused on
2 a narrow issue and use that to try to get the
3 benefit of 1990 rules, the TDR rules to allow
4 something this Board would have been very
5 concerned about when it was asked to grant the
6 relief.

7 So with that brief introduction, I
8 would like to introduce Mr. Hasselman, who
9 will present Figures 13, 14 and a few others
10 as well and walk you through the building.
11 Florence Harmon, one of the individual
12 residents, will make a brief statement on
13 behalf of the association, herself and Mr.
14 Scholz. Mr. Gell is prepared to discuss the
15 legal issues. And we also have present Mr.
16 Chris Labis, who is the property manager who
17 can answer any specific questions that the
18 Board may have about the building or the
19 presentation.

20 CHAIRPERSON MILLER: I just want
21 to make a cautionary note.

22 MR. HITCHCOCK: Yes.

23 CHAIRPERSON MILLER: That this

1 isn't a special exception case, so that --

2 MR. HITCHCOCK: Understood.

3 CHAIRPERSON MILLER: -- I don't
4 know exactly what all these witnesses want to
5 testify to, but that you need to stick to the
6 legal question, whether this is one building
7 or two.

8 MR. HITCHCOCK: Right.

9 CHAIRPERSON MILLER: Okay.

10 MR. HITCHCOCK: We will limit it.

11 CHAIRPERSON MILLER: Okay.

12 MR. HITCHCOCK: Mr. Hasselman's
13 testimony is I think about 15 minutes and Ms.
14 Harmon is under 10 minutes. So if that's any
15 help.

16 CHAIRPERSON MILLER: Fine. As
17 long as -- I just want to make sure --

18 MR. HITCHCOCK: Yep.

19 CHAIRPERSON MILLER: -- it was to
20 that point.

21 MR. HITCHCOCK: Um-hum. There's a
22 handout.

23 CHAIRPERSON MILLER: You know,

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1 before you start again, I'm going to make an
2 announcement again that we are still in the
3 last case of the morning session for anybody
4 who is here for the afternoon session. Don't
5 -- we certainly won't start before 3:00.

6 MR. HASSELMAN: Okay. Madam
7 Chair, Members of the Board, what we're going
8 to do is give you a walking tour of the office
9 building and the residential building. In the
10 course of this testimony, we will make two key
11 points. First, the office building and the
12 residential building were constructed as two
13 buildings without any means of direct
14 communication.

15 Secondly, whatever may have been
16 said during the 1980 proceedings there never
17 was and there is not now any above-grade
18 connection between these two buildings. The
19 developer argues that there are several
20 connections, but this is simply not the case.

21 Let's begin with the plans that
22 were presented to the Board during the 1980
23 Board proceedings. These were taken from the

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1 docket in that case. On Slides 20, 21 and 22,
2 at the back of your booklet, you can see that
3 the two buildings were intended to be
4 physically separated and they were. You may
5 wish to reference this at this point in time.

6 The plans on Slides 21 and 22
7 address essential argument in this appeal,
8 mainly that the buildings were designed with
9 a connection between a third floor balcony of
10 our building and the office building. There
11 is no such connection.

12 I would add that it would be very
13 difficult to create a connection elsewhere,
14 given that the floor to ceiling ratios of the
15 two buildings are different and they do not
16 align. That's what the plan said.

17 Now, let's look at how it turned
18 out in practice. Here is the office building
19 looking north on K Street. 22nd Street is on
20 the left side of the picture. Here is another
21 shot of 22nd Street showing a portion of our
22 building. Note that 22nd Street declines as
23 you go north towards L Street. Here is the

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1 view of the front of our building with the
2 entrance on the left and the office building
3 on the right.

4 Here is a closeup of the office
5 balcony on the right and the residential
6 balconies on our building. There is no
7 connection. Here is another angle and another
8 and another, all showing no connections.
9 Please, note the thick black vertical line
10 running between the two buildings. That is a
11 grill that covers the empty space between the
12 two buildings.

13 As you can see, there is a clear--
14 there is clearly a space that exists between
15 the two buildings. There is thus no
16 connection at the front of the two buildings.
17 The developer also claims that there is a
18 separate above-grade connection at the rear of
19 the building. There is no such connection, at
20 least not above-grade.

21 Let's remember that if this were
22 truly one building, then the grade would be
23 measured on the front of the building on K

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1 Street. As noted earlier, the grade slopes
2 down along 22nd Street as you approach L
3 Street. To get to the rear of our building by
4 car, you have to enter an alley on L Street,
5 drive down the alley and you come out here.
6 This is the view westbound looking directly at
7 the back of our building.

8 You would proceed straight ahead
9 to where the Marlo truck is shown and you
10 would proceed left. There you would see the
11 office building on the left and our building
12 on the right. This is a downward ramp in the
13 lower right corner, the door that is said to
14 be an above-ground connection. Here is a
15 closer shot of that and again an even closer
16 shot.

17 This door leads to the garage at a
18 point that is part of the residential parking
19 area. These are the doors referred to as the
20 fire doors earlier. There is no connection to
21 the office building parking on this level. If
22 one walks through this door and then walks
23 down one level, you can walk into the office

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1 building's garage parking area. This is the
2 only space where there is a connection and it
3 is two floors below-ground.

4 Let's go back to picture 14 for a
5 moment. You will note, first of all, the
6 vertical grill in the middle of the picture.
7 This is the other end of the space between the
8 buildings that we saw from the front of the
9 building, which marks the dividing line
10 between the two buildings. You will also note
11 that the ramp slopes downward below-grade to
12 get to the door.

13 This is downward also from L
14 Street, which itself is below-grade on K
15 Street, which is the benchmark we would be
16 using if this were truly one building.

17 The appellant also argues that
18 there was supposed to be a connection between
19 a balcony on the rear apartment unit and the
20 office building. However, Figure 14 makes
21 very clear our building was constructed
22 without balconies on the rear units. On the
23 rear side of the building, as on the 22nd

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1 Street elevation, there is no element that
2 projects into the space occupied by the office
3 building.

4 The brick wall above the fire
5 doors is truly, in essence, nothing more than
6 a fence which protects a fall zone from the
7 grade level rear plaza area on the property of
8 the residential building. In short, any way
9 you look at it, there is not an above-grade
10 connection between the two buildings. The
11 limited communication which does exist is all
12 below-grade.

13 MR. HITCHCOCK: Just one question
14 for clarification, Mr. Hasselman. Could you
15 indicate with reference to Figure 14 the
16 location of the third floor residential unit
17 where the balcony was supposed to exist,
18 according to the 1980 plan?

19 MR. HASSELMAN: Yes. This line
20 right here is the grade level area of the
21 plaza deck that I just referenced. Behind
22 this wall, which is about 6 feet tall, there
23 is a set of windows which are the first floor

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1 of the residential building. The main floor
2 level of the residential building is slightly
3 below the main floor level of the commercial
4 building, because of the slopping grade
5 between K and L Streets.

6 This is the second floor. This is
7 the third floor. This is the area where on
8 the original drawings a balcony was depicted
9 and it is, obviously -- has not been built.

10 MR. HITCHCOCK: Okay. Just so the
11 record is clear, you pointed that there are
12 three sets of windows on the right hand side
13 and you pointed to the two windows in the
14 middle indicating that was the third floor.
15 Is that correct?

16 MR. HASSELMAN: Correct. Right
17 there.

18 MR. HITCHCOCK: Thank you. Our
19 next witness will be Florence Harmon.

20 MS. HARMON: Is it possible to
21 turn the lights on?

22 CHAIRPERSON MILLER: Ms. Bailey?

23 MR. HITCHCOCK: Could we have the

1 lights, please?

2 CHAIRPERSON MILLER: They are
3 ready for the lights, please.

4 MR. HITCHCOCK: Thank you.

5 MS. HARMON: Madam Chair, Members
6 of the Board, my name is Florence Harmon. I'm
7 the owner of a condominium in West End Place
8 Condominium. My unit is on the top floor and
9 faces the alley behind 22nd and K and L
10 Street. That view that you are looking at on
11 the screen. My property also directly abuts
12 the appellant's office building.

13 I purchased my condominium in 1999
14 and like most owners of the 67 condominiums in
15 West End Place, it is my most significant
16 financial asset. My unit along with the upper
17 level condominium units will be significantly
18 devalued by appellant's proposed construction
19 property.

20 CHAIRPERSON MILLER: I can see Mr.
21 Epting is about to make an objection. Is that
22 right?

23 MR. EPTING: I object.

1 CHAIRPERSON MILLER: Okay. Ms.
2 Harmon, that's what I was saying to Mr. --

3 MS. HARMON: Okay. I'll go on to
4 the one building, two buildings.

5 CHAIRPERSON MILLER: Okay. You
6 have something to say with respect to that.
7 Great.

8 MS. HARMON: Okay. Despite what
9 Minshall Stewart contends, the original
10 developers intended, the predecessors of their
11 current condominium and office building are --
12 the condominium originally was apartments.
13 They were called Washington Park Apartments.
14 They built them originally for condominiums,
15 but weren't able to, you know, sell them, so
16 they made it into an apartment building. So
17 you will see the term Washington Park
18 Apartments.

19 They constructed them as two
20 separate buildings. As far as we know, there
21 is no communication between the buildings at
22 any level above-ground. There is no third
23 floor balcony extension which you -- and there

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1 is no way to walk between the two buildings.

2 In fact, the Washington 100 Best
3 Addresses publication from the 1980s notes the
4 complete separation of the office building and
5 condominium building. And this is the book.
6 It was published in the 1980s, closer to the
7 time when the BZA originally considered this
8 project. And I quote from the description of
9 the Washington Park Towers in this book.

10 It specifically states that "The
11 office building section is clearly demarcated,
12 because it sets well back from the facade of
13 Washington Park Tower, which borders the
14 sidewalk. The offices are completely
15 separated from the apartments. There are no
16 internal connections. Each building has its
17 own entrance, lobby and elevator. The
18 architectural drawings of the two buildings
19 show no above-ground walkway or entrance
20 joining the two buildings that provide
21 communication between them.

22 There is absolutely no way owners
23 of the condominium building can gain access to

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1 the office building, except through separate
2 exterior entrances and vice versa."

3 And I have to tell you, I never
4 knew about the below-ground fire doors. I
5 never knew where they went. There is an alarm
6 on them, so our residents do not use them.
7 Similarly, tenants of the office building
8 cannot gain access to the condominium
9 building. There are no -- there is no passage
10 way between the two buildings. In fact, as we
11 have pointed out, there is a 20 inch
12 separation.

13 The office building and
14 condominium building were separately
15 constructed. They were -- different
16 Certificates of Occupancy were issued. People
17 I have talked to who lived in the area at the
18 time in the townhouses across say that they
19 were actually at two different times.

20 The West End Condominium
21 Association, Mr. Scholz and I, would urge this
22 Board to uphold the Zoning Administrator's
23 determination that two buildings exist. In

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1 doing so, the Board would preserve the
2 original intent of the 1980 BZA that separate
3 buildings do, in fact, exist. And I point you
4 to the paragraph 18 of the 1980 BZA order
5 which the Board was very careful to state that
6 even 10 feet of unnecessary wall would have a
7 negative aesthetic impact and increase shadows
8 to the detriment of the proposed roof gardens.

9 Mr. Epting has also quoted a great
10 deal of the transcript. I will tell you there
11 is, I was told by the staff of the BZA or the
12 Zoning Administrator, I'm not sure where they
13 are, there is a transcript that may be
14 missing. So we don't have the complete
15 record. But Mr. Mariani, who was on the BZA
16 at the time, did make very specific comments
17 that they were two separate buildings.

18 He did refer to them as a project.
19 We thank you for your consideration of this
20 matter and I'll be happy to take any
21 questions.

22 CHAIRPERSON MILLER: Thank you. I
23 was just wondering, could you clarify for me

1 whose words you were reading from from Best
2 Addresses? Were you reading the author or
3 were you reading the --

4 MS. HARMON: I was reading the
5 description and I actually have copies of it
6 if you would like me to enter it into the
7 record.

8 CHAIRPERSON MILLER: You have
9 copies?

10 MS. HARMON: Of the excerpt
11 about --

12 CHAIRPERSON MILLER: Okay.

13 MS. HARMON: -- our condominium
14 building. It was apartments then.

15 CHAIRPERSON MILLER: Okay.

16 MS. HARMON: But I can enter the
17 copies into the record.

18 CHAIRPERSON MILLER: Okay. Any
19 other Board questions? Questions by the other
20 -- oh, is that the end of your witnesses? Mr.
21 Gell?

22 MR. GELL: Yes.

23 CHAIRPERSON MILLER: I mean, are

1 we ready for cross examination or do you have
2 more to your case?

3 MR. GELL: No, we're ready for
4 cross examination.

5 CHAIRPERSON MILLER: Okay. The
6 appellant?

7 MR. EPTING: I just have one
8 question for Ms. Harmon, because she talked
9 about the BZA order.

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11 MR. EPTING: As allowing as being
12 two separate buildings, they why would they
13 have sought roof structure relief if it was
14 two separate buildings?

15 MR. HITCHCOCK: That's a legal
16 conclusion.

17 MS. HARMON: That's a legal
18 conclusion and I'm not a zoning attorney, Mr.
19 Epting.

20 MR. EPTING: Thank you.

21 MR. TAYLOR: Madam Chair, the
22 Government does not have questions for this
23 witness.

1 CHAIRPERSON MILLER: Okay.

2 MS. HARMON: I also would like to
3 provide a letter from the ANC. The ANC wasn't
4 fully constituted until September 19 and I'm
5 now a member of the ANC representing this
6 District, so I have a letter. The ANC did not
7 realize they needed to protest both the
8 variance proceeding and the appeal and I have
9 a letter from the ANC protesting this
10 particular appeal.

11 MR. GELL: We would move that be
12 accepted.

13 CHAIRPERSON MILLER: Sure. Do you
14 have copies for the other parties?

15 MS. HARMON: Yes, I do.

16 CHAIRPERSON MILLER: Okay. Good.
17 Did you say you are on the ANC, Ms. Harmon?

18 MS. HARMON: Yes.

19 CHAIRPERSON MILLER: Okay. But
20 you don't have any additional testimony on
21 behalf of the ANC. Is that --

22 MS. HARMON: I can provide some if
23 you would like, if you have any questions. I

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1 was designated. Vince McConey was the ANC
2 representative for ANC-2A06 prior to me and he
3 moved, so the seat was open, so I am now the
4 ANC representative.

5 CHAIRPERSON MILLER: Okay.

6 MS. HARMON: For ANC-2A06.

7 CHAIRPERSON MILLER: Okay. Why
8 don't we just take a look at the letter and
9 then if we have a question, we'll ask you.

10 MR. EPTING: Could I ask whether
11 the ANC meeting was noticed, duly noticed in
12 terms of the appeal?

13 CHAIRPERSON MILLER: Do you have a
14 copy of the letter? I mean, does it say on
15 the -- I haven't seen the letter. It says it
16 on the letter?

17 MR. EPTING: We have a copy of the
18 agenda.

19 MS. HARMON: Yeah, that's this.

20 CHAIRPERSON MILLER: Okay. I have
21 a question. Well, first of all, Mr. Epting
22 asked whether it was noticed. It looks to me
23 it should have been noticed. It was at your

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1 regularly scheduled meeting. Is that correct?

2 MS. HARMON: I was not sworn in
3 until the 19th, so I'm not familiar with it,
4 the notice procedure.

5 CHAIRPERSON MILLER: Well, I
6 believe that most ANC's post notice of the
7 agenda for the upcoming meeting --

8 MS. HARMON: Yeah, it was on --

9 CHAIRPERSON MILLER: -- in various
10 ways.

11 MS. HARMON: -- the agenda.

12 CHAIRPERSON MILLER: It was on the
13 agenda?

14 MR. AVITABILE: If I may, Madam
15 Chair?

16 CHAIRPERSON MILLER: Yes.

17 MR. AVITABILE: We actually were
18 monitoring The Current, which often posts the
19 agenda and it did not post any agenda in
20 either the week before or the week of the
21 meeting. We have copies of that, if you would
22 like it, but really our opposition is not to
23 the letter per se, it says what it says. It's

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1 just the ANC shouldn't be afforded any great
2 weight, because they didn't follow the proper
3 procedure. And also, in an appeal, the ANC is
4 not automatically a party. They have to file
5 for party status like anyone else. They did
6 not do so, so we just want to make sure that
7 this is given the weight that it is afforded,
8 but no more.

9 MR. TAYLOR: I think the ANC is
10 automatically a party.

11 MR. AVITABILE: Not in an appeal
12 it's not.

13 CHAIRPERSON MILLER: I think our
14 rules are confusing, but I believe that it is
15 and I'll double check the rules if you want,
16 but I think that --

17 MS. MONROE: Excuse me, if you
18 want to know, I mean, it's 3199.2, "the party,
19 the following is indicated on appeals to the
20 Board." And No. 4 is "the ANC for the area in
21 which the property is located."

22 CHAIRPERSON MILLER: Yeah, but
23 what is says is that you are appealing the

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1 Zoning Administrator's determination.

2 MS. MONROE: It's just --

3 CHAIRPERSON MILLER: Why would you
4 be appealing the Zoning Administrator's
5 determination?

6 MS. HARMON: No, it says we oppose
7 their appeal.

8 MR. TAYLOR: Madam Chair?

9 CHAIRPERSON MILLER: Oh, you
10 oppose the appeal. I'm sorry. You're right.

11 MR. TAYLOR: Were there copies for
12 parties for this letter?

13 CHAIRPERSON MILLER: I thought
14 that they were distributed.

15 MS. HARMON: Yes, I gave it to the
16 fellow.

17 CHAIRPERSON MILLER: Okay. Let's
18 deal with this pretty quickly. I mean, I
19 think there has been a valid question about
20 notice. I would assume that what the
21 applicant is saying is that they monitored the
22 hearings and they didn't see notice of this.
23 So that would go to the great weight. And you

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1 are saying you were new and you can't attest
2 whether or not there was notice.

3 So I would suggest though that we
4 take it into the record as an indication of
5 the ANC's opposition to the appeal. And I
6 don't see any great issues that this Board
7 would address were it to be giving the ANC
8 great weight. You have a comment, Mr. Gell?

9 MR. GELL: Simply to say that we
10 are moving here on testimony of people who may
11 not be absolutely sure of what the ANC did in
12 terms of notice. It may not have been in the
13 newspaper. It may well have been adequate
14 notice.

15 CHAIRPERSON MILLER: Would you
16 like us to leave the record open?

17 MR. GELL: I would prefer that the
18 Board accept further documentation.

19 CHAIRPERSON MILLER: Okay.

20 MR. GELL: As to whether it was
21 not, before it decides.

22 CHAIRPERSON MILLER: I don't have
23 a problem with that, leaving the record open.

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1 MR. GELL: All right.

2 CHAIRPERSON MILLER: We don't have
3 to decide it at this point. If you want to
4 address it in the post-hearing submissions,
5 you can do that.

6 MR. GELL: We would be glad to.

7 CHAIRPERSON MILLER: Okay. Any
8 questions about this letter to the ANC? Okay.
9 Other questions besides the notice one?

10 MR. EPTING: None.

11 CHAIRPERSON MILLER: Okay. So
12 that's -- you're finished with your case.
13 We're ready for any other cross.

14 MR. GELL: No, we --

15 CHAIRPERSON MILLER: No? You're
16 not. Okay.

17 MR. GELL: We would like to
18 present some legal arguments in our case.

19 CHAIRPERSON MILLER: How about
20 cross examination then for the witnesses? You
21 are finished with your witnesses?

22 MR. GELL: I'm sorry, I thought
23 cross examination was complete.

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1 CHAIRPERSON MILLER: Is it
2 complete? I want to make sure.

3 MR. EPTING: I'm done.

4 CHAIRPERSON MILLER: Okay. Then
5 we are okay.

6 MR. GELL: Before addressing the
7 major legal issues that this case presents, we
8 would like to formally move that the appeal be
9 dismissed, because the appellant claims that
10 this is one building. If it is one building,
11 the appeal was not filed by the owner of the
12 building. There has been no showing that the
13 people before you, Mr. Epting and his client,
14 speak for the majority of the owners of the
15 various tax lots or, indeed, speak for the
16 owners of a majority of the gross square
17 footage.

18 It is our understanding that the
19 condominium building is actually larger than
20 the office building. And accordingly, the
21 appellant would really have to show and has
22 not shown in any way that it has -- that is
23 speaks for "the owner of the building."

1 CHAIRPERSON MILLER: Mr. Gell,
2 where is --

3 MR. GELL: I'll be happy to
4 continue with my other arguments --

5 CHAIRPERSON MILLER: Can I ask
6 you --

7 MR. GELL: -- and just leave that
8 as formal.

9 CHAIRPERSON MILLER: No, but I was
10 interested in that issue, but where is it in
11 our regulations that the appellant must be the
12 owner to bring this appeal?

13 MR. GELL: Appeals do not have to
14 be brought by the owners of buildings,
15 obviously. But in this case, the appellant is
16 supposedly speaking for the owner of a single
17 building. That's the way they are presenting
18 the case. If they are not, indeed, the owner
19 of that single building and the Board would
20 have to decide how they determine whether it
21 is or is not and we would be glad to brief the
22 issue, then this case has no business being
23 before you. Shall I --

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1 CHAIRPERSON MILLER: Yes, thank
2 you. Go ahead.

3 MR. GELL: -- move on to the --
4 there is a lot of evidence in the record that
5 the original Board, the 1980 Board, indeed,
6 thought that this was one building. We think
7 there's also some evidence that indicates that
8 it's not -- that they did not. However, let's
9 assume that they thought it was one building
10 and move from there.

11 There doesn't -- there really is
12 not -- has not been presented to this Board
13 sufficient information, backup material,
14 evidence, testimony to show that what the
15 Board actually thought at the time this was
16 presented to them, and I regard that as a
17 burden that the appellant has to prove that,
18 in fact, the Board thought it was one building
19 or that the Board, the 1980 Board, indeed,
20 would not have placed other conditions on this
21 building at the time.

22 The appellant has, indeed, not
23 brought forth an architect, a building

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1 manager, anybody who either as an expert or
2 with full knowledge of the building could
3 speak to whether the connections exist. A lot
4 of assumptions have been made. We have been
5 asked to assume that because the Board issued
6 an order approving this building, that
7 therefore they must have found some connection
8 somewhere.

9 But we don't know what that one
10 was. Even assuming that the Board, in fact,
11 did think there was a connection and under
12 previous rulings the Board had a right to
13 believe there were such a connection. And I
14 might digress a moment. We are not fully
15 convinced that that was, in fact, the case,
16 because, again, there are no cases presented
17 to us. Nothing that indicates why a simple
18 extension of a balcony over a particular line
19 or even up to a wall really constitutes a
20 connection.

21 All we are told is well, Mr.
22 Epting says I have been in the business a long
23 time and I can tell you that has really been

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1 accepted. Well, what case has accepted that.
2 What regulation is he interpreting? I wish I
3 knew, because then I would be able to address
4 it.

5 But even if they did, and maybe he
6 can find those, that backup material, clearly
7 those connections were not made. So the
8 assumptions on which the Board acted earlier
9 do not exist today. That Board today would
10 probably say this is not one building. They
11 may even disapprove the plans if they had
12 shown -- if they had known what the
13 connections would actually be.

14 VICE CHAIR ETHERLY: So, Mr. Gell,
15 pardon the interruption, because you are
16 flowing nicely, but let's just kind of cut to
17 it then. I have asked the question a couple
18 of times in what footing should this Board be
19 looking at this case then? Should this Board
20 be looking at this case as it stood in 1980 or
21 should it be looking at this case today?

22 MR. GELL: I would say this Board
23 should look at it as it is today. The

1 building that was built back in 1980 is not
2 going to be torn down under any reading of
3 whether the law was adhered to or not.
4 Certainly, laches, collateral estoppel,
5 failure to bring an appeal within a reasonable
6 time, all of those things would have stopped
7 and would stop the D.C. Government from
8 telling these nice folks and the condos now
9 you've got to take a couple of floors off.

10 I think that's just a red herring.
11 Whatever was done was done. If it was a
12 mistake, it still has been done. But that
13 mistake, if it was a mistake, and I'm not sure
14 we have enough information to say whether it
15 was or not, but if it was a mistake, certainly
16 this Board ought not to take that mistake and
17 enshrine it in, you know, marble and then go
18 on from there and then prove four more floors
19 to this building.

20 VICE CHAIR ETHERLY: So, number
21 one, the connection that was the much
22 discussed connection from 1980 wasn't built?

23 MR. GELL: That's my next point.

1 VICE CHAIR ETHERLY: There is no
2 evidence it was ever built.

3 MR. GELL: It was not built.

4 VICE CHAIR ETHERLY: It's not
5 there. Mia copa, you can't cry over spilt
6 milk.

7 MR. GELL: Right.

8 VICE CHAIR ETHERLY: Number two,
9 the connection that has been discussed in
10 Exhibit 14 isn't a sufficient enough
11 connection based on your experience, based on
12 the interpretation that you have heard from
13 the Zoning Administrator, based on what was
14 presented in Mr. Crews' letter in response to
15 the applicant's letter. So those two
16 connections clearly wouldn't satisfy today's
17 understanding of what a connection is. No
18 functional purpose, no access, no meaningful
19 connection, if you will.

20 And then finally, the issue of --
21 and the other alleged connections don't
22 satisfy the main floor piece. They are below-
23 grade. So ultimately, is this drilling down,

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1 in your opinion, and I'm not looking to rush
2 you through it, but I'm just trying to really
3 parse to the DNA of this thing.

4 So the ultimate issue really is
5 given the fact that we are here today, however
6 we got here, the question is what is the
7 manner in which this building should be
8 allowed to proceed, given the potential for,
9 I don't want to use impacts, but I'll just use
10 it, because there it's too close to special
11 exception talk, but for the lack of a better
12 phrase at this point, there are considerable
13 concerns about impacts to the residential
14 building if any changes or expansions to the
15 office portion aren't handled very carefully
16 and in the appropriate zoning scenario.

17 MR. GELL: All right. I would
18 like to respond.

19 VICE CHAIR ETHERLY: Sure.

20 MR. GELL: I hope I haven't
21 forgotten a piece of what you have said.

22 VICE CHAIR ETHERLY: Sure.

23 MR. GELL: Because there were

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1 really two major matters that you have
2 addressed. And one of them is where is the
3 connection? If it's on the third floor in the
4 front, clearly, that wasn't built. You can't
5 even say that coming up to a wall there
6 provided a connection.

7 VICE CHAIR ETHERLY: Um-hum.

8 MR. GELL: Because it wasn't built
9 the way it was supposed to be built. I have
10 a feeling that Mr. Mariani was assuming when
11 he asked very pointed questions about where
12 that connection was and whether it would be
13 built was really concerned and, in fact, that
14 would go all the way up to the office
15 building, but it simply wasn't built.

16 And the BZA, once it approves
17 plans, assumes those plans are going to be
18 carried forward.

19 VICE CHAIR ETHERLY: Um-hum.

20 MR. GELL: It assumes that the
21 Zoning Administrator is going to catch any
22 irregularities. It assumes that the inspector
23 who goes out and looks and sees what building

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1 was actually built was built in accordance
2 with those plans. The BZA doesn't go out and
3 check. So to say that the BZA -- their
4 decision that it may have been one building
5 back then because they regarded there to be a
6 connection, that that somehow controls us now
7 is ludicrous.

8 VICE CHAIR ETHERLY: But you make
9 an interesting point which is it raises really
10 the practical question here of which is all of
11 that notwithstanding we're here where we are
12 today, and so the challenge is how do we move
13 forward from where we are today? To an
14 extent, you know, one of my questions as well,
15 does this turn into a glorified enforcement
16 action 25 years after the fact? I think your
17 answer to that is no, it doesn't.

18 MR. GELL: No.

19 VICE CHAIR ETHERLY: They are not
20 going to go out and build a balcony on the
21 third floor and make the connection and
22 correct the problem. That's not what you are
23 looking for.

1 MR. GELL: Well, they wouldn't be
2 able to.

3 VICE CHAIR ETHERLY: Gotcha.

4 MR. GELL: Because they would have
5 to get permission at least on that --

6 VICE CHAIR ETHERLY: Understood.

7 MR. GELL: -- from both sides.

8 VICE CHAIR ETHERLY: Understood.

9 MR. GELL: But the other point is
10 that as soon as they have to admit well, we
11 really didn't build the connection on the
12 front, they say oh, but look in the back.
13 Well, look in the back. Mr. Hasselman
14 testified that the floor, the plaza floor,
15 which you might call a walkway or whatever, is
16 actually nearly a floor below the main floor
17 of the office building.

18 VICE CHAIR ETHERLY: Um-hum.

19 MR. GELL: Therefore, that can't
20 be a connection at grade or at first floor
21 level.

22 VICE CHAIR ETHERLY: Okay.

23 MR. GELL: If it's one building,

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1 and they claim it's one building. So I'm
2 going to, you know, insist that they adhere to
3 that and say if it's one building and that's
4 how we got the height for the condo building,
5 therefore, that's where the first floor is.
6 It's not the first floor of the condo
7 building. Did I address both points?

8 VICE CHAIR ETHERLY: No, you did.
9 I mean, again, I'm just struggling with at the
10 end of the day how do you look at that? And
11 you have offered some interesting perspectives
12 on that. One, this 1980 stuff versus where we
13 are today, might be to an extent a little bit
14 of a red herring. Let's just focus on what we
15 have today and practically how do move forward
16 with addressing that today.

17 MR. GELL: But it's very important
18 to keep in mind the -- who has the burden
19 here. All right. They have the burden, we
20 don't. And again, they haven't provided you
21 with enough information on which you can
22 assure yourself that they have met that
23 burden. Had they done so, it would then be on

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1 us to prove that they were wrong.

2 Mr. Hitchcock had a point.

3 VICE CHAIR ETHERLY: Sure.

4 MR. HITCHCOCK: Yeah, maybe
5 another way of looking at it, Commissioner
6 Etherly, is the only connection cited in 1980
7 was the third floor rear balcony. Okay. That
8 wasn't built. So that can't be a basis. The
9 appellant says well, let's look at some other
10 connections that were not cited to the BZA,
11 were not in the plans.

12 If you are going to be looking at
13 other connections, it seems appropriate to
14 look under current standards, not what might
15 have been presented to the BZA in 1980. You
16 know, if we're going to be looking at the 1980
17 order, we need to look at what was presented
18 then and what actually happened and anything
19 else ought to be judged under the current
20 standard.

21 VICE CHAIR ETHERLY: In essence,
22 you can't have it both ways. You can't say
23 stick yourself in 1980 and look at what we

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1 presented, but at the same time, here are some
2 other connections that weren't part of the
3 table in 1980.

4 MR. HITCHCOCK: Exactly. If what
5 the Board thought in 1980 is going to be
6 determinative, there is evidence as to that
7 and anything else and, obviously, we disagree
8 with that. But other connections, I mean, you
9 can't say the Board looked at X when X was not
10 presented. So I agree with that assessment.

11 VICE CHAIR ETHERLY: Is there any
12 evidence, and perhaps this isn't a question
13 that's appropriate for you, but let me just
14 ask it, that the walkway at the rear was in
15 place in 1980, was part of the 1980 structure?

16 MR. HITCHCOCK: Let me see if Mr.
17 Hasselman would know.

18 VICE CHAIR ETHERLY: Mr. Hasselman
19 appears to be indicating yes, it was part.

20 MR. HASSELMAN: Yes, absolutely.

21 VICE CHAIR ETHERLY: Okay. So Mr.
22 Hasselman testified that yes, that portion of
23 the building was, in fact, in place in 1980.

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1 But again, your argument would be that still
2 didn't qualify as a connection under 1980
3 standards and it wouldn't qualify under
4 today's standards.

5 MR. GELL: It would not qualify
6 under 1980 standards. It was not presented to
7 the Board as a reason for qualifying under
8 1980 standards.

9 VICE CHAIR ETHERLY: But that
10 wouldn't prohibit it --

11 MR. GELL: Was not qualified.

12 VICE CHAIR ETHERLY: -- from being
13 used as grounds for considering whether it is
14 one building or not, would it?

15 MR. GELL: Yes.

16 VICE CHAIR ETHERLY: Because it
17 wasn't discussed on the record.

18 MR. HITCHCOCK: All we have been
19 talking about is the one connection of the
20 rear balcony.

21 VICE CHAIR ETHERLY: Gotcha.

22 MR. HITCHCOCK: And that's -- you
23 know, the appellant's emphasis throughout has

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1 been what is the Board's concern? Why did --
2 what did the Board think it was doing? And
3 that's what it thought it was doing.

4 VICE CHAIR ETHERLY: Okay.

5 MR. HITCHCOCK: Or what happened.

6 VICE CHAIR ETHERLY: Thank you.

7 Thank you, Madam Chair.

8 MR. GELL: And I might add that
9 the architect seemed to think that was the
10 connection as well, the one in the front,
11 because that's all he referred to. The order
12 doesn't really give us much help on it, but
13 the only testimony happened to be about the
14 front where they were supposed to be and
15 probably would have been a connected had they
16 not changed the plans.

17 MR. HITCHCOCK: And just so the
18 record is clear, Mr. Hasselman has reminded me
19 that the so-called walkway was not really a
20 walkway. You couldn't get from one building
21 to the next using that walkway.

22 MR. GELL: I think they called it
23 a plaza actually. I think I have covered some

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1 of the things in my notes and I don't want to
2 cover them again, so that's why I'm taking a
3 moment just to --

4 CHAIRPERSON MILLER: Would you
5 like a question, at this time?

6 MR. GELL: I think -- huh?

7 CHAIRPERSON MILLER: Would you
8 like a question, at this time? Maybe it will
9 trigger --

10 MR. GELL: I'm always ready for a
11 question, I guess.

12 CHAIRPERSON MILLER: Okay. The
13 appellant has made the argument that to treat
14 the structures as two buildings now would
15 trigger zoning violations and violations of
16 the Height Act. And I think DCRA has been
17 able to address the zoning, possible zoning
18 violations that it would not trigger
19 enforcement on their part unless other action
20 was taken by a private party to bring it
21 before them. They are not going to be going
22 out and charging the owners with violation of
23 the rear yard or things like that.

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1 Okay. My question is do you have
2 an opinion with respect to the Height Act,
3 whether there is an issue there if this
4 triggered noncompliance with the Height Act?

5 MR. GELL: The fact is that at the
6 time it was built, it may well have met the
7 requirements of the Height Act. If, indeed,
8 it was considered one building. So the Height
9 Act was not violated at that time. I doubt
10 the Federal Government would come in now and
11 assert that we have to take some floors off.

12 And as I indicated earlier, I
13 think we have a number of defenses that we
14 could use against such a move. And it's very
15 unlikely any such thing would happen. So I
16 think we are willing to take our chances, but
17 I don't have -- I haven't researched the issue
18 specifically of how the Federal Government has
19 dealt with Height Act issues that at one time
20 were considered to be legal and then many,
21 many years later were reviewed and determined
22 that, in fact, they didn't meet the standards,
23 even at the time or today. It seems to me

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1 that would be retroactive in a way that simply
2 wouldn't fly.

3 CHAIRPERSON MILLER: Okay. Yeah,
4 I was just looking at some of the text here
5 and it's written in a way that says "No
6 building shall be erected, altered or raised
7 in the District of Columbia in any manner, so
8 as it exceeds," you know, etcetera, etcetera,
9 "the Height Act." And so this would be
10 looking back. When it was erected or altered,
11 it was in accordance with the Height Act. So
12 then this is looking back on it now. Okay.

13 MR. GELL: Madam Chair?

14 CHAIRPERSON MILLER: Yes.

15 MR. HITCHCOCK: Before -- I didn't
16 want to interrupt if there are more questions.
17 I was wondering if I could ask Mr. Hasselman
18 perhaps to answer Commissioner Etherly's
19 question directly? I may have garbled what he
20 was saying about the walkway or the plaza.

21 VICE CHAIR ETHERLY: No, I don't
22 think it's necessary.

23 MR. HITCHCOCK: Okay.

1 VICE CHAIR ETHERLY: I think I got
2 the gist of Mr. Hasselman's lip reading.

3 MR. HITCHCOCK: Okay. Right. The
4 walkway was put in as part of the construction
5 of the residential building. It's basically
6 the ceiling or the cover for the garage.

7 VICE CHAIR ETHERLY: Okay.

8 MR. HITCHCOCK: So rather than a
9 walkway or plaza as such.

10 VICE CHAIR ETHERLY: Thank you.

11 MR. GELL: I just wanted to move
12 to go to Goto or Goto. We can't definitively
13 say that they rejected the notion that the
14 dissent concurring opinion -- all we know is
15 that they sent it back. And they may have
16 done that for a number of reasons. They don't
17 really reject specifically the footnote where
18 Judge Kelly sets out the argument.

19 And again, the appellant hasn't
20 cited any authorities of the proposition that
21 the balcony, in fact, was a connection. The
22 approval of the multiple roof structures, I
23 would suggest to the Board that that was,

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1 indeed, a variance. The Board treated it as
2 a variance. So to argue that that necessarily
3 requires you to see this as one building,
4 rather than two buildings, seems to me is not
5 a very strong argument.

6 CHAIRPERSON MILLER: If it were
7 two buildings, would they need a variance for
8 it?

9 MR. GELL: If there were two
10 buildings, they wouldn't need a variance.

11 CHAIRPERSON MILLER: They
12 wouldn't?

13 MR. EPTING: That's correct.

14 CHAIRPERSON MILLER: Okay.

15 MR. GELL: But they did grant a
16 variance. You know, I think we have probably
17 said enough and I'm going to stop at that
18 point. If you have any questions, I would be
19 glad to answer them.

20 CHAIRPERSON MILLER: Okay. No.
21 Okay. So I guess, at this point, it's
22 appellant's opportunity for rebuttal and
23 closing.

1 MR. EPTING: Okay.

2 CHAIRPERSON MILLER: Okay.

3 MR. EPTING: Thank you, Madam
4 Chair. First, 3112.2, let's just kill this
5 for once, allows any person agreed by an order
6 to appeal -- to file a timely appeal to the
7 Board, which is what we have done. And I
8 think we're getting confused about a number of
9 things. I just want to try to hit them
10 briefly.

11 I know Mr. Taylor said it
12 differently, but I do think this is simple,
13 although there has been a lot of confusion
14 about it. Mr. Gell talked about me making
15 assumptions. I wasn't talking about
16 assumptions. What I said and quoted from the
17 transcript is that the Board approved one
18 building on one record lot, which that record
19 lot still exists, then permits were issued.
20 We will submit the permit plan showing that
21 plaza at the first and second level as
22 permitted.

23 C of Os were issued which evidence

1 is compliant with the Zoning Regulations.
2 They have been in place for 27, 28 years. The
3 C of O issuance has not been challenged. It
4 was not challenged in 1982 when it should have
5 been timely challenged if people thought there
6 was no appropriate connection. That's the
7 appropriate time for challenging a permit or
8 C of O.

9 There has been --

10 CHAIRPERSON MILLER: When is the
11 appropriate time? Like 60 days from when the
12 C of O is issued?

13 MR. EPTING: Yes, yes. And the
14 intervenors' testified that a wall was in
15 place at the time the buildings were built.
16 And whether or not the Zoning Administrator
17 determined that to be a valid connection,
18 should not matter now. That determination was
19 made and it should have been challenged 28
20 years ago.

21 The BZA order was not --

22 CHAIRPERSON MILLER: You can
23 challenge the decision now about the --

1 MR. EPTING: Because I've
2 challenged the Zoning Administrator. He has
3 gone back and reinterpreted the Zoning Regs.
4 I'm challenging Bill Crews' decision and I
5 filed timely within 60 days.

6 CHAIRPERSON MILLER: And they are
7 responding to that, so how is that --

8 MR. EPTING: No, they are saying
9 that the connection was never built or
10 something like that. And I'm saying that you
11 have to believe it was built, otherwise, the
12 C of O would not have been issued. It would
13 not have been continued to be issued. It's
14 apples and oranges, I think. And if I'm not
15 being clear, I really want to be clear.

16 The connection -- the building had
17 to comply with zoning in 1982 or a C of O
18 would not have been issued. And if it did not
19 comply, then somebody should have challenged
20 it back then. There has been no testimony
21 that the building is different than it was in
22 '82. And C of Os have remained in effect all
23 these years.

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1 So whatever it was in 1982, it is
2 today. The BZA order --

3 CHAIRPERSON MILLER: They're not
4 challenging the C of O. They are challenging
5 that it wasn't built according to the plans.

6 MR. EPTING: But then a C of O
7 would not have been issued. That's -- the C
8 of O can only be issued if the plans are
9 correct. The BZA order also did not condition
10 where any connection would be. So it allowed
11 the Zoning Administrator to make his
12 determination about where a connection should
13 be. There's no conditions in the order
14 about --

15 CHAIRPERSON MILLER: Wait. I
16 don't want to get in a debate with you, but if
17 you want us to be clear where you are, we
18 issue orders with plans and it's to be built
19 according to plans. And it doesn't mean we
20 put in a condition that everything that is
21 represented on the plans --

22 MR. EPTING: I agree. And like I
23 said, I can't tell you what happened 28 years

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1 ago, but the Zoning Administrator apparently
2 made a determination that whatever was
3 presented to him was okay. And that was not
4 challenged. A C of O was issued. That's not
5 an assumption, that just seems to be fact.
6 And the building has not changed since then.

7 The BZA order also, and you just
8 asked Mr. Gell about it, talks about two
9 structures on the same roof. If these were
10 two separate buildings, you would not have
11 needed roof structure relief. That part I
12 really think you need to understand, because
13 they would stand alone. And our roof
14 structure would have had to have been setback
15 from the property line. It wasn't.

16 We couldn't access our parking if
17 it wasn't. Mr. LeGrant -- we talked about
18 3202.3, which allows one building on record --
19 on one record lot. So there will need to be--
20 either us or the residential building will
21 need to apply for a subdivision to be in
22 compliance with that section, if the Board
23 denies our appeal.

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1 And then we get back to 101.6, and
2 there is some zoning violations that are
3 there, the rear yard, a court and maybe they
4 can be worked out, but I think those are valid
5 considerations. And Mr. LeGrant also
6 testified, and I think it's clear from the
7 comp sheet, that the elevation of the
8 residential building is lower than K Street.
9 And as we showed in our Exhibit E, that would
10 make the building taller than 90 feet.

11 And the case Mr. LeGrant cited,
12 the 200 K Street case said if there is no
13 meaningful connection, then you have to be
14 separate record lots and separately measured.
15 And the Dot case says the same thing. So
16 either these are one building and you measure
17 them from K Street like Mr. Gell said and it
18 does comply or it's not, it's two separate
19 buildings and you have to measure from
20 somewhere else. And that other measurement
21 point is necessarily lower than K Street, 6
22 feet lower.

23 CHAIRPERSON MILLER: If I'm not

1 mistaken, I thought that Mr. LeGrant said with
2 respect to subdivision in other areas in which
3 you would be in noncompliance, that you would
4 not have to go for a subdivision. You would
5 not have to come into compliance. That you
6 could be grandfathered in.

7 MR. EPTING: But we were
8 grandfathered as a single building with the
9 same roof and now there is an argument that
10 we're actually two separate buildings. And
11 under the 200 K Street, if there is no
12 meaningful connection, then you need to have
13 separate record lots with separate measuring
14 points, that's what that case says, and Dot
15 says the same thing.

16 Mr. Gell talked about the main
17 floor level as being the office building and
18 we did note, and I talked to Mr. LeGrant about
19 it, that it's also the main floor for the
20 residential building, which is lower than the
21 K Street building.

22 I do want to go back one more time
23 and I'm almost done. The definition of

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1 building also talks about structures not
2 physically separated. This shaft between the
3 two buildings does serve for ventilation
4 purposes for the office building and it is a
5 connection. It's -- the buildings are
6 physically attached with that shaft. And that
7 seems to meet that part of the definition of
8 building.

9 CHAIRPERSON MILLER: What are you
10 referring to? Are you referring to the black
11 area in between the two buildings?

12 MR. EPTING: The vents, yes.
13 There is a connection. There is a physical
14 separation between the buildings, a physical
15 connection between the -- I'm sorry. A
16 physical connection between the two buildings.

17 CHAIRPERSON MILLER: Could you
18 explain that better? Do you mean -- we saw
19 this black line in between.

20 MR. EPTING: Yes.

21 CHAIRPERSON MILLER: Is that what
22 you are referring to?

23 MR. EPTING: Yes, yes.

1 CHAIRPERSON MILLER: Is that --
2 how is it connected?

3 MR. EPTING: Well --

4 CHAIRPERSON MILLER: Is it open
5 inside?

6 MR. EPTING: It's open inside, but
7 there is a grate that goes from the commercial
8 building to the residential building and back
9 and forth.

10 CHAIRPERSON MILLER: Oh, I see.

11 MR. EPTING: They are not
12 physically separate, which is what the
13 definition of --

14 CHAIRPERSON MILLER: I see.

15 MR. EPTING: -- building says.

16 CHAIRPERSON MILLER: Instead of
17 there being air in between those, it's --

18 MR. EPTING: Exactly.

19 CHAIRPERSON MILLER: Okay.

20 MR. EPTING: It also has a roof
21 over the top, so it's covered at the top
22 level. If we're not one building --

23 CHAIRPERSON MILLER: That wasn't

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1 considered by the Zoning Board in 1980?

2 MR. EPTING: No, no, but it talked
3 about -- it did cite the term same roof, which
4 would imply it was --

5 CHAIRPERSON MILLER: The roof?

6 MR. EPTING: Yes.

7 CHAIRPERSON MILLER: Does that
8 mean the vent that you are talking about?

9 MR. EPTING: But it's covered at
10 the roof. And the Board talked about it being
11 two structures under the same roof, which
12 implies them as one building. And then the
13 backside, if we are not one building and the
14 Board thinks we are two buildings, then we're
15 going to proceed with the variance case.

16 But I do believe either us or the
17 residential building will have to apply for
18 record lots and we will not be able to meet
19 101.6 of the Zoning Regs absent relief. And
20 that to me shows an error with the Zoning
21 Administrator's determination that the two
22 buildings could, basically, coexist without
23 each other.

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1 We don't have parking access. We
2 won't have a rear yard. We will have
3 nonconforming courts. There is a height
4 issue. There is a loading issue. Those are
5 very unusual.

6 CHAIRPERSON MILLER: Can you share
7 loading and things like that without being one
8 building?

9 MR. EPTING: Not without relief --

10 CHAIRPERSON MILLER: A garage?

11 MR. EPTING: -- from the zoning --
12 from the BZA.

13 CHAIRPERSON MILLER: Okay.

14 MR. EPTING: I mean, normally,
15 buildings have to have all of their, you know,
16 parking and loading on the perimeter of their
17 building. And access to the office building
18 usually has to be within that building, absent
19 relief for off-site access.

20 And that's when I went and I was
21 responding to Mr. Etherly before sort of an
22 indicia of even if you don't like what people
23 are saying about the connection, the other

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1 indicia of this building looks and feels like
2 one building, because everything else, zoning-
3 wise, is shared. Two roof structures, access
4 from L Street, loading is shared, parking is
5 shared.

6 You know, it smells like one
7 building for zoning purposes. And that's not
8 a legal term, but -- and we can present -- and
9 that's shown on the comp sheet. And I don't
10 want to get into this, because again it was a
11 decision made in the '80s, but there were many
12 kinds of connections above-grade that were
13 accepted in the '80s that might not be
14 connected -- accepted today.

15 But it would really be in pain for
16 you to go back and say well, I don't like that
17 one. I don't like that one. I mean, somehow
18 or another for whatever reason, the Board
19 adopted something, a permit was issued and C
20 of Os were issued in '82. And none of us were
21 there, but it wasn't challenged and the C of
22 O has not expired and so it's still in place
23 today.

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1 And I can't get beyond that. So
2 therefore, whatever was approved then, to me,
3 is what it is. So it was approved as one
4 building.

5 MR. HITCHCOCK: And I think --
6 Madam Chair, may I add a word on that? I
7 don't want to -- okay.

8 CHAIRPERSON MILLER: No, no, no.
9 I don't --

10 MR. HITCHCOCK: Just for the
11 record, there is an easement dealing with a
12 lot of these issues which we can provide for
13 the record. I agree we are getting somewhat
14 far afield, but if the spectrum of --

15 CHAIRPERSON MILLER: Okay.

16 MR. HITCHCOCK: -- problems being
17 raised, there are answers.

18 CHAIRPERSON MILLER: Okay.
19 Basically, you know, we have our rules of
20 procedure.

21 MR. HITCHCOCK: Understand.

22 CHAIRPERSON MILLER: And the
23 appellant gets the last word there.

1 MR. HITCHCOCK: Right.

2 CHAIRPERSON MILLER: But we are
3 going to have the record open for written
4 submissions.

5 MR. HITCHCOCK: Right.

6 CHAIRPERSON MILLER: Okay.

7 MR. TAYLOR: Madam Chair, to
8 clarify that is to what extent are you leaving
9 the record open for new evidence to be
10 presented?

11 CHAIRPERSON MILLER: I don't know.
12 What evidence is there to be presented? I
13 think it's just for legal argument.

14 MR. TAYLOR: I have heard --

15 CHAIRPERSON MILLER: Is there
16 any --

17 MR. TAYLOR: -- argument --

18 CHAIRPERSON MILLER: I want to
19 hear it right now if there is evidence people
20 want to put in the record. I don't --

21 MR. TAYLOR: Well, parties have
22 put forward that they are going to be
23 presenting new evidence to you that is not

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1 presented here before us.

2 CHAIRPERSON MILLER: Let's hear
3 it. I mean, is somebody going to be
4 presenting more evidence? We have had
5 reference to easements in the record. I don't
6 think that's anything new.

7 MR. EPTING: The only thing I
8 could present, the permit plans showing the
9 plaza or whatever you call it as permitted,
10 but I think we have testimony saying that it
11 was there at the time the building was built,
12 so I don't know if we'll even need it. I mean
13 it was there when the C of O was issued.

14 MR. TAYLOR: That is the specific
15 reference that I had in mind. Where it's said
16 that --

17 MR. EPTING: And that's fine.

18 MR. TAYLOR: -- would be presented
19 to you and I think the Government objects to
20 that.

21 MR. EPTING: And that's fine. I
22 mean, I think it stands for what it is.

23 CHAIRPERSON MILLER: Yeah, what I

1 had in mind was just legal arguments now,
2 post-hearing legal arguments, if you all want
3 to do that. So we just need to set a briefing
4 schedule and a time for our deliberation I
5 know before the next application is scheduled,
6 which I think is November 20th.

7 MR. GELL: Excuse me, Madam Chair?

8 CHAIRPERSON MILLER: Yes?

9 MR. GELL: There was one item of
10 fact it seems to me that you are interested
11 in. That had to do with notice of the ANC.

12 CHAIRPERSON MILLER: Absolutely.
13 Okay. We'll leave -- that's different, yes.
14 We'll leave the record open, okay, number one,
15 for further evidence or whatever on notice
16 that was provided by the ANC that this appeal
17 was on their agenda.

18 Okay. To schedule this. We were
19 just looking at the schedule with the window
20 being that the variance on this case is
21 scheduled for November 20th, in the event that
22 it does go forward, we want to give you enough
23 time to prepare for the variance case, if that

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1 were to happen. So what we're seeing is that
2 we could deliberate this. We have a Special
3 Public Meeting scheduled for October 23rd.

4 Wait a minute. Okay. I'm sorry.
5 I need to ask you all a question, because we--
6 a lot of our dates are pretty busy. And so if
7 we were to set deliberation for November 13th,
8 is that too late for your preparation in the
9 event we were to go forward on the 20th or
10 have you already submitted your documents?
11 Otherwise, we may go to -- Mr. Etherly can't
12 be here on the 6th, so then we could go back
13 to October 23rd, but it's a pretty busy day
14 for us.

15 MR. EPTING: I mean, I think we
16 were prepared for the hearing in April or
17 June, so it doesn't affect us.

18 CHAIRPERSON MILLER: Okay.

19 MR. HITCHCOCK: Yes, there --
20 Madam Chair, there were some dates for
21 opposition memoranda in late October. October
22 29th is one filing, according to my notes.
23 And then a reply on November 12th, so if

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1 that's any help.

2 CHAIRPERSON MILLER: Okay. Then
3 what we could do is we could set this for
4 October 23rd, if you can get in your post-
5 hearing submissions, which I anticipate would
6 be -- you can tell me if that's not enough
7 time, but I think you have already basically
8 briefed the issues, but it would be a wrap-up
9 of your legal arguments. You would have to
10 get that in by -- what date would that be, Ms.
11 Bailey, if we were to deliberate this on the
12 23rd?

13 MS. BAILEY: The latest, Madam
14 Chair, I would suggest would be October the
15 19th, which would be the Friday before your
16 decision meeting.

17 CHAIRPERSON MILLER: So that would
18 be 10 days.

19 MR. EPTING: Does it include draft
20 order or not?

21 CHAIRPERSON MILLER: You don't
22 have to do that. We can discuss that now.
23 What we are most interested in would be the

1 legal arguments. It doesn't have to be in the
2 form of a draft order.

3 MR. GELL: Madam Chair?

4 CHAIRPERSON MILLER: If all the
5 parties want to do it in that format, you can
6 and then have that in your legal conclusions.

7 MR. GELL: It seems to me that if
8 the 20th is the date for the hearing and we
9 were pretty well ready to go at the prior date
10 that was postponed, that we should be able to
11 prepare our case sufficiently in advance of
12 the 20th, so that if you had the meeting,
13 decision meeting on, what did you say, the
14 13th?

15 MR. HITCHCOCK: November 13th.

16 CHAIRPERSON MILLER: The other
17 date we were looking at was November 13th.

18 MR. EPTING: I don't care.

19 MR. GELL: Let me just check.

20 CHAIRPERSON MILLER: Okay.

21 MR. GELL: I think that would work
22 for us.

23 CHAIRPERSON MILLER: November 13th?

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1 I mean, would we need to adjust those other
2 dates or not necessarily? You'll just go with
3 those other dates?

4 MR. GELL: That would give us more
5 time. We'll work with them.

6 CHAIRPERSON MILLER: As of now,
7 the -- I don't know what is going to happen
8 with the other case. It's scheduled for the
9 20th. I understand there are briefing dates
10 related to that case. That's not a problem if
11 this is not decided until a week before that
12 case?

13 MR. GELL: We would have to get
14 our stuff in two weeks before the 20th, right?

15 MR. EPTING: I thought everything
16 was in except for the supplemental response,
17 which is due earlier.

18 MR. GELL: Excuse me, we're
19 conferring.

20 MR. EPTING: My memory is that Mr.
21 Gell either in April or June submitted a
22 statement and they wanted time to sort of, for
23 lack of a better word, polish it up and that's

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1 what was going to be submitted the end of
2 October. And we would have a week or so to
3 respond to it. And I think those are the only
4 things we are looking for in the variance
5 case, because we have submitted the other
6 materials.

7 CHAIRPERSON MILLER: But my
8 understanding was you were awaiting for this
9 decision before you went forward.

10 MR. EPTING: Yes, we are.

11 CHAIRPERSON MILLER: Okay.

12 MR. EPTING: But I think --

13 CHAIRPERSON MILLER: If we only
14 have -- if you were to wait and we issued a
15 decision on November 13th, would that affect
16 dates for some of these responses? Would you
17 want to come in between the 13th and the 20th?

18 MR. GELL: I would prefer
19 rescheduling the responses based on the 13th,
20 rather than based on the 23rd if we're going
21 to actually move the date.

22 MR. EPTING: My understanding is
23 it was just a repolishing of what they have

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1 already filed. And they asked us at the --
2 three weeks ago to go ahead and file the
3 shadow studies ahead of time, which we did, so
4 I don't see it being a big burden on them to
5 polish their little statement up and get it
6 in, you know, before the hearing. Because if
7 it moves from November 20th, it moves until --

8 CHAIRPERSON MILLER: We don't want
9 to make it move based on our deliberation
10 schedule, because we can adjust our
11 deliberation schedule. So I don't want to do
12 that, you know. There is a date that you all
13 have, so I don't want to affect that.

14 MR. HITCHCOCK: We'll stick with
15 the 23rd.

16 CHAIRPERSON MILLER: The 23rd of
17 October?

18 MR. HITCHCOCK: Yes, ma'am.

19 CHAIRPERSON MILLER: Okay. So
20 we'll set this for October 23rd and then, Ms.
21 Bailey, did you say that their submissions
22 would be due October 19th?

23 MS. BAILEY: Yes, Madam Chair.

1 CHAIRPERSON MILLER: Okay. And
2 what we anticipate these submissions to be
3 just to reiterate, if you have any questions,
4 would be your final legal arguments as to
5 whether the building should be treated as one
6 or two.

7 MR. EPTING: And that could be in
8 the form of a draft order, is it?

9 CHAIRPERSON MILLER: It could be.
10 Whatever form you are comfortable with, I'm
11 not really going to require it one way or the
12 other. When we come to deliberate, we're
13 going to be primarily looking at the legal
14 arguments, but draft orders are acceptable.

15 Okay. Any other questions? So
16 the record is left open for the legal
17 arguments, and it can be in the form of a
18 draft order if you would like, but not
19 required, and also the question about the ANC
20 notice.

21 MR. EPTING: Could I ask --

22 CHAIRPERSON MILLER: And whether
23 or not the ANC should be afforded great

1 weight. What?

2 MR. EPTING: Maybe I'm tired.

3 CHAIRPERSON MILLER: No, we all
4 are. We went right through lunch, so go
5 ahead.

6 MR. EPTING: David and I are
7 having -- what is the date for the decision on
8 the appeal?

9 CHAIRPERSON MILLER: The date will
10 be October 23rd.

11 MR. EPTING: Okay. So I misheard.
12 Thank you.

13 CHAIRPERSON MILLER: And the
14 submissions will be due the 19th.

15 MR. EPTING: The 19th, yes. Thank
16 you.

17 CHAIRPERSON MILLER: Okay. I
18 think this concludes the case. Thank you.

19 MR. TAYLOR: Thank you, Madam
20 Chair.

21 CHAIRPERSON MILLER: Okay. There
22 are people here I know for the next hearing
23 and we are going to take a very brief lunch

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1 break. We're going to try to be back here at
2 3:45 to hear the afternoon appeal case. Okay.
3 The morning's hearing is adjourned.

4 (Whereupon, the Public Hearing was
5 adjourned at 3:23, to reconvene this same day
6 at 3:56 p.m.)
7
8
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12
13

14 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

15 3:56 p.m.

16 CHAIRPERSON MILLER: Ladies and
17 gentlemen, this is the October 9th afternoon
18 Public Hearing of the Board of Zoning
19 Adjustment of the District of Columbia. My
20 name is Ruthanne Miller. I'm Chair of the
21 BZA. To my right is Mr. Curtis Etherly, who
22 is the Vice Chair, to my left is Mr. Marc
23 Loud, who is the mayoral appointee, and also

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1 joining us is Mr. Clifford Moy of the Office
2 of Zoning, Sherry Glazer from the Office of
3 the Attorney General and Beverley Bailey from
4 the Office of Zoning.

5 Copies of today's hearing agenda
6 are available to you and are located to my
7 left in the wall bin near the door. Please,
8 be aware that this proceeding is being
9 recorded by a Court Reporter and is also
10 webcast live. Accordingly, we must ask you to
11 refrain from any disruptive noises or actions
12 in the hearing room.

13 When presenting information to the
14 Board, please, turn on and speak into the
15 microphone, first, stating your name and home
16 address. When you are finished speaking,
17 please, turn your microphone off, so that your
18 microphone is no longer picking up sound or
19 background noise.

20 All persons planning to testify
21 either in favor or in opposition are to fill
22 out two witness cards. These cards are
23 located to my left on the table near the door

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1 and on the witness tables. Upon coming
2 forward to speak to the Board, please, give
3 both cards to the reporter sitting to my
4 right.

5 We have an appeal this afternoon.
6 The order of procedure for appeal application
7 will be as follows: One, statement and
8 witnesses of the appellant. Two, the Zoning
9 Administrator or other Government official's
10 case. Three, case for the owner, lessee or
11 operator of the property involved, if not the
12 appellant. Four, the ANC within which the
13 property is located. Five, intervenor's case,
14 if permitted by the Board. Six, rebuttal and
15 closing statement by appellant.

16 Pursuant to Section 3117.4 and
17 3117.5, the following time constraints will be
18 maintained: The appellant, persons and
19 parties, except an ANC, in support, including
20 witnesses, 60 minutes collectively.
21 Appellees, persons and parties, except an ANC,
22 in opposition, including witnesses, 60 minutes
23 collectively.

1 These time restraints do not
2 include cross examination and/or questions
3 from the Board. Cross examination of
4 witnesses is permitted by the applicant or
5 parties. The ANC within which the property is
6 located is automatically a party in a special
7 exception or variance case and in an appeal
8 case.

9 Nothing prohibits the Board from
10 placing reasonable restrictions on cross
11 examination, including time limits and
12 limitations on the scope of cross examination.

13 The record will be closed at the
14 conclusion of each case, except for any
15 material specifically requested by the Board.
16 The Board and the staff will specify at the
17 end of the hearing exactly what is expected
18 and the date when the persons must submit the
19 evidence to the Office of Zoning. After the
20 record is closed, no other information will be
21 accepted by the Board.

22 The Sunshine Act requires that the
23 Public Hearing on each case be held in the

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1 open before the public. The Board may,
2 consistent with it's rules of procedure and
3 the Sunshine Act, enter Executive Session
4 during or after the Public Hearing on a case
5 for purposes of reviewing the record or
6 deliberating the case.

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

13 Please, turn off all beepers and
14 cell phones, at this time, so as not to
15 disrupt these proceedings.

16 The Board will make every effort
17 to conclude the Public Hearing as near as
18 possible today to 5:30. We have a quorum
19 problem, so if need be, we will, at the end of
20 the hearing, discuss whether or not we will
21 need to reconvene at a different date. But we
22 will make every effort to see what we can
23 conclude today.

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1 At this time, the Board will
2 consider any preliminary matters. Preliminary
3 matters are those that relate to whether a
4 case will or should be heard today, such as
5 requests for postponement, continuance or
6 withdrawal or whether proper and adequate
7 notice of the hearing has been given. If you
8 are not prepared to go forward with a case
9 today or if you believe that the Board should
10 not proceed, now is the time to raise such a
11 matter.

12 Does the staff have any
13 preliminary matters?

14 MS. BAILEY: Madam Chair, staff
15 does not at this time, just to swear the
16 witnesses in.

17 CHAIRPERSON MILLER: Okay. Then
18 would all those wishing to testify today,
19 please, rise to take the oath?

20 MS. PRINCE: Excuse me, Madam
21 Chair, Allison Prince. I represent the
22 property owner, Soka Gakkai International. I
23 did, in fact, file a preliminary motion, a

1 motion to dismiss. And I'm prepared to argue
2 that now or later, whatever is your pleasure.

3 CHAIRPERSON MILLER: Okay. Since
4 we only have this one appeal, what we will do
5 is Ms. Bailey will swear in the witnesses and
6 then we will deal with the motion to dismiss
7 first in the case.

8 MS. PRINCE: Thank you.

9 CHAIRPERSON MILLER: Okay.

10 MS. BAILEY: Please, raise your
11 right hand.

12 (Whereupon, the witnesses were
13 sworn.)

14 MS. BAILEY: Thank you. Madam
15 Chair, as you indicated this is an appeal and
16 the number is 17663, Friends of Babcock-Macomb
17 House, pursuant to 11 DCMR 3100 and 3101, from
18 the decision of the Zoning Administrator to
19 approve the construction of a place of
20 worship, this is a Buddhist Temple, in the
21 D/NOPD/R-1-B District at premises 3417
22 Massachusetts Avenue, N.W., Square 1939, Lot
23 42.

1 CHAIRPERSON MILLER: Thank you.
2 Would the parties introduce themselves for the
3 record, please?

4 MS. PLEASANT: Shakira Pleasant,
5 Assistant Attorney General, for the District
6 of Columbia, Department of Consumer and
7 Regulatory Affairs. And with me is Matt
8 LeGrant, the Acting Zoning Administrator.

9 CHAIRPERSON MILLER: I'm sorry,
10 what's your last name again?

11 MS. PLEASANT: Pleasant.

12 CHAIRPERSON MILLER: Pleasant,
13 okay. Thank you.

14 MS. PARRIS: Good afternoon, Lori
15 Parris, Deputy General Counsel, for the
16 Department of Consumer and Regulatory Affairs.

17 CHAIRPERSON MILLER: And I missed
18 your last name, also.

19 MS. PARRIS: Parris.

20 CHAIRPERSON MILLER: Parris?

21 MS. PARRIS: P-A-R-R-I-S.

22 CHAIRPERSON MILLER: Okay. Okay.

23 MR. MAGNUS: I'm John Magnus. I'm

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1 here for the Friends of the Babcock-Macomb
2 House, the appellants. And at an appropriate
3 time, I would like to understand the order of
4 the proceedings. We didn't come here today
5 prepared to debate the motion to dismiss, so
6 if you could help me understand that before we
7 get into the thick of it, I would be very
8 grateful. Thank you.

9 CHAIRPERSON MILLER: We'll do that
10 after we do the intros.

11 MS. PRINCE: Allison Prince,
12 Pillsbury Winthrop Shaw Pittman, counsel for
13 Soka Gakkai International.

14 CHAIRPERSON MILLER: And you are
15 with?

16 MS. PRINCE: Bill Aiken, who is
17 the Public Affairs Director for Soka Gakkai
18 International. He will be a witness, but is
19 not involved in the motion to dismiss.

20 CHAIRPERSON MILLER: Okay. And
21 you are intervenors in the case, correct?

22 MS. PRINCE: We haven't formally
23 intervened, because we are the property --

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1 CHAIRPERSON MILLER: You are
2 automatically, yeah.

3 MS. PRINCE: Exactly.

4 CHAIRPERSON MILLER: Okay. We
5 have a motion to dismiss that's before us, I
6 would like to refer to as intervenors, that's
7 easiest, okay, by the intervenors. Have you
8 been served with the motion to dismiss?

9 MR. MAGNUS: Yes, we have. It
10 arrived last week. We communicated with Mr.
11 Moy's office and were advised that we had
12 either 7 or 10 days in which to respond to
13 that and that deadline falls later this week
14 or early next.

15 CHAIRPERSON MILLER: Can you be
16 more specific?

17 MR. MAGNUS: It was served on me
18 the night that I left for London last week,
19 which was Wednesday evening at my home. So if
20 the deadline from service runs 7 days, then
21 our response to the motion to dismiss would be
22 due on Wednesday this week. We checked with
23 Mr. Moy's office and he said that it was

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1 either 7 or 10 days and, therefore, that the
2 hearing would go ahead on the basis of our
3 appeal. Their opposition to the appeal, the
4 motion to dismiss would not need to be joined
5 or argued this afternoon.

6 The motion to dismiss includes a
7 whole lot of extraneous stuff that's not
8 included in their opposition to the appeal,
9 such as the Federal Statute and some
10 Constitutional issues, which I think would be
11 much better addressed in writing and we have
12 not come prepared today to argue over those,
13 based on what we heard from Mr. Moy's office.

14 CHAIRPERSON MILLER: Okay. I
15 think that I don't want to speak for Mr. Moy
16 too much or put him on the stand, but, you
17 know, most likely he would refer you to our
18 Rules of Procedure and not necessarily give
19 you legal advice as to what you can or cannot
20 do. But I understand that your point is you--
21 under the rules as you understand it, I
22 believe, that you have more time to respond to
23 this motion. Is that the bottom line? Did

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1 you check the rules? Do you have the rules?

2 MR. MAGNUS: I was on my way
3 overseas when the document arrived. Actually,
4 a supporter of the group checked with Mr.
5 Moy's office and got an email reply saying
6 that the rules prescribe either a 7 or a 10
7 days deadline.

8 CHAIRPERSON MILLER: Okay.

9 MR. MAGNUS: And once we saw that
10 that landed past the hearing today, we knew
11 that there would be no need to be ready on
12 that by the time of the hearing today and that
13 we could focus on the appeal and the
14 opposition at the hearing today.

15 CHAIRPERSON MILLER: Okay. Ms.
16 Prince, do you have a response to that?

17 MS. PRINCE: Not surprisingly, I
18 disagree completely with that interpretation
19 of the timing associated with the response to
20 our motion. Nonetheless, I feel so strongly
21 about the strength of our case that I'm fully
22 prepared to proceed today, based on the merits
23 of the case, and hold the motion in abeyance.

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1 CHAIRPERSON MILLER: Okay. Well,
2 given the short period of time and your
3 agreement to hold it in abeyance and the
4 question about whether you have had enough
5 time to respond, why don't we go forward with
6 the appeal?

7 MR. MAGNUS: And if the Board does
8 want to give us a hard deadline for replying
9 to that motion to dismiss, we're certainly
10 perfectly happy to do it.

11 CHAIRPERSON MILLER: We'll check
12 the exact rules in the meantime, but Mr. Moy
13 is correct that it is somewhere within that
14 range of 7 to 10 days, so, you know, depending
15 on when you got it, so it's pretty soon. But
16 well, why don't we just deal with the merits,
17 at this point, and then take that up at the
18 end.

19 So as the Rules of Procedure, I
20 believe I laid it out, but I can, you know, do
21 it again. As the appellant, you have the
22 burden of going forward first and making your
23 case.

1 MR. MAGNUS: Thank you very much
2 and good afternoon, Members of the Board. My
3 name is John Magnus and I'm appearing as the
4 current president of a group originally formed
5 in the late 1980s, it's known as the Friends
6 of the Babcock-Macomb House. Now, this group
7 is established under the -- today is
8 established under the auspices of a Committee
9 of 100 for the Federal City.

10 Its members are owners of
11 properties near the property that is the
12 subject of our legal dispute today. We are
13 participating here pro se.

14 CHAIRPERSON MILLER: Can I just
15 ask you, is this related to your mission? I
16 mean, who is the Babcock-Macomb House?

17 MR. MAGNUS: The Babcock-Macomb
18 House is the house that is currently serving
19 as the Embassy of Cape Verde, whose side yard
20 was split off through a subdivision and is now
21 3417 Massachusetts Avenue. So this is a
22 neighbors' group that was originally formed in
23 order to fend off a different sort of a threat

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1 to the Babcock-Macomb House. And the Babcock-
2 Macomb House is a historically very
3 significant building, architecturally
4 significant building.

5 CHAIRPERSON MILLER: Okay. Thank
6 you.

7 MR. MAGNUS: I can, if you are
8 interested, go into the historic preservation
9 aspects of this, but I think it's --

10 CHAIRPERSON MILLER: No. Yeah, I
11 think we want to stay focused --

12 MR. MAGNUS: -- not germane to our
13 appeal. Thank you.

14 CHAIRPERSON MILLER: -- on the
15 question before us. Okay.

16 MR. MAGNUS: So we are
17 participating here pro se and we will
18 appreciate whatever indulgence the Board can
19 give us on that account. I am not well-
20 familiar with BZA procedures and I regret
21 that.

22 We had our ANC Commissioner here
23 for the Single Member District, ANC-3C, in the

1 Single Member District 08 whom we had intended
2 to have participate as a fact witness in
3 today's hearing, but because the schedule
4 today was delayed and delayed, she had a
5 meeting with Councilwoman Cheh and had to
6 depart.

7 In that regard, and in that regard
8 only, if only in that regard, our hope would
9 be that if the Board requires her testimony or
10 would benefit from her testimony, that the
11 record will be held open to that extent, so
12 that she can, in fact, get her factual
13 testimony into the record of this hearing,
14 because she is not here for me to ask
15 questions of her today.

16 CHAIRPERSON MILLER: Did she have
17 a written testimony that was approved by the
18 ANC?

19 MR. MAGNUS: No, no. The ANC --
20 I'll get to this in a moment, but we have not
21 asked the ANC to file a report. Our
22 Commissioner for the Single Member District
23 where this problem arises was here today to

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1 participate as a fact witness only. The ANC
2 has issued a resolution -- adopted a
3 resolution on this matter, and I'll be getting
4 to that in my statement momentarily,
5 explicitly opposing this project.

6 So I'll get to that shortly.
7 There is no new report that she was coming
8 here to deliver. She was here to participate
9 as a fact witness. And that's the only extent
10 to which we would hope the record would stay
11 open for her to contribute after the hearing,
12 if it's necessary.

13 So you are entitled to know whom I
14 am speaking for. I'll be precise. Not a
15 vocal minority, not even a majority, but every
16 neighbor residing in the vicinity of this
17 project opposes it. SGI today, SGI, the
18 applicant, Soka Gakkai International, will not
19 be able to demonstrate any support from any
20 neighbors.

21 CHAIRPERSON MILLER: I'm sorry,
22 what does that mean, residing in the vicinity?
23 Every neighbor? How many neighbors are you

1 talking about? That's a very big statement.

2 MR. MAGNUS: I'm aware of that.

3 We have canvased the neighborhood and all the
4 nearby neighbors -- I would be glad to supply
5 the Board with a list of neighbors who
6 specifically have agreed to be listed as
7 members of the friends group and opponents of
8 this project.

9 CHAIRPERSON MILLER: And I don't
10 want to belabor, but, I mean, you said let me
11 know -- I mean, you wanted to let us know who
12 you were speaking for.

13 MR. MAGNUS: Um-hum.

14 CHAIRPERSON MILLER: And so just
15 when you said that it's like what vicinity?
16 Is it 34th Place? Is it Massachusetts Avenue
17 from A to Z? Is it 20 people? Is it 250
18 people, you know?

19 MR. MAGNUS: It's more than 50
20 neighboring households, owner-occupied
21 households. There are, of course, a number of
22 institutional buildings in the area who have
23 differing abilities to express an official

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1 point of view on something like this.

2 CHAIRPERSON MILLER: But you don't
3 have signatures now that you are representing
4 them?

5 MR. MAGNUS: I have a list of
6 neighbors who have agreed to be listed as
7 opponents of this project and members of the
8 Friends of the Babcock-Macomb House group for
9 that specific purpose, which I would be glad
10 to submit to the Board if it's of interest.

11 CHAIRPERSON MILLER: Okay.

12 MR. MAGNUS: And the flip side of
13 that is that the applicant today will not be
14 able to identify any neighborhood support for
15 their effort to enlarge the matter-of-right
16 category and to insert a community center into
17 a residential neighborhood without securing
18 the legally required zoning relief for a
19 community center.

20 The background you probably know a
21 lot of it already, so I'll cover it briefly.
22 The property that we are talking about is
23 located at 3417 Massachusetts Avenue, N.W.,

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1 and the Massachusetts Avenue Heights
2 Neighborhood and in an area that is Zoned R-1-
3 B. Until 2004, it was the side yard of the
4 Babcock-Macomb House, which was in use then
5 and is in use now as the Embassy of Cape
6 Verde.

7 The Cape Verde ambassador wanted
8 to raise some money. He sought a subdivision
9 in order to sell off the side yard and during
10 review of that proposed subdivision by the
11 relevant ANC, that's 3C, he promised through
12 his counsel, who are now SGI's counsel, to
13 find a buyer with an appropriately light
14 footprint. Regrettably, that promise was not
15 reduced to writing.

16 The moment that the subdivision
17 received regulatory approval, Cape Verde sold
18 the separated side yard property to a lay
19 Buddhist organization known as Soka Gakkai
20 International, SGI. SGI then applied for a
21 permit to construct a community center on the
22 property, misleadingly labeling the proposed
23 building as a church or other house of

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1 worship, which could be constructed there as
2 a matter-of-right under Title 11 of the D.C.
3 Municipal Regulations section 201.1(b).

4 A lengthy and sadly disorganized
5 review by the Office of the Zoning
6 Administrator followed. Excavation and other
7 permits were issued in late 19 -- or in late
8 2006 contrary to the then sitting Zoning
9 Administrator's own instructions and his
10 promises to the neighbors and the ANC and
11 before he had issued a ruling on the matter-
12 of-right issue.

13 Ultimately, this past March, March
14 2007, the Zoning Administrator issued a
15 determination accepting SGI's characterization
16 of the proposed building as a church or other
17 place of worship constructable as a matter-of-
18 right. In that finding, he made two
19 subsidiary findings. One was that there was
20 some activity that could legally be
21 characterized as worship that was likely to
22 occur in this building and not only that, but
23 he concluded that it was the dominant and not

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1 an ancillary category of activity for this
2 building and, therefore, determined the
3 category -- the character of the building.

4 In making this decision, he relied
5 on some flatly incorrect information that had
6 been supplied to him by the applicant, SGI.
7 In his decision he said specifically that he
8 had been relying on the information submitted
9 to him. I'll give you two brief examples
10 right now of inaccuracies in the information
11 that was submitted to him that he said he was
12 relying on when he approved the project as
13 being within the matter-of-right category.

14 One thing that the applicant said
15 which turns out not to be true, turned out not
16 to be true was that this building was going to
17 have only one underground floor. The scale of
18 the building had provoked quite a controversy.
19 His last --

20 CHAIRPERSON MILLER: Excuse me.

21 MR. MAGNUS: Yes?

22 CHAIRPERSON MILLER: I think there
23 was probably various controversy surrounding

1 this building perhaps. How is that related to
2 whether or not this is a house of worship,
3 whether it has one floor at a certain level or
4 what?

5 MR. MAGNUS: Ultimately, one of
6 the key factors in this is what percentage of
7 the structure is allocated to potential
8 worship uses, that's why it's relevant. I
9 guess maybe I'll begin with that one then,
10 since it will be easier for the Board to
11 appreciate the relevance of it.

12 In the information that the
13 applicant submitted to the Zoning
14 Administrator, and which he said he was
15 relying when he approved matter-of-right
16 status, the applicant insisted that the spaces
17 in the building devoted to worship use
18 accounted for 82 percent of the floor space in
19 the project, 82 percent of the entire project.

20 Now, in order to help you
21 appreciate just how wrong that is, there are
22 a couple of numbers I would like you all to
23 keep in mind, if you would. This is a

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1 building that, according to other documents
2 submitted by the applicant, has 18,000 feet of
3 program space. 18,000 feet. 11,000 --

4 CHAIRPERSON MILLER: Where is
5 that? Where is that?

6 MR. MAGNUS: Well, among other
7 places, it's in their --

8 CHAIRPERSON MILLER: But that's
9 correct? You're not challenging that?

10 MR. MAGNUS: No.

11 CHAIRPERSON MILLER: That's a fact
12 you are saying is true?

13 MR. MAGNUS: This is a number that
14 is pulled from their current submissions to
15 this Board.

16 CHAIRPERSON MILLER: Okay.

17 MR. MAGNUS: 18,000 feet of which
18 11,000 are above the ground and 7,000 are
19 below the ground. 18,000 feet of programming
20 space. And another 14,000 feet of parking
21 space, grand total 32,000 square feet in the
22 building. Okay. The sanctuaries combined,
23 the two rooms set aside for ritual chanting,

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1 gohanzen rooms, combined 2,000 square feet.
2 The larger one 1,500, the smaller one 500.
3 Okay.

4 CHAIRPERSON MILLER: Do we have
5 regulations that require a certain amount of
6 space for chanting in order to be a religious
7 organization?

8 MR. MAGNUS: No. You have
9 governing law that says the character of a
10 building is defined by the primary and not by
11 an ancillary use of a building. And this is
12 evidence about what is the primary and what is
13 the ancillary use of this building. The space
14 set aside for sanctuary use accounts for 6
15 percent of the floor space in the building or
16 if you exclude the parking, it accounts for 10
17 percent of the floor space in the building.

18 The applicant came in and told the
19 Zoning Administrator and has now come back and
20 told the Board as well that it accounts for
21 over 80 percent of the building.

22 CHAIRPERSON MILLER: Right. Where
23 are they wrong?

1 MR. MAGNUS: I beg your pardon. I
2 must have bumped that. Where they are wrong
3 is that they have invented a new denominator
4 for their calculations, which they call total
5 activity room space. So when they say that
6 the two sanctuary rooms, which in combination
7 are 2,000 square feet of space, when they say
8 that those account for more than 40 percent of
9 the total project, what they really mean is
10 that they account for more than 40 percent of
11 the portion of the project that they would
12 like you all to look at, which they define as
13 total activity room space.

14 Programming space, which is a term
15 they have themselves used, 18,000 square feet
16 of programming space. Another 14,000 square
17 feet of parking space. So the 2,000 square
18 feet of sanctuary space is 1/9th of the
19 programming space. It's not 40 percent. It's
20 not anything vaguely approaching 40 percent.

21 What happened here was that they
22 came in with misleading numbers and bamboozled
23 the Zoning Administrator. And he said himself

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1 that he was relying on what they told him when
2 he approved this application as being within
3 the matter-of-right category.

4 The correct calculation is that
5 the two sanctuaries in combination account for
6 6 percent of the building or if you want to
7 leave parking out of the denominator, they
8 account for 10 percent of the building. They
9 don't account for 40 percent. They don't
10 account for 80 percent. Now, in order --

11 CHAIRPERSON MILLER: What are you
12 alleging the rest of the building is used for?

13 MR. MAGNUS: All manner of things,
14 conference rooms, office space, administrative
15 space, a book store, food service facilities,
16 this is a community center. This is not a
17 house of worship.

18 CHAIRPERSON MILLER: This is a
19 community center. Let me ask you, would you
20 say that it is organized exclusively for the
21 promotion of the social welfare of the
22 neighborhood in which it is proposed to be
23 located?

1 MR. MAGNUS: I would say that it
2 is organized exclusively for exactly what SGI
3 says all of its community centers are
4 organized for, which is the promotion of, and
5 I quote, "peace, culture and education."

6 CHAIRPERSON MILLER: Okay.

7 MR. MAGNUS: Peace, culture and
8 education, that is what 100 percent of their
9 efforts are and activities are focused on.
10 Now, whether you mean peace --

11 CHAIRPERSON MILLER: Okay. Let me
12 interrupt you.

13 MR. MAGNUS: -- in the immediately
14 surrounding neighborhood or worldwide, I would
15 say that probably that they are focused on
16 peace worldwide and not in the immediately
17 surrounding neighborhood. If they cared at
18 all about peace in the immediate neighborhood,
19 they would have approached this matter very
20 differently than they have.

21 CHAIRPERSON MILLER: Well, this
22 Board looks to the Zoning Regulations and, in
23 this case, it would be to define what are

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1 they. What is this organization? And you are
2 saying they are not a house of worship. But,
3 in fact, that they are a community center.
4 And our regulations --

5 MR. MAGNUS: With respect, with
6 respect, I do not purport to say what they
7 are. I would like to talk about what the
8 building is, not what they are. It doesn't
9 matter what they are. It's only about their
10 building. We are not here arguing about what
11 they are or are not.

12 CHAIRPERSON MILLER: You are
13 arguing that the use of the building --

14 MR. MAGNUS: The use of the
15 building --

16 CHAIRPERSON MILLER: -- might be
17 used for worship. And you have used the terms
18 that, unless you are changing, they are not a
19 house of worship, they are not a church, that
20 they are a community center. And we have a
21 definition for community center in our regs
22 and you have just said that that's not what
23 they are, because they are not serving the

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1 neighborhood.

2 MR. MAGNUS: When you say "what
3 they are," that's why I'm reacting the way I
4 am. We're not talking at all about what they
5 are.

6 CHAIRPERSON MILLER: That's not
7 what they --

8 MR. MAGNUS: We're talking about
9 what their building is, what its primary and
10 ancillary uses might be.

11 CHAIRPERSON MILLER: Okay. We're
12 talking about what the use of the building
13 would be for.

14 MR. MAGNUS: Yes, ma'am.

15 CHAIRPERSON MILLER: Okay. All
16 I'm saying is when you use terms, we need --
17 we look to our regulations. And we're more
18 familiar with them, obviously, than you are
19 and what I'm saying is 209 defines a community
20 center, use as a community center. And what
21 you just said is that that's not what they do,
22 because it's -- a community center, according
23 to our regulations, is "organized exclusively

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1 for the promotion of the social welfare of the
2 neighborhood in which it is proposed to be
3 located."

4 And I would agree with you based
5 on the papers in our file that's not what this
6 organization is about.

7 MR. MAGNUS: You're going to be
8 required in this case, I believe, to figure
9 out what -- which of your legal categories
10 most nearly applies.

11 CHAIRPERSON MILLER: Well, okay.

12 MR. MAGNUS: The applicant calls
13 this a culture center. Okay.

14 CHAIRPERSON MILLER: I believe
15 that that -- and I will -- they will correct
16 me if I'm wrong, but that they are a 501(c)(3)
17 and saying that they are a religious
18 organization and you are saying that they are
19 not a religious organization.

20 MR. MAGNUS: I beg your pardon.
21 I'm not saying anything about what kind of an
22 organization they are.

23 CHAIRPERSON MILLER: Okay.

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1 MR. MAGNUS: Let me be very clear
2 about this.

3 CHAIRPERSON MILLER: You're saying
4 it's not going to be used for religious
5 purposes?

6 MR. MAGNUS: There are lots and
7 lots of buildings that are operated or
8 constructed by indisputably religious
9 organizations that are not houses of worship,
10 lots of them. Office buildings run by
11 Catholic Charities.

12 CHAIRPERSON MILLER: Okay.

13 MR. MAGNUS: Okay. So this is not
14 about who they are or what their tax status
15 is. We have always been very careful to focus
16 this on their building and their proposed use
17 of the building and not on who they are.
18 They, in fact, have been very eager to say
19 well, wait, no, because we are a Buddhist
20 group, then naturally any building that we
21 might build should qualify as a house of
22 worship. It doesn't work that way. It's
23 about the likely use of their building.

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1 CHAIRPERSON MILLER: Okay.

2 MR. MAGNUS: Primary and ancillary
3 that defines what the building is not who they
4 are.

5 CHAIRPERSON MILLER: Okay. Are
6 you agreeing though that they are not going to
7 use it as a community center, based on the
8 information that you are aware of?

9 MR. MAGNUS: I think they are
10 going to use it exactly the way that community
11 centers typically are used, that's what I
12 think. I think that for purposes of your
13 regulations, you're going to have to figure
14 out which category most nearly applies. This
15 certainly does not fall into the category of
16 a church or house of worship.

17 CHAIRPERSON MILLER: Where are
18 those standards set forth?

19 MR. MAGNUS: Well, for one thing,
20 worship -- in order for that category to
21 apply, worship would have to be the primary
22 reason for assembly in this building and it
23 isn't and I'll get to that in a moment in my

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1 presentation. Okay. It doesn't mean it can't
2 -- it isn't enough that worship occasionally
3 happens. There is a chapel at Sibley
4 Hospital. It's not a house of worship.
5 People occasionally do worship there, but it's
6 not a house of worship.

7 CHAIRPERSON MILLER: Okay.

8 MR. STERN: So it can't be --

9 CHAIRPERSON MILLER: Are you
10 saying that it's not a house of worship,
11 because religion will not be the primary use
12 of the building? Is that what you're saying?

13 MR. MAGNUS: No. I'm saying it's
14 not a house of worship, because worship will
15 not be the primary use of the building.

16 CHAIRPERSON MILLER: Oh, worship
17 will not be.

18 MR. MAGNUS: This is not about
19 religious purpose.

20 CHAIRPERSON MILLER: Okay.

21 MR. MAGNUS: This is about
22 worship.

23 CHAIRPERSON MILLER: And where is

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1 worship defined?

2 MR. MAGNUS: Your statute creates
3 a special category for a church or other place
4 of worship. SGI is not even contending that
5 this building is a church. They are
6 contending that it's a place of worship.

7 The Zoning Administrator found
8 that it's a place of worship. I'm saying that
9 that was not a reasonable finding that a
10 reasonable Zoning Administrator could have
11 made based on the facts here. And it's about
12 the building. It is not about the applicant.
13 It's about the building itself. That's partly
14 the floor space allocations, that's partly
15 their use of other buildings that are similar
16 buildings. It's a whole variety of
17 information that allows you to zero in.

18 CHAIRPERSON MILLER: Okay. Floor
19 space allocation, you are saying then you know
20 they are not going to be using the majority of
21 their floor space for worship? Is that it?

22 MR. MAGNUS: What we know is that
23 the space set aside as sanctuary space, first

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1 of all, accounts for 6 percent of the floor
2 space in the building or if you exclude the
3 parking, 10 percent of the floor space in the
4 building. Second of all, we know that,
5 according to Mr. Aiken, who is here today as
6 a fact witness, according to what he told the
7 neighbors during the one meeting that has been
8 held on this with SGI, that that sanctuary
9 space, those gohanzen rooms, are typically the
10 least used space in an SGI culture center.

11 The least used. So 10 percent of
12 the floor space and the least frequently used
13 space, right there all by itself, that is
14 plenty of evidence to dictate a finding that
15 worship is not the primary use of this
16 proposed building. Based on favorable math,
17 10 percent of the building is set aside for a
18 use that might be worship. And by the way,
19 there is a lot of evidence also that worship
20 is not a term that could correctly be used to
21 characterize any of what happens in one of
22 these culture centers.

23 That the group itself has eschewed

1 the notion of worship as a descriptor of what
2 its members do. Okay. But if you assume that
3 what happens in the sanctuary rooms is
4 worship, 10 percent of the available
5 programming space or 6 percent of the total
6 available space in the building is dedicated
7 to that use.

8 The Zoning Administrator had in
9 front of him misleading information from the
10 applicant suggesting that upwards of 80
11 percent of the project was dedicated to
12 worship. He could not reasonably have relied
13 on that. Now, you might wonder why didn't we
14 set him straight.

15 In violation of his promises to
16 us, he did not give us a chance to see or
17 react to the factual information that the
18 applicant tossed over the transom into his
19 office at the last minute. He simply rushed
20 out his decision memorandum in early March
21 without giving us an opportunity to see it or
22 comment on it or anything. We would have been
23 able to explain these errors to him, as we are

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1 now explaining them to you.

2 I guess you have enough of the
3 background here now and I can go forward with
4 our case in chief, except to say that we
5 appealed the matter-of-right ruling and a
6 couple of the related permit issuances and the
7 Board found our Notice of Appeal to be
8 procedurally adequate and set today's hearing
9 date.

10 Last week, we were served with the
11 opposition and the motion to dismiss from the
12 applicant, which arrived at -- I don't know
13 where else they may have been sent, but they
14 arrived at my home on Wednesday and we will
15 reply in writing by the appropriate deadline.

16 Work on the building itself has
17 proceeded continuously since March and it is
18 now framed. Our appeal challenges the
19 following decisions and actions by the Zoning
20 Administrator:

21 First of all, his ruling that the
22 proposed building qualifies as a church or
23 other place of worship that can be constructed

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1 as a matter-of-right in an R-1 Zone.

2 Secondly, DCRA's approval of
3 Application No. 5263-A-6, construction permit,
4 concluded on April 10, 2007. Our appeal also
5 challenges, although certainly this has been
6 overtaken by events to a certain extent, but
7 our appeal also challenges the unlawful
8 issuance of some excavation sheeting and
9 shoring permits and a covered walkway permit,
10 which occurred late in 2006 before there had
11 even been a ruling on the matter of right
12 issue.

13 My intention today is to leave
14 those off to the side, but they are included
15 in the Notice of Appeal we filed many months
16 ago.

17 CHAIRPERSON MILLER: There is
18 nothing separate about them. There is no
19 specific Zoning Regulations that you allege
20 are being violated with respect to those?
21 They are related to the allowance of the use
22 of the building as a matter-of-right. Is that
23 correct?

1 MR. MAGNUS: The construction
2 permit if the building is not in the matter-
3 of-right category, then issuing the
4 construction permit was unlawful, the
5 excavation sheeting and shoring and so forth.

6 CHAIRPERSON MILLER: Right. You
7 tied them to the matter-of-right
8 determination.

9 MR. MAGNUS: Yes, ma'am.

10 CHAIRPERSON MILLER: Okay.

11 MR. MAGNUS: Before I run through
12 our case in chief, I do want to point out one
13 interesting detail, which I imagine will be
14 interesting to the Board as well. Despite
15 extensive efforts, including dozens of phone
16 calls, checks of the DCRA website, in person
17 visits to the Zoning Administrator's office
18 and so forth, we and the ANC have been unable
19 to obtain from DCRA copies of the permit
20 applications that were granted, which means
21 that there is absolutely no way to know
22 whether what is happening on that site
23 conforms or does not conform to permits that

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1 were granted.

2 CHAIRPERSON MILLER: Let me try to
3 keep you focused, if I could.

4 MR. MAGNUS: Yes.

5 CHAIRPERSON MILLER: From what I
6 understand, the basic premise here is that you
7 are challenging the Zoning Administrator's
8 matter-of-right decision with respect to this
9 organization being allowed to be there as a
10 matter-of-right, because they say that they
11 are a house of worship and they are going to
12 worship there. Isn't that what this is about?
13 So can we focus on that specific point?

14 MR. MAGNUS: We certainly can, but
15 as a jurisdictional matter, this is an appeal
16 waiting to happen if, in fact, what is being
17 built there is different from what a permit
18 was granted for and I honestly am at a loss to
19 understand why public information like this is
20 not available from the agency.

21 As I understand it, normally, you
22 can just go and find copies of the
23 applications when a permit has been granted,

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1 so that you can actually check and see whether
2 what's happening matches up with what was
3 permitted. And in this case, that's not
4 possible. All these months later, the permits
5 -- the applicants themselves are missing.

6 CHAIRPERSON MILLER: I understand
7 that.

8 MR. MAGNUS: I strongly suspect
9 that what is happening there and it has --
10 this again goes to the question of the number
11 of underground floors.

12 CHAIRPERSON MILLER: But that's
13 totally separate. You know, if you have
14 grounds for an appeal later about, you know,
15 they are not constructing in accordance with
16 their permits, that's another appeal. I don't
17 hear you saying that you don't have enough
18 information to litigate your appeal, based on
19 the question of whether or not they will be
20 practicing worship here and should be afforded
21 matter-of-right status.

22 MR. MAGNUS: There is plenty of
23 information to litigate that issue, yes.

1 CHAIRPERSON MILLER: Okay. So

2 let's --

3 MR. MAGNUS: Yes.

4 CHAIRPERSON MILLER: -- stick to
5 that.

6 MR. MAGNUS: Okay. Well, I guess
7 that pulls me out of the background then.
8 That was part of the background.

9 CHAIRPERSON MILLER: We read your
10 background. We have read all the papers.

11 MR. MAGNUS: The errors in the
12 administrative decision and specifically the
13 matter-of-right ruling, matter-of-right status
14 is available only to a church or other place
15 of worship. It appears now that the applicant
16 is not claiming that its building is a church.
17 This was more of an issue earlier in the
18 proceeding when we received documents from the
19 Zoning Administrator's office that had the
20 word church on them.

21 And that was particularly
22 surprising since one of the things about this
23 particular group is that it's specifically

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1 eschews the use of churches or temples. In
2 fact, there is another group with which it has
3 a long running battle to whom it refers
4 derisively as church people or temple people.
5 It's a point of pride to not have churches or
6 temples.

7 It is an organization comprised
8 exclusively of lay Buddhist practitioners.
9 And its roughly 80 facilities across the
10 United States are all designated community
11 centers or culture centers. Until the present
12 effort to build in a residential neighborhood,
13 SGI has never before called one of its U.S.
14 facilities a church.

15 And as one of its leaders has
16 emphasized, we don't have either temples or
17 priests, we are a lay Buddhist group. So
18 perhaps we should leave that part of the
19 regulation aside now and, you know, we can all
20 agree that this whole thing rises or falls on
21 whether it is a place of worship, since it
22 clearly is not a church.

23 CHAIRPERSON MILLER: What

1 regulation are we leaving aside?

2 MR. MAGNUS: There are two
3 separate elements of the special category
4 created by section 201.1(b), church or other
5 place of worship. There is no longer, as far
6 as we can tell, and this is based on reading
7 the papers that SGI filed last week, any claim
8 by them that this facility is a church. If
9 you drive by the facility right now, what you
10 will see is a great big sign referring to
11 their culture center that they are building at
12 3417 Massachusetts Avenue.

13 If it would be helpful to the
14 Board, I can address it.

15 CHAIRPERSON MILLER: No. Okay.
16 So no, it's helpful to the Board that you
17 pointed to the regulation that you were
18 referring to. So the question before the
19 Board, at this point, is okay, whether or not
20 it is a place of worship. Is that it?

21 MR. MAGNUS: That's right. There
22 is no possibility of it being a church and the
23 remaining possibility is might it be a place

1 of worship? And I would add there that in
2 order to be a place of worship, it has to be
3 a building in which the primary reason for
4 assembly is worship, not an occasional use or
5 an ancillary use or anything like that, but
6 the primary reason for assembling in this
7 building has to be worship in order for it to
8 qualify as a place of worship.

9 CHAIRPERSON MILLER: And --

10 MR. MAGNUS: I understand that.

11 CHAIRPERSON MILLER: -- what's
12 your source for that?

13 MR. MAGNUS: I'm not a technician.
14 I understand that to be black letter land use
15 and zoning law that the character of a
16 building is defined by its primary use and not
17 by any ancillary use. So whether some
18 worship --

19 CHAIRPERSON MILLER: And is that
20 defined by floor allocation or how is that
21 defined?

22 MR. MAGNUS: I certainly wouldn't
23 suggest that it's defined by floor allocation

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1 alone. In a situation like this where you
2 have relatively few windows that you can peep
3 through, so to speak, floor allocation is
4 certainly something worth considering.

5 CHAIRPERSON MILLER: Okay.

6 MR. MAGNUS: We have never said
7 that it's --

8 CHAIRPERSON MILLER: Okay.
9 Primary use then?

10 MR. MAGNUS: We have never said
11 that the floor allocation is dispositive. We
12 have said that it's relevant in making a
13 decision about what the primary use is. And
14 there aren't that many categories of relevant
15 information, so in that kind of a context, the
16 floor allocations take on an increased
17 importance. But it's not the only relevant
18 category of information. We have never said
19 that it is.

20 The building's primary use will
21 not be as a place of worship. There is a very
22 legitimate question whether any worship will
23 occur or -- according to the legal definition

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1 of that word in this building at all, given
2 the approach that this organization has taken
3 and statements that its leaders have made
4 relating to the concept of worship as being
5 not a particularly apt description of the
6 practice of its adherents.

7 Now, certainly in the advocacy
8 documents related to this legal controversy,
9 the word worship is popping up all over the
10 place, but the record in front of the Zoning
11 Administrator, including the items that we
12 included as attachments to our Notice of
13 Appeal, tell a very different story from the
14 documents prepared for advocacy purposes in
15 this case.

16 Nonetheless, leaving that aside,
17 if you assume that there is some element of
18 worship that is likely to occur in this
19 building, that nevertheless leaves open the
20 question of whether it is likely to be the
21 dominant use or simply an ancillary use.

22 There you come to the floor allocations. You
23 come to the floor space allocations. You come

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1 to the statement from Mr. Aiken that the
2 sanctuary spaces are the least used spaces in
3 SGI culture centers.

4 You come to a lengthy list of
5 other uses of the building, other reasons for
6 assembly, administrative functions, government
7 affairs, educational programming, peace
8 conferences, other conferences, peace rallies,
9 book sales and the like. While all of these
10 might be legitimate ancillary functions in a
11 place of worship, they certainly do not
12 qualify as worship for purposes of determining
13 the principal use of the building.

14 CHAIRPERSON MILLER: So what does?

15 MR. MAGNUS: Pardon?

16 CHAIRPERSON MILLER: What does
17 qualify as worship? I'm trying to, you know,
18 follow your argument. Like this doesn't, you
19 know, what does? How would we find that it
20 does or does not qualify as worship? A book
21 store doesn't qualify as worship, right?

22 MR. MAGNUS: That's right. A book
23 store doesn't qualify as worship.

1 CHAIRPERSON MILLER: What --

2 MR. MAGNUS: It's a great deal
3 easier --

4 CHAIRPERSON MILLER: Okay.

5 MR. MAGNUS: -- for me to tell you
6 what doesn't than what does.

7 CHAIRPERSON MILLER: Isn't it,
8 yes.

9 MR. MAGNUS: The concept of
10 worship, I suppose, involves a hierarchial
11 relationship between the worshiper and the
12 worshiped.

13 CHAIRPERSON MILLER: Really?

14 VICE CHAIR ETHERLY: And that
15 definition would flow from where?

16 MR. MAGNUS: That was the I
17 suppose part. There is a dictionary
18 definition of worship. In the pleading
19 submitted by SGI, they recite the dictionary
20 definition. And I certainly don't dispute
21 that it's an accurate rendering of the
22 dictionary definition. It also has a legal
23 definition.

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1 CHAIRPERSON MILLER: Actually, our
2 regs do say look to the dictionary when it's
3 not in the regulations.

4 MR. MAGNUS: Yes. There is a
5 legal definition that will -- has emerged or
6 I think more accurately will emerge from your
7 jurisprudence and that of the courts that sit
8 above you.

9 CHAIRPERSON MILLER: Do you know
10 where that is? I think that would be helpful
11 for us to look at it in order to evaluate
12 what --

13 MR. MAGNUS: The definition that--

14 CHAIRPERSON MILLER: Of worship,
15 yes.

16 MR. MAGNUS: It will take me half
17 a minute to turn to it. Well, here is
18 Wikipedia.

19 CHAIRPERSON MILLER: What?

20 MR. MAGNUS: Wikipedia.

21 CHAIRPERSON MILLER: No, they
22 don't tell us to turn to Wikipedia.

23 MR. MAGNUS: Okay.

1 CHAIRPERSON MILLER: I mean, we
2 could hear it, but that's not --

3 MR. MAGNUS: You're not interested
4 in Wikipedia.

5 CHAIRPERSON MILLER: Our regs say
6 Webster's.

7 MR. MAGNUS: All right. Yes. No,
8 there is a Webster's definition that the
9 applicant has been kind enough to cite and I
10 should have tabbed the page and didn't, but
11 just give me half a moment. Okay. That's not
12 the right document. Statement in opposition.

13 CHAIRPERSON MILLER: Does the
14 applicant -- I mean, the intervenor know?

15 MR. MAGNUS: Is this your
16 statement of opposition or your motion to
17 dismiss?

18 MS. PRINCE: Statement in
19 opposition.

20 MR. MAGNUS: Okay. Here we go. I
21 was just getting to that document. The term
22 place of worship is not defined, and I'm
23 reading from their pleading now, under the

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1 Zoning Regulations. The Merriam-Webster
2 Dictionary defines worship as No. 1 "A person
3 of importance," that's not relevant here, I
4 guess. No. 2 --

5 CHAIRPERSON MILLER: Can you tell
6 me where you are reading from?

7 MR. MAGNUS: Yes, this is page 5
8 of the applicant's statement in opposition to
9 our appeal. The first full paragraph. "A
10 person of importance."

11 CHAIRPERSON MILLER: Okay. You
12 can read it.

13 MR. MAGNUS: "Reverence offered a
14 divine being or a supernatural power, also an
15 act of expressing such reverence; a form of
16 religious practice with its creed and ritual;
17 extravagant respect or admiration for or
18 devotion to an object of esteem." And it
19 appears that they are claiming that they come
20 in under No. 3 "A form of religious practice
21 with its creed and ritual."

22 CHAIRPERSON MILLER: Okay.

23 MR. MAGNUS: "A form of religious

1 practice."

2 CHAIRPERSON MILLER: What I want
3 to know actually though is you are saying it's
4 not going to be used as -- for worship
5 purposes, so I just want to make sure that the
6 Board understands what -- however -- what uses
7 you are referring to that are not worship.

8 MR. MAGNUS: I'm saying you can be
9 absolutely certain that its primary use will
10 not be for worship. It's primary use will be
11 in alignment with the allocation of floor
12 space of the building. Conferences or peace
13 rallies, musical extravagances, book sales,
14 book clubs, language tables, all the stuff
15 that you find in a community center or a
16 culture center.

17 And also, some dedicated sanctuary
18 spaces, the least used spaces in the building,
19 which collectively account for using favorable
20 math 10 percent of the programming space.

21 CHAIRPERSON MILLER: Okay. So it
22 sounds like you are measuring it on floor
23 allocation.

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1 MR. MAGNUS: And I'm describing a
2 whole series of other anticipated uses of the
3 building, which the applicants themselves have
4 identified and with which the Board can
5 familiarize itself if it wishes to, simply by
6 looking at the program materials from Mount
7 Ranier or any of the other SGI community
8 centers across the country, of which there are
9 roughly 80.

10 Again, none of them in residential
11 areas as far as we can tell. None of them,
12 therefore, creating any reason to seek access
13 to a special regulatory category like the one
14 they are seeking access to here. This is
15 something new under the sun.

16 VICE CHAIR ETHERLY: So if I may,
17 Madam Chair, it sounds as though that your
18 starting point is, as you indicated, 201.1(b),
19 which speaks to the idea of church or other
20 place of worship, but not including rescue
21 mission or temporary revival tents. Clearly,
22 we're not talking about those latter two
23 categories.

1 So as you indicated, church or
2 place of worship, that's pretty much where the
3 game is afoot, and I just use that lightly.

4 MR. MAGNUS: And that's what they
5 have pleaded under themselves.

6 VICE CHAIR ETHERLY: Understood.

7 MR. MAGNUS: That's what they
8 applied under.

9 VICE CHAIR ETHERLY: Understood.

10 MR. MAGNUS: Yes.

11 VICE CHAIR ETHERLY: Now, without
12 necessarily eliminating the term church or
13 place of worship, because I think part of this
14 Board's responsibility under the appeal will
15 be to look at the entire definition, whether
16 or not the applicant may be applying portions
17 of that definition to itself. So your
18 starting point is church or place of worship.

19 It sounds as though what you are
20 pointing to are a couple of key things as the
21 Chair has indicated. One is you are looking
22 to the floor space allocation as an indication
23 of how this space will be used. And I think

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1 I understand that. I want to talk through it
2 a little bit, but that appears to be the first
3 place.

4 The second place is kind of
5 programming, how the space is to be used in
6 terms of the types of events or activities
7 that will be underway in the space. Again,
8 there will be a need, I think, for some Q&A on
9 that particular point, but I think I
10 understand those first two pieces.

11 And then to an extent what I have
12 kind of written for my own use here, not
13 pulling it from any zoning law or any place in
14 the Zoning Regs, but to an extent, I think you
15 have also tried to speak to a little bit of,
16 if you will, kind of an indicia of worship.
17 What are some of those Qs or what are some of
18 those things that perhaps can be viewed as
19 commonly part of a worship experience and are
20 those things present here.

21 Again, I'm not pulling anything
22 from the Zoning Regs. I'm not speaking
23 necessarily to anything that you have

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1 submitted, but just trying to kind of package
2 what I think you are presenting. And I think
3 you are starting at the appropriate place and
4 I think the Chair's Q&A with you early on was
5 absolutely on target, because we needed to
6 focus you on what we are vested with dealing
7 with here.

8 And the question that needs to be
9 answered is is this a church or a place of
10 worship? So you have pointed to floor
11 allocation, look at the applicant's own
12 submittals, look to how they are programming
13 their space, a very small amount of that space
14 is used for actual worship. You have spoken
15 to programming and to an extent, I'm using
16 this other term kind of indicia of worship, so
17 to speak.

18 Again, I'm just trying to kind of
19 encapture what you are speaking to. Now, what
20 I would like to do, perhaps, is from my Q&A
21 standpoint, I think, some of the push-back
22 that you will get, and I just use push-back in
23 terms of the give and take, you know, jumping

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1 into the Socratic method here is a little bit
2 of where some of these items are getting
3 pulled from in terms of the Zoning Regulation.

4 As I look at Mr. Crews' letter,
5 again, I think I understand where you are
6 coming from, because Mr. Crews' letter speaks
7 to, and I'm referring to his March 2nd letter,
8 "In order to confirm SGI's claims that the
9 building will be used predominantly as a place
10 of worship, this office requested" and it
11 continues on.

12 So to an extent, there is this
13 notion, in Mr. Crews' mind, and DCRA, of
14 course, will speak to it at the appropriate
15 time, of predominant. What does that mean in
16 terms of the Zoning Regulation? Does that
17 mean it has to be a majority of the floor
18 space? Because to an extent, part of my
19 question might very well be for the appellant
20 here what would be the requisite amount of
21 floor space?

22 Does 50 percent get you over the
23 hump? Does 60 percent get you over the hump?

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1 And if so, how do you arrive at those numbers?
2 Again, I understand the point that you are
3 making. You are looking simply at what the
4 applicant has submitted and so I've kept that
5 recitation of the applicant in terms of how
6 they are programming their space, that total
7 activity room space that you referenced, 4,821
8 square feet. And then they provide
9 percentages of that activity space for certain
10 uses.

11 MR. MAGNUS: May I be clear about
12 that number?

13 VICE CHAIR ETHERLY: Sure.

14 MR. MAGNUS: It is -- and that's--
15 that number comes out of thin air. There are
16 only two possible denominators for any
17 calculation of the floor space in this
18 building. One is 18,000 and the other is
19 32,000. To say that 4,821 is a relevant
20 denominator for any percentage calculation is
21 unfathomable.

22 VICE CHAIR ETHERLY: And in your
23 estimation, the 4,800 number, the 4,821 is

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1 neglecting what? What's excluded in that
2 number? Parking?

3 MR. MAGNUS: The -- no, no, no,
4 no. There are 18,000 feet of programming
5 space, according to their own submissions.
6 Programming space. The other 14,000 feet are
7 parking square feet.

8 VICE CHAIR ETHERLY: Understood.

9 MR. MAGNUS: 18,000 feet of
10 programming space, but they want to use as the
11 denominator for their calculations 4,821 feet,
12 which just comes out of thin air.

13 VICE CHAIR ETHERLY: Okay.

14 MR. MAGNUS: It has no substance
15 at all.

16 VICE CHAIR ETHERLY: Okay.

17 MR. MAGNUS: Also, we have never
18 sought to dumb-down the complicated analysis
19 that regulators have to do in this area.

20 VICE CHAIR ETHERLY: Um-hum.

21 MR. MAGNUS: And say well, you
22 know, if it's above X percent, then you get
23 one answer and if it's below X percent, then

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1 you get a different answer. Right? If -- you
2 wouldn't have to have intelligent people in
3 the regulatory agencies if that's all it was
4 about. Okay. We don't think that that's the
5 case.

6 Unfortunately, in a situation like
7 this, you have a small amount of largely
8 circumstantial evidence that you have to base
9 your regulatory judgments on. If you were to
10 listen to the advocacy coming from SGI, then,
11 in fact, the moment that an applicant invokes
12 the W word or the C word, worship or church,
13 in an application, then the regulators no
14 longer have any obligation or any legal right
15 to even examine the situation and make their
16 own judgment as to whether worship is likely
17 to be the predominant or primary use of the
18 facility, because of the Constitution and
19 Federal Legislation.

20 VICE CHAIR ETHERLY: And I
21 understand.

22 MR. MAGNUS: And they want to
23 write your role just out of it all together.

1 VICE CHAIR ETHERLY: And I
2 understand that.

3 MR. MAGNUS: We don't see it that
4 way.

5 VICE CHAIR ETHERLY: And to an
6 extent, there are some valid aspects to that,
7 but that's not a question that we're vested
8 with dealing with right at this moment, but I
9 understand your concern in terms of is it used
10 as a shield, so to speak. We're not touching
11 that just yet. But in terms of looking at the
12 evidence that you are pointing to to buttress
13 your argument, I am trying to be sure I parse
14 it out correctly and interpret it correctly in
15 terms of how you are suggesting that we view
16 it.

17 So if one were to look at the
18 programming space, as you indicated, if you
19 use, let's say for example, either the 18,000
20 square feet marker or the 32,000 square feet
21 marker, by your estimations, 6 percent of the
22 space would be for what you would deem to be
23 worship purposes. That's if you go by the

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1 18,000 square feet. And of the 32,000 square
2 feet, 10 percent or do I have it in reverse?

3 MR. MAGNUS: You have it in
4 reverse.

5 VICE CHAIR ETHERLY: I have it in
6 reverse.

7 MR. MAGNUS: I'm not saying that
8 what happens or is likely to happen in those
9 gohanzen rooms qualifies as worship. I'm
10 saying that if you assume that that qualifies
11 as worship, it's the only thing that could
12 even arguably qualify as worship and it is
13 happening in a very, very, very small portion
14 of the building.

15 VICE CHAIR ETHERLY: A small
16 portion.

17 MR. MAGNUS: That has --

18 CHAIRPERSON MILLER: Excuse me.

19 MR. MAGNUS: -- been described as
20 the least used space.

21 CHAIRPERSON MILLER: How is it
22 it's the only thing you can deem as worship?
23 Who is making that determination? You are,

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1 based on what?

2 MR. MAGNUS: I have looked at the
3 applicant's submissions, which I assume you
4 have as well, and I haven't seen anything
5 else, any other anticipated use that looks
6 even remotely like anything in that dictionary
7 definition of worship. I see language tables
8 and book club discussions and a variety of
9 other kinds of uses that --

10 CHAIRPERSON MILLER: Book club
11 discussions. If you were in church and they
12 were discussing the Old Testament, would that
13 be worship?

14 MR. MAGNUS: It would not.

15 CHAIRPERSON MILLER: It would not
16 according to whom?

17 MR. MAGNUS: According -- you have
18 asked me, that's my opinion.

19 CHAIRPERSON MILLER: According to
20 you.

21 MR. MAGNUS: If you and I have a
22 discussion about the Old Testament, I don't
23 think we're worshipping, no, I don't.

1 CHAIRPERSON MILLER: According --

2 MR. MAGNUS: Do you?

3 CHAIRPERSON MILLER: But that's
4 not what the law is, according to you. We're
5 trying to decide what the law is, not what --

6 MR. MAGNUS: If there were a clear
7 definition of the law of what constitutes
8 worship, then this whole thing would proceed
9 on a much easier basis. I'm not saying that
10 there is a well-developed law of which
11 categories of behavior qualifies worship and
12 which ones don't. I'm asserting that there is
13 nothing in the list of possible uses that has
14 been presented to you that comes even close,
15 except for the ritual chanting in front of the
16 gohanzen scroll.

17 CHAIRPERSON MILLER: Where are you
18 looking that you are eliminating all these
19 activities as worship, except for chanting?

20 MR. MAGNUS: Well, a good deal of
21 this is in the materials that were submitted
22 to the Zoning Administrator and were appended
23 to his decision on March the 2nd. Most of it

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1 is regurgitated in the -- SGI's pleadings to
2 this Board for purposes of this hearing today.

3 CHAIRPERSON MILLER: Okay.
4 Because, mainly, you know, we just want to
5 make sure we understand your argument. And so
6 it sounds like you have looked over the list
7 and, based on your opinion, and you are an
8 advocate here, that the only activities that
9 were before the Zoning Administrator, that
10 they listed as worship, the only ones that
11 could have constituted worship were the
12 chanting. And that takes place in a small
13 percentage of the floor allocation and
14 therefore it's not the primary use?

15 MR. MAGNUS: You are hearing now
16 in the pleadings, by the way, that there have
17 been scrolls installed all over the place in
18 every available conference room and classroom
19 through the facility. There are two
20 sanctuaries and everything else is post-hoc
21 and artifice as far as that goes.

22 CHAIRPERSON MILLER: Okay. But
23 what I'm trying to do is really zero in on

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1 your argument.

2 MR. MAGNUS: Um-hum.

3 CHAIRPERSON MILLER: Okay, so we
4 get it. So that the ZA erred because only 6
5 percent or 10 percent of the building could be
6 considered allocated for worship. Is that
7 correct, number one?

8 MR. MAGNUS: No reasonable Zoning
9 Administrator could have looked at all this
10 information and made the findings that he
11 made.

12 CHAIRPERSON MILLER: Is that it in
13 general?

14 MR. MAGNUS: All this information
15 includes what was going on with the floor
16 space allocations, the other described uses,
17 the evidence about the actual use of other SGI
18 culture centers or community centers,
19 etcetera.

20 CHAIRPERSON MILLER: Okay. Wait a
21 second. Describe --

22 MR. MAGNUS: And I grant you that
23 a great deal of that information is

1 circumstantial. Okay. But the alternative is
2 simply to rely on assertions that are made in
3 a permit application. Oh, certainly, we're
4 going to worship there.

5 CHAIRPERSON MILLER: Okay.

6 MR. MAGNUS: And that's not
7 satisfactory either.

8 CHAIRPERSON MILLER: Okay. But
9 basically, what he had -- what he based his
10 decision on you said only 10 percent of the
11 allocated floor space could have been devoted
12 to worship, and that being the chanting that
13 takes place in some of these smaller rooms.
14 And also based on your knowledge, I don't know
15 if that was before the ZA or not, you tell me,
16 of the way this type of organization functions
17 in other places. Is that correct?

18 MR. MAGNUS: All the information
19 about -- that we were able to locate about the
20 use of other community centers --

21 CHAIRPERSON MILLER: What about
22 all --

23 MR. MAGNUS: -- was made available

1 to the Zoning Administrator and was in front
2 of him.

3 CHAIRPERSON MILLER: Right. But
4 what's in there that was -- that he didn't see
5 that was -- that made him err? What should he
6 have concluded from it? What are you pointing
7 to?

8 MR. MAGNUS: What he should have
9 concluded from it was that 100 percent of the
10 activities at the Soka Gakkai International
11 Culture Centers is focused on the very
12 laudable objectives of peace, culture and
13 education.

14 CHAIRPERSON MILLER: Okay. So --

15 MR. MAGNUS: Which is great and
16 has nothing to do with worship.

17 CHAIRPERSON MILLER: Okay. That's
18 the premise of your argument? A 100 percent
19 of --

20 MR. MAGNUS: Yes. I would submit
21 to you that --

22 CHAIRPERSON MILLER: -- the
23 activities are focused --

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1 MR. MAGNUS: -- if we gather here
2 together right now --

3 CHAIRPERSON MILLER: -- on --

4 MR. MAGNUS: -- and concentrate
5 our minds on peace, that we are doing
6 something very commendable that does not meet
7 the dictionary or legal definition of the term
8 worship.

9 CHAIRPERSON MILLER: Okay. There
10 we go. Anything else?

11 MR. MAGNUS: Just a little.

12 CHAIRPERSON MILLER: Okay.

13 MR. MAGNUS: I want the Board,
14 please, to keep in mind a few areas in which
15 this case breaks new ground. You can see and
16 we have included some of this in the -- on the
17 annexes to our Notice of Appeal, but you can
18 see at the group's website thumbnails of other
19 community centers, culture centers that it has
20 and the -- by the pictures, the thumbnail
21 pictures, you can see where these things are
22 located. They are not in residential
23 neighborhoods.

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1 They are in appropriately zoned
2 commercial and mixed-use areas. And as just
3 one example, I would encourage you or your
4 staff to visit Mount Ranier facility. There
5 is a Family Dollar store but within a stone's
6 throw.

7 The District has numerous
8 buildings used or constructed by groups that
9 are connected to a recognized religion. They
10 are not all houses of worship. This Board has
11 examined many such buildings including one
12 case involving a YMCA. It's not a house of
13 worship. Many buildings within the Board's
14 area of jurisdiction have chapels or sanctuary
15 spaces accounting for a portion of the total
16 floor space, not all of them are house of
17 worship.

18 Sibley Hospital has a sanctuary
19 space. It's not a house of worship. D.C. law
20 has a category that much more nearly applies
21 to a facility like this, much more nearly,
22 community centers. Putting one in a
23 Residential District requires special zoning

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1 relief. SGI seeks to bypass this category in
2 favor of a more convenient one.

3 It has proposed a project that
4 will overwhelm a residential neighborhood with
5 vehicular traffic, hundreds of cars on a
6 regular basis and it insists that because this
7 particular community center will be used by
8 people whose religious affiliation is Buddhist
9 there is literally no audience, no place we
10 can go to have our concerns aired about the
11 vehicular traffic.

12 It seeks to turn the matter-of-
13 right category into one that is literally
14 boundless and is successful merely by invoking
15 certain words in a permit application.

16 I want to briefly note the views
17 of two other bodies that have taken a look at
18 this and issued opinions on it. One of them
19 is legally entitled to great weight. The
20 other, I would submit, is morally entitled to
21 great weight.

22 CHAIRPERSON MILLER: It's legally
23 entitled to great weight if we have a report

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1 from them that meets the great weight
2 standards.

3 MR. MAGNUS: Well, I'll just
4 describe their --

5 CHAIRPERSON MILLER: Do we have an
6 ANC report?

7 MR. MAGNUS: I'll describe the
8 ANC's resolution for you and you can then if
9 you think it's entitled --

10 CHAIRPERSON MILLER: Well --

11 MR. MAGNUS: -- to something other
12 than great weight, you can give it the weight
13 you think it's --

14 CHAIRPERSON MILLER: -- we have to
15 see it.

16 MR. MAGNUS: It's in the record.
17 The ANC has issued a resolution specifically
18 on this matter and I'll just -- and we'll
19 introduce it into -- we'll put a copy in
20 evidence, if for some reason that hasn't
21 happened.

22 CHAIRPERSON MILLER: Okay. I
23 don't think we have it.

1 MR. MAGNUS: But I'll just read
2 you now the relevant whereas and resolve
3 clauses.

4 "Whereas, SGI USA's webpage shows
5 that all the SGI --

6 MS. PRINCE: I have an objection.
7 Could you, please, state the date of that
8 resolution and the date that you filed the
9 appeal?

10 MS. PLEASANT: The District makes
11 the same objection, Madam Chair.

12 CHAIRPERSON MILLER: Oh, I don't--
13 okay. I don't think we need to have it read
14 either. It would be good if we could all just
15 look at it and save time.

16 MR. MAGNUS: I just -- I don't
17 have a print with me.

18 CHAIRPERSON MILLER: Oh, you don't
19 have a copy? Okay.

20 MR. MAGNUS: I do have a copy. I
21 don't have a copy with me.

22 CHAIRPERSON MILLER: Okay.

23 MR. MAGNUS: This resolution was

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1 adopted when the ANC looked at this matter.

2 CHAIRPERSON MILLER: What's the
3 date?

4 MR. MAGNUS: Which was well before
5 we filed this appeal.

6 CHAIRPERSON MILLER: Could you
7 give the date? It must have a date on it.

8 MR. MAGNUS: Sighs.

9 CHAIRPERSON MILLER: Isn't it
10 right on it? Are you reading a resolution
11 that's not dated?

12 MR. MAGNUS: I copied some text
13 from it into my speaking notes here. Does
14 anybody know the date? January before the
15 filing of the appeal.

16 CHAIRPERSON MILLER: Okay.

17 MR. MAGNUS: So before we filed
18 the appeal. If that has some significance,
19 it's lost on me.

20 CHAIRPERSON MILLER: It's not
21 going to be given great weight like this,
22 because we can't even see it.

23 MR. MAGNUS: Well, I'll --

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1 CHAIRPERSON MILLER: If you want
2 to read it for the purpose of your --

3 MR. MAGNUS: Certainly. Will you
4 allow me leave to put the actual document in
5 the record?

6 CHAIRPERSON MILLER: Yes.

7 MR. MAGNUS: After we leave here
8 today.

9 CHAIRPERSON MILLER: Yes, we would
10 love to see the --

11 MR. MAGNUS: Okay.

12 CHAIRPERSON MILLER: -- ANC
13 report.

14 MR. MAGNUS: Okay. So here is the
15 whereas clauses:

16 "Whereas, SGI's webpage shows that
17 all the SGI facilities across the country are
18 identified as community, activity or culture
19 centers, but none are identified as churches."

20 (Whereupon, at 5:00 p.m. the
21 Public Hearing continued into the evening
22 session.)

23

1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 5:00 p.m.

3 MR. MAGNUS: "Whereas, the
4 conceptual drawings for the proposed building
5 presented to ANC-3C demonstrate that the
6 proposed building will contain a book store,
7 conference rooms, class rooms and offices,
8 where, among other things, SGI USA's public
9 affairs activities will be conducted with
10 little of the total building being devoted to
11 sanctuary use.

12 Whereas, SGI USA has observed
13 local zoning ordinances for its Maryland and
14 Virginia community centers by locating them in
15 areas that have office or other commercial
16 zoning. And there is no reason for SGI USA to
17 expect that the District would depart from
18 normal zoning practices."

19 Those are the relevant whereas
20 clauses. And there is only one relevant
21 resolve clause:

22 "Resolve, therefore be it resolved
23 that ANC-3C opposes the construction of this

1 proposed SGI USA building on the subdivided
2 lot adjacent to the MCFK."

3 Another body that has taken a look
4 at this whose views, I would submit, are
5 morally, although perhaps not legally,
6 entitled to great weight is the Committee of
7 100 for the Federal City, which wrote a letter
8 stating the following:

9 CHAIRPERSON MILLER: Excuse me.

10 MR. MAGNUS: Yes?

11 CHAIRPERSON MILLER: Who did they
12 write the letter to?

13 MR. MAGNUS: The Zoning
14 Administrator.

15 CHAIRPERSON MILLER: Oh, the
16 Zoning Administrator, okay. I wanted to make
17 sure it wasn't to the BZA and we didn't get
18 it. Okay.

19 MR. MAGNUS: No, but if you
20 consider this to be an acceptably old
21 expression of their views, I'm sure that we
22 can arrange for a current expression of their
23 views addressed to yourselves would be

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1 created, but this was -- this is not that old.

2 This was --

3 CHAIRPERSON MILLER: Well, how old
4 is it? We're not making any judgments.

5 MR. MAGNUS: Less than a year old

6 CHAIRPERSON MILLER: Okay.

7 MR. MAGNUS: "The principles
8 underlying Soka Gakkai philosophy appear to be
9 averse to worship, making the use of this site
10 for a house of worship oxymoronic. The
11 proposed building would be what all of Soka
12 Gakkai's other buildings around the country
13 are, places of assembly for instruction and
14 discussion and administrative support.

15 Such uses cannot be considered
16 within the matter-of-right category within R-1
17 Zones. A clear distinction between houses of
18 worship and other assembly buildings is well-
19 drawn from many perspectives in both
20 regulations and case history. The facts in
21 this case are clear. They lead directly to
22 the conclusion that the Soka Gakkai building
23 would not conform with the requirements of an

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1 R-1 Zone.

2 Therefore, the Committee of 100
3 joins the Friends of the Babcock-Macomb House
4 in opposition to the issuance of a building
5 permit."

6 Just to be clear, the relief that
7 we are asking for with this appeal, we are
8 asking that the matter-of-right ruling be
9 reversed. We are asking that the construction
10 and other permits be revoked and we are asking
11 that SGI be compelled to seek appropriate
12 zoning relief from this Board or else restore
13 the property to the condition it as in prior
14 to excavation.

15 In conclusion, this is not an
16 anti-religious initiative on our part. This
17 is not an anti-house of worship initiative on
18 our part. This is a neighborhood that is
19 chock full of houses of worship, which we
20 adore. This is not an anti-Buddhist effort
21 either.

22 This is an effort to see that the
23 matter-of-right category is correctly policed

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1 and that decisions about what projects are in
2 it or not in it are based on real information
3 and not misleading calculations or anything
4 else of the kind that marred the determination
5 issued by the Zoning Administrator in this
6 case.

7 Four points I just want the Board
8 to hang on to. First of all, the Zoning
9 Administrator expressly relied on information
10 supplied by the applicant that was false and
11 that the applicant has also asked this Board
12 to swallow just as unthinkingly as the Zoning
13 Administrator did.

14 Secondly, if there is any worship
15 among the proposed or likely uses of this
16 building, at most, that use is ancillary.

17 Third, and this is critical, it's
18 about the building and not about the
19 applicant. Religious organizations are fully
20 capable of constructing or using buildings
21 that are not houses of worship. Tax exempt
22 status doesn't mean a thing.

23 Fourth, finally, approving this

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1 ruling by the Zoning Administrator will make
2 the matter-of-right category literally
3 boundless and unlimitable, which is why the
4 Committee of 100 agreed to back our position
5 in this matter in the first place.

6 So I don't know how much of my
7 time I have used.

8 CHAIRPERSON MILLER: Well --

9 MR. MAGNUS: A great deal of that
10 I suppose was question and answer. I'm
11 certainly available to answer questions and I
12 know you have other parties to hear from and
13 you have had a long day already, so I will
14 thank you for your attention.

15 CHAIRPERSON MILLER: Thank you.

16 BOARD MEMBER LOUD: Before you
17 leave, let me just ask one quick question to
18 summarize my understanding of your definition
19 of worship. And I'm going to toss this out
20 and you tell me if I'm close to the mark.
21 Worship is what occurs inside of a sanctuary
22 through a ritual or creed belonging to that
23 denomination. Is that a fair assessment --

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1 MR. MAGNUS: Whew.

2 BOARD MEMBER LOUD: -- of where
3 you are on worship?

4 MR. MAGNUS: I haven't intended to
5 come in here and lay out a unified field
6 theory or propose a definition of what doesn't
7 -- of what worship is. I have intended to
8 come in here and persuade you that, at most,
9 the uses that could qualify as worship for
10 this particular building are ancillary.

11 I -- respectfully, I don't have a
12 unified field theory of that sort to offer to
13 you. And if it's necessary for the Board to
14 develop one in order to resolve this dispute,
15 then you have my sympathy.

16 BOARD MEMBER LOUD: Well, I think
17 we're all here and we have had this exchange
18 for about 45 minutes, because the regs don't
19 have a definition of worship. But what they
20 do authorize and empower us to do is take a
21 look at the definition in the dictionary.

22 MR. MAGNUS: Yes, sir.

23 BOARD MEMBER LOUD: And you

1 offered about, I think there were, four
2 different variations of what that worship
3 would be. But your comments zeroed in on one
4 of those four, specifically more dealing with
5 the ritual of it, the creed of it, the
6 sanctuary expression of it. And I just wanted
7 to be clear as to whether you intended that to
8 be your take on worship or if there was some
9 broader definition?

10 MR. MAGNUS: I appreciate that
11 question. What I thought I said, sir, and
12 what I meant to say was, and they can
13 obviously speak for themselves and will
14 shortly, but it appears to me that we were
15 reading from page 5 of the opposition filed by
16 SGI, where they quote the dictionary
17 definition.

18 And I then said it appears to me
19 that they believe they come in under the third
20 of the four subdefinitions which says "A form
21 of religious practice with its creed and
22 ritual." If you read the rest of their
23 paragraph, they appear to be relying on that

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1 part of the definition as if it covered a
2 broad swath of what they are proposing to do
3 in this particular building.

4 I don't think that it applies to
5 very much of what they propose to do in this
6 particular building.

7 BOARD MEMBER LOUD: I wouldn't
8 necessarily read it that way, but we'll hear
9 from them shortly. I think alternate No. 2
10 which talks about "acts expressing reverence"
11 would tend, to me more, to cover some of what
12 might be described in their pleadings as
13 worship. Different things that happen outside
14 of the actual sanctuary. So that's why I
15 wanted to clarify whether or not that was your
16 sort of proffer of worship or you were
17 characterizing their's.

18 MR. MAGNUS: If it's the Board's
19 view that we, as appellants, have an
20 obligation to put forward a complete
21 definition, unified field theory of what does
22 constitute worship, then we would be glad to
23 do that in writing. It certainly is going to

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1 take some time to reflect on it that we don't
2 have in the context of an oral hearing.

3 CHAIRPERSON MILLER: I would say
4 that --

5 MR. MAGNUS: I just made the
6 offer.

7 CHAIRPERSON MILLER: I would say
8 it's your appeal and you make it however you
9 see fit.

10 MR. MAGNUS: Thank you.

11 CHAIRPERSON MILLER: Okay.

12 BOARD MEMBER LOUD: That's it.

13 CHAIRPERSON MILLER: DCRA?

14 MS. PLEASANT: Thank you, Madam
15 Chair.

16 CHAIRPERSON MILLER: Sorry.

17 MS. PRINCE: Excuse me?

18 CHAIRPERSON MILLER: Ms. Prince?

19 MS. PRINCE: Will there be an
20 opportunity to question the appellant?

21 CHAIRPERSON MILLER: Will you be
22 questioning as to facts? You know, we had
23 this discussion earlier about in appeals how

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1 much cross examination should be allowed. And
2 we don't perceive it as an opportunity to
3 attack their legal argument, but as an
4 opportunity if they set forth facts, for
5 instance, you know, if he said something, not
6 a legal statement, I mean, he did make some
7 factual statements.

8 I don't want to -- if he said that
9 your client was lying or something and you
10 wanted to cross examine him on that aspect, I
11 would say, okay, that's a factual matter. But
12 if you're saying doing an interpretation of
13 201 or something of the Zoning Regs, we
14 wouldn't want to go there necessarily. Do you
15 understand the difference?

16 MS. PRINCE: We can refrain and
17 raise our issues in our direct testimony.

18 CHAIRPERSON MILLER: Okay. Okay.
19 Then we're ready for DCRA.

20 MS. PLEASANT: Thank you. Madam
21 Chair, Members of the Board, today's appeal
22 concerns a church's right to use their land.
23 The Government intends to prove today that

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1 former Zoning Administrator Bill Crews'
2 determination that SGI could use their church
3 as a matter-of-right in an R-1-B District was
4 correct and also that the building permits
5 that were issued were also properly issued.

6 Now, at this time, I would like to
7 introduce the testimony of Matt LeGrant.

8 DIRECT EXAMINATION

9 MS. PLEASANT: Can you, please,
10 state and spell your name for the record?

11 ZONING ADMIN. LeGRANT: Yes, it's
12 Matthew LeGrant. M-A-T-T-H-E-W L-E-G-R-A-N-T.

13 MS. PLEASANT: And where are you
14 employed?

15 ZONING ADMIN. LeGRANT: I am
16 employed with the Department of Consumer and
17 Regulatory Affairs with the District of
18 Columbia, Office of Zoning Administrator.

19 MS. PLEASANT: And how long have
20 you been with the Office of the Zoning
21 Administrator?

22 ZONING ADMIN. LeGRANT: Since
23 March of 2006.

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1 MS. PLEASANT: And what is your
2 current position?

3 ZONING ADMIN. LeGRANT: I am the
4 Acting Zoning Administrator.

5 MS. PLEASANT: And how long have
6 you been the Acting Zoning Administrator?

7 ZONING ADMIN. LeGRANT: Since July
8 of 2007.

9 MS. PLEASANT: Can you state your
10 duties as the Acting Zoning Administrator,
11 please?

12 ZONING ADMIN. LeGRANT: The duties
13 of the position are to administer, enforce and
14 interpret the Zoning Regulations of the
15 District of Columbia.

16 MS. PLEASANT: And have you held
17 any other positions at DCRA?

18 ZONING ADMIN. LeGRANT: Yes, I was
19 the Deputy Zoning Administrator from March
20 2006 until June 2007.

21 MS. PLEASANT: And can you briefly
22 summarize your duties in that position?

23 ZONING ADMIN. LeGRANT: This was

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1 to assist the then Zoning Administrator, Mr.
2 Bill Crews, in administration, enforcement and
3 interpretation of the Zoning Regulations.

4 MS. PLEASANT: And what other
5 education training --

6 CHAIRPERSON MILLER: Ms. Parris, I
7 just want to ask you since we're short on
8 time, the purpose of your questioning if it's
9 to qualify him as an expert in zoning, we
10 don't need to hear more, but if it's to for
11 some reason to show his qualifications to the
12 other parties, then I would let you proceed.

13 MS. PLEASANT: Yes, Madam Chair,
14 it is to show his qualification as an expert,
15 but also for those who have not been to these
16 proceedings, to briefly give them an
17 understanding.

18 CHAIRPERSON MILLER: Okay. It's
19 both. Do you need to go much further? I'm
20 just watching the clock.

21 MS. PLEASANT: No, just one more
22 preliminary question.

23 CHAIRPERSON MILLER: Okay. Okay.

1 MS. PLEASANT: Madam Chair, I am
2 Ms. Pleasant, sorry.

3 CHAIRPERSON MILLER: Sorry. Ms.
4 Pleasant.

5 MS. PLEASANT: Okay. Thank you.
6 Okay. And one last question. What education
7 training or experience have you had in zoning
8 and planning?

9 ZONING ADMIN. LeGRANT: Yes, I
10 have two degrees in city planning. A
11 bachelor's and a master's and I have practiced
12 in zoning and planning for, approximately, 25
13 years, including 17 years in the City of
14 Berkeley, California.

15 MS. PLEASANT: Did you have an
16 opportunity to review the application for 3417
17 Massachusetts Avenue?

18 ZONING ADMIN. LeGRANT: Yes, I
19 have. I actually was the person designated to
20 review the building permit application and
21 plans in March of 2007.

22 MS. PLEASANT: And did anyone
23 assist you in that review?

1 ZONING ADMIN. LeGRANT: Yes, I
2 asked my Zoning Technician, David Bolen, to
3 assist me in my review under my direction.

4 MS. PLEASANT: And for what
5 purpose was that review conducted?

6 ZONING ADMIN. LeGRANT: Well, the
7 purpose of the review was, of course, to
8 ensure that the application -- first, to
9 determine its use, to see if it was a church
10 use and then also to see if the -- that
11 building complied with the development
12 standards, i.e., the height limits, lot
13 occupancy, setbacks and parking requirements,
14 etcetera, associated with the building for
15 that use.

16 MS. PLEASANT: And you mentioned
17 that you were reviewing for use and
18 development standards. What documents did you
19 review?

20 ZONING ADMIN. LeGRANT: I reviewed
21 the application, the plat and the plans
22 associated with that building permit
23 application.

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1 MS. PLEASANT: Can you explain
2 your conclusion based on your review?

3 ZONING ADMIN. LeGRANT: I can. In
4 conducting the review, we looked at the
5 depictions on the drawings as well as the
6 information contained in the application to
7 see if, in fact, the use purported to be a
8 church is, in fact, a church as represented.
9 And then, of course, we looked at the drawings
10 as to the compliance of the development
11 standards which was documented in what we call
12 a Zoning Computation Sheet for those numerical
13 requirements.

14 Based on that review, we concluded
15 that the church was a church use allowed as of
16 the matter-of-right in the subject district.

17 MS. PLEASANT: Madam Chair, we
18 have graph, may I present it?

19 CHAIRPERSON MILLER: Yes. What do
20 you have?

21 MS. PLEASANT: We have a chart.

22 CHAIRPERSON MILLER: Okay.

23 ZONING ADMIN. LeGRANT: The

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1 graphic that Ms. Pleasant just posted was
2 distributed to the Board Members that gives an
3 overview of the site, including the subject
4 zoning that applies. It is in the base zone
5 of the R-1-B Single-Family Residential
6 District with two overlays. There is a
7 Diplomatic Overlay and there is the Naval
8 Observatory Precinct District Overlay. All of
9 which apply to this site.

10 The lot in question is illustrated
11 in the aerial photograph as well as the map on
12 the right.

13 MS. PLEASANT: And what was the
14 purpose of reviewing the overlays?

15 ZONING ADMIN. LeGRANT: The
16 overlays, of course, are additional sets of
17 zoning rules that apply to the site. In this
18 case, in my analysis, the -- first starting
19 with the Diplomatic Overlay. The Diplomatic
20 Overlay applies to a certain class of uses
21 that is embassies and chanceries, which does
22 not apply here. So there is nothing relevant
23 in the Diplomatic Overlay that applied to the

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1 subject case.

2 In the Naval Observatory Precinct
3 District Overlay, there are certain rules and
4 specifications for those cases that come
5 before the Board, criteria for special
6 exceptions. One relevant aspect is a height
7 limit for buildings that is lower than that of
8 the allowable height for church buildings in
9 the underlying R-1-B District.

10 And, in fact, the difference
11 allows a 40 foot high church, where in the
12 absence of that overlay, one could have a 60
13 foot high church. In any event, the subject
14 building as revealed in the plans was a
15 structure of 32 feet in height. So it
16 certainly complied with that height limit.

17 MS. PLEASANT: And based on your
18 review of the overlays and the other
19 documents, what was your conclusion?

20 ZONING ADMIN. LeGRANT: I
21 concluded that the subject application did
22 conform with the regulations for a church use
23 in the subject -- at the subject location.

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1 MS. PLEASANT: And how did you
2 come to that conclusion?

3 ZONING ADMIN. LeGRANT: Well,
4 there was a couple of key analyses here. The
5 previous Zoning Administrator, who was Bill
6 Crews, had researched the application
7 materials, some of which have been submitted,
8 I believe, as part of the record, to look at
9 the organization proposing the church
10 operation as well as other materials from
11 other organizations.

12 The -- my charge from Mr. Crews
13 was to look at the site, look at the building
14 permit application specifically to see if it
15 met the development standards applicable to a
16 church, which again I concluded that it had
17 done so. The -- I'll stop there.

18 MS. PLEASANT: Okay. So what was
19 your final determination?

20 ZONING ADMIN. LeGRANT: That it
21 was a church allowed as a matter-of-right.

22 MS. PLEASANT: And what do you
23 define as a church?

1 ZONING ADMIN. LeGRANT: Well, the
2 -- to backup a little bit, one of the things
3 that I did, of course, because that
4 determination of Mr. Crews' letter to the
5 applicant, March 2nd, was to look at his
6 review to see what materials he had, in fact,
7 covered. So I went through the record. I
8 looked at the information he looked at, but
9 again I, myself, did my own analysis to come
10 to my own conclusion to, in fact, see if, in
11 fact, it was a church use.

12 And I, based on the materials I
13 reviewed, concluded -- I also concluded and
14 agreed with the previous Zoning
15 Administrator's decision that, in fact, it was
16 a church use.

17 As to what is defined as a church,
18 we -- it has been noted here already the
19 Zoning Regulations in and of themselves do not
20 define a church or place of worship, so we're
21 directed to Webster's Unabridged, which I
22 looked at a copy of that. And to get to the
23 point, it talks about a -- the first

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1 definition is "A building set apart for public
2 worship" and then there it also mentions
3 Christian.

4 But then the second definition "A
5 place of worship for any religion." So those
6 definitions, to me, are the most relevant in
7 looking at the issue as to whether this is a
8 church or a place of worship.

9 MS. PLEASANT: And based on your
10 conclusion, what did you do next?

11 ZONING ADMIN. LeGRANT: I
12 completed the review of the building permit
13 application and on March 28th I signed off and
14 approved that application. I stamped the
15 plans as approved for the zoning -- for the
16 Office of the Zoning Administrator and passed
17 on to the other disciplines in DCRA for their
18 review for compliance with Building Code
19 issues.

20 MS. PLEASANT: You mentioned the
21 plan areas. What was your -- what did you do
22 with regard to reviewing the plans?

23 ZONING ADMIN. LeGRANT: Well,

1 again, the -- when I looked at the plans, I,
2 both in discussion with the -- Mr. Crews,
3 looked at the floor plans and looked at the
4 layout of those spaces. They were labeled
5 with different uses. I did some calculations
6 as to what those areas represented.

7 Again, my key charge, at that
8 point in time, was to ensure that, for
9 example, parking -- the development standards
10 such as the numerical requirements of the
11 Zoning Regulations were met. As an
12 illustration, there is a requirement for a
13 parking requirement. A parking requirement is
14 based on the size of the sanctuary.

15 And so I looked at the sanctuary.
16 In the floor plan there was not a specific
17 arrangement of pews or chairs denoted. So the
18 Zoning Regulations dictate that in such cases
19 one uses a standard of 7 square feet. When
20 there is an area without exceeding, you use 7
21 square feet. And I looked at that floor --
22 that large sanctuary area depicted on the
23 floor plan and figured out what was the square

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1 footage that was available for seating and
2 then made the calculation of what that
3 represented in the end and came up with 172
4 persons. The parking requirement is a ratio
5 of 1 space per 10 persons, so I concluded the
6 parking requirement was 17 spaces.

7 In looking at the underground
8 parking area that is proposed, the number of
9 spaces provided was 20, so they actually
10 exceeded their minimum parking requirement.

11 MS. PLEASANT: And what was the
12 significance of looking at the parking and the
13 seating in the sanctuaries and other rooms in
14 the building?

15 ZONING ADMIN. LeGRANT: Well, part
16 of -- again the discussion with the Zoning
17 Administrator was what appears to be the use
18 of the building. And I identified several
19 rooms that appear to be relevant to a church
20 or place of worship, including a large
21 sanctuary with, I calculated, 1,550 square
22 feet, which is the largest room in the
23 structure. By far, the largest program room

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1 was a sanctuary.

2 There is a small sanctuary. There
3 is a chanting room. There is a fellowship
4 room. So as well as other rooms that was
5 mentioned, there is a book store. There is an
6 office. There is a classroom. There is
7 corridors. There is an entryway. There was
8 an office and, of course, restrooms and
9 storage and mechanical penthouse.

10 Based on the plans that I
11 reviewed, I came up with a gross floor area of
12 11,247 square feet. This does not include the
13 underground parking area, which are the 20
14 parking spaces, which I mentioned earlier.

15 MS. PLEASANT: And what is the
16 significance of the gross floor area?

17 ZONING ADMIN. LeGRANT: Well, it's
18 -- I guess it's significant in the fact that
19 that is the area in which the use will occur.
20 If we do not include the cellar, and cellars
21 are not included in the calculation of gross
22 floor area, and this becomes the baseline in
23 which we measure the -- which I guess I would

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1 measure by what the use is for that structure.

2 MS. PLEASANT: And what would you
3 say is the dominant use?

4 ZONING ADMIN. LeGRANT: The
5 dominant use, to me, based on my analysis, is
6 that of assembly for religious purposes or for
7 worship areas.

8 MS. PLEASANT: So once again, what
9 is the significance of the dominant use of the
10 assembly areas?

11 ZONING ADMIN. LeGRANT: Well, the
12 -- one of the standards laid out, I believe,
13 to Mr. Crews -- Mr. Crews looked at what was
14 the predominant use. I mean, he used that in
15 his letter of determination. And the -- when
16 looking at the sum of all those rooms that I
17 mentioned, the four major rooms, and that it
18 be -- I would use that as the program space,
19 that exceeded 50 percent.

20 I came up with 56 percent of the
21 areas of the major program rooms of this
22 structure, again, that's excluding restrooms
23 and closets and mechanical areas, are

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1 associated with this activity. And so it
2 allowed me to agree with Mr. Crews'
3 determination that this was the predominant
4 use of the structure.

5 MS. PLEASANT: Earlier the
6 appellant introduced some different figures.
7 Why do you believe they have different
8 figures?

9 ZONING ADMIN. LeGRANT: I don't
10 know. I do not know what drawings they looked
11 at, but maybe this, they mentioned a much
12 larger square footage figure and I believe in
13 their written appeal noted a two level
14 underground area. Well, maybe that was in an
15 earlier design, but the plans that I reviewed
16 have one underground parking area, so one
17 level.

18 So that may be a source of some of
19 the disparity in numbers. Also, as I have
20 mentioned, the square footage of the garage
21 itself is not -- as a cellar is not included
22 in the gross floor area calculation and that's
23 specifically laid out in the definition of

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1 gross floor area in the Zoning Regulations.

2 CHAIRPERSON MILLER: Can I ask why
3 these -- are you addressing these numbers just
4 because of discrepancies that the appellant
5 raised? Because otherwise, I would like to
6 know is this an important factor in your --
7 when you reviewed the materials that Mr. Crews
8 reviewed in determining that this property was
9 going to be used as a house of worship.

10 ZONING ADMIN. LeGRANT: I think
11 the fact that other numbers were raised, you
12 know, I wanted to distinguish the analysis
13 that I did and what numbers I used. There
14 seemed to be different numbers mentioned and
15 I want to distinguish the numbers that I came
16 up with and, hopefully in the Board's mind,
17 tell you how it may be different than the
18 numbers mentioned by other parties.

19 CHAIRPERSON MILLER: Okay.

20 VICE CHAIR ETHERLY: If I may just
21 go ahead and jump in then, since the Chair
22 just opened the flood gates here?

23 ZONING ADMIN. LeGRANT: Okay.

1 VICE CHAIR ETHERLY: Because it
2 gets to, for me, what's an interesting and
3 somewhat important question. Does the zoning
4 determination vis-a-vis the question of
5 church/place of worship, does it hinge in some
6 material way on the percentage of your gross
7 floor area that can be attributed to worship
8 or worship-related activities, such that let's
9 say one of the other larger numbers was,
10 indeed, the appropriate number to look at.
11 And I understand very clearly that your
12 testimony is not -- that it's not.

13 But I'm just trying to get a sense
14 of so what's kind of the bright line test
15 here. If 5 percent of your GFA is
16 attributable to worship space, does that take
17 you out of place of worship or church
18 neighborhood and put you into something else
19 versus if it's 50 percent or more, in your
20 opinion or in the ZA's opinion, does that put
21 it into church or worship, place of worship
22 category?

23 ZONING ADMIN. LeGRANT: I think

1 it's relevant in that the issue was raised to
2 the previous Zoning Administrator prior to the
3 determination that there's a question about
4 whether this was, in fact, a church or a place
5 of worship. So part of his rigorous analysis,
6 I think, was to take -- to look at the
7 organization, the use that the SGI is
8 proposing and then how it manifests itself in
9 a building -- in building plans.

10 As to whether there is a specific
11 number, I can say only in my career that it
12 may not -- again, in the City of Berkeley,
13 California --

14 VICE CHAIR ETHERLY: Understood.

15 ZONING ADMIN. LeGRANT: -- we
16 looked at a use and the question of what was
17 the use of a structure. In the absence of any
18 guidance, my legal advisers there said what's
19 over -- okay, is there anything over 50
20 percent here that you can hinge upon? And not
21 knowing what particular percentage number I
22 would come up with, I just wanted to see what
23 the --

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1 VICE CHAIR ETHERLY: Um-hum.

2 ZONING ADMIN. LeGRANT: -- looking
3 at these rooms that, in my mind, are
4 associated with religious assembly represent.
5 I found it was 56 percent. So that, I think
6 in part, and I will continue as my testimony's
7 other factors I take and look into account as
8 well.

9 VICE CHAIR ETHERLY: And just to
10 be sure I'm clear in terms of the rooms that
11 you specifically looked at and then I'll let
12 you get back on track, could you just run
13 through again -- and I'm looking at the page
14 that has the kind of, if you will, floor space
15 map and it has labeled pantry, classroom,
16 fellowship lounge, I just want to be sure I'm
17 clear in terms of your look, your assessment
18 of the -- what I believe I wrote down as you
19 saying the four major rooms, what were those
20 rooms again that you looked at in particular?

21 ZONING ADMIN. LeGRANT: Okay.
22 Well, I certainly looked at, you know, the
23 materials that I submitted. But in my

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1 analysis, which I believe I would like to
2 stand alone --

3 VICE CHAIR ETHERLY: Understood.

4 ZONING ADMIN. LeGRANT: -- is for
5 the first floor there was a pantry, a
6 fellowship lounge, chanting room, a classroom,
7 a book store, an office, okay. And then the
8 two rooms that I picked out were the
9 fellowship lounge and the chanting room. On
10 the second floor, there was a large sanctuary,
11 a small sanctuary, three study rooms and a
12 family room. And again, there I picked out
13 two of those, the large and the small
14 sanctuary.

15 And that together represented
16 56.18 percent of those -- the sum of those
17 rooms all together.

18 VICE CHAIR ETHERLY: Okay.

19 ZONING ADMIN. LeGRANT: And that's
20 what I did my analysis on.

21 VICE CHAIR ETHERLY: Excellent.

22 Thank you. I'll have some additional
23 questions, but I'll hold those. Thank you.

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1 ZONING ADMIN. LeGRANT: Thank you.

2 VICE CHAIR ETHERLY: Thank you,
3 Madam Chair.

4 CHAIRPERSON MILLER: Excuse me.
5 As I mentioned earlier, unfortunately, we're
6 going to lose our quorum, so I apologize for
7 inconvenience to the parties in this case. I
8 would like to -- if the parties would come
9 forward, I would like to just talk about a
10 date to continue and finish this case.

11 We would be able to continue this
12 next Tuesday, first in the afternoon, if you
13 are all available. You're here. No, I meant
14 like Ms. Prince to the table. Would you all
15 be available next Tuesday afternoon? If you
16 couldn't do it first, we could do it later,
17 but we wanted to give you the convenience of
18 going first, so you wouldn't have to wait as
19 long.

20 MS. PRINCE: I'm available.

21 MR. MAGNUS: That's --

22 CHAIRPERSON MILLER: You're
23 available.

1 MR. MAGNUS: -- October the 16th in
2 the afternoon?

3 CHAIRPERSON MILLER: Yes.

4 MR. MAGNUS: And the afternoon
5 session starts at 1:00?

6 CHAIRPERSON MILLER: It usually
7 does. Well, no, I shouldn't say that.

8 MR. MAGNUS: In principle, it
9 starts at 1:00?

10 CHAIRPERSON MILLER: Yeah.

11 MR. MAGNUS: I'm available then.

12 CHAIRPERSON MILLER: Okay.

13 MS. PLEASANT: The Government is
14 available on the 16th.

15 CHAIRPERSON MILLER: Perfect.

16 Okay.

17 MR. MAGNUS: May I ask one
18 procedural question?

19 CHAIRPERSON MILLER: Yeah, yeah.

20 MR. MAGNUS: About the proceeding
21 hearing?

22 CHAIRPERSON MILLER: Um-hum.

23 MR. MAGNUS: We are eager to cross

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1 examine the last witness that you have just
2 heard from, but in order to do so, it would
3 sure be helpful if we also were able to look
4 at copies of the granting permit applications,
5 since he is purporting to have made a decision
6 based on information in those permit
7 applications. And we don't have them. So if
8 the Board could somehow extract copies of
9 those permit applications?

10 CHAIRPERSON MILLER: Well, let's
11 hear what DCRA has to say.

12 MR. LeGRANT: Well, this is the
13 first time I've been made aware that you have
14 not seen the building permit application and
15 plats. And I have the plans. I think we have
16 a copy of the application. I'm happy to
17 provide access to those.

18 CHAIRPERSON MILLER: Okay.

19 MR. MAGNUS: If that could happen
20 under some Board supervised fashion, I sure
21 would be grateful, because there have been no
22 fewer than two dozen telephone calls to the
23 Zoning Administrator's office.

1 CHAIRPERSON MILLER: Well, I
2 think, I guess I would ask DCRA just to serve
3 it on all the parties, to serve the Board as
4 well with whatever you are -- a permit
5 application?

6 MR. MAGNUS: The granted permit
7 application.

8 CHAIRPERSON MILLER: The granted
9 permit application.

10 MS. PLEASANT: Yes, we can do
11 that, Madam Chair.

12 CHAIRPERSON MILLER: Okay. When
13 will you do that by?

14 MS. PLEASANT: By Friday?

15 CHAIRPERSON MILLER: Okay. There
16 is also the question of your having an
17 opportunity to file a response to the motion
18 to dismiss. Basically, the question about
19 motions, our rules don't specifically address
20 motions and we often look to the Court for
21 guidelines, but there is no specific time.
22 And so, you know, 7 to 10 days is something
23 that is often provided for responses to

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1 motions.

2 So I would ask you if you could,
3 do you think you could respond by Friday as
4 well and then the Board could get a copy of
5 your response? I guess that would be 9 days.
6 You would have -- you got it a week ago
7 Wednesday? Is that too little? Do you need
8 until the following Monday?

9 MR. MAGNUS: I got it this past
10 Wednesday. This past Wednesday is when I got
11 it.

12 CHAIRPERSON MILLER: Today is
13 Tuesday.

14 MR. MAGNUS: Right. So 6 days ago
15 is when I got it.

16 CHAIRPERSON MILLER: Okay.

17 MR. MAGNUS: In the evening.

18 CHAIRPERSON MILLER: Okay.

19 MR. MAGNUS: So --

20 CHAIRPERSON MILLER: Well, let me
21 just ask you. We're going to convene next
22 Tuesday.

23 MR. MAGNUS: Right.

1 CHAIRPERSON MILLER: Did you want
2 to -- unless, Ms. Prince, you are not
3 concerned about the motion any more?

4 MR. MAGNUS: I'm happy to respond
5 to it in writing at such time as the Board
6 would direct. If, instead, you want us to
7 respond to the points in that motion to
8 dismiss during the next segment of the
9 hearing, we can do that.

10 CHAIRPERSON MILLER: I think the
11 Board would like to see it before Tuesday and
12 then we could determine how we want to deal
13 with the motion.

14 MR. MAGNUS: Okay. In that case,
15 I would request to have until Monday to submit
16 a response to the motion to dismiss.

17 CHAIRPERSON MILLER: Okay. Then--

18 MR. MAGNUS: We're operating pro
19 se here.

20 CHAIRPERSON MILLER: What time
21 would you need it by in order -- it would need
22 to be faxed to the Board on Monday, so we
23 could review it before Tuesday.

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1 MR. MAGNUS: Certainly.

2 CHAIRPERSON MILLER: So before
3 noon?

4 MR. MAGNUS: Could I email it to
5 the Board? I don't actually use a fax
6 machine.

7 CHAIRPERSON MILLER: Oh, you could
8 mail it to the Office of Zoning.

9 MR. MAGNUS: Sure.

10 CHAIRPERSON MILLER: Yeah.

11 MR. MAGNUS: I'll bring it by in
12 person, yes.

13 CHAIRPERSON MILLER: And they will
14 forward it to us.

15 MR. MAGNUS: I'll deliver it
16 during the morning on Monday and serve it on
17 the other parties as well.

18 CHAIRPERSON MILLER: Okay. But if
19 you -- that might be convenient to the Office
20 of Zoning as well if you email it as well.

21 MR. MAGNUS: Okay.

22 CHAIRPERSON MILLER: In order to
23 get it to the Board expeditiously as well. I

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1 don't know. Okay. Any other questions?

2 MS. PRINCE: Just by way of
3 clarification, will we be arguing the motion
4 to dismiss at the outset or will we continue
5 this?

6 CHAIRPERSON MILLER: Would you
7 like to do that? That was -- we were
8 intending to deal with that and then the
9 appellant raised the concern that he hadn't
10 had time to respond. So you did present it to
11 us.

12 MS. PRINCE: Um-hum.

13 CHAIRPERSON MILLER: We would
14 consider doing that. We have gotten into the
15 appeals.

16 MS. PRINCE: Yes.

17 CHAIRPERSON MILLER: You know, I
18 don't know.

19 MS. PRINCE: I'm hesitant to
20 disrupt the flow, yet, I obviously filed the
21 motion for a reason, so I'll leave it to your
22 discretion. On Tuesday, we'll come prepared
23 to argue it and you proceed the way you --

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1 CHAIRPERSON MILLER: Okay.

2 MS. PRINCE: -- best think it
3 should proceed.

4 CHAIRPERSON MILLER: Okay. Okay.

5 MR. MAGNUS: And in that regard, I
6 would just ask that if the Board decides to
7 allocate or not to allocate a portion of next
8 Tuesday's hearing to arguing over the motion
9 to dismiss, if you could just let us know that
10 that's how the time is going to be spent and
11 so we can prepare as best as possible.

12 CHAIRPERSON MILLER: Let me -- I
13 don't know, because we're not getting your
14 response until Monday.

15 MR. MAGNUS: Okay.

16 CHAIRPERSON MILLER: So it's hard
17 to let you know what we're going to do with
18 it, because I think we need to evaluate the
19 whole picture.

20 VICE CHAIR ETHERLY: Madam Chair,
21 what I would perhaps offer.

22 CHAIRPERSON MILLER: What do you
23 think?

1 VICE CHAIR ETHERLY: This is kind
2 of an unusual step in that we did kind of
3 proceed a little bit, more than a little bit
4 into the substance.

5 CHAIRPERSON MILLER: Yeah.

6 VICE CHAIR ETHERLY: I would
7 probably like to suggest that we just plan to
8 deal with the motion to dismiss on Tuesday.
9 As the representative for SGI indicated, there
10 are some critical and important issues that
11 are raised in terms of both the jurisdictional
12 issues in terms of timeliness and then also
13 some of the substantive issues in terms of
14 what the Board can address here. And I think
15 it's important that we just go ahead and just
16 resolve those issues on Tuesday.

17 MR. MAGNUS: Is it possible that
18 the Board in the middle of a hearing could
19 actually decide on the issues in a motion to
20 dismiss and treat them as dispositive and just
21 cut the appeal off at that point? I mean,
22 you're not going to be in a -- caucusing.

23 VICE CHAIR ETHERLY: Well, again,

1 it's an unusual position, but we are a little
2 bit in that posture, because we wanted to
3 accommodate you.

4 CHAIRPERSON MILLER: That's
5 possible, right.

6 VICE CHAIR ETHERLY: And I think
7 that was a prudent thing to do to err on the
8 side of getting forward and using the benefit
9 of everyone's time, especially since the Board
10 was running so late today. But I mean, again,
11 Ms. Prince has indicated, you know, she has
12 acknowledged that we have kind of ventured
13 down the road. It's hard to kind of pull
14 back. But I would be inclined perhaps just to
15 deal with it, because I think there are some
16 credible questions that are raised by the
17 motion that need to be dealt with.

18 CHAIRPERSON MILLER: Okay. Okay.
19 And it deal with several decisions, so it's
20 possible, you know, that part of the hearing
21 could be disposed of and not the rest of it or
22 whatever. All, none, some of it. Okay.

23 Also, I guess, we may expect to

1 get an ANC report? I don't know. It has been
2 alluded to.

3 MR. MAGNUS: We have not asked the
4 ANC to file a report.

5 CHAIRPERSON MILLER: Okay.

6 MR. MAGNUS: We're going to give
7 you a copy of the resolution that the ANC
8 already adopted, which we agreed to put in the
9 record.

10 CHAIRPERSON MILLER: Okay.

11 MR. MAGNUS: I can't believe it's
12 not in the record yet, but we're going to send
13 that in and put it on the record. Not a new
14 report, not a new statement from the ANC.

15 CHAIRPERSON MILLER: And so --

16 MR. MAGNUS: That's not --

17 CHAIRPERSON MILLER: -- also the--

18 MR. MAGNUS: We haven't asked them
19 for that.

20 CHAIRPERSON MILLER: Okay. And
21 the ANC Commissioner who was not able to stay
22 today, I assume, you will -- the office will
23 let her know that she would have an

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1 opportunity to come next week.

2 MR. MAGNUS: Yeah, the
3 anticipation was that she would participate
4 purely as a fact witness and I have --

5 CHAIRPERSON MILLER: Oh, I see.

6 MR. MAGNUS: -- about five minutes
7 of questions.

8 CHAIRPERSON MILLER: As a fact
9 witness for you?

10 MR. MAGNUS: Oh, yes.

11 CHAIRPERSON MILLER: Okay. Not
12 for the ANC as a party. Okay.

13 MR. MAGNUS: No, no, no, no, a
14 fact witness as part of our case in chief on
15 our appeal.

16 CHAIRPERSON MILLER: Oh.

17 MR. MAGNUS: And if it is possible
18 for us to staple on five more minutes of our
19 case in chief by having -- by asking her a
20 couple of questions at the next hearing, then
21 we will have cured what we missed by her
22 departure today.

23 MS. PRINCE: Excuse me, Madam

1 Chair, I have an issue with that. I believe
2 the case in chief has been presented. Ms. May
3 has left. She was speaking on her own
4 personal behalf and not on behalf of the ANC,
5 which has taken no action on this appeal since
6 it has been filed.

7 CHAIRPERSON MILLER: Um-hum.

8 MS. PRINCE: And enough is enough.

9 MS. PLEASANT: Madam Chair, the
10 District also requests that the resolution by
11 the ANC and the letter from the 100 Group be
12 submitted to all the parties by the 13th.

13 CHAIRPERSON MILLER: When is that,
14 Friday?

15 MS. PLEASANT: By Friday.

16 CHAIRPERSON MILLER: Yes, okay,
17 that's a good idea. Okay.

18 MR. MAGNUS: Is service on the
19 parties by email sufficient for that?

20 CHAIRPERSON MILLER: I don't --

21 MR. MAGNUS: I'm a one man show
22 here and operating pro se, so I want to get it
23 to everybody --

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1 CHAIRPERSON MILLER: I don't see
2 why not.

3 MR. MAGNUS: -- without actually
4 having to traipse around town.

5 CHAIRPERSON MILLER: It's not the
6 official report. You are not giving an
7 official report. You are giving --

8 MR. MAGNUS: No, this is an
9 adopted -- first of all, this is on the ANC
10 website. I mean --

11 CHAIRPERSON MILLER: Okay.

12 MR. MAGNUS: And the Committee of
13 100 letter is on their website. So I'll --
14 but I'll serve copies on everybody, but if I
15 could do that by emailing them, that would
16 be --

17 CHAIRPERSON MILLER: I think you
18 should work it out with the parties.

19 MR. MAGNUS: Okay.

20 CHAIRPERSON MILLER: Okay.
21 Because as an appellant, you do take on some
22 burdens and I don't want to be in the position
23 of taking them off. There is two parties

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1 here. I think you guys can work it out.

2 MR. MAGNUS: Okay.

3 CHAIRPERSON MILLER: As far as
4 your witness goes, I don't think you have made
5 the case that, you know, you haven't been able
6 to present your case without this witness, so,
7 at this point, I wouldn't be inclined to
8 automatically give you more time on your
9 appeal. However, if you put something in
10 writing that would make a compelling case why
11 that's so necessary, I don't want to close the
12 door, at this point. We'll see where we are
13 next week.

14 Okay. Anything else? All right.
15 We will see you next week. Thank you.

16 MS. PLEASANT: Thank you for your
17 time.

18 MS. PRINCE: Thank you.

19 CHAIRPERSON MILLER: Ms. Bailey,
20 that concludes today's agenda?

21 MS. BAILEY: Yes, Madam Chair.

22 CHAIRPERSON MILLER: Okay. Then
23 this hearing is adjourned.

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(Whereupon, the Public Hearing was
concluded at 5:44 p.m.)