

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

OCTOBER 2, 2007

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER	Chairperson
CURTIS ETHERLY, JR., ESQ.	Vice-Chairperson
MARC D. LOUD	Board Member
SHANE DETTMAN	Board Member (NCPC)

COMMISSION STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

The transcript constitutes the minutes from the Public Meeting held on October 2, 2007.

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P R O C E E D I N G S

(10:59 a.m.)

CHAIRPERSON MILLER: This meeting will come to order.

Good morning, ladies and gentlemen. This is the October 2nd public meeting of the Board of Zoning Adjustment of the District of Columbia.

My name is Ruthanne Miller. I'm Chairperson. Joining me today is Vice Chair Curtis Etherly. To my right and to my left is Mr. Marc Loud, mayoral appointee; Mr. Shane Dettman, representing the NCPC; and then Cliff Moy from the Office of Zoning; Lori Monroe and Sherry Glazer from the Office of Attorney General.

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

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

Please be advised that this

1 proceeding is being recorded by a court
2 reporter and is also Webcast live.
3 Accordingly, we must ask you to refrain from
4 any disruptive noises or actions in the
5 hearing room.

6 Please turn off all beepers and
7 cell phones.

8 Does the staff have any
9 preliminary matters?

10 MR. MOY: Good morning, Madam
11 Chair and members of the Board. There are
12 preliminary matters, but staff suggests that
13 we handle that on a case-by-case basis.

14 CHAIRPERSON MILLER: Okay. Thank
15 you.

16 And we do have an agenda of
17 several cases this morning, and Mr. Moy, I
18 think that we were discussing rearranging the
19 order a little bit due to some circumstances
20 that have arisen in specific cases that we
21 will address when we get to them. I think in
22 particular, I was wondering if you would call
23 the Harnett case first, please.

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1 MR. MOY: Yes, ma'am. That case
2 is Appeal No. 17615 of William J. Harnett,
3 pursuant to 11 DCMR 3112, from the November
4 17, 2006 administrative decision of the Zoning
5 Administrator, Department of Consumer and
6 Regulatory Affairs, to issue Building Permit
7 No. 101019, permitting the alteration and
8 repair, including striping five new parking
9 spaces in the owner's parking garage
10 identified in yellow as spaces P-1 through P-
11 5. The subject property is located in the W-3
12 District at premises 3030 K Street, N.W.,
13 which is in Square 1173, Lot 102.

14 On July 31st, 2007, the Board
15 completed public testimony, closed the record,
16 and scheduled its decision on October 2nd,
17 2007. The Board requested draft findings of
18 fact and conclusions of law from the parties,
19 as well as the opportunity for responses.

20 Madam Chair, the Board has
21 received filings on findings of fact and
22 conclusions of law from the Appellant and the
23 Intervenor, Exhibit 34 and Exhibit 35,

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1 respectively.

2 The Board has also received two
3 filings from the Appellee. The first is a
4 letter filed on September 7, 2007, identified
5 in your records as Exhibit 36, where DCRA
6 requested an enlargement of time.

7 Staff also notes that -- well, the
8 second filing is dated September 29th, 2007,
9 which is DCRA's draft findings of fact,
10 conclusions of law. Both of these filings,
11 the Board should act as a preliminary matter.

12 Finally, the Board allowed
13 responses to these drafts from the Appellant
14 and the Intervenor, Exhibits 38 and 37,
15 respectively, and staff also notes that the
16 Board has also received -- no. That should
17 conclude the staff briefing, Madam Chair.

18 CHAIRPERSON MILLER: Thank you
19 very much.

20 This is a preliminary matter
21 because -- well, first of all, we have a
22 consent motion to rule on for an enlargement
23 of time, but in this case the motion was until

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1 September 11th, and actually DCRA just filed
2 their filing September 28th, and our briefing
3 schedule had allowed all of the parties to
4 respond to each other's pleadings, and
5 therefore, the Intervenor and the Appellant
6 haven't had time to respond to DCRA's filing.

7 And as a cover letter to its
8 filing, DCRA stated that they request that we
9 extend time for the Appellant and the
10 Intervenor to respond to this filing. So even
11 though this case was scheduled for
12 deliberation today, I think in the interest of
13 fairness to all parties and prejudice to none
14 that we should provide that time to have the
15 other parties respond even though we don't
16 have a specific motion before us for that, and
17 I think that is, in part, due to the fact that
18 this just came in.

19 So I would recommend to the Board
20 that we set a date of October 16th for
21 responses to DCRA's filing and then set this
22 for October 23rd for a special meeting to
23 decide it.

1 And do I have the consensus of the
2 Board?

3 And I think we can also rule by
4 consensus to grant the motion for the
5 enlargement of time to DCRA.

6 Okay. Then I think that completes
7 our action on this case, unless the staff has
8 any questions on that.

9 MR. MOY: None at all.

10 The next case, I believe, is the
11 Board to address the motion for a stay to
12 Appeal No. 17532 of AppleTree Institute for
13 Education Innovation, Inc. This motion is to
14 the original appear, which was pursuant to 11
15 DCMR 3100 and 3101, from the administrative
16 decision of the Zoning Administrator, DCRA, to
17 require BZA special exception approval for a
18 proposed addition to an existing building, to
19 accommodate a public charter school use.

20 The Appellant alleged that the
21 Zoning Administrator erroneously relied on the
22 Zoning Commission's February 13, 2006
23 emergency rulemaking to require additional on-

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1 site parking spaces. The subject property is
2 located in the R-4 District at premises 138
3 12th Street, N.E. That's in Square 998, Lot
4 820.

5 The participating Board members
6 are Ruthanne Miller, Curtis Etherly and Carol
7 Mitten.

8 On September 7th, 2007, the
9 opposition party filed this motion for a stay
10 of the effectiveness of the BZA Appeal Order
11 No. 17532, and that is identified in your case
12 folder as Exhibit 51.

13 The staff would also -- well, I
14 think staff will conclude here and the Board
15 can act on the merits of the request for a
16 stay.

17 CHAIRPERSON MILLER: Okay. I
18 think that the Board is not prepared to act on
19 the merits at this time because we don't have
20 a quorum of Board members here who
21 participated in the case, and Ms. Mitten has
22 not sent in an absentee ballot.

23 So what I'm going to suggest is

1 that we postpone deliberation on this case
2 until October 23rd, and by that time another
3 Board member will have read the case and be
4 prepared to participate in the deliberation on
5 this motion for stay.

6 MR. MOY: Okay. Very good.

7 The next application for the
8 Board's decision then is Application No. 17664
9 of 2321 Shannon Place, S.E., LLC, pursuant to
10 11 DCMR 3104.1, for a special exception to
11 construct four new single-family dwellings
12 under Section 353 in the R-5-A District at
13 premises 2321 Shannon Place, S.E. That's in
14 Square 5787, Lot 812.

15 On September 25th of this year,
16 the Board completed public testimony, closed
17 the record, and schedule its decision on
18 October 2nd. The Board allowed the record to
19 remain open for the Applicant to file revised
20 plans attendant to the ground floor elevation
21 dimensions.

22 That filing was entered into the
23 record. There's a letter with attached

1 drawings, dated September 28th, 2007, and is
2 identified in your case folders as Exhibit 37.

3 The Board is to act on the merits
4 of the requested zoning relief from Section
5 353 and 405. Staff should add that the
6 application was amended to add the side yard
7 variance under Section 405.

8 And that completes the staff's
9 briefing, Madam Chair.

10 CHAIRPERSON MILLER: Thank you
11 very much.

12 Okay. Getting into the merits of
13 this case, this case was pretty
14 straightforward, except we ran into that
15 wrinkle last week with respect to whether or
16 not there were four stories for the proposed
17 structure or three, and then we'll get to
18 that.

19 But in essence, it is an
20 application for special exception under 353 to
21 demolish a two-story building, to construct
22 three three-story plus basement rowhouses and
23 variances from the side yard requirement from

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1 ten feet to two feet.

2 Office of Planning supports the
3 application. They addressed all of the
4 Section 353 criteria in depth in their Office
5 of Planning report, and they found no adverse
6 impact on neighboring property and in harmony
7 with the zoning regulations.

8 They found it was consistent with
9 the comprehensive plan, that the land use
10 element for neighborhood infield development,
11 and I am just going to highlight a little bit.

12 D.C. Public Schools found that the
13 schools have capacity to absorb the students
14 who could reside in this housing development.

15 Okay. In general it met those. I
16 want to jump into the variance test because
17 that's a little bit more demanding. In
18 essence, the Applicant had to seek a variance
19 from the side yard requirements. Where ten
20 feet would be required, they could only
21 provide eight, and what has happened in this
22 case is that they ran into an issue with an
23 easement for Pepco, Pepco lines, which

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1 prohibited their development into the
2 easement.

3 And originally there were going to
4 be four rowhouses here. They have cut back to
5 three. The exceptional condition here is this
6 existence of the easement, and the practical
7 difficulty is there are two aspects of it.
8 One is that the building was already reduced
9 from four to three buildings, and they
10 couldn't be any narrower. And if they had to
11 go to two buildings they ran into an economic
12 feasibility problem, which OP concurred with.

13 And then there was no substantial
14 detriment to the public at all in this case.
15 The ANC also supports.

16 I think I'd like to ask Mr.
17 Dettman if he wants to address that issue that
18 the filing was made for with respect to four
19 stories versus three stories in this case.

20 Would you like to do that?

21 COMMISSIONER DETTMAN: I'd be
22 happy to, Madam Chair.

23 I'm looking at Exhibit No. 37,

1 which was submitted by the Applicant on
2 September 28th to the Office of Zoning. That
3 exhibit includes a letter as well as another
4 set of up to date plans for the project, and
5 if I can direct the Board's attention to page
6 7 and 8, I believe, of the plans showing the
7 front and rear elevations of the project, it
8 appears that the Applicant has provided
9 clarity on the question regarding the extent
10 of the basement level above grade, and it is,
11 in fact, below four feet, which would not
12 constitute an additional story for this
13 project.

14 And so this project is, in fact, a
15 three story building which is allowable under
16 the zoning regulations.

17 CHAIRPERSON MILLER: Thank you.

18 And I read rather quickly over the
19 353 criteria, not addressing all of them, but
20 they all are addressed in Office of Planning
21 report, and we have come out here a little bit
22 late, and there is no opposition in this case,
23 but is there any other aspects of this

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1 application that anybody else wants to
2 highlight or address?

3 (No response.)

4 CHAIRPERSON MILLER: Okay. I
5 think then that we can adopt actually the
6 findings of the Office of Planning, and I
7 would move then to grant special exception
8 relief, pursuant to Section 353 to construct
9 three new single family dwellings in the R-5-A
10 District and variance relief from the side
11 yard requirement.

12 Do I have a second?

13 COMMISSIONER LOUD: Second.

14 CHAIRPERSON MILLER: Any further
15 deliberation?

16 (No response.)

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

19 (Chorus of ayes.)

20 CHAIRPERSON MILLER: All those
21 opposed?

22 (No response.)

23 CHAIRPERSON MILLER: All those

1 abstaining.

2 (No response.)

3 MR. MOY: Staff would record the
4 vote as four to zero to zero on the motion of
5 the Chair, Ms. Miller, to approve the
6 application, seconded by Mr. Loud. Also in
7 support of the motion, Mr. Etherly and Mr.
8 Dettman.

9 Madam Chair, we also have an
10 absentee ballot from Mr. Jeffries who also
11 participated on the application, and his vote
12 is to also grant the application, which would
13 give a final vote of five to zero to zero.

14 CHAIRPERSON MILLER: Thank you.

15 And I believe this could be a
16 summary order because we have no opposition in
17 this case.

18 Okay. That is the consensus of
19 the Board.

20 MR. MOY: All right. Thank you.

21 The next application for decision
22 is the Application No. 17656 of Alley Cat
23 Mews, LLC, pursuant to 11 DCMR 3103.2, for a

1 variance to allow the construction of a
2 detached single family dwelling on an alley
3 lot that does not directly abut an alley that
4 is at least 30 feet in width and is not
5 directly accessible from a public street along
6 an alley or alleys of not less than 30 feet in
7 width under Subsection 2507.2, in the R-1-B
8 District on an alley lot at the rear of Reno
9 Road, Chevy Chase Parkway and Harrison Street,
10 N.W. That's in Square 1877, Lot 37.

11 On September 25, 2007, the Board
12 convened opening testimony on the application
13 and completed two separate actions. First,
14 the Board scheduled a public meeting on
15 October 2nd to establish whether the relief
16 being sought in this application is
17 appropriately evaluated as a use variance or
18 an area variance.

19 The Board also allowed parties to
20 file their briefs by September 28th.

21 Second, the Board continued the
22 public hearing on December 11th.

23 The Board received filings from

1 the Applicant and the opposition party,
2 Exhibit 37 and 36, respectively, and that's in
3 your case folders.

4 The Board also received, dated
5 yesterday, October 1st, a supplemental filing
6 from the Applicant, and it is identified in
7 your folders as Exhibit 38.

8 That completes the staff's
9 briefing, Madam Chair.

10 CHAIRPERSON MILLER: Thank you.

11 I think as a preliminary matter we
12 need to address a pleading that just came in.
13 It was given to the Board this morning. It's
14 date stamped October 1st and dated October
15 1st, entitled "BZA Application No. 17656,
16 Response to Greenpeace Land, LLC, Supplemental
17 Memorandum," from counsel for the Applicant.

18 And just from the first sentence,
19 I mean, it purports to address certainly
20 arguments and statements or whatever that were
21 submitted in Greenpeace's memorandum.

22 I would suggest that we not accept
23 this into the record at this time, that it is

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1 late. It is not authorized by our briefing
2 schedule. It goes to -- I haven't read it.
3 I've only glanced at it. We had a lot of late
4 stuff coming in that we were dealing with
5 before coming out here, but in this case we're
6 looking at legal arguments, and I think the
7 record is very full of arguments cited, and if
8 there were any misrepresentations in the
9 Greenpeace's memorandum, and I'm not saying
10 that there were, that we use that as a guide,
11 the memorandum, to go back and look at the
12 primary sources, the cases. And so I don't
13 believe we need this pleading to help us make
14 this decision on whether or not we have before
15 us a use or an area variance.

16 But I would like to hear from
17 others because if others feel that they do
18 want to consider this document, then I guess,
19 you know, in all fairness we might need to
20 open the record further for the other parties
21 to do another supplemental pleading.

22 So what do you all think?

23 PARTICIPANT: I support the

1 direction you're moving in, particularly as
2 relates to it being untimely.

3 CHAIRPERSON MILLER: Okay. Not
4 hearing any other objections, I think that we
5 should deal with today this issue. Basically,
6 the Applicant has filed for a variance from a
7 specific regulation, and that is 11 DCMR
8 2507.2, which reads, "A one family dwelling
9 shall not be erected or constructed on an
10 alley lot unless the alley lot abuts an alley
11 30 feet or more in width and has from the
12 alley access to a street through an alley or
13 alleys not less than 30 feet in width."

14 The Applicant filed the
15 applications for an area variance, and the
16 opponents have argued that this is a use
17 variance.

18 And then when we discussed this at
19 the hearing last week, the Applicant stated
20 that they wanted the Board to decide this in
21 advance of any hearing because we were
22 considering at that point just conducting the
23 hearing and then determining later which

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1 standard to apply.

2 So the Board has taken a very
3 careful look at the law and all of the cases
4 that have been submitted. I think I want to
5 just set out the elementary framework that
6 we're dealing in.

7 The Board has authority under our
8 regulation 3102 to grant variances, and this
9 comes from the D.C. Code Section 6-
10 641.07(g)(3). Both the statute and the
11 regulations say the same thing. There's a
12 three-part test for variances. One is that it
13 be unique or an exceptional condition, and I'm
14 going to read the words just so that it's all
15 out here for us.

16 It specifically says, "Where by
17 reason of exceptional narrowness, shallowness
18 or shape of a specific piece of property at
19 the time of the original adoption of the
20 regulations or by reason of exceptional
21 topographical conditions or other
22 extraordinary or exceptional situation or
23 condition of a specific piece of property, (2)

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1 that it would result in practical difficulties
2 to or exceptional and undue hardship upon the
3 owner of such property. To authorize an
4 appeal relating to such property or variance
5 from strict application so as to relieve such
6 difficulties or hardship, provided, (3) such
7 relief can be granted without substantial
8 detriment to the public good and without
9 substantially impairing the intent, purpose
10 and integrity of the zoned plan as embodied in
11 the zoning regulations and map."

12 The first and the third prongs are
13 the same whether it is an area variance or a
14 use variance. What's different is prong
15 number two, whether the test would result in
16 practical difficulties to the owner or whether
17 there would be exceptional undue hardship upon
18 the owner of the property.

19 The statute and the regulations
20 don't go any further with respect to area or
21 use distinctions, but the connection between
22 practical difficulties and area variances and
23 hardship and use variances is set forth in

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1 court decisions.

2 We deal with variances all the
3 time, week after week. We usually see them in
4 a more pure sense, in that we usually see area
5 variances which generally go to where an
6 owner needs relief from a dimensional
7 requirement, such as the side yard or
8 something of that sort, and we see use
9 variances where the use may not be permitted
10 in a certain district without a variance, such
11 as if it's a residential district and they
12 want to introduce a commercial use. They
13 would need a use variance.

14 Those are pretty straightforward.
15 What happens once in a while is we see
16 somewhere it appears to have elements of both,
17 and I think that this is one of those cases.
18 There's an element of dimension and an element
19 of use.

20 And then the Board needs to decide
21 which is it. Is it an area or use? In this
22 case, I mean, a certain use is prohibited, and
23 that use is use as a one family dwelling.

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1 There is also the dimension in this case where
2 they talk about unless the alley lot abuts an
3 alley 30 feet or more in width.

4 So the parties have submitted
5 extensive documentation dealing with Board
6 cases in the past, and references to court
7 decisions, and the Board has looked at those.
8 I would note that the Board isn't bound by
9 past Board decisions. However, we certainly
10 look to them for guidance as to how they
11 approached the situation, and certainly if
12 Board decisions in the past have all gone a
13 certain way and we're going to go a different
14 way, we would certainly need to justify that.

15 I think that a lot of the cases
16 that I read from the Board decisions seem that
17 there were cases going both ways, and I had to
18 see which was the more persuasive and which
19 made common sense to me, to this member.

20 And I also looked at court
21 decisions, and it appears that in the court
22 decisions they are often looking back at the
23 board decisions and determining whether the

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1 Board made the right decision.

2 And I just want to note one case
3 in particular. It's Wolf, where the court
4 said that "determinations with respect to the
5 treatment and classification of proposed
6 variances are best made, we think, on an ad
7 hoc basis from the agency whose regulations
8 those variances are sought," and that they
9 defer to our administrative expertise.

10 These cases, I think in Wolf in
11 particular, address the kind of case where
12 both use and area were at issue, where it was
13 really an increase in density, for instance,
14 for a single family dwelling or flat was
15 permitted and it was increased to an
16 apartment. In one sense you could say that
17 that's a change in use from single family to
18 apartment, but the Board in that case, and it
19 was upheld by the court, said it's really just
20 an increase in density. It's still
21 residential use.

22 So looking at this specific
23 regulation now, and I said it really has both

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1 parts, which is it? I think certain things
2 stand out to me, and one is that in this
3 particular regulation we have a prohibited
4 use, which is a very strong way for a
5 regulation to address a use in a dimension.

6 It specifically says that this use
7 is not permitted unless there's 30 feet
8 abutting the alley, and this applies to all
9 zoned districts. So sometimes when an area
10 variance or when a use variance is under
11 consideration, if it changes the character of
12 the zoned district, it goes more to a use
13 variance, and in this situation I don't think
14 that's applicable because this applies to all
15 of the zoned districts.

16 So I just want to start the
17 conversation with respect to at least this
18 particular regulation. I think one of the
19 strongest reasons that I would think this is
20 a use variance is because it's a specifically
21 prohibited use as opposed to an allowed use in
22 a zoned district.

23 And for precedent, I think I found

1 compelling in the Manna case the Footnote 7,
2 which is a fairly recent Board decision in
3 which it was noted that the prohibition
4 against single family dwellings on these type
5 of alley lots is better analyzed as a use
6 variance because it results in the complete
7 prohibition of a use in these circumstances.

8 And I do note that that was just a
9 footnote. I think it may have been treated as
10 an area variance, and the board determined
11 that if it couldn't make the area variance, it
12 certainly could make the use variance
13 standards. So it was just in that footnote.

14 I think I'll let others speak at
15 this point.

16 MR. ETHERLY: Madam Chair, I'd
17 like to associate myself with your remarks on
18 this question of use versus area variance. As
19 my colleagues will recall and perhaps as some
20 parties involved will recall, I did approach
21 this question with some sense of difficulty at
22 the outset not only in light of the testimony
23 that we had received, both written and oral,

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1 but also in the context of looking at a
2 residential district as was argued by the
3 Applicant in their written submittal.

4 In looking at the question of use
5 versus area differences and as you refer to a
6 use variance, it's typically defined as a
7 variance that, quote, seeks a use ordinarily
8 prohibited in the particular district. That's
9 a quote taken from Palmer which also tracks
10 some of the broader language offered in zoning
11 treatises around this question of use versus
12 area variances.

13 And at my first blush on this
14 particular question, I thought that we were
15 clearly in the ambit of a use that was
16 contemplated in the underlying district
17 question here, which is a residential
18 district.

19 That being said, however, the
20 testimony offered by the Office of Planning,
21 which has been reflected in your discussion,
22 I think further illuminated how one should
23 look at 2500 and how it is treated with

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1 respect to questions of this type.

2 Again, I will not hesitate to note
3 that there is still perhaps a little bit of
4 tension in my thinking on this, but I think
5 the legal argument that has been offered by
6 the party in opposition, as well as the
7 argument offered by the Office of Planning,
8 however, is the appropriate legal outcome with
9 regard to this particular interpretation; that
10 2507 cuts across -- 2500 cuts across all
11 residential districts and is very specific and
12 very particular in its prohibition.

13 Again, kind of just on the feel of
14 it, it strikes me as somewhat incongruous that
15 we are talking about a residential use in a
16 residential district, but 2507 is much, much
17 clearer and must more directed with regard to
18 that type of use on this type of alley.

19 And for those reasons I will
20 support the Chairman's reading of this case
21 being more properly analyzed under a use
22 variance as opposed to an area variance.

23 Thank you, Madam Chair.

1 CHAIRPERSON MILLER: Thank you.

2 Others?

3 COMMISSIONER LOUD: Madam Chair, I
4 also want to associate myself with the
5 direction of both yourself and Mr. Etherly on
6 it.

7 I was persuaded early on -- I
8 guess it's one of the advantages of being kind
9 of green -- by Mr. Nettler's testimony that
10 the area cases typically involve situations
11 where the dimensions are on the lot itself and
12 not on adjacent lots. I know that there are
13 cases that address it and speak to it in a lot
14 of different ways, but to my way of thinking
15 it just makes a lot more sense that that's
16 what we're talking about when we're talking
17 about an area variance, that the dimensions
18 are on the lot itself.

19 And also, Mr. Jackson's testimony
20 before us last week that zoning does not allow
21 use of alleys for residential purposes absent
22 the 30 foot, which is essentially what you
23 said in referencing 2507.2.

1 So some of the more sophisticated
2 sort of permutations about the argument I
3 never quite got to. For me it was kind of --
4 I guess it was a little less gray for me than
5 it was for others, but I enjoy the expansion
6 to look at all sides of the argument.

7 CHAIRPERSON MILLER: Thank you.

8 Others?

9 COMMISSIONER DETTMAN: Madam
10 Chair, I would associate myself with the
11 position that yourself and Mr. Etherly and Mr.
12 Loud have communicated on this in terms of
13 this being looked at as a use variance, and so
14 I think I have arrived at the same place,
15 however maybe in a different way, and maybe I
16 could take a minute to offer that up.

17 In looking at the information that
18 both parties submitted, the very useful
19 information, as you know, when we first
20 started looking at this I was leaning towards
21 an area variance because I thought 2507 or
22 2507.2 was simply just another area criteria
23 that a project had to conform to much like the

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1 area requirements that are laid out in Chapter
2 4 of the zoning regs.

3 However, the case -- let me take a
4 second -- Case No. 12934, if I may read from
5 the conclusions of law, it says, "As the Board
6 has concluded in previous cases, the variance
7 to allow construction on an alley lot fronting
8 an alley less than 30 feet is a use variance."

9 And it goes on to say this was a
10 case that the Board was looking at granting
11 use and area variances, and in terms of the
12 area variances, it says the lot with street
13 frontage variances are an area variance
14 because they relate to the size and
15 configuration of the property rather than its
16 use.

17 And it made me think about the
18 area requirements in Chapter 4 and how in
19 order to come into compliance with something
20 laid out in Chapter 4, you could modify the
21 proposal. You could modify the design of a
22 structure on a particular property to come
23 into compliance. If you're over FAR, you

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1 reduce your FAR in the design to come into
2 compliance.

3 However, there's no way you could
4 actually alter a proposal, alter a design in
5 order to come into compliance with 2507.2. So
6 my reading of 2507.2 is really that it
7 dictates the use and that if a particular
8 property does not abut an alley that's 30 feet
9 or wider, a single family dwelling is simply
10 not allowed on that particular property.

11 So again, I would reiterate my
12 stance as looking at this as a use variance.

13 CHAIRPERSON MILLER: Were you
14 finished Mr. Dettman?

15 COMMISSIONER DETTMAN: Yes.

16 CHAIRPERSON MILLER: Okay. Then I
17 would like to also add that, you know, we read
18 these regulations also in the context of the
19 section that they're in with the other
20 regulations that precede and follow, and 2507
21 deals with building on alley lots, and 2507.2
22 prohibits a one family dwelling on that lot,
23 but allows an artist studio. It says 2507.5

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1 says an artist studio shall be a permitted use
2 in a building located on an alley lot subject
3 to the following criteria.

4 So it appears that in this section
5 the differentiation is by use, not by the
6 dimension of the alley lot because the artist
7 studio, which would be the same structure as
8 the one family dwelling would be allowed if
9 the use was as an artist studio as opposed to
10 a one-family dwelling. So that was another
11 factor in my decision in this particular case.

12 Any other comments on this?

13 MR. MOY: Madam Chair, staff might
14 suggest that Mr. Jeffries who also is
15 participating on this case has filed his
16 absentee comments, so to speak. So if the
17 board believes that is a good time to read his
18 comments, we could do so.

19 CHAIRPERSON MILLER: I think so.
20 I think these members, we're finished with our
21 comments.

22 MR. MOY: Okay. Very good. Well,
23 in that case, Mr. Jeffries has filed his

1 absentee comments, I should say, and I'll read
2 it verbatim.

3 "Based on my review of the
4 attorney statements, I believe the BZA should
5 look at the relief sought as a use variance.
6 The Applicant should resubmit application
7 seeking a use variance, and we will consider
8 the application at that time. Still I am in
9 favor of continuing the case rather than
10 dismissing it if the Applicant wants to submit
11 a new argument."

12 CHAIRPERSON MILLER: Okay. Any
13 other comments?

14 (No response.)

15 CHAIRPERSON MILLER: Well, I think
16 it's the clear unanimous consent of the Board.
17 I don't know whether we need to take a vote on
18 this. We don't really have any motion before
19 us unless we move one, which I don't really
20 think is necessary.

21 So it is the decision of the Board
22 by consensus that this should be treated as a
23 use variance, and the Applicant at the hearing

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1 did represent to the Board that if this were
2 the decision of the Board, then the Applicant
3 wanted an opportunity to go back and
4 reconsider, revise and have an opportunity to
5 file an amended pleading.

6 And I believe we set a date for
7 that already in December.

8 MR. MOY: December 11th.

9 CHAIRPERSON MILLER: Right. So I
10 don't think that there is any further action
11 that's required from the Board on this case,
12 if I'm not mistaken.

13 Okay. Thank you.

14 MR. MOY: The next application
15 before the Board is application No. 17648 of
16 District-Properties.com, LLC, pursuant to 11
17 DCMR 3104.1, for a special exception to
18 construct a new eight-unit apartment building
19 under Section 353 in the R-5-A District at
20 premises 5106 -- in the original application
21 it was Drake Place, S.E., but I believe the
22 new street name is Queens Stroll Place, and
23 that's in Square 5314, Lots 18 and 803.

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1 On September 4th, 2007, the Board
2 completed public testimony, closed the record,
3 and scheduled its decision on October 2nd.
4 The Board requested the following post hearing
5 documents:

6 First, the record was kept open to
7 allow filings from or a report from the
8 Department of Transportation and the ANC.

9 DDOT did file. Their letter is
10 dated September 27th. It was received in the
11 office September 28th, and it is identified in
12 the case folders as Exhibit 30. This should
13 be treated as a preliminary matter because
14 report had a due date of September 17th, and
15 the Applicant was allowed to respond to these
16 two reports.

17 By September 24th they did, and
18 that filing is identified in your case folders
19 as Exhibit 29.

20 The Applicant also submitted a
21 supplemental letter today, October 2nd, that
22 will be identified as Exhibit 31 in your case
23 folders.

1 So the Board is to act on the
2 merits of the application requesting zoning
3 relief from Section 353, and that completes
4 the staff's briefing, Madam Chair.

5 CHAIRPERSON MILLER: Thank you,
6 Mr. Moy.

7 Did you say there was a
8 preliminary issue? Are you just referencing
9 documents that recently came in?

10 MR. MOY: Yes. It's the DDOT
11 report, which is Exhibit No. 30, because that
12 was due. They had a deadline of September
13 17th, and the Board received that September
14 28th.

15 CHAIRPERSON MILLER: Well,
16 certainly with respect to Exhibit 30, I would
17 suggest that we accept that into the record.
18 That's the DDOT report, as DDOT's views on
19 these cases is very important and part of the
20 353 process.

21 Would Board members agree with
22 that?

23 MR. ETHERLY: I would have no

1 objection, Madam Chair. I would offer, and
2 you perhaps have this in mind as we also look
3 at Exhibit 31, which is the response from the
4 Applicant, that it's no crystal clear in terms
5 of how the Applicant may or may not have had
6 an opportunity to review the DDOT report in
7 question. So that would perhaps be my only
8 consideration as we move forward.

9 But with regard to the acceptance
10 of, the waiving of our rules and accepting
11 Exhibit No. 30, the DDOT report, I would have
12 on objection because, as you indicated, it is,
13 indeed, critical to our deliberation.

14 CHAIRPERSON MILLER: Mr. Etherly,
15 that was exactly my concern, and I've been
16 trying to look at Exhibit 31 carefully right
17 now to see whether we need to continue this
18 case to give them an opportunity to work with
19 DDOT or to review the report.

20 However, I don't know if I'm
21 reading this letter right. It appears that or
22 he says at the conclusion, "I would like to
23 state that I would accept any decision taken

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1 by the distinguished Board members of the BZA
2 and would like to have the BZA order as soon
3 as possible."

4 So he does not seem to be seeking
5 an opportunity to be able to respond to a DDOT
6 report, but others, what do you think?

7 MR. ETHERLY: And I would have no
8 objection to that interpretation. I think as
9 we will recall from the hearing on the matter
10 and the testimony of the Applicant, that there
11 was some considerable disagreement, if you
12 will, between the Applicant and the position
13 that had been taken by OP in review of the
14 proposed project.

15 I would probably very well read
16 the submission at Exhibit No. 31 as the
17 Applicant's way of saying, "I'm prepared to
18 move forward as I deem appropriate," and I'm
19 aware that DDOT may have a different position.

20 CHAIRPERSON MILLER: Right. I
21 mean, he does also reference that during the
22 hearing Office of Planning stated DDOT's
23 position. He says that "during the hearing

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1 Mr. Moore of OP stated that DDOT opposed to
2 have eight parking spaces and recommended to
3 provide six parking spaces."

4 So it's not new to him.

5 COMMISSIONER LOUD: I tend to agree
6 with you, Madam Chair. I think if what were
7 in the DDOT report were a surprised or
8 something that the Applicant had not had an
9 opportunity to prepare for, for example, had
10 they recommended two parking spaces, say,
11 instead of six, I would be a little bit more
12 concerned.

13 But given your interpretation of
14 Exhibit -- what are we talking about? --
15 Exhibit 31 where the Applicant asks for a
16 prompt decision and the fact that there's
17 nothing new or surprising in the DDOT report,
18 I'd be inclined to support both admission of
19 the DDOT report without a corresponding
20 opportunity to the Applicant to respond.

21 MR. ETHERLY: I would be prepared
22 to move forward, Madam Chair, with acceptance
23 of the DDOT report.

1 CHAIRPERSON MILLER: Okay. I
2 would, too.

3 MR. ETHERLY: And I will just note
4 for the record, Madam Chair, that also at
5 Exhibit 31 the Applicant did attach what
6 appears to be the Advisory Neighborhood
7 Commission 7(e) report signed by the
8 Chairperson, Naomi P. Robinson. That report
9 is dated September 29th. I believe that we
10 did not have that report or an ANC report in
11 the record at the time of our hearing date.

12 So I would just like to highlight
13 that, and the report does indicate that that
14 the ANC did not make any recommendations
15 regarding the application and did not vote on
16 the application, and all other aspects of the
17 report do appear to be in order with regard to
18 the ANC's meeting being a public meeting that
19 was, indeed, duly advertised and did have a
20 quorum present.

21 CHAIRPERSON MILLER: Thank you
22 very much.

23 And I just want to make one more

1 point on this DDOT recommendation to reduce
2 the units from eight to six or parking spaces
3 from eight to six, which goes along with the
4 number of units, I think, but also the
5 Applicant did address that point in Exhibit
6 29, the reduction in general, which was being
7 put forth by the Office of Planning. Okay.

8 MR. ETHERLY: And I should note,
9 Madam Chair, perhaps just one final bit of
10 housekeeping on this particular issue because
11 the ANC report, although through the
12 Applicant, has come in to us at this dated,
13 that perhaps with just a soft eye toward the
14 Office of Attorney General might suggest that
15 we might want to waive our rules to accept the
16 ANC report, which I would have no objection to
17 doing. I just wanted to indicate that
18 particular issue for the record.

19 We're treating the report as being
20 received today.

21 CHAIRPERSON MILLER: I would
22 concur, and while we're on the ANC report, we
23 might as well note that I believe it meets the

1 great weight requirements setting forth the
2 form and the notice and the vote and the
3 elements that are required.

4 Okay. Now, so we go to the
5 merits.

6 COMMISSIONER LOUD: Madam Chair,
7 would you like me to proceed by starting with
8 a motion and then follow up with the
9 substantive background or just start with the
10 summary of where the case is?

11 CHAIRPERSON MILLER: I'd say why
12 don't you bring us into the case first and
13 then we'll get to the motion. How is that?

14 COMMISSIONER LOUD: Sounds good.

15 CHAIRPERSON MILLER: Okay.

16 COMMISSIONER LOUD: All right. In
17 this case, the Applicant proposed an eight-
18 unit new residential in the R-5-A, in the
19 Marshall Heights neighborhood, on two vacant
20 lots. The proposed height is 32 feet, ten
21 inches. The property will be three stories
22 above grade plus a cellar as proposed.

23 There are currently about 16

1 properties on this square, which is Square
2 5314, including per the record before us about
3 13 single family residences, two semi-
4 detached, and one 12-unit property.

5 significantly, there are single
6 story, detached residential structures to the
7 immediate east and west of the subject lots,
8 and that is found at page 4 of the OP report,
9 which is out Exhibit 26.

10 With respect to that last point,
11 there is testimony from Mr. Moore that the
12 light is diminished from mid to late morning
13 and late afternoon to both of those
14 immediately adjacent properties.

15 The Applicant proposes a rear
16 landscaped buffer that will exceed the
17 required five percent of the parking area.
18 There's no impact or at least negligible
19 impacts to local schools based on the record
20 before us.

21 DHCD did submit a letter of
22 support. That's our Exhibit 23, and
23 apparently for the entire eight units.

1 DDOT filed a letter opposing the
2 eight units. That's our Exhibit 30. It was
3 filed yesterday, and we have had a brief
4 discussion about it this morning, and as Mr.
5 Etherly noted, the ANC did submit a report.
6 However, in that report, they did not vote on
7 the application.

8 There was testimony at the hearing
9 from Ms. Green who lives nearby in the 5200
10 block of E Street that there is no place for
11 children to play at the proposed sited eight
12 units, citing the example of Fort Dupont Park,
13 which she believed was the closest
14 recreational facility 15 minutes away.

15 And then, of course, the Office of
16 Planning's Mr. Moore testified and sought
17 reduction of units from eight to six, citing
18 in his testimony disruption of the single
19 family character in the far northeast area of
20 Marshall Heights, but also as I noted, loss of
21 light to the immediately adjacent properties.

22 He further recommended reducing
23 the parking units from eight to six, that

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1 there be brick cladding on the front of the
2 property which my colleague, Mr. Dettman,
3 explained to me all about cladding and I
4 appreciate that.

5 Mr. Moore also recommended a ten-
6 foot setback from, I believe, the rear
7 property line, and the Applicant has no
8 problems with that. The property is already
9 set back 25 and a half feet, and there were
10 some additional concerns raised by Mr. Moore.

11 Our laws require that we are or
12 authorize us to approve new multi-family
13 residential as a special exception in the R-5-
14 A and recommends that the application be
15 referred to the Board of Education, Department
16 of House and Community Development, DDOT and
17 the Office of Planning, per Sections 353.2 to
18 353.4.

19 In this particular case, OP's
20 recommendations and comments on the site plan,
21 the arrangement, the building structure, the
22 light, air, park, and recreation and
23 landscaping and trading were indicated in its

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1 report, which I incorporate by reference and
2 lift up only the parts of which that I think
3 pertain to the recommendation that I'm making
4 to my colleagues here.

5 OP recommended that the number of
6 units be reduced, as I stated beforehand, from
7 eight to six, referencing some concerns about
8 the impact to use of neighboring properties
9 and touching upon the legal test of how they
10 might adversely affect the use of neighboring
11 properties.

12 OP also had some concerns about
13 whether the proposed projected eight units
14 were in harmony with the zoning regs. and map,
15 and again, indicated the number of single
16 family residences that are on that Square 5314
17 being about 13 single family residential to
18 only two multi-family.

19 In its response, dated September
20 29, I believe the Applicant identifies, I
21 believe, seven close by squares that in his
22 view have a total of 28 multi-family dwellings
23 on them, and he provided pictures of about 23

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1 of those.

2 Nonetheless, this property does
3 have immediately adjacent properties to the
4 east and west that are single story, single
5 family residential. There is testimony from
6 Mr. Moore on the record that light would be
7 severely impacted to both of those properties,
8 and that's at page 4, I believe, of his
9 report, which is our Exhibit 26.

10 In light of what I've said, in
11 light of the record before us, I would
12 recommend that the Board adopt the report of
13 the Office of Planning and approve this
14 application with the conditions that the
15 number of units be reduced from eight to six
16 units, the number of parking also reduced to
17 six units, that there be brick cladding in the
18 front, which is already a part of the
19 Applicant's proposal, and the additional
20 conditions that were included in Mr. Moore's
21 report, and significantly note that the DDOT
22 report which we've just let in also says the
23 same thing regarding reducing the parking from

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1 eight to six, raising a severe concern which
2 OP had raised earlier about there being
3 inadequate space on the property for the
4 location of eight parking spaces in the rear
5 and a trash dumpster and the ability to
6 maneuver in that space.

7 So I'd like to move approval of
8 the application with the conditions as
9 mentioned.

10 MR. ETHERLY: I'll second that
11 motion, Madam Chair, pending our discussion.
12 Well, not pending. I will second that motion.

13 And perhaps while we orient
14 ourselves, I'm more than happy to just kind of
15 start our discussion within the framework that
16 Mr. Loud so excellently laid out, and that is
17 highlighting what is perhaps one of the
18 obvious aspects of this case, and that is for
19 me at least the ongoing tension that
20 oftentimes I think especially recently that
21 this Board has encountered in dealing with
22 infield development, especially in Ward 7, but
23 most certainly not limited to Ward 7, and that

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1 is the challenge dealing with proposals that
2 provide in some instances a density that would
3 appear on its face to be consistent with the
4 underlying comprehensive plan and other
5 considerations with regard to land use, but
6 also we have been confronted, I think, with
7 situations where density perhaps has sought to
8 be stepped up, if you will, by an applicant,
9 and clearly we are in that type of posture
10 here.

11 I am struggling somewhat with this
12 case. As I've said numerous times before, I
13 endeavor to take advantage of opportunities
14 where an applicant is stepping forward with an
15 appropriate project in many or most respects
16 concerning infield development so that we can
17 bring as many of our vacant and fallow lots
18 back into productive use.

19 The Office of Planning's report,
20 however, is, indeed, somewhat compelling as it
21 relates particularly with regards to some of
22 the prongs of the 353 analysis, the impact
23 regarding light and air by virtue of the

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1 height that is proposed, the density that is
2 proposed by the application as it currently
3 stands.

4 I would perhaps invite some
5 discussion from my colleagues as to how we
6 deal with addressing that issue from the
7 standpoint of the relief that's been requested
8 because I think it would appear that the
9 Applicant is standing firm with regard to what
10 they are desirous of achieving with this
11 property.

12 I don't think it's out of the
13 ordinary for this Board to suggest or offer
14 relief to a certain point that may be short of
15 what an applicant is seeking, but I will
16 simply just kind of highlight that as kind of
17 one of the interesting questions before us.
18 The Applicant appears to be set on the eight
19 unit, eight parking space proposal, and Office
20 of Planning has clearly taken the position
21 that the proposal should be downsized,
22 substantially downsized, by two units and two
23 spaces.

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1 And I think I am ultimately
2 inclined to support the Office of Planning's
3 recommendation and, therefore, was comfortable
4 with seconding the motion, but I just wanted
5 to, again, highlight some of the obvious
6 tensions here because this is not the first
7 project even in this calendar year of 2007
8 that we've seen in Ward 7 specifically, but
9 again, we've seen them in other settings
10 throughout the city.

11 So with those prefatory remarks,
12 Madam Chair, I'm prepared to continue with our
13 deliberation.

14 Thank you.

15 CHAIRPERSON MILLER: Thank you.

16 Those were very good points
17 because I was actually looking at this,
18 thinking that it could be approved for, for
19 instance, six instead of eight, but from what
20 I hear you saying is that Office of Planning
21 was recommending that they modify the plans to
22 change them to reduce the number of dwelling
23 units to six and parking spaces to six, and

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1 that they didn't do that and that we can't
2 necessarily do that in an order; that it's
3 either approve the plan as submitted or deny.

4 MR. ETHERLY: And I'll just note
5 that that was part of the shall we say
6 unspoken suggestion of my comments, but I'm
7 not advocating perhaps an outcome here of that
8 nature, but I kind of glanced at the Office of
9 Attorney General in this particular regard
10 because I know at times we've had
11 conversations and exchanges regarding this
12 Board's ability to fashion a different relief
13 if it deems one is appropriate.

14 And quite honestly, I'd be
15 inclined to see something go forward in this
16 instance and something that I believe is more
17 consistent with the requirements of 353, and
18 as I indicated, I do tend to agree with the
19 Office of Planning's approach and findings
20 concerning the impact of the proposed density
21 on light, on air, and to an extent
22 highlighting some of the aspects of the
23 comprehensive plan as it relates to low

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1 density residential development.

2 The Applicant did indicate in one
3 of their responsive submittals a number of
4 other multi-unit, multi-family dwellings that
5 the Applicant perceived to be in existence
6 around the general area, but I think the
7 Office of Planning's argument is persuasive
8 and compelling.

9 So maybe just with an eye towards
10 the Office of Attorney General, I'm more than
11 happy through the Chair to OIG invite any
12 comment on whether or not it's appropriate for
13 the Board to downsize the relief, or is it
14 more proper that the Board has to
15 unfortunately give an up or down vote on the
16 project as proposed by the Applicant?

17 MS. MONROE: What exactly is your
18 proposition, that you would change this
19 project to be just six units and not eight?

20 MR. ETHERLY: Based on the Office
21 of Planning's report.

22 MS. MONROE: No, you can't.

23 MR. ETHERLY: Understood.

1 MS. MONROE: I mean, he can come
2 back with another project or similar, a
3 different design, but you can't.

4 CHAIRPERSON MILLER: Right. We do
5 approve or deny, you know, the plans that are
6 submitted to us.

7 I don't know. In some instances
8 we can certainly attach conditions or
9 something, but they don't change their
10 drawings and the plans, which this one would.

11 And I think that certainly Office
12 of Planning has made some good points about
13 this development. Even if there are other
14 apartments in this area, it's a mixed area.
15 In this particular case, there are houses
16 right next to this building, and that's not
17 always the case with apartment buildings that
18 are put in this District or square.

19 I also found it kind of
20 interesting. Office of Planning -- and let me
21 know if you noticed something different -- but
22 they talk about impact on light and air on
23 these neighboring houses, but the proposal

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1 that they recommended reducing it to six
2 units, it didn't sound like they were -- it
3 was going to bring down the height of the
4 building. It just was going to reduce the
5 density, which I think density is an issue in
6 and of itself.

7 But I didn't see how that aspect
8 was going to be addressed in here.

9 MR. ETHERLY: And that perhaps
10 highlights the need for if we were to go down
11 the Office of Planning's road; it would
12 highlight the need obviously for the Applicant
13 to be in agreement with that, and therefore
14 presenting plans consistent with that type of
15 orientation.

16 So I would definitely agree with
17 that, and I think in another part of the
18 Office of Planning's report, to an extent the
19 Office of Planning did note that -- and I'm
20 looking at page 6 of the report -- OP
21 acknowledges that the project meets the
22 requirements of 353 in the zoning regs., but
23 of course, continues to comment on its

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1 concerns regarding the density of the proposed
2 development.

3 So, again, there's clearly some
4 tension here. I think there's clearly a
5 desire to see a productive residential use
6 reintroduced to this particular lot, but it
7 would appear to be the case, and I'm in
8 agreement with the Office of Planning's report
9 that unfortunately this is not that project,
10 but it is always with hesitation that I turn
11 away from residential development in our city,
12 especially when, again, we're bringing vacant
13 lots back into productive use.

14 As much as I would like to,
15 consistent with the start of the Supreme
16 Court's term, take a power grab here and
17 exceed my boundaries, I recognize that Office
18 of Attorney General has counseled us that we
19 are not in a position to do so at this time.

20 COMMISSIONER LOUD: I just wanted
21 to add that I was a little concerned as well
22 that even with six units it still had an
23 impact on light, not so much air according to

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1 the report, but definitely light, and I
2 recognize that as OP kind of struggling with
3 this issue as we are, but I also noted, and it
4 was interesting to me, that neither adjacent
5 property owner opposed this project, and you
6 would tend to think that the adverse impact
7 would be felt the most by the adjacent
8 property owners, and maybe that was OP's way
9 of finding a safe, comfortable place for it to
10 land on the issue. But it was of some concern
11 to me.

12 CHAIRPERSON MILLER: And I would
13 also like to add that while it meets the
14 specific criteria of 353, 353 also mentions
15 that general standard for special exceptions
16 under 3104, and I believe that there are
17 certainly aspects of this that have an adverse
18 impact on neighboring property, at least found
19 by OP, and that is certainly -- they use that
20 word, those words on their report, page 4.
21 They say, "However, the north-south
22 orientation of the building and the height of
23 the proposed new structure will adversely

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1 impact the light if the building will be
2 substantially higher than the neighboring
3 structures, three story versus one story.
4 This height difference will cause light to be
5 diminished during mid to late morning and
6 afternoon."

7 So it doesn't meet 353 as at least
8 concerns 3104 on that grounds.

9 MR. ETHERLY: And I'll note, Madam
10 Chair, just as we move towards, I guess,
11 further deliberation on this that Exhibit 29
12 the Applicant did take considerable effort to
13 respond and rebut a number of the Office of
14 Planning's concerns with regard to the
15 proposed eight unit, eight parking space
16 project as it currently exists.

17 Much of the Applicant's submittal
18 spoke to the density issue and pursuant to
19 that, again, the Applicant did discuss other
20 multi-family or low rise garden style
21 apartments that were located in the
22 surrounding area, but the applicant did not,
23 as far as I can glean speak to the particular

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1 impact of light.

2 The Applicant does speak to an
3 extent to the issue of height and perhaps that
4 goes to the point you raised earlier, Madam
5 Chair, about whether or not a six unit
6 building would necessarily be a different
7 height in OP's opinion, but I would tend to
8 agree with you that with respect to the broad
9 special exception test, there is evidence on
10 the record that there is an impact, an adverse
11 impact to the use of neighboring property as
12 indicated by the impact on light.

13 And I think the Office of
14 Planning's report is very strong in terms of
15 its concerns about the impact on or I should
16 say the lack of accordance, if you will, with
17 the zoning regulations and zoning map in this
18 particular area, given some of the concerns
19 versus the comprehensive plan.

20 So with that, Madam Chair, again I
21 have seconded the motion, but our discussion
22 would perhaps suggest that there would either
23 be a retooling of that motion or an

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1 alternative motion altogether moving for
2 denial of the application 17648.

3 COMMISSIONER LOUD: I would be more
4 than happy to reword the motion, but I wanted
5 to ask: is there a way to -- I don't know if
6 this is appropriate or not -- but to signal to
7 this Applicant that six would be an acceptable
8 number without that Applicant having to read
9 the whole transcript?

10 CHAIRPERSON MILLER: What would
11 happen if we deny the application is that the
12 Applicant could not submit the same
13 application, but they would be -- you know, at
14 least for another year -- but they could
15 submit a different application, and they could
16 listen to whatever the Board has said on this.

17 But at this point we couldn't
18 guarantee them that their application would be
19 granted in any way. We look at each
20 application as it comes in, and then it gets
21 evaluated by Office of Planning.

22 But I think that they certainly
23 have been made aware by Office of Planning of

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1 their position, and then whatever comments the
2 Board makes today, they could factor in their
3 decision on the new project, if they decide to
4 do another project.

5 COMMISSIONER LOUD: How about if I
6 moved for denial of the application, adopting
7 OP's report with some degree of favor? Is
8 that?

9 CHAIRPERSON MILLER: I find that -
10 -

11 COMMISSIONER LOUD: You don't like
12 it.

13 CHAIRPERSON MILLER: -- hard to go
14 along with. I think it just needs to be
15 clean, that you know, I would be denying it on
16 grounds that it didn't meet the standards set
17 forth in 353, and probably that would be it.

18 But as an explanation, certainly
19 number one would be the light and air concerns
20 that we have. Number two might be the
21 density, at least if that's what we have
22 concerns with as set forth in the OP report.

23 They are more of, I guess, like

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1 grounds or reasons for the denial if we're
2 going that way, which it looks like we
3 probably are going that way at this point.

4 I think that we've noticed certain
5 concerns here that -- at least I'm reading it
6 that way. Do you have -- I don't know -- more
7 comments on that?

8 MR. ETHERLY: And I would tend to
9 agree with you. I'd love to go down your
10 road, Mr. Loud. I'll also note that at the
11 same Exhibit 29, the Applicant did indicate
12 that while it was speaking perhaps more
13 specifically to the idea of two duplex
14 rowhouse units with two floors above in the
15 subject building, the Applicant did indicate
16 with regard to that particular avenue that
17 there would be an economic burden due to the
18 Applicant's believe that there's no market for
19 such duplex rowhouse units.

20 The Applicant expressed concern
21 about the construction cost as well as the
22 ability to locate a market for what would be
23 larger condominium units, if you will. So I

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1 would hazard a guess that there might still be
2 some considerations that the Applicant would
3 be unable to overcome even with the six unit
4 proposal or some other downsized project.

5 I think the deliberation has been
6 full and complete such that if the Applicant
7 chooses to read into whatever tea leaves may
8 be found in our order, the Applicant can do
9 so.

10 But I would tend to agree with the
11 Chair that kind of direct language, if you
12 would, might be a little bit of a slipper
13 slope, as much as I would like to do it
14 because, again, I hate to leave an undeveloped
15 lot as it is, but I think we are where we are
16 unfortunately.

17 And I don't like to have OIG mad
18 at me. I do that enough.

19 COMMISSIONER LOUD: I guess in the
20 spirit of sort of wrapping this up, let me
21 move for denial of --

22 CHAIRPERSON MILLER: Do you want
23 to table your motion that's on the -- you

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1 didn't table your motion yet, did you?

2 COMMISSIONER LOUD: No.

3 CHAIRPERSON MILLER: Is this what
4 you're doing?

5 COMMISSIONER LOUD: I thought I
6 had, but perhaps I would be willing to
7 withdraw it.

8 CHAIRPERSON MILLER: Okay.

9 COMMISSIONER LOUD: But I formally
10 table the motion.

11 CHAIRPERSON MILLER: Okay.

12 COMMISSIONER LOUD: All right and
13 would move that we deny Application 17648 for
14 new multi-family residential construction at
15 5106 Drake Pale or Queen Stroll, S.E.

16 MR. ETHERLY: Seconded, Madam
17 Chair.

18 CHAIRPERSON MILLER: Deliberation?

19 (No response.)

20 CHAIRPERSON MILLER: Okay. All
21 those in favor say aye.

22 (Chorus of ayes.)

23 CHAIRPERSON MILLER: All those

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1 opposed?

2 (No response.)

3 CHAIRPERSON MILLER: All those
4 abstaining?

5 (No response.)

6 MR. MOY: Staff would record the
7 vote as three to zero to two. It's on the
8 motion of Mr. Loud to deny the application,
9 seconded by Mr. Etherly. Also in support of
10 the motion, Ms. Miller, the Chair. There is
11 no Zoning Commission member or other Board
12 member participating in this application.

13 The next and final action of the
14 Board is a motion for reconsideration of
15 Application No. 17446-A, pursuant to Section
16 3126 of the Zoning Regulations. The original
17 application of Pauline Ney was pursuant to 11
18 DCMR 3104.1, for variances from lot occupancy
19 requirements under 403 and nonconforming
20 structure provisions under Subsections 2001.3
21 and 2002.4, to construct four residential
22 units above existing one story retail
23 structures in the R-5-B District, at premises

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1 2160 through 2162 California Street, N.W.,
2 which is in Square 2530, Lots 99 and 100.

3 Our participating members are Ms.
4 Miller, Mr. Etherly and Mr. Dettman.

5 Originally scheduled for decisions
6 on September 4th, the 18th and the 25th, and
7 rescheduled because of lack of a majority
8 concurring vote; that on September 25th, the
9 Board established the following actions.

10 First, on its own motion, the
11 Board rescheduled its decision to October 2nd.
12 The record was reopened to allow the Applicant
13 to file revised plans, and the Board allowed
14 filings in response as well.

15 The Applicant made its filing and
16 is in your case folders identified as Exhibit
17 119. Your case folder also has two additional
18 filings in response, one from a Sheraton
19 Kalorama Historical Association with
20 attachments as well as the Sheraton Kalorama
21 Neighborhood Council, Inc., Exhibits 10 and
22 121, respectively.

23 The Board should act on the

1 evidence before them. That completes the
2 staff's briefing.

3 CHAIRPERSON MILLER: Okay. This
4 case is a little bit difficult. It constantly
5 raises issues where we think we're coming to
6 closure. Something else makes us pause.

7 So I'm going to address we had
8 filings that we definitely said could be
9 submitted. The Applicant did submit the
10 drawings that we asked for and the explanation
11 that responded to our question regarding the
12 700 square feet that was identified in the
13 basement for residential use.

14 In response, we also got two
15 letters from Sheraton -- well, we got a letter
16 from Sheraton Kalorama Historical Association
17 and Sheraton Kalorama Neighborhood Council,
18 Inc. And we had left open the door for them
19 to respond to the plans.

20 In essence, they don't exactly
21 just respond to the plans. They make some
22 more statements that basically go beyond that,
23 but I found one of the statements somewhat

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1 compelling enough to bring up to discuss today
2 before we proceed on the motion for
3 reconsideration on the merits.

4 And that is basically Ms. French
5 says that they haven't been given an
6 opportunity to cross-examine the Applicant's
7 representatives and experts under oath, and
8 that goes with respect to the use of the rest
9 of the basement other than the 700 square
10 feet.

11 And so that gave some of us pause
12 as to whether or not -- well, what was the
13 evidence on the nonconforming use of that
14 area?

15 And I believe that the evidence is
16 representations by counsel, and what's
17 difficult about this is we originally opened
18 up for hearing with respect to the motion for
19 reconsideration this whole issue about what
20 were the ramifications of that new information
21 that went to the 700 square feet, and in the
22 earlier pleadings from what I recall, there
23 was argument that we should conclude because

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1 the 700 square feet was used for residents;
2 that the rest of the area should be used that
3 way.

4 And that seemed to be -- I'm
5 really just summarizing right now -- that may
6 not be totally accurate, but that's the way I
7 understood basically the argument, and now I'm
8 hearing, you know, there might be new evidence
9 that the opponents have about eyewitnesses or
10 whatever, but the most compelling thing that
11 I'm hearing is that there might just not be
12 evidence on this very important issue in the
13 record.

14 And so on the one hand, I think
15 that this should have been raised earlier, but
16 on the other hand, I want to discuss it
17 because I think that it's a basic point with
18 respect to the completeness of the record and
19 with respect to due process rights regarding
20 cross-examination.

21 So I lay that out for the Board
22 members to address right now.

23 MR. ETHERLY: Thank you very much,

1 Madam Chair.

2 I would be more than happy to kind
3 of weigh in, and I'll simply start at the
4 outset, that we have saved the best for last
5 this morning because this has, indeed, been a
6 very challenging set of acts to work with
7 around what is essentially a fairly
8 straightforward question of relief, if you
9 will, and I Don't mean straightforward from
10 the standpoint of yes or no, but just
11 straightforward from the standpoint of what
12 the Applicant is seeking relief from.

13 But this space, this space in the
14 basement has just kind of taken on a life of
15 its own. I feel like I'm in a Star Trek
16 episode, and there's a break in the time-space
17 continuum, and I'm just trying to figure out
18 how to deal with it.

19 All of that being said and in all
20 seriousness, I think there are a couple of key
21 questions about it. One of the questions that
22 I struggle with is does this particular
23 question, in fact, impact the relief that's

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1 being sought, or is it more appropriate that
2 it essentially suggests that there would be
3 additional relief that would be needed by the
4 Applicant?

5 If the Applicant is seeking relief
6 from certain provisions of the zoning regs.,
7 if it's the case that there are other
8 questions that are raised by this basement,
9 I'm struggling with how far does this Board
10 reach to get to those additional questions and
11 potentially grapple with the evidentiary
12 challenges that would be raised by those
13 questions or is it better left to focus on the
14 relief that's been sought that's been asked in
15 front of us, clarify what factual issues we
16 may need to clarify in our order, but
17 otherwise just deal with the base relief
18 that's been sought, and the Zoning
19 Administrator deals with any other relief
20 questions that may be raised by questions of
21 fact on the issue of this basement.

22 That is perhaps one way to deal
23 with it. I want to recognize and highlight,

1 however, the Chair's concern about how we have
2 gotten to where we are on the questions about
3 the basement and the fact that those questions
4 still are perhaps unresolved on both sides
5 because as the Chair indicated, there have
6 been questions raised by the party in
7 opposition. There have been indications made
8 by the party in opposition that they may be
9 aware of witnesses who could speak to with
10 greater particularity what happened or what is
11 happening in that basement.

12 I recognize that the Chair is
13 concerned that at the end of the day on that
14 factual issue as far as the Applicant is
15 concerned, we have perhaps been left with at
16 most representations from counsel about what
17 has and has not been happening in that space,
18 and given how we got to where we are today,
19 there may not necessarily be the greatest
20 willingness to accept that going forward, and
21 that's not to question or cast aspersions on
22 counsel. It is perhaps to simply be sure that
23 we are absolutely fully and completely

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1 engorged with all of the relevant facts on the
2 record.

3 And I think the Chair is correct
4 in that we probably still have an outstanding
5 question of fact as to what's happening in
6 that basement.

7 I have been up to this point and
8 perhaps even going forward not necessarily as
9 moved by the due process concerns and issues
10 because my first inclination was to be at that
11 space of just focusing on the relief that's
12 been sought, and if there are other avenues or
13 other relief issues that have been raised
14 here, they can be dealt with in another forum.

15 But perhaps rather than punt and
16 to an extent that would be a little bit of a
17 punt back to the ZA conceivably, I am, given
18 the Chair's kind of opening remarks here,
19 willing to perhaps contemplate a limited
20 evidentiary expedition into what this basement
21 is all about and what that means specifically
22 for, one, the relief that has been sought to
23 date, which I think is still very specific and

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1 may or may not necessarily be impacted by the
2 basement, but also two, and maybe more
3 importantly, does it raise the issue of other
4 relief, i.e., a conforming use being converted
5 to a nonconforming use conceivably?

6 And I simply think that I am
7 forced to agree with the Chair, and I don't
8 say that from the standpoint that I don't like
9 to agree with the Chair, but I think the
10 Chair is right in that there is not enough
11 evidence on the record. There's still
12 questions of fact outstanding as to what
13 exactly is happening in that basement level.

14 But if we are potentially to go
15 down that route, I think this Board will have
16 to be very, very clear that it's put up or
17 shut up time for both parties, for the
18 Applicant and the party in opposition.
19 Whatever you have got in your toolbox,
20 whatever you have got in your quiver, bring it
21 to the table. If you've got witnesses who can
22 speak to it, let's hear them, and that's for
23 the parties in opposition.

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1 For the Applicant, if you have
2 representatives or if you have aspects of your
3 client's organization that can speak to what's
4 been happening in that space, bring them so we
5 can put it to rest once and for all.

6 Again, I'm struggling with whether
7 or not it fundamentally changes the relief
8 that you're seeking here today, but I am
9 tending to agree with the Chair that we're
10 here. We have put all of this time and energy
11 to get to this point to date. We might as
12 well just be in for the pound. We have spent
13 the penny. Now let's spend the pound and just
14 get all of this resolved while we have the
15 parties here and get it squared away.

16 There is some hesitation with
17 which I venture down that road, and I am very
18 fearful that we may still not be able to get
19 the kind of evidence that we need to
20 definitively and decisively put the question
21 to bed.

22 Again, the Chair was absolutely
23 correct. When reading the Sheraton Kalorama

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1 Historical Association's submittal at Exhibit
2 No. 120, third paragraph, "A number of
3 eyewitnesses who have been in the section of
4 the basement marked 'storage' have seen
5 specific proof to the contrary."

6 It begs the natural question of
7 why they weren't here at earlier stages in
8 this deliberation, why they weren't here at
9 earlier stages of our hearing to present that
10 testimony.

11 Now, again, the response to that
12 may be, "Well, we didn't know. We didn't
13 know, and how that we're finding this all out,
14 we really need to dig deeper and we need the
15 Board's assistance to do that."

16 It is with hesitation that I
17 perhaps suggest and agree with the Chair that
18 the Board get into that position because to an
19 extent there's this tension. An applicant
20 steps forward to us with relief that they're
21 seeking. How deep do we dig to insure that
22 that's the only relief they need?

23 This Board isn't necessarily an

1 investigative body, but as the Chair has
2 indicated, I think there are enough questions
3 of fact that have been raised about this
4 basement, and we're all here. Perhaps we just
5 simply need to get it done, move forward in
6 that regard, Madam Chair, and see if we can
7 put this case to bed at some point before
8 2012.

9 Thank you, Madam Chair.

10 COMMISSIONER DETTMAN: Just a
11 couple of comments. I'm almost sure I share
12 all of Mr. Etherly's views on this, especially
13 his hesitation on how much is this new
14 evidence, if we keep the door open for
15 additional evidence and what's going on inside
16 the space in the basement of 2162 outside of
17 the already established 700 square feet of
18 residential, I'm not sure how much of a
19 material impact that will have on the relief
20 that has already been granted.

21 But I would be willing to
22 entertain that idea of introducing some new
23 evidence in the space and would make the

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1 suggestion that I also agree with Mr.
2 Etherly's comment to, you know, bring
3 everything that you have this time. I believe
4 he said put up or shut up, and suggest that we
5 focus this area to the basement of 2162 and
6 that we're very, very clear that any evidence
7 that is introduced into the record, any
8 additional evidence that's introduced into the
9 record be focused to the basement of 2162.

10 That's all I have.

11 MR. ETHERLY: And not to beat the
12 horse here because I don't think the horse is
13 dead yet and I don't want to presume that it
14 is, but just to kind of spin out the
15 alternative here because I think it's
16 important to kind of figure out where we are
17 in terms of what's in front of the Board, we
18 had a motion for reconsideration which was
19 granted. We had that reconsideration or
20 rehearing, if you will, and then we had quite
21 a bit of written submissions brought forward
22 to the Board.

23 Of course, the party in opposition

1 asked for a stay, which this Board decided not
2 to reach, not to entertain. So essentially
3 where we are today is there's no motion in
4 front of us. It's the Board has to figure out
5 what to do next.

6 And part of the options could
7 conceivably be nothing, simply leave the order
8 unchanged with the exception of perhaps a need
9 to change some of the factual aspects of our
10 findings of fact in the original order. That
11 could be one option.

12 Another option could be as I
13 believe the Chair is suggesting, and I don't
14 want to paraphrase or put words into the
15 Chair's mouth, but getting to the bottom of
16 what's happening in the basement and
17 determining what impact, if any, that has on
18 the relief that has already been requested and
19 what ramifications it may have for additional
20 relief. That's another option.

21 And then the third option could
22 conceivably be let's just work with what we
23 have in front of us and decide what we figure

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1 we need to decide both on the existing relief
2 that has been requested by the Applicant, as
3 well as any additional relief that we think
4 the record might suggest is in order.

5 I think -- and this is where I'm
6 tending to agree with the Chair's posture --
7 that there are still enough questions of fact
8 to suggest that the status quo probably isn't
9 going to be as solid a position as we would
10 like it to be, meaning just letting the order
11 move forward as is with just some factual
12 changes to reflect the fact that we have some
13 new information that has come in.

14 I am probably not comfortable with
15 that posture.

16 In terms of that third possibility
17 of simply let's work with what we have and
18 decide whatever it is we need to decide today,
19 I also agree with the Chair that there are
20 still factual questions about what's going on
21 in that basement.

22 So as Mr. Dettman indicated, as I
23 indicated in my remarks, let's put everything

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1 on the table and just get to it once and for
2 all. Given the amount of energy, the amount
3 of time, the amount of resources that have
4 been invested into this process to date,
5 probably the cleanest and most effective and
6 from a due process standpoint to an extent, I
7 try to be careful when I bandy that phrase
8 about, but it probably simply makes sense for
9 all parties involved to just get to the table
10 one more time and just put everything -- lay
11 it all out.

12 This is Thanksgiving dinner. So I
13 want to see the turkey, the cranberry, the
14 pies. I want to see it all, and I've made
15 light a couple of times with colorful
16 metaphors and analogies, and I'm not doing
17 that to downplay the importance and the
18 seriousness of the concerns that have been
19 raised here both on the part of the parties in
20 opposition and the Applicant's desire to move
21 forward.

22 But I know for just one Board
23 member there has been frustration at the

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1 piecemeal way in which we have gotten to where
2 we've gotten. And I recognize the arguments
3 on both sides. The opposition feels as
4 though, well, we have gotten information in a
5 piecemeal basis if at all from the Applicant.
6 The Application perhaps feels that the
7 information you're talking about isn't really
8 germane to the relief that we're seeking.

9 But I think we are where we are.
10 Probably the fairest and cleanest way to
11 resolve this in such a manner that everyone
12 feels that they've had their shot, they've had
13 their bite at the apple is to perhaps move in
14 the direction that the Chair is suggesting,
15 and let's just simply get it all out.

16 But I just can't emphasize enough
17 my desire to see it all out. So we are at
18 this posture again. I know there was
19 frustration when we last talked about this
20 case because there was a desire to get to some
21 kind of closure, and the Chairman was very
22 circumspect with her remarks.

23 I indicated some concern about

1 what does all of this mean at the end of the
2 day, but let's try to get to it. Let's drill
3 down to the important details about this
4 basement and what it means for the relief that
5 has been sought, what it may mean for any
6 additional relief that the Applicant may need,
7 and let's put this to bed.

8 Thank you, Madam Chair.

9 CHAIRPERSON MILLER: Any other
10 comments?

11 Okay. We have the ability in our
12 meetings to call on parties to come forward,
13 and we think it might be a good time at this
14 point to discuss this limited evidentiary
15 hearing that the Board is contemplating.

16 So could you come forward? I
17 believe all of the parties are represented.
18 I know you weren't prepared to come forward,
19 but we want to give you the opportunity to
20 give us some input about how much time you
21 would like to prepare for -- no, I don't know.

22 You're not here as a witness. We
23 can deal with that later.

1 Basically I think what you've
2 heard the Board say is that, you know, we're
3 a little bit torn about this whole idea of
4 reopening and reopening and reopening, but
5 there seems to be some good cause to do that,
6 and what we want to do at this point though is
7 this is it. I mean, you can't just then go,
8 okay, we have this hearing on the basement and
9 then somebody has an idea about another floor
10 or something. This is really the last
11 reopening that we can do. We don't do this
12 normally in cases.

13 But based on the arguments that
14 were made, we'd like to get some feedback from
15 you as to when you would be prepared to go
16 forward on an evidentiary hearing, just as Mr.
17 Dettman said, what use has been in the
18 basement for the relevant period of time, and
19 I think that's it. Is that it? Basically
20 that is it. Okay.

21 MS. BROWN: Good afternoon, Madam
22 Chair. Carolyn Brown on behalf of the
23 Applicant, Pauline Ney.

1 I guess I want to get a clear
2 understanding of what type of evidence you're
3 willing to accept. We can provide
4 photographic evidence. We have already
5 submitted the plans that show what it is that
6 were prepared by the architect.

7 Everything that we have submitted
8 to the record is based on the first-hand
9 knowledge of the architect and the owner's
10 representative, her son, who manages the
11 property.

12 I don't know what his schedule is
13 to be here as a witness, but we certainly can
14 provide photographs. The architect's schedule
15 may be more flexible. Ms. Ney is in Florida.
16 She will not be coming up for this type of
17 evidentiary hearing.

18 And so if you set the parameters,
19 I can get it into you, you know, this week if
20 you want photographic evidence.

21 CHAIRPERSON MILLER: Okay. Let me
22 just say this. You know, the Board isn't
23 really in a position to tell the parties what

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1 evidence they should produce. When I look at
2 finding of fact number five, which is not
3 going to stay the same in our order, it seems
4 like it's a key finding that both buildings
5 are nonconforming to use and structure, and I
6 would say to you that the opposition is
7 challenging that obviously, and it is up to
8 you what evidence you want to put in.

9 We are going to be weighing all of
10 the evidence. They are saying they want to
11 cross-examine someone, you know, Mr. Ney or
12 whatever. I will see if my Board members
13 disagree. I mean, we might think of evidence
14 might be ideal, but to me that is not the
15 point. I didn't think we had any evidence
16 other than representations by counsel and your
17 plans, which are very important, as ot how the
18 building was going to be used.

19 So I would say it is up to you.
20 You have a burden there, and you can meet it
21 how you choose.

22 MS. BROWN: Okay. I understand.
23 I was just trying to -- because I think we

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1 talked about this back in July, about that the
2 rules of evidence don't really apply here. So
3 I just wanted to make sure that I met your
4 needs, but I'll go ahead and handle it the
5 way --

6 CHAIRPERSON MILLER: Okay.

7 MS. BROWN: I hear what you're
8 saying, and I'll present the evidence, and as
9 far as the hearing date, if that's what you're
10 looking for, I am prepared whenever you need
11 me to be, with the exception of October 25th
12 through November 6th. Any time before that.

13 MR. ETHERLY: And perhaps just to
14 answer your initial question, you have heard
15 some of the discussion regarding information
16 that has been proffered or offered in terms of
17 some of the additional submittals about what
18 has been happening in the basement.

19 I think definitely err on the side
20 of just being as definitive as you believe you
21 are in a position to be either through, you
22 know, any testimony from your client or, you
23 know, other representatives of your client or

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1 just further detail.

2 You have heard some of the written
3 suggestion suggests that witnesses -- and I
4 put that in quotes -- not to characterize the
5 assertion that they are witnesses, but to
6 indicate that I hope we see them, but there
7 has been a suggestion that here has, in fact,
8 been a personal residential use regarding this
9 basement space rather than a commercial use.

10 So I think as definitive as we can
11 be on what's been happening in that space
12 between. I mean, I'm so tempted to ask what
13 is a question for me about what does it
14 ultimately mean. I'm not going to verge down
15 that road. You know, I've given into the
16 direction that we're moving in, and so I'll
17 stay away from that.

18 But I think be as definitive as
19 you can be on what's been happening in that
20 space. Has it been used for commercial
21 purposes? If so, what can you provide to this
22 Board that would help buttress those arguments
23 and those claims would be, I think, very, very

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1 helpful.

2 CHAIRPERSON MILLER: I just want
3 to follow up on that. Evidence is one thing,
4 and then I guess I foresee at the conclusion
5 of that what does it mean then, you know, when
6 we're done with this probably one more
7 pleading saying what the evidence showed.

8 So, I mean, if you talk about
9 photographs or whatever, I'm not sure if
10 you'll show the duration of the use by
11 photograph, but I don't know.

12 Okay. Ms. French or would you
13 identify yourselves for the record? I'm
14 sorry. All of you.

15 MS. FRENCH: I'm Kindy French,
16 President of the Sheraton Kalorama Historical
17 Association.

18 MS. STARR: Helen Starr, a
19 resident of the Woodrow Cooperative.

20 MS. DRISSEL: Marie Drissel,
21 Secretary, Sheraton Kalorama Neighborhood
22 Council, Inc.

23 MR. MATZ: Harry M-a-t-z, also

1 resident of the Woodrow Cooperative.

2 CHAIRPERSON MILLER: Okay. Would
3 you like to address this issue?

4 MS. FRENCH: I'll do my best.

5 CHAIRPERSON MILLER: Okay.

6 MS. FRENCH: As you know, our
7 usual representative, Kate Begs is out of the
8 country, and we won't return to the country
9 until October 8th. So we're trying to pinch
10 hit for her.

11 First of all, we very much as the
12 opponents appreciate your forbearance on this,
13 and I would like to address just the one point
14 of why didn't we come forward. I know we're
15 not getting into the evidentiary matters now,
16 but why didn't we come forward with this
17 information before? And that's because we
18 didn't have it.

19 We very much appreciate your urge
20 to get this finished and get all of the
21 information out there. It didn't cross our
22 minds to start trying to obtain this
23 information until we had the opportunity with

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1 the motion for reconsideration having been
2 granted.

3 In terms of additional evidence
4 that we would like, we would like to be able
5 to cross examine a witness for the Applicant,
6 a real person who does know about the duration
7 of whatever commercial use might have occurred
8 in the basement or even if there ever was a
9 commercial use in the portion of the basement
10 that's shown in the drawings now.

11 I think cross examining the
12 architect would be helpful, the people who
13 previously were here and implied to all of us
14 that the buildings together are 100 percent
15 nonconforming use, a statement which we now
16 know is not accurate.

17 So I don't know whether you have a
18 power or we have a power to get a witness in
19 here, but that's what we would like.

20 CHAIRPERSON MILLER: I'll just
21 respond to that. We don't have the power to
22 tell Ms. Brown what witnesses to present.
23 Okay? That's her choice. You have the power

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1 to call your own witnesses though.

2 MS. FRENCH: Okay, and we will do
3 the best that we can. We're going to need a
4 little bit of time. I mean, next week would
5 not be a good week for us.

6 MR. ETHERLY: And if I may jump in
7 here, I think your question and the Chair's
8 response raises kind of a subtle nuance to
9 this whole discussion over our last few
10 proceedings, and it has kind of been the
11 burden of proof, if you will, and typically as
12 a movant, the movant of a motion would have
13 the burden of proof for demonstrating why that
14 motion should be acted upon favorably.

15 Now, we're not in that kind of
16 situation here in a very strict way, but in
17 essence, at least from this one Board member's
18 standpoint, I'm almost holding both of you to
19 your own burden of proof to, you know, help
20 satisfy your arguments. Because clearly,
21 again, a question of fact, what has happened
22 or what is happening in that basement, and so
23 to an extent I hope this doesn't devolve, you

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1 know, divert simply into he say/she say, but
2 let's try to be as specific as possible and
3 buttress your specificity with hopefully your
4 own witnesses if you have them or testimony
5 that supports, again, at Exhibit 120, Sheraton
6 Kalorama Historical Association, you indicate
7 that you have witnesses who have been to this
8 space. Those witnesses could conceivably be
9 very helpful, much in the same way that I
10 would look to Ms. Brown to talk with her
11 client about how they can present proof of
12 what has been happening in that basement.

13 But I wanted to highlight that
14 burden issue because I don't want the party
15 in opposition, the Woodrow or the ANC or the
16 Historical Association to hope that you get
17 the right witness from Ms. Brown that you can
18 make your case on. We're going to need you to
19 be as affirmative and as proactive in your
20 argumentation as possible, recognizing that to
21 an extent you may have some challenges doing
22 that and, if so, be clear with us as to what
23 you think those challenges are.

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1 But some of the submittals on
2 record have indicated that you have witnesses
3 or that you have strong belief that something
4 else has been going on in that basement.

5 MS. FRENCH: But ultimately as a
6 matter of law and if this were to regrettably
7 go off on appeal, the burden of proof is on
8 the Applicant to prove what has been used or
9 not used in that space.

10 So I mean, we will seek to meet
11 the burden that you would like us to meet, but
12 ultimately the burden is on the Applicant to
13 prove that it's entitled to the variance.

14 MR. ETHERLY: And I don't want to
15 argue too much around it, and I know that's
16 not what you're suggesting, here. Perhaps
17 being not so much legalistic in terms of
18 saying who has the burden, is it de novo, is
19 it, you know, all of that good stuff that all
20 of us lawyers know, but just in terms of where
21 I think we are, you both have raised questions
22 of fact here about what's happening in the
23 basement.

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1 I think at the end of the day this
2 Board will benefit from whatever you can
3 produce to help us discern what has been
4 happening in that basement, and we can kind of
5 work at it from there.

6 I'm trying to, just as one Board
7 member, again, I'm trying to be as even handed
8 as possible in terms of looking at that
9 inquiry, and you know, I don't want to dig too
10 deep into this because it will get us too far
11 afield, but I'm trying to just approach this
12 with a balanced eye toward what all of the
13 parties and the Applicant will have to say in
14 answer to what we're looking for.

15 MS. DRISSEL: I want to make the
16 comment that we have asked all of the
17 government interests to inspect the property.
18 DCRA has tried to get in there, and we have
19 asked other government interests to get in
20 there.

21 We have a problem because we have
22 a lot of conflicting both legal and social
23 issues about this property that are seriously

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1 impacting on us, and we really do need access,
2 and without it, I don't think we're in a
3 position. Either a government person has to
4 get in there or someone else that's a
5 representative.

6 MR. ETHERLY: And I think as you
7 heard the Chair indicate, you know, our
8 powers, as much as I'd like to, again, do a
9 power grab today, our powers are very limited
10 on what we can compel. So we can't compel Ms.
11 Brown to produce a certain witness, and we
12 most certainly can't direct other arms of the
13 government to venture into the property.

14 But, again, if there are witnesses
15 as one of the written submissions has
16 indicated, if you have witnesses that have
17 seen the space, bring them here

18 CHAIRPERSON MILLER: Let me add to
19 this. I mean, this isn't an appeal, you know,
20 where DCRA is a party. So it's different. So
21 I don't think that this Board is supposed to
22 wait until something happens on the
23 government's part to take action in a case

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1 involving private property.

2 So I want to understand today. Do
3 the opponents have witnesses or have a case
4 that they can put on at this point or not
5 really? Because we're reacting to the letters
6 that state that, you know, there's more
7 evidence here, including eyewitnesses.

8 So I really need you all to
9 address this because we don't want to set a
10 hearing and then not have it go forward.

11 MS. STARR: We feel that we can
12 show that it has been residential and it is
13 still residential, absolutely, through
14 witnesses.

15 CHAIRPERSON MILLER: You have
16 evidence?

17 MS. STARR: Yes.

18 CHAIRPERSON MILLER: Okay.
19 Because I think the basic point here is that
20 the record isn't complete with respect to this
21 point about use of the building, whether it
22 has been conforming or nonconforming, and this
23 would be the opportunity to present evidence

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1 from both sides that go to the question, that
2 go to the use, and the Board will then have
3 more facts on which to base its conclusion as
4 to whether it's conforming or nonconforming
5 use in that space.

6 MR. ETHERLY: And I'll probably
7 note, again, the Board has said it
8 sufficiently, but we're only going on the
9 evidentiary submissions that have been
10 provided, and so when we keep referring to
11 witnesses, we're referring specifically to
12 there is not a date on the letter. Well,
13 October 1. It is Ms. French's October 1
14 letter at Exhibit No. 120, which speaks
15 specifically to witnesses.

16 With respect to Exhibit 121, Ms.
17 Drissel, again, good to see you as always.
18 There is an extensive discussion of some of
19 your beliefs regarding how the space has been
20 used. So that's what the Board keeps coming
21 back to because your arguments raise questions
22 of fact that haven't been resolved.

23 Now, with that being said, and

1 I'll be quiet, I will note because the Board
2 did have some discussion about it, just as one
3 Board member, in your letter, Ms. Drissel,
4 there's quite a bit of discussion about the
5 will and the probate aspects of the property,
6 and I want, again, speaking as one Board
7 member, I want to be very careful how we deal
8 with that, if at all, and I'm leaning more
9 towards the "if at all" piece because that is
10 very complicated and gets into an area of
11 expertise that this Board doesn't get into.

12 So I just want to kind of just
13 highlight that. I know it's part of your
14 discussion and you may have to, you know,
15 reach or point to some of that, but I just
16 want to highlight, you know, a concern at our
17 ability to really parse through the will and
18 the estate aspects of the transition from one
19 family member to another and how it had been
20 used.

21 But just in the overall question
22 of evidence and proof, you know, this Board
23 looked very closely at those two letters, and

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1 they were very definitive in their prose about
2 witnesses and observations of what was
3 happening in that space. So that's why we
4 keep coming back to it.

5 But clearly, we recognize some of
6 the challenges that you may have in getting to
7 see the space or getting others to see the
8 space, but your letters suggest that you have
9 some people that can speak to what they think
10 is going on there.

11 Thank you, Madam Chair.

12 MS. BROWN: Madam Chair, if I
13 could just make one comment since you did
14 bring up the Sheraton Kalorama Neighborhood
15 Council letter, I would move to strike
16 anything related to probate, wills, and the
17 argument that somehow personal property
18 through a will is definitive of whether or not
19 something is commercial or private use is not
20 the test that the Board uses. It's what the
21 Zoning Administrator and this Board uses to
22 decide what is a commercial use under the
23 zoning regulations, and you do not look to any

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1 probate issues.

2 And I did make reference to a
3 case, I believe, in not the most recent
4 letter, but an earlier letter. It's back in
5 my chair. I think it's 14512 or something
6 like that. It describes what the Zoning
7 Administrator does when there is no -- what
8 evidence he looks to when he's trying to
9 figure out whether to grant a certificate of
10 occupancy when there's no history of a
11 certificate of occupancy for a space, and what
12 evidence he looks to, then the burden on
13 someone else who is challenging it, what they
14 have to prove, and back and forth.

15 So I think that provides the right
16 kind of guidance of what this Board should
17 look to.

18 I'm glad to go get the case. It's
19 just back at my chair.

20 CHAIRPERSON MILLER: Okay. I
21 mean, that sounds useful. I mean if you want
22 to submit that.

23 I don't know that we have to, you

1 know, strike at this point, but I understand
2 your point, and I don't think that's a
3 direction that the Board wants to go to. I
4 think that would be useful, too, what the ZA
5 looks to, but yeah, my general impression is
6 we're looking at how it is actually used.

7 Okay. Yes.

8 MR. MATZ: Obviously, one of the
9 challenges we have as the opponents is that
10 the Applicants control the access to the
11 premises. Through the ANC representative, as
12 you know from Ms. French's submission, we've
13 asked for access. We were told that it was
14 not necessary in light of their pleading, and
15 that is the drawings and the statements that
16 the Applicant made.

17 We reiterated our access saying
18 that -- I mean our request for access saying
19 that that's not the ultimate answer; that's
20 merely your submission, and we haven't heard
21 back. We presume that the answer is no. It
22 might be simple if we just got that taken
23 care of so that we know whether to pursue it.

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1 And we are, if we do not have
2 access, hamstrung in producing the kind of
3 photographic evidence and other evidence,
4 documentary evidence, that we expect that the
5 Applicant may try to put forward.

6 CHAIRPERSON MILLER: Well, that
7 was our question before, you know. Can you
8 put on a case or not?

9 We cannot give you that authority,
10 you know, in this type of proceeding. You
11 know, you may have other resources, but in
12 this proceeding, our authority is limited, and
13 so we can't, you know, provide you access. We
14 can't make DCRA provide you documents. We
15 can't do any of those things.

16 So what we're saying here is there
17 seem to be a request for an opportunity to put
18 in more evidence and to challenge the other
19 side's evidence, and we're willing to do that
20 if you are ready to go forward on that.

21 MR. MATZ: The answer, as we said,
22 is yes. We can put on a case without that.

23 CHAIRPERSON MILLER: All right.

1 What about a date? Ms. Brown was ready to go
2 pretty quickly, but do you all have a date in
3 mind? And then we'll look at our calendar.

4 MR. ETHERLY: And just while we're
5 checking calendars, Ms. Brown, I believe
6 you're referencing your August 20th letter at
7 Exhibit 117 with regard to the --

8 MS. BROWN: That's correct, and
9 it's BZA Case No. 14212.

10 MR. ETHERLY: Okay.

11 CHAIRPERSON MILLER: All right.
12 Let me just let you know. We have looked at
13 our calendar, which is pretty well booked, and
14 we noticed that we could put you in in the
15 afternoon on November 20th if you are free.
16 It's before Thanksgiving if you all are here.
17 Okay. Third in the afternoon.

18 MS. STARR: So I just have one
19 questions because before we came up you said
20 that we would have an opportunity to like
21 cross-examine. This will be a one-time,
22 everything goes. There won't be any follow-
23 up, any added letters or testimony or there

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1 will be the time to rebut whatever was heard
2 on that day?

3 CHAIRPERSON MILLER: Okay. I
4 think that what we have in mind, this will be
5 a one time hearing, the last time we reopen
6 the record for hearing on this.

7 After that we would allow the
8 parties to file one more pleading arguing, you
9 know, setting forth what they believe the
10 evidence was and what it shows and what it
11 means to the case, how it affects the previous
12 order.

13 MS. STARR: Thank you.

14 CHAIRPERSON MILLER: Okay.

15 (Pause in proceedings.)

16 CHAIRPERSON MILLER: We were just
17 conferring. We think it might be useful to
18 the Board and perhaps the parties as well, but
19 we don't have a rule that requires it, to file
20 ahead of time the list of witnesses you intend
21 to put on before our hearing.

22 What date do they normally file?
23 Like November 20th would be the hearing. When

1 would we want that list?

2 MR. MOY: The week before would be
3 sufficient with regard to knowledge for the
4 Board. It would be November 13th unless you
5 want it sooner.

6 CHAIRPERSON MILLER: Okay. No,
7 that sounds good to me. Would that be
8 amenable to the parties? And serve it on each
9 other. Then you know what witnesses they're
10 calling as well.

11 Okay, good. Okay. Yes.

12 MS. DRISSEL: I asked one dumb
13 question once before and I'm going to ask it
14 again. I really didn't understand why the
15 attorney isn't sworn in, and I'm told I'm
16 really stupid for asking that, but I need to
17 ask it again because I didn't understand that,
18 and I understand that, but she has been giving
19 evidence. So I don't understand it. So would
20 you just explain it simply to me so that I
21 understand it?

22 CHAIRPERSON MILLER: Okay. I
23 can't give you a definitive answer. I mean,

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1 I would say I think that attorneys, in
2 general, take an oath before they begin
3 practice or whatever, and so what they're
4 saying in these proceedings is true, blah,
5 blah, blah. That's what I think.

6 But what we're saying to day is
7 we're not sure that that's sufficient
8 evidence, what the attorney said, and so we
9 are saying let's go further and get real
10 evidence, and that would be testimony,
11 documents, et cetera.

12 MS. DRISSEL: Thank you. Okay
13 Yes, that's what. Okay.

14 MR. ETHERLY: Yeah, and just to
15 talk about something a little lighter than the
16 substance, I mean, traditionally, the legal
17 representative or counsel will be making legal
18 argumentation as opposed to factual.

19 Now, of course, it's a fairly thin
20 line, and at times it may sound as though part
21 of the legal argumentation veers more into the
22 factual underpinnings of the case, but
23 generally speaking, the attorney is thought to

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1 be presenting legal argument and because
2 there's a whole realm of other requirements
3 under the bar and membership that we have to
4 adhere to from standards of professional
5 responsibility, we're already mortgaged to the
6 hilt in terms of our souls if we diverge from
7 ethical conduct and what have you.

8 But the Chair raises a good point
9 in that here we're looking to dig a little
10 further than just the representations of
11 counsel around that basement use, hence the
12 expedition into more factual underpinnings
13 here.

14 Thank you, Madam Chair.

15 MS. DRISSEL: Thank you.

16 CHAIRPERSON MILLER: Sure. Any
17 other questions? A statement?

18 MS. BROWN: I'm sorry. Just one -
19 -

20 CHAIRPERSON MILLER: Comment?

21 MS. BROWN: -- procedural
22 question.

23 CHAIRPERSON MILLER: Okay.

1 MS. BROWN: And I don't know if
2 it's appropriate to ask. Do you anticipate
3 any Board members needing to read the record
4 for this upcoming hearing in November?

5 MS. MONROE: No, I don't think so
6 because Mr. Etherly, supposedly, if all goes
7 well, will be on the Zoning Commission and
8 could actually rotate through as the Zoning
9 Commission member for that.

10 MS. BROWN: Great. Thank you.

11 MS. MONROE: So we would still
12 have the same three people.

13 MS. BROWN: Perfect. Thank you.
14 I just wanted to make sure there wouldn't be
15 a delay. Okay. Thank you.

16 MR. MOY: Madam Chair, staff has a
17 question for clarification. Since this would
18 be a limited hearing, is the Board wanting to
19 set any time restrictions on this or are you
20 going to go through the course of your
21 deliberation hearing?

22 CHAIRPERSON MILLER: I think the
23 rules might say an hour each, if I'm correct.

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1 Am I not correct? I'm pretty sure that's a
2 general rule, but that doesn't count cross-
3 examination or questions from the Board.

4 But really the more focused, the
5 better. I mean, this is one single issue, and
6 we're squeezing this case in. I don't think
7 it should take that long.

8 Do the parties have another view?
9 Okay.

10 We're just going to be following
11 the general rules, but I think that's what it
12 would be, about an hour each. But I don't
13 think it will be that much because most of the
14 time will be cross examination of any
15 witnesses, if there are many witnesses. It's
16 very hard to tell. We don't have your witness
17 list.

18 Yeah, okay. Anything else?

19 (No response.)

20 CHAIRPERSON MILLER: All right.

21 Then we'll see you November 20th.

22 Thank you.

23 MS. BAILEY: Madam Chair, is it

1 possible for the person who spoke today to
2 complete a witness card so that we could have
3 that record?

4 CHAIRPERSON MILLER: Yes. Please
5 do that. Thank you.

6 And is there anything else on the
7 agenda for the Board's meeting this morning?

8 MR. MOY: No, that completes the
9 public meeting, Madam Chair.

10 CHAIRPERSON MILLER: Okay. Then
11 this meeting is adjourned.

12 (Whereupon, at 1:03 p.m., the
13 public meeting was concluded.)

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