GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY,

JULY 17, 2007

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER	Chair
CURTIS ETHERLY, JR.	Vice Chair
MARC LOUD	Board Member
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

MICHAEL TURNBULL, FAIA	Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

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

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.
ALAN BERGSTEIN, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEPHEN MORDFIN
STEVE COCHRAN
ARTHUR JACKSON

This transcript constitutes the minutes from the Public Hearing held on July 17, 2007.

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9:30 a.m.

CHAIRPERSON MILLER: This hearing will, please, come to order. This is the July 17th Public Hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Ruthanne Miller. I'm the Chair of the BZA. To my right is Mr. Turnbull, who is representing the Zoning Commission. Mr. Curtis Etherly sits to my immediate right. He will be joining us later. He is the Vice Chair. And to my left is Mr. Marc Loud, Mayoral appointee and next to him is Mr. John Mann representing the National Capital Planning Commission.

And to Mr. Mann's left is Mr. Clifford Moy with the Office of Zoning, Sherry Glazer with the Office of Attorney General, Bryan Stockton is an intern in the Office of Attorney General and next to Bryan is Beverley Bailey with the Office of Zoning. And also to my far right sits the Office of Planning.

Copies of today's hearing agenda

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

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

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

The order of procedure for special

exceptions and variances is: One, statement and witnesses of the applicant. Two, Government reports, including Office of Planning, Department of Public Works, DDOT, etcetera. Three, report of the Advisory Neighborhood Commission. Four, parties or persons in support. Five, parties or persons in opposition. Six, closing remarks by the applicant.

Pursuant to Section 3117.4 and 3117.5, the following time constraints will be maintained: The applicant, persons and parties, except an ANC, in support, including witnesses, 60 minutes collectively. Appellee, persons and parties, except an ANC, in opposition, including witnesses, 60 minutes collectively. Individuals 3 minutes.

These time restraints do not include cross examination and/or questions from the Board. Cross examination of witnesses is permitted by the applicant or parties. The ANC within which the property is located is automatically a party in a special

exception or variance case.

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

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

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

The decision of the Board in these

contested cases must be based exclusively on the public record. To avoid any appearance to the contrary, the Board requests that persons present not engage the Members of the Board in conversation.

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

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

Does the staff have any preliminary matters?

MS. BAILEY: Madam Chair, Members of the Board and to everyone, good morning. There is a preliminary matter and it has to do

with Application No. 17637, application of Simon and Robyn Hinson-Jones. There is a request for postponement of this application. Additionally, there are two requests for party status as well.

CHAIRPERSON MILLER: The party status in that particular case, too, or, too, in general?

MS. BAILEY: There are two requests for party status in the application that I just mentioned.

CHAIRPERSON MILLER: Okay. Okay. Then I think we ought to take that case first, but could you perhaps swear in all individuals who want to testify today first before we go forward?

MS. BAILEY: Certainly.

CHAIRPERSON MILLER: Thank you. Would all those who plan to testify today, please, rise to take the oath?

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

(Whereupon, the witnesses were

sworn.)

MS. BAILEY: Thank you.

CHAIRPERSON MILLER: Ms. Bailey, would you call that case, please?

MS. BAILEY: Application No. 17637 of Simon and Robyn Hinson-Jones, pursuant to 11 DCMR 3103.2, for a variance from the lot occupancy requirements under section 403, a variance from the rear yard requirements under section 404, a variance from the court requirements under section 406 and a variance from the nonconforming structure provisions under section 2001.3, to allow the addition to an existing single-family row dwelling at premises 320 South Carolina Avenue, S.E. The property is in the CAP/R-4 District and it's located in Square 794 on Lot 13.

CHAIRPERSON MILLER: Thank you. Good morning. Would you like to introduce yourself for the record, please?

MR. HINSON-JONES: Hi, my name is Simon Hinson-Jones. I live at 320 South Carolina Avenue, S.E.

CHAIRPERSON MILLER: And you are the applicant in the case. Is that correct?

MR. HINSON-JONES: And I'm the applicant, yes.

CHAIRPERSON MILLER: And is the ANC here? And are any of the individuals who filed applications for party status here today? Could you come forward, please? Could you also introduce yourself for the record?

MS. DMYTRACZENKO: My name is Tania Dmytraczenko and I'm the property owner of 321 E Street, which is immediately behind 320 South Carolina Avenue.

CHAIRPERSON MILLER: Okay. And as I understand it, you just filed your application today. Is that correct?

MS. DMYTRACZENKO: No, I filed it last week.

CHAIRPERSON MILLER: Oh, okay, the Board is just seeing it for the first time.

MS. DMYTRACZENKO: Okay.

CHAIRPERSON MILLER: Did you get a copy of her application for party status?

MR. HINSON-JONES: No.

CHAIRPERSON MILLER: Did you give the applicant a copy or no?

MS. DMYTRACZENKO: I didn't know I was supposed to.

CHAIRPERSON MILLER: That's okay. That's okay.

MS. DMYTRACZENKO: Sorry.

CHAIRPERSON MILLER: All right. I just wanted to see where everybody is. Okay. First, the applicant is seeking a postponement and they are both preliminary matters we have, a postponement and party status application. We haven't read your party status application yet, because it just came to us. I don't think it was timely filed. I think the rules provide for 14 days ahead of time, if I'm correct, okay.

It doesn't mean we won't consider it, but it means that we haven't considered it yet, because we haven't had a chance to look at it. But anyway, I want you at the table as we talk about this preliminary matter.

1 You are seeking a postponement
2 because Office of Planning has advised you to
3 go to HPRB first. Is that correct?
4 MR. HINSON-JONES: That's correct,
5 yes.
6 CHAIRPERSON MILLER: Okay. If you
7 were a party, you know, you would have a right
8 to chime in on this, but I'm going to turn to
9 you right now anyway and ask you, do you have
10 any objection with the postponement?
11 MS. DMYTRACZENKO: I do, because
12 the reason I filed late is because I was in
13 Bangladesh. I'm moving to Bangladesh on
14 August 18 and so for me, the postponement is
15 a big issue, because if it happens after
16 August 18th, I would have to hire a lawyer.
17 CHAIRPERSON MILLER: Okay. As I
18 understand it, Mr. Jones, if you go to HPRB,
19 it's very possible the application would
20 change. Is that correct or not?
21 MR. HINSON-JONES: I don't think
22 so.
23 CHAIRPERSON MILLER: You don't

think it's going to change?

MR. HINSON-JONES: I believe not, no.

MR. CONNERS: It has changed already slightly. They don't have the information that has already changed.

MR. HINSON-JONES: Oh, there is a setback that I believe the Historic Board hasn't seen. Sorry, I'm asking my architect who is behind me.

CHAIRPERSON MILLER: He can come forward, too, please.

MR. HINSON-JONES: Oh, okay.

MR. CONNERS: Hi, good morning, Chairperson.

CHAIRPERSON MILLER: Good morning.

MR. CONNERS: With this case --

CHAIRPERSON MILLER: Would you introduce yourself, please?

MR. CONNERS: Hi, I'm Dennis Conners, Simon and Robyn's architect. And I met with the staff about a month ago, historic staff, and there was a new design concept that

incorporated an additional setback from the rear facade about 3 feet. And we haven't had a chance to submit that revised design to this Board. We just filed the historic package a few weeks ago to get on July's agenda for the historic design.

I can show you that sketch if that helps to allow everyone to understand the difference. It's a slight difference, but it's significant.

CHAIRPERSON MILLER: Okay. I think it might be a good idea for us, because also for the party status applicant, because if you're in the rear and they are changing the rear, that would be a reason to wait. I mean, you have to go down there. I'm sorry. And meanwhile, why don't we have the Office of Planning introduce themself as well, because I'm sure you may weigh in on this.

MR. MORDFIN: Okay. Good morning, I'm Stephen Mordfin with the Office of Planning. And the Office of Planning had agreed with the postponement because the

Historic Preservation office wanted to review the application first and wanted it to go to HPRB, because the way it had been originally submitted, we could not support. So, therefore, we support that it go to HPRB prior to it coming back to the BZA.

CHAIRPERSON MILLER: Okay. That's good just to visualize, but something is going to change and/or you are proposing to change something, so it doesn't really make sense for us to consider an application that is going to change. Yes, go ahead.

MS. DMYTRACZENKO: This change doesn't change the issues that I have regarding the addition, because the issues that I have is that any addition, any third story addition to the back of the house would change the fabric of the alleyway which is a very narrow alleyway because of the angle of South Carolina Avenue.

The issue I have also is that, you know, also in addition to blocking the open space and the light, these are seven identical

houses. This house is not exceptional in any way, so I'm also very concerned about it setting a precedent for the neighboring houses to do the same, which would be even more problematic as you go east down the alley where the alley becomes even more narrow.

I also have issues that I don't see this as being a hardship. You know, I don't understand. You know, there are a lot of two bedroom houses on the hill. There is a three bedroom house that went on sale on this very block just a couple of doors down, so, you know, I understand that Mr. Hinson-Jones is an artist, but, you know, a skylight on the back bedroom and French doors would resolve the issue of the light.

And I also think that, you know, building a third story addition imposes on the neighbors on the sides that might want to have a skylight like the Hinson-Jones do themselves have a skylight and not have to have neighbors peering in to their skylight.

CHAIRPERSON MILLER: Let me

interrupt for a second though, because we're really not going to get into the merits, but I understand what you are saying. I mean, there are two issues here and I'll see what my Board Members think as well. But one is postponement and usually we will grant a postponement if the applicant says that they are going to be changing their application and it's going to be different.

And we don't have a report by the Office of Planning yet for that reason as well. You know, it may be a different piece to analyze. Your issues may not change and your right to address those issues won't change. That's how I feel about the postponement question.

Now, as far as your party status application, you know, we could either consider it today or not consider it today. One reason not to consider it today is we haven't had a chance to read it yet, because it's late. Another reason to do it would be because you're here today. But if you are not

1 going to be able to participate in the
2 hearing, I'm not sure whether you would be
3 actually seeking party status.
4 And let me just backup a little
5 bit. You will be entitled to be heard fully
6 regardless of whether you have party status or
7 not. What you filed, which I haven't read
8 yet, addresses all those issues about why they
9 don't make the variance test. We're going to
10 consider them. They are in the record. They
11 would be considered as evidence.
12 Party status means that you can
13 participate fully in the hearing as if you
14 were a full fledged party, cross examining
15 witnesses, putting on evidence, that kind of
16 thing, filing findings of fact if necessary.
17 So if we were to postpone, which I think is
18 pretty likely, where does your party status
19 application stand? You know, what's your
20 view?
21 MS. DMYTRACZENKO: I would
22 continue to request party status. I would
23 just need to hire somebody to represent us,

right? Wasn't that one of the options to have somebody --

CHAIRPERSON MILLER: Absolutely, yes. Okay. Well, let's then consider whether we ought to consider your party status application today. But first of all -- well, yes, let's do that. How do other Board Members feel then?

COMMISSIONER TURNBULL: Which house? Looking at the elevation from the alley, do you live on one side?

MS. DMYTRACZENKO: Behind it.

COMMISSIONER TURNBULL: Oh, behind it.

MS. DMYTRACZENKO: Immediately behind.

COMMISSIONER TURNBULL: On the other side of the alley?

MS. DMYTRACZENKO: Um-hum.

COMMISSIONER TURNBULL: Okay. So you are not either like left or right of it?

MS. DMYTRACZENKO: No, I'm immediately behind.

COMMISSIONER TURNBULL: Behind it, okay. Thank you.

MR. HINSON-JONES: Excuse me, I don't believe that is correct. She is one adjacent over.

CHAIRPERSON MILLER: All right. Did you want to pass something up? You need to pass it down at that end.

MS. DMYTRACZENKO: This is just a picture showing how their house is immediately behind my back bedroom window.

MR. CONNERS: If it's okay, I can just clarify what my client Simon was saying, that although his house is visible from her house, technically, her lot is not immediately behind their lot. It's behind and one lot over, if you follow what I'm saying. And I don't know the exact lot number, but we have included in the BZA package a full copy of the square and I think it could help maybe if they point out which houses are their's for your explanation.

CHAIRPERSON MILLER: You are

changing your house in the rear and she is in the rear, but you are saying that she is not immediately behind, so you don't believe that she is impacted by the addition?

MR. CONNERS: Oh, no.

CHAIRPERSON MILLER: Okay.

MR. CONNERS: That's not what I'm saying. I just wanted to clarify.

CHAIRPERSON MILLER: Okay.

MR. CONNERS: Because there are --

CHAIRPERSON MILLER: She is not immediately behind.

MR. CONNERS: Not immediately behind.

CHAIRPERSON MILLER: Okay.

MR. CONNERS: And --

COMMISSIONER TURNBULL: I just wanted to clarify, you're not only changing the back elevation by setting it back, but you are also changing the front? It looked like previously you had an angled light, skylight and now it looks like you are basically coming straight down?

MR. CONNERS: Yes, that's also something that we talked about with the historic staff. They felt that we should look at some different options for reincorporating the skylight into the design, rather than just extending the addition completely over it.

COMMISSIONER TURNBULL: You are squaring it off?

MR. CONNERS: Right. And for the historic presentation, we asked the staff person if we would be able to present two options and she said yes, so that's what we will be presenting.

COMMISSIONER TURNBULL: So right now it's an option?

MR. CONNERS: Right now, that's the staff's preferred option.

COMMISSIONER TURNBULL: Preferred. Okay. I gotcha. Thank you.

CHAIRPERSON MILLER: Okay. You have a long last name, can I call you Tania? Okay. Okay. I think we just need to step back and let me say this to the Board. You

1 know, we're kind of starting to consider party
2 status, but I think that we just need to
3 address, first, the question should we address
4 party status today or should we put it off
5 until this case goes to hearing.
6 And, you know, I see pros and cons
7 to both sides. I mean, one is the application
8 is going to change, so maybe we should put it
9 off. But on the other hand I hear Tania
10 saying that it's not going to change that
11 much, so that, if I understand you correctly,
12 it's not going to change that much, so
13 therefore we should be able to determine your
14 party status today if we want to waive the
15 time requirements.
16 Do you believe that you would be
17 at a disadvantage if we didn't decide your
18 party status application today?
19 MS. DMYTRACZENKO: I guess I don't
20 understand the process enough. If it's
21 postponed, then can -- is the usual process
22 for requesting a party -- what is it?
23 CHAIRPERSON MILLER: Party status?

MS. DMYTRACZENKO: Status, extended to the new hearing date?

CHAIRPERSON MILLER: Yes, yes. And you would be timely in that case. We wouldn't have a problem with that. And what would happen would be that your representative, if you are planning on hiring an attorney, then he would represent you on that issue.

MS. DMYTRACZENKO: Right. So for me it's -- the issue really is the postponement. It's the postponement that's a problem for me.

CHAIRPERSON MILLER: Okay.

MS. DMYTRACZENKO: Because, you know, any postponement would entail significant cost to me.

CHAIRPERSON MILLER: All right. Well, let's deal with the postponement question first. I hear what she is saying, but I think that it makes sense to postpone, because it's the applicant's project and it is going to change. And Office of Planning can't

weigh in either until the project is where it's going to be. And actually we can't analyze a project that's not going to stay the same, that's going to change. So I would be in favor of a postponement. What do the other Board Members think on this?

BOARD MEMBER MANN: I am also in favor of postponement for those very reasons. I mean, the fact that it has to go through some sort of Historic Preservation review means that there is the potential that it could change while we don't necessarily know what they are going to say beforehand.

Also, if I could raise another issue about which I'm a little bit confused and maybe we can get some clarification. The relief sought that was advertised is variance relief. On Exhibit No. 24 from the Office of Planning, it indicates that there is variance relief and section 223. And I'm not quite certain where or if there is a difference. I don't know why there is a difference between the two and how that occurred, if that was

intentional or not.

MR. CONNERS: Mr. Mann, I can explain that a little if it helps.

BOARD MEMBER MANN: Yes.

MR. CONNERS: I think that it was initially written a bit incorrectly when we filed. It is simply just section 223.01, is that the section, meaning that the -- it's a conforming use, a nonconforming structure. So the client is not seeking to change the footprint of the building, but those particular items, the rear yard setback, the courtyard and lot occupancy. Those are the three existing conditions that cause them to have the 2301.

BOARD MEMBER MANN: 2001.3, I think, you mean.

MR. CONNERS: Yes, I'm sorry, 2001.3.

BOARD MEMBER MANN: Uh-huh.

MR. CONNERS: So they are not changing the footprint of the building. They are only seeking one variance, from what I

1 understand.

2 BOARD MEMBER MANN: Well,

3 whichever relief you are seeking is not

4 necessarily my concern. I just wanted to make

5 sure that it had been advertised properly or

6 that we get it clarified and that OP is in

7 agreement.

8 MR. MORDFIN: Well, under section

9 223, you get special exception relief for the

10 courtyard for section 2001.3 you get for all

11 of those things, but, in this case, and I

12 didn't prepare this report, I believe they

13 also need a variance from the CAP Overlay

14 District and I think that might be where the

15 variance comes in, because that restricts the

16 maximum FAR. But I'm not sure, maybe that's

17 where the variance comes in.

18 BOARD MEMBER MANN: And that's --

19 MR. MORDFIN: That's why all those

20 other ones can -- are a special exception and

21 there is no variance for rear yard, for

22 courtyard, for 2001.3 to add on to a

23 nonconforming building. It's all one special

exception.

BOARD MEMBER MANN: And that's something specifically that this project will not go over. It has a starting FAR of 1.4. Normally, in an R-4 Zone, it's non-prescribed, but in the CAP Overlay, it's a maximum FAR of 1.8. And even since the design has changed slightly, the FAR is going to be even further reduced. So it won't even be 1.8, it will be probably more like 1.7 or something.

CHAIRPERSON MILLER: Okay. I don't think we want to go too far into the merits of this.

MR. CONNERS: Sure.

CHAIRPERSON MILLER: Yes, but it's the consensus of the Board that we want to postpone this case? Okay. So I think that's the right thing to do.

MS. DMYTRACZENKO: Short request?

CHAIRPERSON MILLER: Yes, yes.

MS. DMYTRACZENKO: This letter that was sent from the Board of Zoning Adjustment, I never received a copy. I

received it from my neighbors and I was communicating with my neighbors and none of them knew about the hearing today. And I didn't see -- I drove by the house yesterday and I didn't see any announcement of the hearing. So if we could, at the next time, I don't know, improve on knowledge?

And also, I learned on the day of the Capitol Hill Restoration Society meeting and on that -- at that meeting, I also learned that the ANC meeting had already taken place and that none of the neighbors were at that meeting. None of us knew about it.

MR. HINSON-JONES: Excuse me, that's incorrect. We had an immediate adjacent neighbor who was at the ANC meeting.

MS. DMYTRACZENKO: Oh, I'm sorry, I wasn't -- I'm sorry, I heard from you that no one was at the meeting on that side.

CHAIRPERSON MILLER: Okay. Well, can you turn your microphone off? Okay. What I think we should do is we'll find another date for the next hearing. I would suggest

that we postpone the consideration of the party status application, we have another application by someone else, until the hearing.

However, I think that you should get, and the other party status applicant, as well as the ANC, a copy of the final plans before the next hearing and the final application and the Office of Planning report as if you were a party. And then I don't think I want the Board to get into, and they can see what they think, but, analyzing your party status when we don't even really have the final, what is the, application before us. That's what makes it difficult. Even though it looks like you are in close proximity, etcetera.

So it will guarantee that you won't be prejudiced in any way, that you will have all the materials you need so that next time if you are here or if a lawyer comes in and you are seeking party status, you will actually be able to fine tune your arguments

towards the application we are actually considering. And worse comes to worse, if you are not here and you have an attorney here and you're not granted party status, your attorney would still be able to present your case, present your argument.

So is that clear?

MS. DMYTRACZENKO: Yes. I have a couple of questions.

CHAIRPERSON MILLER: Okay.

MS. DMYTRACZENKO: One is when would the next --

CHAIRPERSON MILLER: The next hearing. We're going to discuss that next.

MS. DMYTRACZENKO: Okay.

CHAIRPERSON MILLER: Are my Board Members okay with that, proceeding that way?

BOARD MEMBER MANN: Yes.

CHAIRPERSON MILLER: Okay.

BOARD MEMBER MANN: Can I just bring a couple of things to your attention, Madam Chair? The staff notes indicate that the applicant did not file an affidavit of

posting as of yesterday. And I also just wanted to point out per our other notice and requirements, at Exhibit No. 6, it does indicate that all the neighbors within 200 feet were notified with the mailing, including the party requesting the party status.

CHAIRPERSON MILLER: Thank you very much. And I would just say to the applicant, you know, be sure you do cross all your Ts and dot your Is next time, because if you come in and there are posting questions or something, we might have to postpone again. In this case, we're postponing anyway.

MR. CONNERS: Okay.

CHAIRPERSON MILLER: Yes?

MR. CONNERS: Can I just say something real quick?

CHAIRPERSON MILLER: Sure you want to respond to that? Sure.

MR. CONNERS: I just want to make sure that Simon, my client, is not being prejudiced against because he has been very forward with everyone in the community. He

has done everything correctly. We have got the exhibit that Mr. Mann just showed that the letters were sent out. And I had filed a request for postponement back on June 19th. I had only received a phone call just recently saying that we had to come to present for the postponement, that's why the boards were not posted. We just -- we didn't know that.

CHAIRPERSON MILLER: Okay. Okay. Why don't we look at our calendar then and see when we have another opening. Mr. Moy, do you have a suggestion?

MR. MOY: Yes, Madam Chair. As you know, with the packed schedule, I think it would be of the Board's benefit that the first available date possibly could be November the 13th in the afternoon. The Board currently has two cases in the afternoon. This could be a third case. Again, that's November 13th for the afternoon, that's the first available date.

CHAIRPERSON MILLER: Okay. Is that okay with the applicant?

MR. CONNERS: It seems okay.

CHAIRPERSON MILLER: And will you be back in the country by then?

MS. DMYTRACZENKO: No, I won't.

CHAIRPERSON MILLER: Okay. All right. Yes, we have a very, very packed schedule, unfortunately, so that's our first opening, kind of opening. Okay. So it will be November 13th in the afternoon. All right.

MR. MOY: Yes, Madam Chair, third case in the afternoon.

CHAIRPERSON MILLER: Third case in the afternoon.

MS. DMYTRACZENKO: Is it possible for me to get the address of the people who you send notices to, because I can check with them if they have received it, because I was on the list, but I didn't receive it. I got a copy from my neighbor. And yesterday when I was communicating with one of my neighbors, she had not received it either. So at least I could verify that way that they got it.

CHAIRPERSON MILLER: Yes. Can you

turn that down again? We have an official file in the case in the Office of Zoning and you can go over there after this hearing, if the file is back there, that will have everything in including that, including the addresses of everybody that was sent notices to.

Okay. Oh, I just received a note from my colleagues saying that if you are interested, you can actually watch the hearing from Bangladesh on the Internet. You know that Office of Zoning has a website. Okay. It's webcast. Okay. All right. So in the meantime, I'll just reiterate a few things.

So the hearing will be November 13th, third case in the afternoon. In the meantime, once you have gone to HPRB and you have a final application and design, that you would serve that on the two party status applicants. Are you aware of the other party status applicant? There is another one in this case who is not here today.

MR. CONNERS: No.

CHAIRPERSON MILLER: Mr. Jeffrey Marks. You might need to check the file as well to see everything that's in there.

MR. CONNERS: Oh, okay. Thank you.

CHAIRPERSON MILLER: Mr. Jeffrey Marks also filed for party status and then the ANC should get a copy of the final application and design. They are a party automatically.

MR. CONNERS: So from what I understand, we copy the party status with any changes. Is that what we do?

CHAIRPERSON MILLER: Yes, that would be your new design and the application.

MR. CONNERS: Okay.

CHAIRPERSON MILLER: Correct?

MR. CONNERS: Okay. There won't be any new application.

CHAIRPERSON MILLER: There won't be any new design?

MR. CONNERS: No.

CHAIRPERSON MILLER: After going to HPRB?

MR. CONNERS: No, I mean, there won't be any new application. Will there be?

CHAIRPERSON MILLER: Well, I don't know if you will change to reflect the new design. I don't know whether -- your application per se won't change. You may want to revise it to reflect any changes. You can do that.

MR. CONNERS: I gotcha.

CHAIRPERSON MILLER: Okay. And then I also would request that Office of Planning serve those entities as well. Okay. That way by the time you all get to the hearing, you will all be on the same page. Okay. Any other questions? Okay. Then we will see you on the 13th. Thank you.

MR. CONNERS: Thank you.

CHAIRPERSON MILLER: Ms. Bailey, we're ready for the next case when you are.

MS. BAILEY: Application No. 17642 of Jeffrey Scott Duncan, pursuant to 11 DCMR 3104.1, for a special exception to allow a ground floor addition to the rear of an

existing single family row dwelling under section 223, not meeting the lot occupancy requirements of section 403. The property is Zoned R-3. It is located at 2030 37th Street, N.W., Square 1301, Lot 848.

CHAIRPERSON MILLER: Thank you. Would the parties come forward, please? And I also want to welcome my Vice Chair, Mr. Etherly, who has just joined us. Good morning.

MR. DUNCAN: My name is Jeffrey Duncan and I live at 2030 37th Street. The application that I filed is for a special exemption to permit my wife and I to undertake a basement remodeling at our existing row house. That remodeling project does include-- in addition to the rear of the home, the addition is aimed at enclosing an area that has already been enclosed on the first and second floor. So there is an existing overhang and we are merely enclosing that at the ground floor level.

I believe that the addition is

consistent with the standards that are set forth in section 223 of the Zoning Regulations in that the proposed addition will not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent property, including light and air, privacy of use, visual intrusion upon the character, scale or pattern of the neighborhood.

I previously appeared before the local ANC in April to request the ANC's support for my application. And on April 12, 2007, the voted to support the application by a vote of 3-0. The D.C. Office of Planning has also recommended approval of the application in a report filed with the BZA on July 9, 2007. My application is supported by many of my neighbors.

I know that my neighbors, John and Carrie Balker, who live at 2032, submitted a letter in support of the application. And my neighbor Kevin Welsh, who is here today, he and his wife live at 2024 and they have also expressed their support. And so I would

request the approval of the Board for the special exemption.

CHAIRPERSON MILLER: Thank you. Yes, it was a very well-written application. Is the ANC here by any chance? Okay. Can you just elaborate just for the record why you believe that your addition wouldn't have any adverse impacts on your neighbors? It wouldn't affect light and air or privacy?

MR. DUNCAN: There are -- it bumps out the back of the house only by about 9 feet. There is an existing wooden porch that comes out behind that area as well and so the addition is going to only be seen if you are walking down the back alley and are looking underneath the deck of the house. The walls on the extension don't have windows in them. The wall at 2020 -- the house next door at 2028 already has extended out its wall to the level that I am seeking. And you can see evidence of that in Exhibits 15, 16 and 18 and the photographs show that.

There are a number of houses on

the block which have done -- undertaken substantially the same extension to the ground floor level and I also submitted photographs showing those houses. And so many of these homes have already done such an extension. And so I believe that undertaking a similar rear addition really is in character with the neighborhood.

CHAIRPERSON MILLER: Great. Okay. Any other questions from Board Members? All right. Then we can turn to the Office of Planning.

MR. MORDFIN: Good morning. The subsequent application is in conformance with the provisions of section 223 of the Zoning Regulations in that the proposed addition is to a row house, a use permitted as a matter-of-right within the R-3 District. The addition will not unduly affect light and air to neighboring properties, because it will be located beneath an existing two story overhang. Privacy and use of enjoyment of neighboring properties will not be unduly

compromised, because the proposed addition will be located beneath the two story addition and behind an existing deck.

The proposed addition will be minimally visible from the public alley, because the location of the deck will substantially block any view of it and the applicant submitted photographs and architectural drawings as a part of the application.

Therefore, the Office of Planning recommends approval of the application as submitted by the applicant. Thank you.

CHAIRPERSON MILLER: Thank you. And that was an excellent report as well. I just wanted to ask a couple of questions. Am I correct that you identified that they needed relief from the rear yard requirements, that they hadn't identified in their application initially. Is that correct?

MR. MORDFIN: Yes.

CHAIRPERSON MILLER: But that doesn't change the nature of the relief,

because it all falls under 223?

MR. MORDFIN: That's correct.

CHAIRPERSON MILLER: Okay. And is there any increase in the nonconformities or just that they existed?

MR. MORDFIN: There is no increase in the nonconformities. They are as existing and they are just filling in space within that area.

CHAIRPERSON MILLER: Okay. Yes, that's what I thought. Okay. I don't have any other questions. Okay. I think I had previously asked if the ANC were here and no one came forward. Is there anybody else in this audience who is here to testify in support or opposition to this application? Okay. Would you come forward?

Mr. Duncan, I assume you don't have any questions for Office of Planning? You are entitled to ask them a question if you do.

MR. DUNCAN: No.

CHAIRPERSON MILLER: No. Do you

have a copy of their report?

MR. DUNCAN: I do. Thank you.

CHAIRPERSON MILLER: Okay.

MS. HARTMAN: Shall I speak from here?

CHAIRPERSON MILLER: You should sit down and then you can turn your microphone on. Get yourself comfortable.

MS. HARTMAN: I think I might keep these, so people can see where --

CHAIRPERSON MILLER: Wait a second. You need to talk into the microphone, so you are on the record.

MS. HARTMAN: Yes, this is Barbara Hartman.

CHAIRPERSON MILLER: And did you have something you wanted the Board to see?

MS. HARTMAN: Yes. This is Barbara Hartman. I reside at 2028 37th Street. I also own the property and I'm going by these various things on the party status application. Number one, "How will the property owned and occupied by such persons be

affected?" I guess this is just to that.

CHAIRPERSON MILLER: Excuse me.

MS. HARTMAN: There are various ways that it will affect the property and I was --

CHAIRPERSON MILLER: Ms. Hartman? Wait. Why don't you sit down.

MS. HARTMAN: All right.

CHAIRPERSON MILLER: Okay. So then I can see your face better.

MS. HARTMAN: Okay. Sorry.

CHAIRPERSON MILLER: Okay.

MS. HARTMAN: Okay. My main -- oh.

CHAIRPERSON MILLER: You are here to testify. You're not seeking party status, correct?

MS. HARTMAN: No, I'm against. I'm against the proposal as it stands.

CHAIRPERSON MILLER: Okay.

MS. HARTMAN: Because of potential adverse effect to my enjoyment of my property and also to the property itself.

CHAIRPERSON MILLER: Okay.

MS. HARTMAN: Okay. And primarily, this is -- the main problem I had was with water, potential water damage to the property and air quality and noise. I was going to pass out all these things. My property is No. 15 and 18 in the photographs. You can see that the slope from Mr. Duncan's property over to mine is downhill, so I am south of his property.

CHAIRPERSON MILLER: Do you want the Board to consider those photographs?

MS. HARTMAN: Yes, I want them to.

CHAIRPERSON MILLER: Okay. So if you do --

MR. DUNCAN: I believe those photographs are already in evidence. Those are part of my application.

CHAIRPERSON MILLER: They are already in the record?

MR. DUNCAN: I believe.

CHAIRPERSON MILLER: Oh, okay.

MR. DUNCAN: I'm looking over at

the photographs and I believe that those photographs are the photographs that I submitted in connection with my application.

MS. HARTMAN: Yes. So everything that I was going to give to the Board I got from the file yesterday. Okay.

CHAIRPERSON MILLER: Okay. You don't need to give it to the Board then. The Board has it in their files.

MS. HARTMAN: Okay. Then I'm going to tell you which things that they should look at.

BOARD MEMBER MANN: Can I just clarify? From the rear of the house, is your property on the right hand side?

MS. HARTMAN: It's on -- when you are facing the back.

BOARD MEMBER MANN: When you are facing the back.

MS. HARTMAN: I'm to the right.

BOARD MEMBER MANN: You're to the right.

MS. HARTMAN: Here is zero

distance.

BOARD MEMBER MANN: Okay.

MS. HARTMAN: Zero distance. I'm exactly zero distance from the property next to me.

BOARD MEMBER MANN: Okay. So your house is toward the right.

MS. HARTMAN: This is 2030 and I'm 2028. Okay. The photos I would like you to consider would be photos 8 -- 15 and 18. And then Exhibits 27, 2, 1, 7, 5, 9. Under 9, particularly, A1, A2, P1 and A3. And then additional photographs would be No. 3, 4 and 2. I already mentioned 2 already. And there is an unusual No. 2, Mr. Duncan's. Maybe it was a black and white one. It's called Exhibit 3 Close-Up. No. 13, 23 and 24.

All right. My main objection, at this point, has to do with the slope that I have on my property. All properties from the top of the hill go downward and anything that Mr. Duncan does affects my property, whether it is hosing his garden roses and having the

debris go into my driveway, which has affected the -- actually, the concrete with chemicals and things. It has eroded it.

But also, there has been in the past in my house a flood in the house itself and also the previous owner told me that, and also I have experienced some flooding into the garage with a very heavy rain, because not only does it slope sideways, the driveways slope inward towards the house. And there is a -- on one of these maps here, the diagrams, there is a demolition project which does not show the drain which is underneath this area that Mr. Duncan is proposing to enclose.

And he has some other kind of solution, but I don't seem to see how that is going to be enough for the amount of rain and possible water. The HUD designation of the number C as the flood plane suggestion for the property really doesn't apply in this case without interpretation, because, first of all, it says here it's not to be, on the Exhibit 2, considered. It's to be interpreted, not to be

1 considered absolute. A minimum area of
2 flooding is what is considered.
3 But with the alley and the slope
4 inward, we have had flooding. And I
5 anticipate that there will be no way to stop
6 that unless Mr. Duncan in some way, you know,
7 makes some accommodations for that.
8 Also, I feel that there are other
9 problems. He proposes that he is going to
10 have the basement for parties and for his
11 office and various things that he will be
12 doing to have extra cars parked further out.
13 I don't know if he is going to have to remove
14 the existing staircase to do that. And I
15 don't know if -- the staircase is already a
16 nonconforming thing going all the way out
17 almost to the curb. It's maybe only a few --
18 maybe 4 feet or so from the curb itself and I
19 don't -- I think that might be considered
20 right now already some problem.
21 But he was proposing various
22 reductions, an increase in capacity to have
23 cars on the property and I consider that just

even doing the garage, he is eliminating one parking spot. And then there is the potential of another behind the house with a garage closed and then two more beyond that. So that is all in the notes that you will see in his self-proving application. Self-certification form, I guess, it's called, that's Exhibit No. 5.

And then I just want to read quickly what I came up with last night. This is taken from Memorandum Exhibition 27, the special relief pursuant to 223 of Title 11 MR to permit the construction of a building addition to the rear of an existing row house for 2030 37th Street not in conformance with 40 -- 403.2, maximum percentage of lot occupancy, 404.1 rear yards and 2001.3 to enlarge a nonconforming structure. And this is from the memorandum, the identification of the property and the problems.

Now, under page 1 of Exhibit 5 of the zoning self-certification form, the owner's relief is for special exemption --

exception 3104.1, subsection 223. In the exhibit, no information on the ratio of floor area to lot area is provided by the applicant. This area on the form is conspicuously blank. But I would propose if one were to add the approximate 168 square feet under the pre-existing wood structure attached to the brick core of the house, formally known as a summer porch, as living enclosed built space, then the ratio of living floor area to lot area would exceed the maximum percentage of building lot occupancy permitted.

I do not believe that the 168 square feet of open air space under the summer porch is currently considered as living space. Without doing the math, the addition of 168 square feet to the 56.9 percent of the enclosure of this open air space easily exceeds the 60 percent maximum allowed per the applicant's citation.

It would be a miraculous feat of magic or visual deception to arrive at a variance deviation of "no change" to the

volume of space to be physically enclosed under the pre-existing summer porch.

Also in Exhibit 5, the applicant says currently there are three parking spaces. I would contend that there are three parking spaces and one more parking space, namely the one car garage under the brick core of the house. By converting the garage into living space and by enclosing under the pre-existing summer porch, the property loses two, not one parking spaces, but maybe with the deck staircase in tact and/or the addition of air conditioning fans, only one parking space would be available.

Thus, also resulting in a deviation of minus three parking spaces on the property. All of this calculating for the zone self-certification and request for special exemption is moot when you consider Exhibit No. 2, which is a location drawing of Lot 8, Square 1301, which warns the consumer that this is a plan required by a lender or title insurance company or its agent in

connection with the contemplated transfer of finance/refinance.

The footnote is not to be relied on upon the establishment of -- the footnote states that it is not to be relied upon for the establishment of location of fences, garages, building or other existing or future improvements. This land does not provide for the accurate identification of property boundaries. Such identification may not be required for the transfer of title or securing financial or refinancing.

So I don't believe he even had the proper survey done to build anything. I mean, you know, I don't know. But that's what I found in the file, unless there was another one that I didn't see. Is that my time?

CHAIRPERSON MILLER: Yes, actually.

MS. HARTMAN: I think I got all my points.

CHAIRPERSON MILLER: Oh, good, because actually the staff put it on the clock

late, so you had actually more time. But so as I understand that, you know, one of your concerns is with drainage.

MS. HARTMAN: That's the main.

CHAIRPERSON MILLER: That's your main concern?

MS. HARTMAN: That's my main thing.

CHAIRPERSON MILLER: Okay.

MS. HARTMAN: And privacy of the air, the air quality if he is going to have the fans from the air conditioner he is proposing out there. And I couldn't see on the plan how he is going to actually have a furnace, unless he has a new type furnace or electric heat. Where is the furnace going to be and what is the square footage required in the basement to have a furnace that's, I assume would be gas, unless he is going to have electric in the whole house? I don't know.

CHAIRPERSON MILLER: Okay.

MS. HARTMAN: Those are mainly it.

CHAIRPERSON MILLER: Okay. Do we have some questions from the Board?

MR. DUNCAN: Could I be heard?

CHAIRPERSON MILLER: You'll have a chance. Let me just tell you how our process works. After the Board asks some questions, you will have a chance to ask questions of Ms. Hartman and then later you will have a chance to rebut.

MR. DUNCAN: Okay.

CHAIRPERSON MILLER: Okay.

MR. DUNCAN: Thank you.

MS. HARTMAN: Well, I forgot to give you these little cards.

CHAIRPERSON MILLER: You can give that to the Court Reporter.

MS. HARTMAN: Okay.

CHAIRPERSON MILLER: Well, you can do that in a little bit. Why don't you -- you want to sit down for a second? You can do it afterwards.

MS. HARTMAN: All right.

CHAIRPERSON MILLER: I think Mr.

Turnbull has a question for you.

COMMISSIONER TURNBULL: Madam Chair, I'm looking at the drawings. It's to address your concerns. The applicant is actually raising the floor level back underneath the deck area for his new -- for his in-fill addition. So the floor area is being raised and he is also providing a trench drain all the way along the bottom of it.

To remedy your concerns or make you feel even better, we could -- I mean, the applicant could provide a final grading plan or a survey which would show that the direction of the slope of the ground that comes into that trench drain is all focused toward the drain and not towards your property.

I mean, that would be a simple elevation for him to -- for the surveyor or whoever is doing the grounds to make sure that any of the ground slopes down to that trench drain, which is totally along the length of the back of this property.

The other part of his property where it is, he is -- where he comes out underneath it, it would appear from the drawings that it is a level area to sidewalk and the air conditioning units are on that pad, which is opposite from your property. It's on the other side. So I think he has addressed the concerns of drainage.

We could simply reinforce that by saying that the final grade plan would show that the drainage would definitely be all focused toward his trench drain. But I think he is going -- I think he is providing his due diligence by actually providing a trench drain, which was not on the property in the first place. So I think he has taken a measure of safeguarding from any water coming onto going down his site.

MS. HARTMAN: May I respond to that?

COMMISSIONER TURNBULL: Yes.

MS. HARTMAN: It's not on the property, because it's not on this plan the

architect drew, because there -- behind every single house on 37th street in the row, there is a rectangular-shaped iron thing which you can pull up and clean out when it gets dirt in it and that goes underneath the garage. Then it hooks into the sewer. So I'm not sure that exactly it's correct the way it is presented in these diagrams.

COMMISSIONER TURNBULL: What's not correct?

MS. HARTMAN: What you are saying. I don't know where is it going to drain to? I mean, first of all, there's no --

COMMISSIONER TURNBULL: It says that --

MS. HARTMAN: -- it doesn't show the pre-existing drain.

COMMISSIONER TURNBULL: No, he does not show any kind of existing conditions. There is no demolition plan. I will agree. There is no demolition plan that shows that is being removed on the grade, but he does show on drawing A2 trench drain connect to existing

storm system. On the foundation plan on A2, he is showing that there is a trench drain connected to existing storm system.

MS. HARTMAN: Well --

COMMISSIONER TURNBULL: So he is-- and all I'm saying is that we could simply make into the order requirement that he would provide that the drainage of the site, any paving or grading, would be all focused away from down into that trench drain away from your property.

But it actually -- and actually, one of the pictures almost showed that your property does look to be a little higher. I'm not sure. I mean it's hard to tell from the photograph.

MS. HARTMAN: No. Now, I'm going downhill.

COMMISSIONER TURNBULL: Well, so is he.

MS. HARTMAN: Yes.

COMMISSIONER TURNBULL: But I think what he is doing --

MS. HARTMAN: Right.

COMMISSIONER TURNBULL: All I'm saying is that he is providing the drain and we could simply require as part of the order that he would then provide his grading would be away from your property to the drain.

MS. HARTMAN: But he has also proposed to put a pad so the cars can come in and where is that going to drain?

COMMISSIONER TURNBULL: A pad? Not for cars.

MS. HARTMAN: Kind of a pad, a cement pad that would -- is it going to drain into the alley or is it going to drain into my property or is it going to drain into the street?

COMMISSIONER TURNBULL: No, that's on the other side. That faces the other neighbor's property. He has got a pad out there. It's a level pad. It's a walkway that as you come out of his new -- under this addition, you come out, you're coming out onto a concrete pad that's level and he is putting

toward the bottom of that toward the -- at the edge of the deck, he is putting his two AC units out there.

MR. DUNCAN: That's right.

MS. HARTMAN: It may look here in the photographs that it's level, but photos can be deceptive.

COMMISSIONER TURNBULL: Well, I believe it's going to be new, that this is a new walkway.

MS. HARTMAN: What happens to the water that collects on a level pad?

COMMISSIONER TURNBULL: But he can have -- that can also be focused to be going to the new area to the drain. I mean, that could be a requirement that it would slope and go. A quarter inch slope. It's a minimal slope to get the water to drain. But again, that's on the other side of your property.

MS. HARTMAN: Yes, but I'm not sure that, from experience, particularly in the winter and when we have a heavy rain, that storm drain on the side sometimes it

overflows. The capacity can't take everything. And this other thing in the middle of the -- underneath the porch, the summer porch that was added on probably when the house was built or shortly after, goes straight out to the sewer. And then the other comes down from the side, from the roof.

So directing everything over to that and then I don't know what happens to it.

COMMISSIONER TURNBULL: Well, as I say, he's putting in a new drain.

MS. HARTMAN: Underneath the whole house?

COMMISSIONER TURNBULL: Underneath that whole addition up to where the --

MS. HARTMAN: Underneath the house to the sewer? I'm asking you that.

COMMISSIONER TURNBULL: No, you would have to look. As I say, if you look on A2 --

MS. HARTMAN: I know.

COMMISSIONER TURNBULL: -- you will see a double line which he says is a

trench drain and that goes underneath the addition by your side of the house there. It's probably, I'm guessing, 8 feet long or somewhere in the vicinity of being 8 feet long. I'm guessing, just by looking at the plan.

MS. HARTMAN: Well, let me say this. If he insisted that that would take care of it, then I would insist that he put up a privacy wall to contain all of his things going on with his property. And it be the maximum height that you can do and it be concrete and cross level underneath on the bottom, so that I don't have the problem with the water coming over to my property.

So then I get the privacy of not having the air coming from the -- the hot air from the air conditioner. I don't have to have him looking at me when I'm coming in and out of the driveway. But it would be on his property, not on the property line and it would be a self-contained unit then. And I would not object to that. It would actually

solve a lot of problems of privacy for me.

CHAIRPERSON MILLER: Thank you. Mr. Duncan, do you have any -- wait. Do my Board Members have any other questions? Okay. Do you have any questions?

MR. DUNCAN: I don't have any questions. I would like to expand.

CHAIRPERSON MILLER: You can. I just --

MR. DUNCAN: If that would be appropriate at this time.

CHAIRPERSON MILLER: -- want to see where we are in the process.

MR. DUNCAN: Okay.

CHAIRPERSON MILLER: You can do your full response after we have heard all of the witnesses. And do we have another witness? Okay. Ms. Hartman, why don't you give your cards to the Court Reporter and then you can go back in the audience.

MS. HARTMAN: Thank you.

CHAIRPERSON MILLER: Thank you very much.

MS. HARTMAN: You're welcome. By the way, I'm not an attorney. I'm just an average citizen. I'm a teacher.

MR. DUNCAN: I'm not an attorney either.

CHAIRPERSON MILLER: Right. A lot of people come here who aren't attorneys. So thank you very much.

MS. HARTMAN: You're welcome.

MR. WELSH: Hi, Kevin Welsh. I live at 2024 37th Street. Prior to buying 2024, my wife and I actually lived in 2026, which is right next to Barbara's house. I guess I would just want to reiterate my support. I filed a letter with the Board. I would agree with everything that Jeff has said and that the Office of Planning said as far as not intruding on sight lines as Mr. Turnbull pointed out, that it's basically bringing the wall clean down. There is nothing that is going to stick out in any way.

And then I just want to touch on the issue of drainage. I think the pictures

are pretty clear that there are -- in addition to the driveway sloping towards the house for the driveway, there is a cement wall on either side. So any water that drains in the driveway only goes into that house. So all the water that goes on his driveway will go into that existing trench drain and there's no way for it to go to the next house.

As I said, I lived next to Barbara for the last four years prior to living at 2024 and water just does not go from her property to my property. I've had the experience of living there. So again, I just wanted to reiterate my support.

CHAIRPERSON MILLER: Thank you. Any questions? Any questions? Okay. Thank you very much. Anybody else here to testify on this application? Okay. Any other questions of the Board? All right. Mr. Duncan, would you like to do a closing?

MR. DUNCAN: Yes, please. With respect to the testimony submitted by Ms. Hartman, let me respond first on the

substance. I do not believe that water is an issue here. As Mr. Turnbull pointed out, the plans do call for the installation of a trench drain and that would collect any of the water that comes down through the drive or comes off the concrete pad.

And as Mr. Welsh indicated, there is already a kind of concrete wall that prevents water from pouring over from the driveway onto the existing property. So I don't believe that that is an issue. I would also point out and my Exhibits, the photographs that I alluded to earlier, 15, 16 and 18 already show that Ms. Hartman has extended the rear of her house or somebody. I don't know whether she did it or some previous owner did it, extended the rear of at least half of her property out to the same exact level that I'm seeking to extend mine out to.

And so it is somewhat difficult for me to understand how my extension could intrude on light or air afforded to her since

the -- since what is back there on the ground floor level is an existing wall between her house and my house. An existing concrete block wall, which you can see by looking at the photographs.

I would also suggest that her suggestion that I erect a concrete wall between my house and her house is somewhat inconsistent with the claim that that mere addition of the -- the mere extension of the back of the house is going to be intruding on light and air, because if that was really a concern, then one would not be suggesting the erection of a high concrete wall to divide the two properties.

I would note that the -- merely note that the Office of Planning figures seem to -- would seem to dispute the claim that Ms. Hartman made regarding lot occupancy and regarding parking spaces. There is parking spaces for two cars outside the back and then, of course, a space for another car if you pulled into the garage. I have actually never

used the garage in the seven years I've been there. I just use it for storage.

So I have a car, my wife has a car. You know, we can fit both back there when the extension is done without poking out into the alleyway. Many people on the block already do that, so I don't think that that's an issue as well. And so that would be my comments on the substance of it.

And I would say or merely add that Ms. Hartman and I have had a longstanding dispute dating back a number of years that I believe may color her testimony. I complained to the city about her claiming the Homestead deduction for the house when the house was vacant. And the city brought a case against her for failing to register a vacant property, revoked her Homestead deduction, starting taxing her at the vacant property tax rate.

She didn't pay those taxes and the property was sold at tax auction last week. So the Office of Attorney General filed a case against her for failure to register a vacant

1 property. She did not show up --
2 CHAIRPERSON MILLER: I don't think
3 that --
4 MR. DUNCAN: -- for the court
5 case.
6 CHAIRPERSON MILLER: -- we need to
7 hear too much about it.
8 MR. DUNCAN: So I'm just saying
9 there is an existing dispute there that I
10 believe colors the testimony from this witness
11 and all of that can be verified if the Board
12 needed to and I can direct you to the
13 appropriate persons from the D.C. Office of
14 Attorney General, Metropolitan Police and the
15 DCRA that can confirm that information.
16 CHAIRPERSON MILLER: Okay.
17 Finished?
18 MR. DUNCAN: Yes, that's all.
19 CHAIRPERSON MILLER: Thank you.
20 MR. DUNCAN: Thank you.
21 CHAIRPERSON MILLER: Okay. Thank
22 you very much. Yes. Mr. Turnbull has a
23 question for you.

COMMISSIONER TURNBULL: Thank you, Madam Chair. I just had one question.

MR. DUNCAN: Yes, sir.

COMMISSIONER TURNBULL: If I'm looking at either photograph 3 or photograph 6 and what Exhibit 17, beyond the pier, the brick pier --

MR. DUNCAN: Um-hum.

COMMISSIONER TURNBULL: -- where you are filling in, there is a concrete curb. Now, does the slope get modified? Are you -- on A6 it looks like there is about a foot or more at the very end down, but from the drawing I couldn't tell where the curb --

MR. DUNCAN: I'm sorry. I'm not clear.

COMMISSIONER TURNBULL: Well, on--

MR. DUNCAN: Which exhibit are you on?

COMMISSIONER TURNBULL: -- photograph 6.

MR. DUNCAN: Okay.

COMMISSIONER TURNBULL: The slope

going down to the brick pier shows that concrete little retaining wall there.

MR. DUNCAN: Um-hum.

COMMISSIONER TURNBULL: It looks like it's about a foot or so.

MR. DUNCAN: Right.

COMMISSIONER TURNBULL: Now, you are raising up the property. You are putting in a new pad there to make it level.

MR. DUNCAN: In the back, correct, yes.

COMMISSIONER TURNBULL: And the wall comes down. Are you basically removing that? That looks like the cracked concrete or something there now.

MR. DUNCAN: There is --

COMMISSIONER TURNBULL: Are we doing that right?

MR. DUNCAN: Which exhibit are you pointing to? This one here?

COMMISSIONER TURNBULL: Yes.

MR. DUNCAN: There is an existing concrete pad there. And then the driveway

goes down, slopes down beneath that. And so in order to install the drain, you know, the new trench drains, the slope, you know, of that drive that existing concrete would have to be removed. The slope somewhat increased to accommodate the trench drain at the bottom, because there will have to be an area, you know, a flat area at the back with all the concrete slope so that the water goes into it. And so it will come down some.

COMMISSIONER TURNBULL: Okay. But the existing -- so the existing grade might get a little steeper?

MR. DUNCAN: Yes, it might get a little bit steeper, which I would argue would kind of tend to make it less likely that water would intrude.

COMMISSIONER TURNBULL: Right. And you are retaining or you are still keeping, that concrete --

MR. DUNCAN: That concrete retaining wall would be --

COMMISSIONER TURNBULL: -- still

stays?

MR. DUNCAN: -- would stay. In fact, the size of it may actually increase slightly.

COMMISSIONER TURNBULL: Because it's going down --

MR. DUNCAN: Because it's going to go down a slightly larger slope.

COMMISSIONER TURNBULL: Okay.

MR. DUNCAN: So I think that that will reduce the -- further reduce the likelihood that there would be water intrusion.

COMMISSIONER TURNBULL: Of the water. Okay. Thank you.

MR. DUNCAN: Yes, sir.

VICE CHAIR ETHERLY: If I may, Madam Chair, just as a follow-up to Mr. Turnbull's question. Thank you very much for your testimony, Mr. Duncan, and the photographic evidence has been very helpful. Often times different pictures help in different ways. So let me flip from the

pictures that Mr. Turnbull was utilizing and go to picture No. 13 in Exhibit No. 17, because that's helpful to me in terms of just orienting myself with the rear of the property.

MR. DUNCAN: Um-hum.

VICE CHAIR ETHERLY: Just to make sure I'm clear, can you give a rough approximation of where that trench drain will be should the application be approved and the project completed?

MR. DUNCAN: Um-hum.

VICE CHAIR ETHERLY: Just kind of roughly speaking, where, if you could, kind of oriented on that picture?

MR. DUNCAN: If you look where the piers are.

VICE CHAIR ETHERLY: Yes, sir.

MR. DUNCAN: Okay. The new rear of the house will be flush with where those piers are now. Okay. In Exhibit 13. There will be windows and then there would be a door on the left hand side.

VICE CHAIR ETHERLY: Um-hum.

MR. DUNCAN: The trench drain would be down toward the bottom close to the wall, to the new wall of the house.

VICE CHAIR ETHERLY: Okay.

MR. DUNCAN: Which you can see by looking at the architectural, you know, blue prints in No. A2.

VICE CHAIR ETHERLY: Okay.

MR. DUNCAN: So it's very close to where the rear of the house is. So it would tend to feed down there, sir.

VICE CHAIR ETHERLY: And so with respect to where the existing piers are now for the deck, what, essentially, happens along the boundary between your property and Ms. Hartman's property with respect to water as you get beyond? I take it the retaining wall that we've talked about a little bit at a certain point becomes level with the slope of the driveway.

MR. DUNCAN: Yes.

VICE CHAIR ETHERLY: And

essentially then disappears.

MR. DUNCAN: Yes.

VICE CHAIR ETHERLY: Is there still a little bit of a concrete barrier there to help with --

MR. DUNCAN: At the top of the drive, so if you kind of were coming out from the alley, you know, if you were standing in the alley at the very rear of the house, there is a patch of earth and you can kind of see it, a little bit of it on Exhibit 13 there right in front of the pilings for the rear deck, and so --

VICE CHAIR ETHERLY: Where the -- I'm sorry, where the flower pots are?

MR. DUNCAN: Yes.

VICE CHAIR ETHERLY: Okay.

MR. DUNCAN: The flower pot on the left and on the right side there is a little plot of earth.

VICE CHAIR ETHERLY: Yes, sir.

MR. DUNCAN: And there are some roses planted back there. And so at the top

it's just a patch of earth between the two properties. Then as you go down, what becomes the retaining wall starts off and so it starts as being just like an inch or two and then it gets larger as you go down to the rear until it becomes about a foot.

VICE CHAIR ETHERLY: Okay. But your experience with water as it's a little farther up in the driveway, your experience in terms of any pooling, have you had any significant flooding as you come back up towards the rear?

MR. DUNCAN: No. What happens is this. The alley, the way that the alley is shaped --

VICE CHAIR ETHERLY: Um-hum.

MR. DUNCAN: -- it kind of has -- it's kind of concave in the middle, so water runs down the middle of the alley and then it kind of bumps up slightly on the edge.

VICE CHAIR ETHERLY: Okay.

MR. DUNCAN: And so most of the water that's pouring down the alley just pours

right down the alley.

VICE CHAIR ETHERLY: Okay.

MR. DUNCAN: If water has kind of -- you know, if it has rained on the --

VICE CHAIR ETHERLY: The driveway itself?

MR. DUNCAN: -- driveway and the house --

VICE CHAIR ETHERLY: Then that --

MR. DUNCAN: -- then that water does pour down into the existing drain.

VICE CHAIR ETHERLY: I see. I see. I see.

MR. DUNCAN: Where I've had -- you know, where I have had kind of some flooding into my garage in the past it has been because the drains get plugged up. You know, those little square drains get plugged up with leaves and so I would suggest that a trench drain is much less likely to get plugged up with leaves than a square drain that's about 16 inches square, which is what the existing drain is.

VICE CHAIR ETHERLY: And the plan is to connect the trench drain to the existing drain?

MR. DUNCAN: To the existing drain, yes, sir.

VICE CHAIR ETHERLY: Okay. Have you had any looks with respect to, I guess we're talking a little bit about, capacity? Are there any concerns about the existing drain being, shall we say, further stressed or over-taxed with the addition of the trench drain?

MR. DUNCAN: I don't have any such concerns, because what I found is that when I first moved into the house, I did get the drain plugged up one time with leaves and I had some flooding. Then I removed the leaves and then I opened up the drain and there was some sand in there and I -- once -- you know, the drain goes down a couple of feet. Once I dug out the sand, I never had any further problems with the drain.

VICE CHAIR ETHERLY: Okay.

MR. DUNCAN: So it seems to have a capacity to take a lot of water. In fact, we have had some pretty heavy rains in the last couple of weeks and I haven't had any problems with it.

VICE CHAIR ETHERLY: Okay. Excellent. Thank you. Thank you, Madam Chair.

MR. DUNCAN: Thank you, sir.

CHAIRPERSON MILLER: Okay. Any other questions? All right. Thank you, Mr. Duncan. Is the Board prepared to deliberate on this today? I think it would be a good idea to do so. Why don't we just jump into the analysis pretty quickly and then we can see who might have a motion.

I think that Office of Planning has laid it out very well for us and it has been filled in by today's testimony, but the relief that is being sought here does fall squarely within 223. It is for relief from the lot occupancy, rear yard and nonconforming structure regulations. And I think it's

important to note in our analysis that none of these nonconformities are being increased, that they are preexisting and the fact that the applicant wants to do any type of addition triggers coming to the Board for this relief.

Basically, we needed to consider here whether there is an adverse impact on light and air. And as this is presented, it's going to be underneath an overhang. It's at the basement level. So it doesn't -- I didn't hear any evidence that it really affected the privacy or the light and air of any neighbors and it doesn't seem that it could so situated.

And it can only be seen from the alley. It's not seen from the front. And as presented, I believe it's in conformance with the character and scale and pattern of houses along the alley as presented in the photographs and the drawings and the testimony. It's within the 70 percent lot occupancy that it can increase to. It's at 62.4 percent.

Really, the only issue we heard

was about draining. Basically, that was the main issue and I think, Mr. Turnbull, you can probably address that. It appears that the plans do make accommodations for that. I guess my only question to you, Mr. Turnbull, at this point is do you feel that an additional -- if we were to approve this today, an additional condition would be required or do you feel that you are satisfied by the testimony and the plans that the drainage won't have an adverse impact on the neighbors?

COMMISSIONER TURNBULL: Thank you, Madam Chair. Part of the problem with drains is always it's a homeowner's maintenance issue. And we have all experienced it. You've got to keep them clean. You've got to get them routed out periodically. There is a -- it's just a homeowner's maintenance issue. I think the applicant hereby is -- I think he is doing his due diligence by putting in a longer trench drain to address the water along the whole surface of that area going down.

The curb is remaining and as he said it looks like he is obviously doing some resurfacing back there in order to put the drain in. If it's a little lower, I think as a condition, I don't think the applicant would object if we say that the final grade of that sloped surface going down is directed toward the drain away from the neighbor's property.

I mean in one way, the neighbor next door has got a deck which is longer, bigger than the other one, so there could be water coming out of her deck going down onto his property, too. I mean, it's a little bit of a neighbor issue and how well you coexist with one another. So it's give and take on these things, but I think he is doing his due diligence, so I would say you could simply say that in the final grading of the sloped area going down that we make it a condition that the -- that it's away from the neighbor's property and it's definitely directed toward the trench drain.

I don't know how much more we can

require. I think he is trying to do his due diligence in addressing the water issue. But, you know, I mean, the existing concrete wall that the -- the wall that goes out almost to the end of the deck or halfway out to the deck, I can't really tell, will still exist. So any water going down is directly going towards his trench drain.

It's not like it's veering off, but we could make a condition that any resurfacing of that edge there be definitely directed toward the trench drain. To me, that's the best safeguard we could say.

CHAIRPERSON MILLER: Now, if we didn't say that, what would happen, do you think? I mean, I don't want to put a condition if it's necessary.

COMMISSIONER TURNBULL: I think he is going to be doing that no matter what. I think just the nature of what he is trying to do, he is going to have to do that. That's just part of an existing condition of what he is trying to do. I think he is going to, for

his benefit alone, make sure that the water is directed toward the trench drain, so he doesn't have anything backing up.

CHAIRPERSON MILLER: I mean, I would like to hear from other Board Members while we're on this, but, you know, I think if that's what he would do anyway and it's really not necessary, I would be inclined not to include it. Sometimes neighbors have concerns and, you know, we try to address them, but maybe we don't need to go as far as a condition that's not necessary, you know.

COMMISSIONER TURNBULL: I would agree. It's -- I think for his own benefit he is going to want that thing level. He is going to want it to pick up whatever water is coming down what's left of the slope of that drive and the surface. I don't know. It's up -- I guess, I mean, we can debate it amongst ourselves whether we feel we need to do it. I think he is going to, just by the nature of what he is doing, want to have to do that anyways.

VICE CHAIR ETHERLY: I would tend to agree. If I may, Madam Chair, I would tend to agree with the thrust of your question and I believe Mr. Turnbull's statement that essentially if it were not conditioned as such, that's what the applicant is going to be doing based on the testimony that's been presented today, based on the plans as they have been presented and based on my understanding of the current topographic setting, if you will, of the subject property.

I think the applicant's plans are well put forth to deal with any issues as relate to water. And ultimately, as Mr. Parsons' indicated, often times these issues are essentially homeowner maintenance management issues and get at two neighbors, two adjoining property owners coexisting together. But I think the plan as it is set forward in the application is sufficient. I think clearly the plans of the applicant wouldn't require any conditioning with regard to that trench drain, because I think it is

already being done, essentially, is what I'm saying. So I think it would be redundant.

CHAIRPERSON MILLER: Others?

BOARD MEMBER MANN: I would have said the same thing.

CHAIRPERSON MILLER: Okay. I think, at this point, then I'm going to make a motion and then if there's further discussion, we can have it under motion. And that would be to approve Application No. 17642 of Jeffrey Scott Duncan, pursuant to 11 DCMR 3104.1, for a special exception to allow a ground floor addition to the rear of an existing single-family row dwelling under section 223, not meeting the lot occupancy requirements, rear yard requirements and nonconforming structure requirements at premises 2030 37th Street, N.W. Do I have a second?

COMMISSIONER TURNBULL: Second.

CHAIRPERSON MILLER: Further discussion? Okay. All those in favor say aye.

ALL: Aye.

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

MS. BAILEY: The vote is recorded as 5-0-0 to approve the application. Mrs. Miller made the motion, Mr. Turnbull second, Mr. Mann, Mr. Etherly and Mr. Loud support the motion.

CHAIRPERSON MILLER: I think that the applicant did state this for the record, but I just want to reiterate that we do have in the record that the ANC voted unanimously to approve it and we considered that as well as the letters in support and all the testimony today.

So I would suggest, at this point, that we do waive our rules for full findings of facts and conclusions of law and issue a summary order in this case, as we have no party in opposition. Thank you very much. We're just going to take a quick two minute break. We'll be right back.

(Whereupon, at 11:08 a.m. a recess until 11:13 a.m.)

CHAIRPERSON MILLER: Ms. Bailey, we're ready for the next case when you are.

MS. BAILEY: The last case of the case -- the last case for this hearing, Madam Chair, is Application No. 17638 of Safeway, Inc. and it's pursuant to 11 DCMR 3104.1, for a special exception to continue an accessory parking use last approved by BZA Order No. 16240, dated August 8, 1997, serving a grocery store under section 214. The property is located at 3725-3729 Morrison Street, N.W. It is Zoned R-1-B. It is located in Square 1867 on Lot 93.

CHAIRPERSON MILLER: Thank you. Good morning.

MR. MOORE: Good morning, Madam Chair, Members of the Board, Jerry Moore, Venable Law Firm, representing the applicant here this morning. My witness has not been sworn in, so he needs sworn in.

CHAIRPERSON MILLER: Okay. Let's

do that.

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

(Whereupon, the witness was sworn.)

MS. BAILEY: Thank you.

MR. MOORE: Madam Chair, Members of the Board, we are prepared to submit this case on the record.

CHAIRPERSON MILLER: Can I interrupt you? Let me interrupt you, sorry. Mr. Etherly wants to make a disclosure before we begin.

VICE CHAIR ETHERLY: Thank you very much, Madam Chair, just a very brief disclosure. Pardon the interruption, Mr. Moore, as you were beginning to gather steam. As my colleagues know, often times when we have grocery store or other convenience store types of cases, I will typically make a disclosure in that by virtue of my employment with a bottling company, a beverage provider in this area, Safeway happens to be one of our

1 customers, so I wanted to make that
2 disclosure, one, on the record.
3 I do not deal frequently with
4 specific real estate related issues as they
5 pertain to individual stores. It will happen
6 from time to time. In that regard, I have had
7 no specific experience with this particular
8 store nor any discussions or contact, of
9 course, with the applicant regarding any plans
10 at the store, but by virtue simply of the fact
11 that my company does retain an ongoing
12 business relationship with Safeway, I wanted
13 to make that disclosure on the record and
14 provide either my colleagues or any members of
15 the general public or, of course, the
16 applicant the opportunity to comment and
17 express any concerns with regard to my ability
18 to sit on the case and sit impartially. Thank
19 you, Madam Chair.
20 MR. MOORE: Madam Chair, the
21 applicant has no problem with that whatsoever.
22 CHAIRPERSON MILLER: Okay. And I
23 would like to note for the record there does

not seem to be anybody else in the audience other than the applicant's witness, who we will get to shortly, but the ANC does not appear to be here nor any other individuals. Okay.

MR. MOORE: Madam Chair, the applicant is prepared to submit this case on the record. In doing so, if it is the will of the Board, we would note that this is the sixth time this case has been before the Board. Each of those times the case has been unopposed by anyone. It is similarly unopposed this time. The ANC has written a letter indicating its unanimous support for the application with conditions.

The Office of Planning has submitted a report indicating its support for the application with conditions. So unless the Board wants to hear the testimony that has been prepared, we're prepared to submit on the record and answer any questions the Board may have.

CHAIRPERSON MILLER: Okay. Well,

who is with you as your witness? Could you identify yourself?

MR. MOORE: Identify yourself.

MR. HANNING: My name is Craig Hanning, District Manager.

CHAIRPERSON MILLER: Okay. I mean, I can tell you where I'm at and I think the rest of the Board Members are probably in a similar position that, you know, you have been in -- this lot has been in existence for almost 40 years or something to that effect and I think that you meet the requirements under the regulations for a parking lot. And the question before us really goes to conditions, including term.

So I think that's what we should focus on, unless other Board Members have questions about the parking lot in general.

BOARD MEMBER MANN: I do have a question.

CHAIRPERSON MILLER: Okay.

BOARD MEMBER MANN: It doesn't necessarily go to the relief, but I am curious

as to why you continue to seek relief in this manner, rather than just having the properties combined into one property, so that you don't have to continue to do this.

MR. MOORE: Actually, there is a zoning line there, Mr. Mann, that goes into the R-1 District and it requires us to have a special exception to use an accessory parking lot in R-1.

BOARD MEMBER MANN: I see. So --

MR. MOORE: The relief has to come from the Zoning Commission to rezone part of the lot, 105 feet of the lot that is in R-1.

BOARD MEMBER MANN: Oh, I was under the -- I understand now. I was under the impression that it was two separate lots. Are they two separate lots?

MR. MOORE: No, just one lot.

BOARD MEMBER MANN: I see. So it's all one lot, it's just two different zones.

MR. MOORE: Split zones, yes.

BOARD MEMBER MANN: Okay. So I

guess then my question would be why do you continue to do this, rather than just seeking relief from the Zoning Commission?

MR. MOORE: That very thought has occurred to us. I would note that the Zoning Commission has under the gun to undertake some zoning consistency cases and Safeway is likely going to play a role in that and one of the roles it will play we'll ask the Office of Planning and the Zoning Commission to look at the back end of that lot.

BOARD MEMBER MANN: Okay. Very good. Thank you.

CHAIRPERSON MILLER: Just as a follow-up for background.

MR. MOORE: Okay.

CHAIRPERSON MILLER: And I wrote this in my notes and I didn't, unfortunately, write down the page that I saw it from, but I wrote down that I thought you said that it wasn't economically viable for the parking to be on the same lot?

MR. MOORE: That's a condition of

special exception. And the support for that is there are a number of parking spaces there, but there are probably not enough for the store there and if we do not have those additional spaces, which we have had for the last 30 plus years, then customers would be parking on the streets. Something that the ANC and others, the community and the Office of Planning have found to not be an interest of the city.

So without those extra spaces there, the -- it would cause us to not meet the requirements of the Zoning Regulations and it would require our customers to -- perhaps we could lose customers by them not having the number of parking spaces that they need to shop conveniently at that Safeway. It's a relatively small store, relatively small lot. So we try to do the best we can with that which we have been given or that which we have bought.

CHAIRPERSON MILLER: And just so that I can visualize, you know, the picture

we're dealing with, do you have or does Safeway have a lot and then an accessory lot or is it just an accessory lot?

MR. MOORE: It's all one lot.

CHAIRPERSON MILLER: The whole thing is --

MR. MOORE: It's all one lot.

CHAIRPERSON MILLER: -- an accessory lot?

MR. MOORE: It's all one lot that is split zone. A part of the lot is used for the structure, Safeway structure. The other part of the lot is used for the accessory parking facility.

MR. JACKSON: A point of clarification. According to the land records, it's two lots. That the actual special exception -- the Safeway store property extends into the R-1-B, but there is no additional requirements that are coming on the R-1-B -- on the Safeway portion of the lot. If you go to the Office of Planning, Exhibit 1, this is according to the D.C. Land Records,

the existing lot is kind of L-shaped that includes a store and the majority of the parking lot.

Then there is a second lot, Lot No. 93, which is owned by Safeway, but that is shown as a separate property. So special exception only covers the second property, which is a continuation of existing parking lot. So at least according to the land records, it is two lots and the special exception is for the second lot, which does not have a store on it.

CHAIRPERSON MILLER: Did you introduce yourself for the record?

MR. JACKSON: Glad to. My name is Arthur Jackson. I'm the Development Use Specialist, the District of Columbia Office of Planning. And again, that comment was just for clarification purposes.

BOARD MEMBER MANN: Well, and that comment actually would be consistent with Exhibit 3.

MR. MOORE: I was about to say Mr.

Jackson is correct. I misspoke. It is -- there is a second lot there and that is Lot 93 and Safeway, the store itself, is on Lot 92.

BOARD MEMBER MANN: Okay. So my original question then still stands, right?

MR. MOORE: It's still -- the second lot is still Zoned R-1 and we --

BOARD MEMBER MANN: So that problem would continue to exist whether or not they were one?

MR. MOORE: Correct.

BOARD MEMBER MANN: Whether or not it was one lot of record?

MR. MOORE: Correct.

BOARD MEMBER MANN: I see.

MR. MOORE: Um-hum.

BOARD MEMBER MANN: Okay.

CHAIRPERSON MILLER: Mr. Jackson, let me just ask you before we jump into the conditions, was there anything else you wanted to testify on in addition to what, you know, is in your report with respect to the application in general or are you comfortable

1 going to the conditions? Because the
2 applicant is resting on their case, basically.
3 MR. JACKSON: Yes.
4 CHAIRPERSON MILLER: And then
5 we're going to the conditions.
6 MR. JACKSON: I believe the case
7 the applicant presents and the Office of
8 Planning presents and the letters presented by
9 the ANC all clearly state what their positions
10 are. And so the Office of Planning also would
11 like to stand on the record and we're
12 available to answer any questions and discuss
13 the conditions as proposed.
14 I would point out that in our
15 report, we are proposing to, for the sake of
16 enforcement, convey some of the conditions
17 that were referenced in the order, in the
18 original agreement with the Upper Connecticut
19 Avenue Organization, and just fold those into
20 this current approval if the Commission
21 decides to -- I mean, the Board decides to
22 retain those conditions for the sake of
23 enforcement, just so it's more readily

available for review by zoning staff in those instances.

And that is what we have referenced in our last attachment. We summarized what the conditions would be. With that, we're available to discuss or to answer any questions about the proposal, proposed conditions.

CHAIRPERSON MILLER: Well, first, I want to thank you for doing that. I think that's exactly the approach that the Board has been taking lately, to update the conditions, to not have to have people look at other agreements to figure out what the conditions are and so that's very helpful. So I think we just have to determine here which set of conditions to use as a starting point, I think.

What I would like to do is go through these conditions or any other ones that the Board Members might suggest and come up with conditions that are up to date, enforceable and make the most sense, mitigate

adverse conditions.

So we could start with -- well, let me hold off for a second. I'm thinking if we could all be on the same page, perhaps if we start with Exhibit 6 of Office of Planning's report, which is their suggested conditions, and then we can look at the ANC's where appropriate and the applicant's where appropriate. So does everybody have that?

I think, you know, maybe we'll do this in a more unusual way, but I would like to get some feedback from the applicant and Office of Planning, perhaps, as we go through each condition that we might be considering.

I'm not sure in this first step whether we will make a definite decision, for instance, on term right away, but the way I see term and I was going to ask Mr. Jackson for a reaction on this, but I think that you said that you thought a term was appropriate, because otherwise it would be like matter-of-right if it didn't have a term, and it's not matter-of-right.

And I believe you suggest 10 years and the applicant is asking us not to put a term on it, because it has been in existence for 40 years, at this point, and it's constantly approved each time. In my experience on the Board, term hasn't really been used exactly the way that you seem to characterize it, because we get many special exceptions that don't have terms, such as schools or child development centers or additions to houses or whatever.

And I think that we have used the term as almost like a probationary period to see if it's working out and make sure if there is a need to come back, that they come back, so we can tweak things or whatever. So in that view, I'm wondering if we get the conditions all up to date and enforceable after 40 years experience, is there something that would be changing, for instance, in the next 10 years that would be a reason for them to come back to us?

Because like if the neighborhood

is changing drastically, then sometimes we say, you know, it's going to be different 10 years from now, so they better come back for that reason.

MR. JACKSON: Madam Chairman, at this point, that prediction is not -- the Office of Planning is not able to make that type of prediction.

CHAIRPERSON MILLER: Okay. So the Office of Planning's recommendation for the term is based on what you said in your report?

MR. JACKSON: Yes.

CHAIRPERSON MILLER: Okay. Not on something you predict that will change. Let me ask the applicant. How does this look 10 years from now in your view? Is anything going to be changing that would affect this parking lot?

MR. MOORE: Safeway has no plans to make any changes in the parking lot at all. They may make some renovations -- we just did some renovations to the store, did you not?

MR. HANNING: Right, just

recently.

MR. MOORE: But there is no more space for us to make it any larger or anything like that of that matter and we would be willing to adhere to some of the conditions that the Board has set as far as keeping the place up, the landscaping, picking up the trash, that sort of thing, we don't have any problem with that at all.

CHAIRPERSON MILLER: Okay. There aren't any big development plans or anything that's going to affect this part of Connecticut Avenue that you are aware of, Mr. Jackson? Okay. All right.

MR. JACKSON: No, there are not.

CHAIRPERSON MILLER: All right. Are there any comments right now on this term question from Board Members? If you want to wait and see how we go through the rest of them, the conditions?

BOARD MEMBER MANN: Yes, I believe that we should wait then perhaps until we've gone through the others and then revisit that.

CHAIRPERSON MILLER: Okay. See how we feel, how secure these conditions are. Okay. And permanent. Okay. Office of Planning has struck the second condition that I guess was in the previous order, which talked about -- am I correct, Mr. Jackson, right?

MR. JACKSON: That is correct.

CHAIRPERSON MILLER: Okay. That talked about compliance with this neighborhood agreement and I would concur that that should be struck for the reasons that we are saying. We're going to pull from that agreement the pertinent conditions. Everybody okay with that? All right.

The next one is "All areas devoted to driveways, access lanes and parking area shall be maintained with the paving of material forming an all-weather impervious surface." Okay. I don't think there is any problems with that, is there?

BOARD MEMBER MANN: No, there's not.

CHAIRPERSON MILLER: Unless you want to put it somewhere else or in conjunction with something else.

BOARD MEMBER MANN: I don't know. I mean, I don't want to belabor some of these too much when perhaps we don't need to devote any time to them, but that means that it only can be impervious. And if they ever wanted to change it to some, you know, green technology pervious surface that the Zoning Regulations allowed, then we wouldn't allow that. But again, I don't want to make a big deal out of something that's probably not a big deal.

CHAIRPERSON MILLER: Well --

MR. JACKSON: Madam Chairman, the Office of Planning would be more than willing to say an all-weather pervious or impervious surface. The thought is really that, and I think it's a good way to think or look forward at some point in the future, Safeway may decide that it would be in their best interest to do something that's pervious and that's -- if that meets the Zoning Regulations, it would

still be considered a pavement surface per se. So we would be more than willing to accept an amendment that would allow them to do either one.

CHAIRPERSON MILLER: Well, I think that's a really good point, because especially if we are inclined to make this unlimited or whatever, we have to be careful, you know, and that's a reason to put on a term. And as we go through it, you know, we may say, you know what, we really should put 10 years because of this. But so how would we amend this to not preclude, you know, other pervious surfaces? Do you have a wording?

BOARD MEMBER MANN: I think Mr. Jackson's --

CHAIRPERSON MILLER: Mr. Jackson, do you have specific wording?

BOARD MEMBER MANN: I think his suggestion was good.

MR. JACKSON: Or pervious behind impervious.

CHAIRPERSON MILLER: So it would

read "an all-weather pervious or impervious surface?"

MR. MOORE: Well, actually, Madam Chair --

CHAIRPERSON MILLER: All-weather surface?

MR. MOORE: I think No. 2 is consistent with Chapter 21 of the Zoning Regulations and we would be willing to adhere to whatever Zoning Regulations apply at the time. I think this is directly from the Zoning Regulations, all parking lots have to be paved with an all-weather impervious surface.

BOARD MEMBER MANN: Well, that is true that there is a Zoning Regulation that dictates that and we've certainly taken the view on other cases where we haven't imposed a condition where it's already dictated by the Zoning Regulations.

CHAIRPERSON MILLER: I'm trying to find it, because I think if that's the case, then we might want to just delete it,

because --

MR. MOORE: It should be in Chapter 21.

CHAIRPERSON MILLER: Yes. Right. You are required to comply with the Zoning Regulations.

MR. MOORE: Right.

CHAIRPERSON MILLER: If the Zoning Regulations change, it would be good not to have written it to an old regulation.

MR. MOORE: Right.

CHAIRPERSON MILLER: Since the Zoning Regulations are going to change.

COMMISSIONER TURNBULL: Yeah, I think if the Zoning Regulations, at some point, change and we're requiring sustainable standards, then they would want to have to comply with that. So allowing -- putting in impervious now might be jumping ahead of the-- of where we want to go.

CHAIRPERSON MILLER: I mean, I would be inclined to leave it out if there is a regulation that says it. It's not in the

parking lot regulations. It's probably in the driveway regulations or something. But if we can locate that this morning, maybe that would be the right way to go.

Mr. Jackson, is No. 3 a new condition that you suggest or what?

MR. JACKSON: Yes.

CHAIRPERSON MILLER: It looks a little bolded.

MR. JACKSON: It's a bit of a consolidation. If you go back to Exhibit 5, what I was attempting to do is to -- there is a condition in the existing agreement with Upper Connecticut that talks about "shall not permit vehicle access from the" -- well, wait a minute. Which one is that, pedestrian walkway?

The owners will not -- were going to limit the driveways. Condition No. 3, that listed Condition No. 3 from the existing agreement, "A limit on the number of driveways along street frontage and also constructive pedestrian access on locations specified on

the map."

Essentially, there was a small agreement that talked about providing the pedestrian walkway and limiting access from Connecticut Avenue. I simply combined all those into this requirement. And I believe this is also in response to a concern expressed by the Department of Transportation about -- this is recollection, but I believe the Department of Transportation expressed a concern about ingress and egress from the parking lot onto Morrison Street.

So this is just to make sure that that continuing situation with access solely from Connecticut Avenue remains maintained and that the walkway at the west end of the parking lot that connects to Morrison Street is also maintained.

MR. MOORE: Madam Chair, the applicant has no problem with that.

CHAIRPERSON MILLER: Okay. Just so we understand, what does this mitigate against? I mean, what's the purpose of this?

MR. JACKSON: I believe the history of this is that the Upper Connecticut Avenue -- well, it may have been the Department of Transportation came forth at one of the previous hearings expressing concern about the circulation on Connecticut Avenue in the interest -- the impact of access to this parking lot along Morrison Street and I believe the condition -- well, no. This is something that was in the original agreement, so that was something that was raised by the-- also raised by the community about a concern that there would not be a lot of driveways on Morrison, because that would take, essentially, a residential street and make it more commercial.

So as a result, all of the traffic is directed toward Connecticut Avenue. And I don't believe there has been any problem with regard to limiting the access there. So the only thing -- the only connection you have at the west end of the parking lot where -- that's in the R-1 Zone is a pedestrian

walkway, which is paved and maintained and has a trash can right there. So that's a perfect situation to maintain the status quo of, because it limits the impacts of vehicular service to this property on the residential zoned area.

CHAIRPERSON MILLER: Okay. And has it been this way for how many years?

MR. MOORE: 30.

CHAIRPERSON MILLER: 30. And it has been working. Okay. Comments on this one? No. 4, "No vehicle or any part shall be permitted to project over any lot or building line or over the public space."

MR. MOORE: That's a reg, too.

CHAIRPERSON MILLER: It's a regulation, right?

MR. MOORE: Yes.

CHAIRPERSON MILLER: But is this a regulation that's likely to change? I don't think we have to be concerned if we leave this one in, do we?

MR. JACKSON: That is unlikely to

1 change, yes. Without --

2 CHAIRPERSON MILLER: Maybe the

3 exact --

4 MR. JACKSON: -- permission. Now,

5 you can't do it as a matter-of-right, but, of

6 course, if you wanted to park in public space,

7 you could apply or you could use it for this

8 purpose, but as for doing it as a matter-of-

9 right, it's unlikely to change.

10 CHAIRPERSON MILLER: Yes, it's not

11 like the one that we're talking about

12 impervious/pervious surfaces that we don't

13 want to lock them in. I think that this one

14 is basic that it is not to intrude on public

15 space.

16 MR. MOORE: Right.

17 MR. JACKSON: Well, yes.

18 BOARD MEMBER MANN: Except that it

19 is part of the regulations already. And so if

20 we're going to be consistent in that sense,

21 then I would suggest that 2117.7 already

22 covers that.

23 CHAIRPERSON MILLER: Okay. So you

1 would be in favor of --

2 BOARD MEMBER MANN: Deleting --

3 CHAIRPERSON MILLER: -- deleting

4 it.

5 BOARD MEMBER MANN: -- No. 4.

6 BOARD MEMBER LOUD: Madam Chair?

7 CHAIRPERSON MILLER: Um-hum.

8 BOARD MEMBER LOUD: The problem I

9 see with deleting some of these, even though

10 it's redundant, is that it places the burden

11 on the ANC to then research these provisions

12 to identify what conditions are in place. And

13 that it may or may not at any given point in

14 time have a capacity to do that. At least if

15 it's stated clearly in the conditions of the

16 order, they've got a central place that they

17 can go to and keep track of this.

18 CHAIRPERSON MILLER: Yes, I think

19 about this one is that even without a

20 regulation, we might want to say it. Do you

21 know what I mean? Regardless, I don't think

22 it should -- I don't think. I mean, I don't

23 see any problem with saying that it shouldn't

project over lot or building line.

BOARD MEMBER MANN: That's fine. I don't -- I won't object to that.

CHAIRPERSON MILLER: All right. I think they are all good points though, you know.

BOARD MEMBER MANN: I just --

CHAIRPERSON MILLER: All right.

BOARD MEMBER MANN: Thank you.

CHAIRPERSON MILLER: 5 is "All parts of the lot shall be kept free of refuse and debris and shall be paved or landscaped." Is that a reg or where did that --

MR. MOORE: That is not a reg, but the applicant has no problem with that.

MR. JACKSON: It's a condition from the previous order.

CHAIRPERSON MILLER: Well, I think that we always do want to address being kept free of debris and trash and things like that. What's that mean paved or landscaped? If it wasn't paved or landscaped, what would it be?

MR. JACKSON: Bare earth.

CHAIRPERSON MILLER: What? Bare earth?

MR. JACKSON: Bare earth, which could lead to erosion and such.

CHAIRPERSON MILLER: Oh.

MR. JACKSON: I will note that as of my site visits, the entire property is paved or landscaped.

CHAIRPERSON MILLER: I don't have an issue with that right now. Does anybody? Okay. I think 6, "Landscaping shall be maintained in a healthy growing condition and a neat and orderly appearance." I'm guessing that that's crossed out, yes, because we're going to have a better landscaping provision, right, condition? Is that correct as we come down?

MR. JACKSON: That's the whole -- the Office of Planning, yes.

CHAIRPERSON MILLER: Yes, okay. So let's move to the proposed landscaping, which is pretty important to the neighbors. No. 6 as proposed by Office of Planning, "The

applicant shall maintain a hedge of eye level evergreen trees, Canadian hemlocks or another similar low-maintenance evergreen growing no taller than 15 feet along the south side of the lot bordering Morrison Street to provide screening for residents. And I assume these have been planted and so now they are going to just have a condition about maintaining them, correct?

MR. JACKSON: Maintaining and replacing dead trees, dead bushes.

CHAIRPERSON MILLER: Oh, the next provision is the continued. 7, "Proper maintenance and upkeep shall be provided of landscaping and grassy areas and unhealthy plants shall be replaced promptly with healthy plants of similar type and size."

Okay. I just want to add to this if I can find in my notes, we recently did a parking lot case last week, I think, and we talked in that case or we required in that case that there be a landscaping agreement. Let me just see if I can find that. Okay. So

I want to throw out for the Board, you know, consideration of improving or yes, building on this landscaping language to provide that landscaping shall be maintained by a professional landscaping service.

And I think actually, I may have pulled some of this from the applicant's application as well. Representatives of the service shall -- representatives of the landscaping company shall service the property on a weekly basis during the spring and summer and as needed during fall and winter.

I believe, Mr. Moore, that I got that language actually from your statement.

MR. MOORE: From our statement.

CHAIRPERSON MILLER: Yes.

MR. MOORE: Correct.

CHAIRPERSON MILLER: Is that a condition that the applicant would support?

MR. MOORE: We do that anyway.

CHAIRPERSON MILLER: Okay. I'll take that as a yes. Okay.

MR. MOORE: Yes.

COMMISSIONER TURNBULL: Madam Chair? I just had a question on -- and I don't know whether it is unrealistic or not, but when we talk about replacing promptly with healthy plants of similar type and size, I guess the question is if a 20 inch caliber tree dies, are we requesting them to put back a 20 inch caliper tree, which could be a substantial cost. I mean, it's a substantial effort to put back a tree of the same size. So I don't know whether that's totally unrealistic if they have a rather huge tree.

I mean, maybe there is a minimum caliber you could put in, but I think putting in or replacing an existing tree of that size could be a substantial endeavor.

MR. JACKSON: Understood.

COMMISSIONER TURNBULL: Okay.

CHAIRPERSON MILLER: Well, okay. So, you know, if we look specifically at these, we might want to take out No. 7 and add in that the landscaping would be maintained by a professional landscaping service and

serviced on a weekly basis during spring and summer and as needed during fall. And then we could add back in that way in that the landscaping shall be maintained in a healthy growing condition and in a neat and orderly appearance or you could have unhealthy plants being replaced promptly with healthy plants.

I don't know how specific we have to get now. Mr. Jackson, has there been a problem with replacing plants?

MR. JACKSON: Well, during my site visit, I did note to the applicant's representative that there did seem to be some bushes, some of the taller 15 foot bushes in front seemed to be missing, there were gaps that didn't seem to be -- to match the rhythm. So I think those would be the more important bushes. There are shorter bushes that are next to the wall, but the real screening is provided by the tall hemlocks along the street.

So there are -- there did appear to be some missing plants and I mentioned that

to the applicant's representative.

CHAIRPERSON MILLER: So do you think the replacing should go to all the plants or just to the hemlocks?

MR. JACKSON: Madam Chair, I think probably what is needed is to have a landscape plan on file of what exists and what the actual landscaping should be. There are references in the agreement to an old plan, but I'm sure there has been some adjustment and modification to that and the applicant may wish to actually emphasize those plants that are most pertinent, such as the hemlock along the edge, the bushes next to the wall.

And so I think it might be good just to go ahead and put something on file that reflects what their maintenance crew or their contractor is maintaining and then agree to maintain those plans. It also is possible that the Department of Transportation has a division that deals with trees and landscaping.

The Office of Planning could

pursue asking them the simple question okay, if you have bush A and it dies, what's a reasonable size to ask to have that bush replaced with, because we're only talking about two or three types of trees. So that's also an option, so that we could provide the specifics that you are seeking in terms of what to replace it with or even avoiding such as bushes of an appropriate size.

CHAIRPERSON MILLER: Okay. No, I think you made some really excellent points and actually as I recollect, I believe, we did ask for a landscaping plan in our last case, a different parking lot. So I think maybe it might work to say proper maintenance upkeep shall be provided in accordance with the landscaping plan attached to this order or something.

And before we issue this order, perhaps the applicant could get together with the Office of Planning and come up with this landscaping plan that would be submitted and approved.

MR. MOORE: Well, actually there is a landscaping plan there now and it really hasn't changed over the last 30 years. Those trees were 3 feet when we planted them and they are now 15 feet tall. From our perspective, it seems to me that the proper condition should just be limited to the applicant shall maintain a hedge of eye level evergreen trees and proper maintenance and upkeep shall be provided. I mean, we have no plans to take trees out of there.

CHAIRPERSON MILLER: Oh, okay, so your view is you don't want to make any changes in the landscaping, basically, this is it?

MR. MOORE: Status quo has served us well over the last 30 years without objection from anyone. And the landscaping plan, you know, I could go out there and put where the trees are now and it seems to me the Board just wants to say that we've just got to keep them and got to maintain them. And if they -- for some reason they die, you've got

to replace them. We would be willing to do that, that's no problem. We want status quo.

MR. JACKSON: Well, again, I wouldn't dispute that, but it's just that a current plan that shows what exists would probably be useful in that, at this point, I was unable to find the original filing, file that had the original plan in it. And it has been identified by reference, but not readded to the record. This would take care of it for the next 10 years, I think, or the foreseeable future.

MR. MOORE: If I remember correctly, I don't have my regulations in front of me, but I think the regulations state you have to have a wall, a 4 feet wall, plus you have to have -- it has to be a brick wall or trees. I don't have my regulations in front of me, but we met that regulation when we first got the special exception and each of the subsequent five special exceptions we've got after that have been sufficient for the Board's purposes.

And I would suggest or ask the Board to just maintain what we have had today on that particular condition. Not what we have had today, what we have had for the last 30 years and that's you've got to have the trees, that is proper -- the applicant shall maintain a hedge of eye level evergreen trees and proper maintenance and upkeep shall be provided. Just maintain the status quo and we're prepared, fully prepared to do that without unduly complicating this thing.

CHAIRPERSON MILLER: Okay. This may sound complicated, but, I mean, the Board is weighing whether to do a term or not do a term. And so not that it's not always important, but it's really more important if we were never not to do a term, that would mean you wouldn't be reviewed again basically. And therefore, those things that seem kind of little take on, I think, a bigger importance.

We want these conditions to be enforceable and understandable by the community. And I think what Mr. Jackson was

saying is well, if you have this plan, then, for instance, the community could see what the plan is and see whether, you know -- maybe they just look at the -- you know, if they look at your landscaping and they see something that doesn't look right, you still may be in compliance, you know, I mean, how do they know?

But anyway, that's why we're looking at it to kind of perfect this. It's your position that it's not necessary. I just would say that it's not irrelevant. It may not be something that we choose to do or I don't know. We're also, you know, trying to anticipate avoiding any, you know, adverse impacts or whatever.

So anyway, Mr. Jackson's view is a plan would be helpful. Your view is you don't think it's necessary. Is that right?

MR. MOORE: My view is that the Board has provided for a landscaping plan over the last 30 years and we would urge the Board to maintain what the Board has decided would

have no impact, adverse impact on the community over the last 30 years. And that -- in reaching that conclusion, the Board would take into consideration there has been no objection at any point during all those 30 years.

We have done the job and we have no intention of changing from that. Safeway is a convenience industry. We have to make our store attractive for people to come. So we have no plans on having any landscaping that the community doesn't find attractive.

CHAIRPERSON MILLER: So you haven't had any complaints about landscaping?

MR. MOORE: Mr. Jackson did note to me when he came to the site that one of the -- or one or more of the trees, one or two of the trees were missing and we're perfectly willing to maintain those, plant trees again. But as Mr. Turnbull was saying, you can't -- it's hard to find a 15 foot tree, so we would replace it.

CHAIRPERSON MILLER: Is there a

plan in the file? Is there an old plan?

MR. MOORE: No, no.

CHAIRPERSON MILLER: No?

MR. MOORE: We just -- the Board just relied on the condition that the --

CHAIRPERSON MILLER: Oh, that you plant these trees, etcetera.

MR. MOORE: Right.

CHAIRPERSON MILLER: Okay. Okay.

VICE CHAIR ETHERLY: And perhaps just as an additional follow-up, counsel for the applicant did reference some of the existing Zoning Regs as I'm kind of perusing 2100, eventually when we get back to the question of the impervious surface piece. I'm looking at a fairly up to date version of the regs, 2117.11 in pertinent part does speak to the fact that "Landscaping shall cover a minimum of 5 percent of the total area devoted to parking, including aisles and driveways. The landscaping shall be maintained in a healthy growing condition."

And then further at 2117.12 there

is reference also to "Either the use of a wall to screen open parking spaces from contiguous residential property or by evergreen hedges or evergreen growing trees that are thickly planted and maintained and that are at least 42 inches in height when planted."

So just as a long story short, I tend to side with Mr. Moore's contention that perhaps less detail is better, because we do have certain provisions in the Zoning Regs that do speak to some of these aspects. So I tend to kind of keep the language as austere as possible.

CHAIRPERSON MILLER: Okay. I would tend to agree after, you know, hearing all this. And so what we would have would be for the landscaping, as I see it, No. 6 would stay with respect to the specific trees and No. 7 would be the provision that I read from the applicant's statement that they do anyway, that they have no problem with, which is, you know, maintaining it by a professional landscaping service and servicing the property

on a weekly basis during spring and summer and as needed during the fall and winter.

Okay. That brings us to No. 8, "The applicant shall provide parking for its employees and to discourage employee parking on Morrison Street at all times."

MR. MOORE: As we said in the record, we're prepared to agree to that.

CHAIRPERSON MILLER: What does that mean? How many employees do you have? How many spaces do you have?

MR. MOORE: Oh, how many employees?

MR. HANNING: I'm going to guess 75.

MR. MOORE: Turn your --

MR. HANNING: Probably 75 employees.

CHAIRPERSON MILLER: And how many spaces do you provide for them?

MR. HANNING: I have that in here.

CHAIRPERSON MILLER: I mean, I assume some of them come by public

transportation?

MR. MOORE: The majority.

CHAIRPERSON MILLER: Oh, okay.

MR. HANNING: The store manager indicates about 5 to 8 employees a day park and use the parking lot.

CHAIRPERSON MILLER: Any comments on that?

VICE CHAIR ETHERLY: So it would perhaps be the applicant's position that there has been, in the applicant's experience at the site, no true necessity for that type of provision. Like you haven't run into any issues in terms of employee parking and parking for your patrons?

MR. MOORE: That's correct.

VICE CHAIR ETHERLY: I mean in the absence of, you know, any testimony or any evidence in the record, Madam Chair, that there is any issue with respect to employee parking, I would perhaps be inclined to eliminate No. 8.

CHAIRPERSON MILLER: Let me ask

you, how do you discourage your employees parking on Morrison Street?

MR. HANNING: Basically, I'm the District Manager, every store we have a map of where the employees can park in the lots or we suggest where we want them to park, which is usually the furthest out in the lot. We ask that they not park on the street as a courtesy to the neighborhood.

VICE CHAIR ETHERLY: And if I may, Madam Chair, to the applicant, there is, however, no specifically assigned employee parking as far as the spaces on the lot itself?

MR. MOORE: No.

VICE CHAIR ETHERLY: Okay.

CHAIRPERSON MILLER: I mean, I understand that the purpose of this would be to mitigate problems with taking up the spaces on Morrison Street from the residents.

VICE CHAIR ETHERLY: I mean, I'm ambivalent either way.

CHAIRPERSON MILLER: Yes, I'm

basically, too.

VICE CHAIR ETHERLY: Madam Chair, I could keep it or I could not from the standpoint of addressing any zoning-related issues.

CHAIRPERSON MILLER: Um-hum.

VICE CHAIR ETHERLY: It sounds as if it would be somewhat, I don't want to say overkill, but it sounds like it would be somewhat, superfluous. The applicant has testified that it is their policy to direct their employees where they can and cannot park and that would be sufficient for me. Again, I haven't -- unless Office of Planning has had some specific evidence or comments from the ANC perhaps with regard to impact of employee parking on adjacent streets, including Morrison.

MR. JACKSON: Well, I would observe that the reason that maybe the ANC probably is comfortable with having this condition in place and may see this as the reason they haven't had any problems with it,

such that to remove this condition could raise a potential concern on their part. And again, what the Office of Planning is attempting to do was to convey those conditions which have led to a status quo which the ANC feels is acceptable, such that they have the confidence that going forward these circumstances would not change.

VICE CHAIR ETHERLY: Okay. I have no objection to retaining. It doesn't appear as though the applicant is, shall we say, overly animated or troubled by the condition and I could, indeed, see the negative impact potentially.

CHAIRPERSON MILLER: Okay. Yes, I see that. I think it's probably one of those conditions we might not put in, but since the community has had it in for all these years and everyone is comfortable with it and it's for a specific purpose, I think we might as well leave it in.

Okay. 9, "Truck loading on the Safeway site shall only occur between the

hours of 6:00 a.m. and 10:00 p.m." Does that come from the agreement or what's that come from?

MR. MOORE: Yes, it does.

CHAIRPERSON MILLER: Okay. Any problems with that?

MR. JACKSON: No.

CHAIRPERSON MILLER: Okay. Fine. Okay. 10, "No parking signs shall be maintained at two points on the side of the store facing the sidewalk facing Connecticut Avenue." Who wants to explain that to the Board?

MR. JACKSON: Again, this is carried over from the other previous regulations. Now, the applicant expressed concern about the fact that we don't have responsibility for the public right of way and that the fact that those signs are there as a function of the store may not be relevant. But on visiting the site, I noted that the distance between the store and the street really is wide enough for a car, but not wide

enough for a car to park carefully.

And that again, this is one of those conditions although the store by the law really can't -- hasn't any enforcement power, the fact that they are there gives the ANC some assurance, well, some level of assurance that persons who would try to attempt to park in this space, which is paved, but it's used more for pedestrian circulation, I believe, would be discouraged.

And at this point, I think it's just used for bicycle parking and has some vendors there. So again, this is -- I won't use the term feel good, but it's something that would give the ANC some comfort that the status quo would not change.

CHAIRPERSON MILLER: The signs are actually put there by DDOT though, is that right? No?

MR. JACKSON: They appear to be the --

CHAIRPERSON MILLER: Has the store put them there?

MR. JACKSON: Apparently. They are on the store facade. I doubt DDOT would put signs on the store facade.

CHAIRPERSON MILLER: Whose authority is it to put those signs up for no parking there?

MR. JACKSON: I have -- well, if it's your property, you can put whatever signs up you want.

CHAIRPERSON MILLER: Oh, it's their private property?

MR. JACKSON: Well, the building is on their property. The signs are in front of their building. Their building comes to the edge of the public space as is illustrated on the aerial that shows the property.

CHAIRPERSON MILLER: Right, okay.

MR. JACKSON: The building actually exists on public space.

CHAIRPERSON MILLER: Okay.

MR. JACKSON: Beyond that it's paved all the way to the grass strip along the street, such that it's an aggregate pavement

and it would be possible to park some cars there. It's just it's not wide enough to park perpendicular for purposes of parking.

CHAIRPERSON MILLER: But the signs are on their property, but the parking is on public space?

MR. JACKSON: There is no parking in that space.

CHAIRPERSON MILLER: Oh, there is no parking, because they say no parking.

MR. JACKSON: Well, they say no parking. They have benches there and they have bicycle parking.

CHAIRPERSON MILLER: Okay. Does the applicant have a comment on that?

MR. MOORE: Well, as I indicated to Mr. Jackson, I thought that that provision -- I've been scratching my head for the last 30 years trying to figure what that's about. Safeway store, which is not the subject of this application, it borders on public space. It's a sidewalk for goodness sake. And the Board in its wisdom years ago decided to ask

the -- require the applicant to put no parking on the sidewalk signs out there.

Now, you know, they have been up and there is no big deal of us keeping them up, but I think they are kind of silly, because we have no enforcement authority whatsoever. It's the sidewalk for goodness sake.

VICE CHAIR ETHERLY: Um-hum.

MR. MOORE: So we're ambivalent. It just doesn't make much sense to us.

CHAIRPERSON MILLER: We don't have a picture of this, do we, in our file?

MR. MOORE: I don't think we have a picture of this.

CHAIRPERSON MILLER: Okay.

MR. MOORE: Let's see.

MR. JACKSON: All we have is the aerial that kind of shows the limit of the store and then that solid pavement in front of it. It's small scale, but there is nothing there. Now, if you look to the south, however, there does appear to be some

landscaping. The Safeway landscaping is in the public space, but they are right behind that in the parking section on the property, just south of the store.

CHAIRPERSON MILLER: Okay. This is not a part of the lot. Is that correct?

MR. JACKSON: No, it is not.

CHAIRPERSON MILLER: Okay. I would be inclined to take it out, because I'm not even sure we have jurisdiction over this area.

VICE CHAIR ETHERLY: Yes, I would tend to agree, Madam Chair. Perhaps just for further clarification, are the spaces otherwise signed or painted in any way that would indicate that they are available for parking?

MR. MOORE: No.

MR. JACKSON: No. It's just an expansion of the -- well, it's a, for lack of a better term, just a huge patio.

VICE CHAIR ETHERLY: Okay.

MR. JACKSON: The sidewalk is

actually further out next to the grass strip.

VICE CHAIR ETHERLY: Okay. Okay. I would tend to eliminate that condition, Madam Chair.

CHAIRPERSON MILLER: If we take it out, is the applicant going to remove the signs?

MR. HANNING: I don't think we would do that. We would just leave it as it is.

MR. MOORE: We can leave them up there.

CHAIRPERSON MILLER: Okay, yes. Also, do you have stuff in that area so that cars wouldn't park there anyway or no?

MR. MOORE: I don't think that anyone has ever parked there in the 30 years we have had the store.

CHAIRPERSON MILLER: Because you have had the sign up there.

MR. MOORE: I haven't been out there every day, but if you were to look at it, you know, it's obviously a place that one

1 would not park.

2 VICE CHAIR ETHERLY: It's not

3 reserved parking for District Managers or

4 anything like that?

5 MR. MOORE: No. It's public

6 space. It's paved.

7 CHAIRPERSON MILLER: All right.

8 How are you all on taking it out? We'll take

9 it out, right? We'll take that one out.

10 Okay. No. 11, "Store curtains shall be kept

11 completely closed during non-daylight hours."

12 Is this connected to the lot?

13 MR. JACKSON: This is on the lot

14 and I really don't know the rationale behind

15 this condition. Again, it's one that we're

16 carrying over. On visiting the site, I

17 noticed that the Safeway store has frosted

18 glass. All the glass is frosted, so as such,

19 you can't see into the store anyway.

20 I don't know if there is any

21 curtains behind that, but I note that on the

22 Connecticut Avenue -- there is a store on

23 Connecticut Avenue, I guess, next to the Metro

-- no, not Connecticut. Wisconsin, behind the Metro Station, I believe that store also has frosted glass on it. But in any case, again, I don't know the rationale behind this.

The -- we're carrying it over just for purposes of consistency and we have no strong objections with removing, because even if they remove the curtains, the frosted glass would still not allow you to see into the store.

MR. MOORE: I think that the original thought from -- this came from the ANC, so the store lights wouldn't shine into adjacent homes. While the fact is, the store faces its parking lot, which by regulation has to be lit, you know, with downward lights. The parking lot is lit up like RFK Stadium at night. Plus that what is immediately south of those windows is a service station. It's a gas station.

There's no homes there. It's a gas station, you know. It has been there, but I've been scratching my bald head ever since

I tried this case wondering why and the only thing I could figure out is it's just a part of the agreement in 1976 with the Connecticut Avenue Betterment Association, but to me it makes no sense.

CHAIRPERSON MILLER: Oh, okay. And this one was in a previous order.

MR. MOORE: It was a part of the Connecticut Avenue Betterment Association.

CHAIRPERSON MILLER: Betterment Association.

MR. JACKSON: Well, remember the previous owner referred to the conditions in the Connecticut Avenue, so as such it was included by reference.

CHAIRPERSON MILLER: Well, is this agreement still in effect?

MR. JACKSON: Well, my understanding is the Betterment Association no longer exists.

CHAIRPERSON MILLER: Okay.

MR. JACKSON: So as such, all those conditions apply -- are applied. They

are requirements of the special exception. The party that actually would have enforcement power of the conditions is no longer existing. I don't think -- if the Connecticut Avenue, Upper Connecticut Avenue Organization no longer exists, I'm not sure who has standing to enforce the conditions.

CHAIRPERSON MILLER: Except to the fact that they are not in our order.

MR. JACKSON: Right.

CHAIRPERSON MILLER: You know, separate. Some of them are going to be in our order, but not that many.

MR. JACKSON: Right.

CHAIRPERSON MILLER: Okay.

VICE CHAIR ETHERLY: I would be inclined to also eliminate this condition, Madam Chair. And I don't have to scratch my bald head to meet that suggestion.

CHAIRPERSON MILLER: I would, too. I mean, the purpose of our conditions is to mitigate adverse conditions. And if we can't see what they are, we shouldn't have a

condition in there for that. Okay. Everybody in concurrence? All right.

12, "The applicant shall vigorously enforce its own stated and posted policy of not allowing: (A) Commuters to park all day in the lot while taking public transportation downtown and (B) Other people to park their cars in the lot while shopping elsewhere and attending the theater and restaurants."

VICE CHAIR ETHERLY: Does the applicant have any signage that speaks or suggests prohibitions of that nature?

MR. MOORE: It is not to Safeway's advantage to have other than it's own customers park in that lot. As I indicated earlier, it's a small lot and the spaces are most often taken up by its customers. So we-- at that store and at the Georgetown store at 1855 Wisconsin Avenue, we have a tough time at times keeping other people out of the lot, but Safeway makes a concerted effort to reserve those spots for its customers. Anything you

want to add to that, Craig?

CHAIRPERSON MILLER: What are the hours of Safeway?

MR. HANNING: At this particular store, I don't think I know that.

MR. MOORE: It's 9:00 to 12:00.

MR. HANNING: I think it's -- yes.

MR. MOORE: 9:00 to 12:00.

MR. HANNING: I think.

MR. MOORE: 8:00 to 12:00? We don't know.

MR. HANNING: Yes, I don't know that right now. All of our stores have different hours, so my guess would be 5:00 a.m. to 12:00 probably.

VICE CHAIR ETHERLY: Does the applicant have any objection retaining that language?

MR. MOORE: No.

VICE CHAIR ETHERLY: Okay. No objection, Madam Chair.

CHAIRPERSON MILLER: Well, okay. I just want to explore a little more. What

1 does it mean? What do you actually do? Did
2 you just ask him?
3 VICE CHAIR ETHERLY: Yes, I mean,
4 well --
5 CHAIRPERSON MILLER: What do you
6 do to -- how do you differentiate when
7 somebody is parking and they go into your
8 store to go to a restaurant?
9 MR. HANNING: I can't speak for
10 this particular store, but I can tell you like
11 what 693, what's that neighborhood, 1200
12 Georgetown. Several of our D.C. stores we
13 actually have an officer that patrols the lot
14 and watches to see if people park their car
15 and then walk off-premises. And then the
16 security officer would talk to that person.
17 So I don't know that we have a full-time
18 person here, but I can tell you I've never had
19 a visit there where the enforcement of parking
20 has been an issue, even on a very high traffic
21 or high volume day for us.
22 CHAIRPERSON MILLER: And why is
23 this an issue? It sounds like this is an

1 issue for Safeway, that they want their spaces
2 available for their customers. Why is this an
3 issue for a condition to mitigate an adverse
4 condition for the neighborhood? I'm sorry the
5 ANC isn't here, but I would be interested in
6 your response and Office of Planning's to
7 that.
8 MR. MOORE: Again, it's my
9 conclusion that this provision was written
10 into the regulation -- to the order in 1976 at
11 the request of the ANC and the Upper
12 Connecticut Avenue Betterment Association. As
13 you know, this application was opposed when it
14 first came out in 1967 and ultimately after it
15 went to court and came back from court, there
16 was ultimately a settlement between the Upper
17 Connecticut Avenue Betterment Association and
18 the Safeway.
19 In 1967, there were no ANCs as us
20 old-timers know. So the community unit was
21 the Upper Connecticut Betterment Association.
22 And because the Board conditioned its
23 subsequent orders to a term, what the Board

simply did is simply rolled over those conditions over and over again and no Board before this one took the time to really look to see what they are asking people to do.

And so -- but I can say in addition to that again that Safeway -- it is in Safeway's interest to keep that lot clear of all but its customers, because if customers can't find parking, they go across the street to Magruder's.

CHAIRPERSON MILLER: Mr. Jackson, do you have an opinion on it?

MR. JACKSON: Well, I can't speak specifically to this location. However, in other -- in similar applications, the comments have been that the concern is that the people taking up the parking lot of the grocery use will remove the available spaces from clients of that use, such that they will move around and use the neighborhood spaces.

So on the two years -- on the two times a year when Safeway -- at Christmas and Thanksgiving when the Safeway store is

overwhelmed, people who are going to the theater and parking at the store would encourage their other clients, other customers to park on Morrison Street and on the other neighborhood streets in order to use the store.

So that would be a concern from the community's perspective just based on similar applications we have dealt with.

CHAIRPERSON MILLER: Okay. I think that makes sense, but let me ask you this, since you are Office of Planning. What's the difference almost between that and the other clients who are -- those people who are going to the restaurants and stuff parking on the street, because they don't park in the Safeway?

MR. JACKSON: Well, similarly, if they -- there is metered parking on the street and so similarly if they were not able to use the metered parking and they were not able to use the neighborhood parking, I'm not sure if they have -- if you actually have to have

stickers to park in the neighborhood, they would go elsewhere.

Again, if you're looking at somebody who is going to a Safeway store might be -- might act a little differently in terms of running in and running out using a neighborhood street, rather than a restaurant, a person going to a restaurant or a theater. We're talking about an hour or two hour wait. They would be less -- they would be more hesitant to work -- to go to a neighborhood that actually has some enforcement program than someone who just runs in Safeway and picks up a turkey or something.

Again, I'm -- this is just conjecture based on similar applications we have dealt with. We have had no communications from the ANC that would indicate that they have seen this as a real problem in the past. However, they would like to see this effort continue in the future.

CHAIRPERSON MILLER: All right. I just have a comment. You know, this is a

1 personal view, you know, so like parking is
2 difficult in the city and so if there were a
3 lot of free spaces at Safeway, it doesn't seem
4 such a bad thing for somebody who is, you
5 know, running into a store and can't find a
6 parking space to be able to pull into Safeway.
7 And sometimes it may end up going to Safeway
8 since they are there anyway.
9 So I don't know whether we should
10 keep this condition or not. I think it
11 probably cuts both ways. What do others
12 think?
13 VICE CHAIR ETHERLY: I would
14 probably be inclined to keep it. OAG has been
15 very good, along with staff, in noting that in
16 the past this Board has been, shall we say,
17 cautioned by the Court of Appeals and I'm
18 referencing the Georgetown case. Again, OAG
19 and staff reminded me that in the Georgetown
20 case, which, of course, has nothing to do with
21 us here, but the Board got into discussion and
22 changing or removal of conditions that have
23 been found by a prior Board to be supported by

substantial evidence and the Board was cautioned in terms of its steps to do that out of a concern that eliminating such conditions could be "arbitrary and capricious."

I'm not worried to any extent about that here, because I think all of the deliberation that we have or the discussion that we have about the conditions and what we're changing, I think, is entirely supported by the record. But I raise that and OAG raised it, because the ANC, in its report, was specific in terms of voting for all of these conditions to be retained and, obviously, we're changing some and perhaps revising language in others.

On this particular one, I'm comfortable with the retention of it. I think that the applicant has stated on the record that they do undertake steps, generally speaking, as a policy to try to ensure that they always have available inventory of parking spaces for their patrons to access the store and get in and get out. So I would

perhaps err on the side of retaining it just because of the potential impact to the neighborhood that if there weren't such actions, you could have commuter parking and other parking taking place on the store's parking lot that in turn could push traffic into the adjacent streets.

Admittedly, that's a fairly long and tortured analysis to get to the negative impact, but I would perhaps be inclined to keep it.

CHAIRPERSON MILLER: Oh, I just have to address your points, because I don't see this concern about arbitrary and capricious due process at all in this case. This case is up before us for renewal and including the conditions. And the ANC was on notice, had a meeting, weighed in, I don't think we have to be stuck or the applicant or the community stuck with conditions from 40 years ago or whatever that aren't reexamined in the context of the present.

So they are on total notice. I

wish that they were here to participate in this dialogue, but they are not. And I guess we may have to go with majority on this condition, I think. When in doubt, I would like to leave it out as someone who lives in the city and I note convenience and the way people want to pop in somewhere and if there is a spot or whatever.

I don't see how this is really mitigates an adverse impact by our making it a zoning requirement. I think that the supermarket itself may wish to have that kind of policy, but I don't see how it is related. It is fairly tortured. We're trying to figure out how is it related to mitigating an adverse impact.

VICE CHAIR ETHERLY: I mean, I would definitely agree, Madam Chair. My posture on it definitely is probably more an anticipation of a potential harm, rather than in response to any evidence on the record that there has been any kind of negative or deleterious impact. So I'm fine either way.

For the sake of moving forward, if we want to nix it, one Board Member is comfortable with that.

BOARD MEMBER LOUD: I think I'm fine either way. On the other hand, while we have reexamined some of these provisions that date back for say 30, 35, 40 years, I think where -- what results from it is an articulation of a rational basis for the provision having been there in the first place. And we hear that. I don't know how much beyond that we want to dig to really scrub that rationale and scrub that analysis.

I think in this case, there has been an articulation that the neighborhood becomes sort of an overflow parking lot if the Safeway doesn't really enforce its policies regarding not allowing commuters and patrons of other establishments to use that parking lot. And I accept that at its face. It makes sense to me. I don't know how much digging we want to do when we get that kind of articulation on the record. But that said, I

can go either way.

CHAIRPERSON MILLER: Well, how about if we just leave in (A) the commuter parking, because I think that that's something that takes up spaces all day long or whatever. I can't imagine that the neighborhood would benefit from. I think the neighborhood could benefit from, you know, if they needed to go to a store for a minute and that was the only space, but I don't think there is -- I think commuter parking is a different issue.

BOARD MEMBER MANN: I don't know. I have a slightly different take on it, right?

CHAIRPERSON MILLER: Yes.

BOARD MEMBER MANN: I'm in favor of deleting this condition, because I don't think that we should be telling Safeway that they have to vigorously enforce their own stated and posted policy of doing these things. And if Safeway wants to change their posted policy, then I think that should be up to them. If they want to sacrifice some of their own parking spaces because they suddenly

decided that they want to encourage people to park in their lot and commute down town, then they should be able to do that.

I don't think that we have any place telling Safeway that they have to vigorously enforce policies that they may or may not want to keep in the future.

CHAIRPERSON MILLER: I can go along with that, too. Yes, I think that's all right. Mr. Turnbull, are you okay with deleting it?

COMMISSIONER TURNBULL: I guess I'm with Mr. Loud just kind of torn both ways. I can -- you can argue the case either way. I think that the concern again going back to before the was an ANC was that they were given a special exception to the store to provide parking and I guess the concern was originally that they wanted people to park in that lot and not on the street.

And the special exception was for that to grant that for that extra lot. And I guess, you know, you're right. I mean, it's

to their interest. They have -- people are going into their store to park in their lot. If they also want to stop at some place else along the way and do something else, too, while they are doing that, that's part of their business needs.

But I guess I'm torn either way. I could go either way, although I see the original intent as to why it was put in.

MR. MOORE: Madam Chair, I think the bottom line is Safeway is going to enforce that policy either way whether it is in the order or not.

CHAIRPERSON MILLER: Right. And I think so, so I don't think that there is a condition that we need to have, okay, to mitigate. Right. And we would have to think about how we can enforce this condition, you know. So, okay, I think we are striking that.

13, "The applicant shall pick up daily all debris on the property and the alley which adjoins the property on the north side and the area between the brick wall of the

parking lot and the curb along Morrison Street."

MR. MOORE: We have no problem with that.

CHAIRPERSON MILLER: Okay. That's it for the conditions suggested by Office of Planning. Now, I think we need to look at ANC's conditions, except we didn't deal with the term yet, which we will deal with last.

VICE CHAIR ETHERLY: Madam Chair?

CHAIRPERSON MILLER: Yes?

VICE CHAIR ETHERLY: Very quickly, I think we still had an outstanding question just on the issue of the proposed Condition No. 2 as related to that all-weather impervious surface or not, however we wanted to -- were we clear on how we wanted to phrase that? Remember there was some discussion on the Zoning Commission's --

CHAIRPERSON MILLER: Did we say that since it's in the regulation we were going to delete it?

VICE CHAIR ETHERLY: Strike it

altogether?

CHAIRPERSON MILLER: I think so.

VICE CHAIR ETHERLY: Okay.

CHAIRPERSON MILLER: Okay.

VICE CHAIR ETHERLY: Excellent. No objection. Either way there is fairly detailed language in 2117 that speaks to surfacing, whether it is pervious or impervious and what have you, so I think the applicant, of course, is going to have to be in compliance with that, so I would be fine striking it. I just wanted to make sure we had closed that.

CHAIRPERSON MILLER: Okay. Yes, I think the view is that we know that the regulations are going to be reexamined in the next few years and so we didn't want to tie them into an outdated reg.

VICE CHAIR ETHERLY: Excellent.

CHAIRPERSON MILLER: Okay. Let's get the term one for a moment, because that will be our last one. I'm looking at the ANC's conditions. Okay. They ask that "For

all the terms and conditions of the summary order of the BZA continue for five years." And we have just gone through, I believe, all the conditions, correct? And we have deliberated as to why we're keeping some and not keeping others.

VICE CHAIR ETHERLY: Um-hum.

CHAIRPERSON MILLER: So we have done that. We're not keeping all of them.

MR. JACKSON: Point of clarification, Madam Chair. There were some conditions of the previous owner and by reference to the Upper Connecticut Avenue contract that we did not address, because they were conditions that either were already addressed or they weren't pertinent to the current use. That doesn't say Safeway was supposed to pay them $1,000, was one of the conditions. Okay. We didn't address that.

MR. HANNING: Right.

MR. JACKSON: That's already been taken care of. So it's -- all the conditions were not conveyed over, just those that were

more -- either addressed the site or the property in general.

VICE CHAIR ETHERLY: And those would be the items that are delineated in Exhibit No. 5 of the Office of Planning's report, I believe.

MR. JACKSON: Yes, those are the only ones we actually discussed.

VICE CHAIR ETHERLY: Excellent.

MR. JACKSON: They go to the original agreement. There are other conditions that were more housekeeping arrangements between Safeway. They had to record the order and survey of the land, things like that, so we didn't address those.

CHAIRPERSON MILLER: Okay. They were already like done. They weren't relevant to now, basically?

MR. JACKSON: For the most part.

CHAIRPERSON MILLER: Okay. If they were, you would have put them in your proposal?

MR. JACKSON: Of course.

CHAIRPERSON MILLER: Okay. Okay. No. 3, "All advertising in the parking lot of the Safeway shall be permitted only from, by or on behalf of nonprofit organizations." Now, I don't believe that they gave us any rationale for that. Can either the applicant or the Office of Planning enlighten us on that?

MR. MOORE: That one came out of left field to us, so we would ask the Board not to adopt that provision for reasons, not the least of which is being, one, I think it's outside the scope of the Zoning Regulations. This is not something that would impact the neighborhood one way or another.

Secondly, there are no advertisements in the site area. Not at all and we have no plans to put any there. Third, we are unaware that any other of our competitors or any other retailer along that strip has a similar condition attached to it. And fourthly, we've -- Safeway has managed to operate the site area of the parking lot for

the last 30 years without such provision, without objection from any one.

There is no reason to start something of that nature now. So we would ask the Board not to adopt that particular provisions.

MR. JACKSON: Madam Chair, we do note that there is what appears to be an on-site billboard, that is some boards, lighted boards that appear to provide information to-- on-site, but not display, not primarily for displaying information off-site on the property that currently nothing -- have nothing on them, but I would agree the Zoning Regulations don't really address the sign issue, so we are silent on this issue as it is presented.

CHAIRPERSON MILLER: I would be inclined to reject this, since there is no rationale presented of an adverse condition it's intended to mitigate. It also seems to infringe on Safeway's free speech. I mean, I don't --

VICE CHAIR ETHERLY: I would agree, Madam Chair.

CHAIRPERSON MILLER: Any others? Okay. So we won't do that one. "Safeway shall arrange for twice daily trash removal."

VICE CHAIR ETHERLY: I would suggest, Madam Chair, it's fairly redundant with respect to Condition 13 that we addressed, although 13 didn't say -- did not specify twice daily, but it gets to the issue of debris on the property. I mean, again, one might make the argument that debris as distinguished from trash could indeed be very different. Perhaps through the Chair to the applicant, what is the applicant's current practice or policy with respect to trash removal on-site? Commercial trash removal, say for your dumpsters or anything of the such.

MR. HANNING: I don't know the frequency of that at this particular store, but --

VICE CHAIR ETHERLY: Generally

speaking.

MR. HANNING: -- maybe it could be every two days. It could be once a week, depending on the volume of the store. But as far as trash in the store, I can tell you that my stores have to confirm to me that someone is looking at it every hour and it's actually documented that someone -- like they have to swipe a time card that they have swept the parking lot of debris and checked trash cans and all that kind of stuff. So we have very strong systems in place to ensure.

VICE CHAIR ETHERLY: And again, through the Chair to the Office of Planning, was the Office of Planning aware of any specific concerns from the ANC or others regarding trash and --

MR. JACKSON: No. No specific concerns were expressed.

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

CHAIRPERSON MILLER: You know, sometimes we do have conditions that deal with

trash containers and trash removal.

MR. MOORE: Madam Chair, I have the privilege of representing all of Safeway stores in the District of Columbia and I've been to a number of not only zoning cases, but ABC cases as well, and trash and pick-up is always -- comes up as an issue most likely -- most often by the -- from the community.

And our response has been pretty uniform and that's that Safeway is a convenience family-oriented business. Unless we have a clean attractive crime free place for people to come and bring their families, their mothers, their fathers, their children, their grandmothers, their in-laws, then people are not going to come.

So Safeway prides itself on its ability to keep its property attractive and free of debris, so that families can come and shop there with confidence. So that is the overriding policy of Safeway's senior managers who I work for and I cannot imagine that that policy does not filter down to this particular

store location, particularly given the location that it is now in. People will not shop there if it's not attractive.

VICE CHAIR ETHERLY: I would also note, Madam Chair, that again as we are focusing on special exception for the accessory parking use, the daily trash removal condition if it attempts to speak to the store, I would be concerned about the scope of this order trying to get at that. And Condition 13, as we currently have discussed it, gets to the issue of debris on the property. So I would be inclined to not move forward with the proposed Condition No. 4 as delineated by the ANC.

CHAIRPERSON MILLER: That's a very good point. I mean, let me ask you this, are the trash containers at the store anywhere? Are they even on the lot?

MR. MOORE: Yes. They have to be on our lot.

CHAIRPERSON MILLER: They're on the parking lot?

MR. MOORE: Yes, yes, yes, absolutely.

CHAIRPERSON MILLER: So you have trash cans on the parking lot?

MR. MOORE: They are strategically located --

CHAIRPERSON MILLER: Okay.

MR. MOORE: -- around the parking lot. I might --

CHAIRPERSON MILLER: Okay. Okay.

MR. MOORE: -- have a picture of that.

CHAIRPERSON MILLER: Okay. So it's relevant somewhat, because there is trash on the parking lot, trash cans on the parking lot.

MR. MOORE: There are trash cans for people to --

CHAIRPERSON MILLER: But you don't know how often they are picked up or anything?

MR. MOORE: I do not know specifically as to this store. I wanted to have this store manager there, but he left the

company on Friday.

CHAIRPERSON MILLER: Oh, okay.

MR. MOORE: So I'm bringing the area manager there, but I can say that again that Safeway's policy is to keep those lots spick and span, because if they don't, somebody is going to pay.

CHAIRPERSON MILLER: Okay.

VICE CHAIR ETHERLY: I would perhaps be inclined, you know, if there is a desire, to somehow capture this in a condition, conceivably Condition 13 could simply be amended to say the applicant shall pick up daily all trash and debris on the property. It's broad enough. I mean, clearly the applicant's policy is what it is and is oriented towards making sure the store is clean and inviting to its patrons. I think that would get at the spirit of what the ANC is trying to address.

MR. MOORE: We have no problem with that --

VICE CHAIR ETHERLY: And the

applicant has indicated that.

MR. MOORE: -- Mr. Etherly, none.

VICE CHAIR ETHERLY: So --

MR. MOORE: That's what we do.

VICE CHAIR ETHERLY: -- that proposed Condition 13 would just add the words trash and between all and debris and I think that provides the applicant with enough flexibility to do what they have already said they are doing on the record.

CHAIRPERSON MILLER: And there hasn't been a history of problems with trash on this lot, correct? We would hear about it, I think, if there were.

MR. MOORE: Absolutely.

CHAIRPERSON MILLER: Okay.

MR. MOORE: I note that this application is unopposed.

CHAIRPERSON MILLER: I think we have gone through all the conditions that have been proposed. Oh, we haven't done the term yet. Thoughts on the term? We have 5 years ANC proposal, 10 years Office of Planning and

no term from the applicant. I guess I'm inclined, but I'm open to others, to have no term, because it has been going on for 40 years without problems. And I think there are good conditions to address any adverse impacts that could arise from this.

I could also go, you know, 10 years. I think that's a long period of time. I think 5 years is way too short, given their good history.

VICE CHAIR ETHERLY: Their track record.

CHAIRPERSON MILLER: Yes.

VICE CHAIR ETHERLY: I would tend to agree, Madam Chair. I would, at most, be amenable to a 10 year term, if only because there was some discussion potentially about should other Zoning Regulations that adhere to the store as it would any other store in the District of Columbia, should any of those conditions change, might there be a need to at least know that we have an opportunity to come back at some point and look at this.

1 But I hate to say hey, I'm open,
2 because, you know, I could go either way. But
3 at worst, 10 years in terms of a duration, but
4 I'm comfortable if there is the majority of
5 the Board that is fine with an unlimited term.
6 But I think clearly from the standpoint of at
7 least delineating going in a different
8 direction from the ANC, the track record has
9 been clear. I think the conditions are very
10 specific and well thought out and address any
11 of the issues that could conceivably arise
12 from the operation of accessory parking lot.
13 So I am most certainly not in favor of the 5
14 year duration. I just don't think it's
15 necessary to come back that quickly.
16 BOARD MEMBER MANN: Madam Chair,
17 I'm in favor of no term.
18 COMMISSIONER TURNBULL: Madam
19 Chair, I would agree with Mr. Etherly in that
20 in just I would go along with no term, other
21 than there would be a condition that would say
22 maybe something that notwithstanding these
23 conditions that the special exception is

subject to the compliance of the Zoning Regulations in effect as of the date of the order and such regulations that would affect this property in the future.

CHAIRPERSON MILLER: You know, I was thinking, you know, about that, like well, you know, first I was thinking, you know, oh, Mr. Etherly has a good point, because the regulations could change, you know, within 10 years or whatever. But then I believe that they would be subject to the new regulations. I don't believe that our conditions would prevail over the new regulations.

VICE CHAIR ETHERLY: That's an excellent point. That's an excellent point.

COMMISSIONER TURNBULL: Well, I guess we need some input from --

CHAIRPERSON MILLER: From Office of Attorney General.

COMMISSIONER TURNBULL: -- Office of Attorney General with their --

MS. GLAZER: Madam Chair, yes, I think that's correct that whatever is stricter

would apply.

COMMISSIONER TURNBULL: Excellent.

MS. GLAZER: If that's the concern.

CHAIRPERSON MILLER: I mean, we were being pretty careful to take out regulations that we thought might change like the pervious surface ones. So, for instance, if there were certain kind of like greening regulations, you know, sustainability, whatever that came into effect, they would apply to this lot like every other lot.

COMMISSIONER TURNBULL: So they wouldn't be grandfathered under the old regulations?

CHAIRPERSON MILLER: No.

COMMISSIONER TURNBULL: Okay. I just wanted to be sure. I guess the only other concern, I'm assuming that the special exception is void if the property is sold by Safeway.

MR. MOORE: That's not correct.

MS. GLAZER: No, I don't believe

that's true.

MR. MOORE: Zoning goes with the land, not the owner.

MS. GLAZER: Yes.

COMMISSIONER TURNBULL: Okay.

MS. GLAZER: Well, I was going to say I agree with counsel for the applicant. It does run with the land.

CHAIRPERSON MILLER: Let me just say, I mean, a lot of these -- if we should take -- that's why I wanted to go through the conditions first before we decided on the term. But, you know, most of them, you know, picking up trash, landscaping, truck loading, I don't think a change in the regulations would be in conflict with them even.

VICE CHAIR ETHERLY: I'm in agreement with Mr. Mann. And I think with the explanation that's been provided by the Office of Attorney General that -- which makes sense to me, I mean, should there be changes in the relevant Zoning Regs, our orders nevertheless would be read in such a way that they would

have to remain consistent with the current Zoning Law. So I'm comfortable with no term. I don't think there has been any indication for a rationale to limit or condition for a specific term at this point.

CHAIRPERSON MILLER: Others? Are you okay with that, Mr. Loud?

BOARD MEMBER LOUD: Yeah, I'm fine with what has been proposed. I just have a question either for Attorney General or for OP regarding what remedies the ANC would have or the community would have if any of these conditions were breached. There is nothing to suggest that that would ever happen based on the 40 year record before us today. But just out of curiosity, what's the connection between the term that's imposed by the Board and the remedies for breach that are available or is there any connection at all?

MR. JACKSON: Well, if the ANC or any citizen felt that any conditions were not met, they could notify the Office of Zoning or the Zoning Administrator that the property did

not appear to be meeting conditions of approval. And then it would be up to the Office of Zoning and the Zoning Administrator to take action to seek enforcement.

BOARD MEMBER LOUD: Um-hum.

CHAIRPERSON MILLER: So the thing with the term means that they just don't come back again in 10 years to reexamine and reexamine the conditions, but the conditions aren't under any term. They go with the order, so they are permanent, too.

MR. JACKSON: I just had one point of clarification. In my research, I did not see a current Certificate of Occupancy for the use. There was one, but it expired. Is there a Certificate of Occupancy for the current parking lot use on the property?

MR. MOORE: We think that there was a Certificate of Occupancy. It has expired. That is -- I think that is the fact. We are sort of caught in a dilemma here, because if we went down and applied for one today, we wouldn't get one absent an approval

of our special exception from the Board of Zoning Adjustment.

MR. JACKSON: Okay. Well, I'm wondering if that -- now, that was a condition of a previous order that apparently was not followed through. I wonder if it makes sense to make it a condition of this order, too, since that would be something that you do as a matter of course that you secure a Certificate of Occupancy for the existing use.

VICE CHAIR ETHERLY: Well, if I may, Madam Chair, pursuant to that, there was an outstanding question that I had a note to get into and it was picked up by Office of Attorney General, who like everyday, they are just hot today. They are just full of information.

But what OAG raised and again I arrived before -- I arrived after our Executive Session, so my apologies if perhaps this came up in Executive Session, but the Office of Planning's analysis reviewed the case, reviewed the application under section

213. The applicant's analysis or the applicant's statement of the case went under 214.

So what I wanted to kind of clarify what OAG suggested we clarify on the record is just which -- I think they are both special exceptions. So there is no doubt about that. But under which relief would you be coming?

MR. MOORE: We came under 214, because we came -- because all of the previous special exceptions that have been granted by the Board were granted under that section.

VICE CHAIR ETHERLY: And that would be, of course, for accessory parking spaces in the R-1?

MR. MOORE: Correct.

VICE CHAIR ETHERLY: Okay. Office of Planning, any disagreement or any concerns about that?

MR. JACKSON: Well, the only reason that we went with the 213 is because it's a separate lot and there's no primary use

on the lot, so as such, we were deeming it as being a parking lot in itself. The accessory parking space is now -- if you -- actually, the accessory parking spaces that extend into the R-1-B are on the lot where the store is.

VICE CHAIR ETHERLY: Where the store is located.

MR. JACKSON: But the other lot has a parking lot on it that doesn't serve a principal use on the lot, e.g., we did not consider that to be an accessory lot per se. However, we would yield to the Office of Attorney General about which one they think trumps the other.

VICE CHAIR ETHERLY: And again just to be sure I'm clear, Office of Planning's analysis 213 because it's a parking lot by itself without the primary use, i.e., the store?

MR. MOORE: Yes.

VICE CHAIR ETHERLY: Okay. And the applicant's suggestion was it's an accessory parking lot for the store itself,

which is located on another lot.

MR. MOORE: Because that's what it is. It's an accessory parking lot.

VICE CHAIR ETHERLY: Okay.

COMMISSIONER TURNBULL: But you can't really get to it as a primary lot. You have to be going through the existing lot, so I guess my question is I think the accessory sounds more logical, I mean.

VICE CHAIR ETHERLY: Okay. I would have no objection. I just wanted to clarify that for the record.

CHAIRPERSON MILLER: I mean, without studying this issue in great depth, it does sound like it's an accessory lot to the Safeway store, which is on another lot, right?

MR. MOORE: Yes.

CHAIRPERSON MILLER: Yes, so I think it's fine in its form. With respect to the Certificate of Occupancy, aren't they required to do that as a matter of law, Mr. Jackson? You made a suggestion we might want to put it in our order, but we often refrain

from doing things that they are required to do anyway, so that's my question.

MR. JACKSON: Well, I guess the point is they haven't done it since 1972, so it is an outstanding issue.

CHAIRPERSON MILLER: It sounds like an enforcement issue though that doesn't need to be in our order, because they are already obligated to do that, correct?

MR. MOORE: Actually, I have a Certificate of Occupancy in my hand here dated November 5, 1992 that expired March 31, 1997, so I think the answer is Safeway did -- may not have gotten one at the end of the last period, but we will get one should the Board be so kind as to grant the special exception. We will get one immediately upon the granting of that.

CHAIRPERSON MILLER: Okay. Thank you.

BOARD MEMBER LOUD: Madam Chair, just going back briefly to the moment of term, I wanted to state that I support the idea of

1 having no term. It having been assured to me
2 that ANCs and communities, the surrounding
3 community's remedies for breach of conditions,
4 if any, are not tied to the length of the term
5 or the existence of the term. Thanks.
6 MR. MOORE: Oh, good.
7 CHAIRPERSON MILLER: Thank you.
8 Very well said. Okay. Any other comments or
9 are we ready to move to a motion?
10 COMMISSIONER TURNBULL: I guess I
11 just wanted to confirm with the OAG that
12 changes in the regulations, more stringent
13 regulations automatically govern the property?
14 I think you had said that earlier that if the
15 regulations change and are more stringent,
16 they will govern the property in the future.
17 MS. GLAZER: Yes, in general, but
18 I think that you need a specific question and
19 look at certain regulations depends on what
20 the regulations actually say and what they
21 provide.
22 COMMISSIONER TURNBULL: Well, I'm
23 just -- again, my question was if we go to no

term and the regulations change, anything governing a parking lot per se, if the regulations change in any way, is this specific property governed by those changes?

MS. GLAZER: I think OAG is taking the position that the law which governs would be the law in effect at the time that the order came out. If there are certain changes, such as in materials, initially, I thought you were referring to the question regarding impervious surfaces and materials and wanted to wait and make certain that they would have the flexibility to provide certain materials.

But as a general matter, the law in effect at the time the order comes out is what governs.

MR. BERGSTEIN: That's what -- Alan Bergstein, just for the record, that's what the regulations say. The regulations vest zoning for either building permit or for Certificate of Occupancy when the order -- either of those are authorized by BZA order, then the building permit and C of O are

authorized, are processed by the Zoning Administrator, based on the Zoning Regulations as they exist on the date the order was issued and not based upon any subsequent amendments.

COMMISSIONER TURNBULL: Well, I guess that was my concern that as the regulations improve, change, and more stringent regulations come into effect regarding parking lots, whether it is sustainable design or whatever, regarding water retainage on the site or whatever, this lot would be exempt from it.

MR. BERGSTEIN: That's correct.

CHAIRPERSON MILLER: Wait. Wait a minute. It wouldn't be exempt. They would only be exempt if they conflicted with those provisions. Isn't that correct? If we have conditions that don't address sustainability in any way at all that talk about trash pick-up or they are not going to be exempt from the sustainability regulations, correct?

MR. BERGSTEIN: They will not be subject to any regulations. If they have an

application for a Certificate of Occupancy that is before the Zoning Administrator and while that Certificate of Occupancy, even before then, if the Zoning Regulations get amended after the date that the order in this case is issued, those amendments have no force and effect on this property, subject to this order.

CHAIRPERSON MILLER: Okay.

MR. BERGSTEIN: The vest and freeze is based upon the Zoning Regulations as of the date that this order is issued.

CHAIRPERSON MILLER: Maybe I'm misunderstanding what you're saying, because I can't believe if we have an order that says no vehicle or any part shall be permitted to project over any lot or building line or over the public space as a condition, that would mean that because we have a condition that this lot isn't subject to sustainability regulations?

MR. BERGSTEIN: If the sustainability regulations are adopted after

the date of your order, then this property is not subject to them. Perhaps I could just read the regulation. It's fairly clear.

CHAIRPERSON MILLER: My point is I think the way I see it is that it would only be if we had some conditions that were in conflict with the new regulations would there be a problem. I think that's -- isn't that what --

MR. BERGSTEIN: Well, let me just read it, because it's -- we could maybe have different views of this, but it says -- for example, I'm assuming that this does not involve a building permit. This just involves an extension of a use. Okay. So they would need to get a Certificate of Occupancy consistent with the order.

And what it says is "Applications for Certificates of Occupancy authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date the orders were promulgated." That means that if there

is any amendments to the Zoning Regulations after the date of your order, the application is not processed for compliance with those future regulations.

CHAIRPERSON MILLER: The point is though, you know, 10 years from now here is a parking lot and the parking lot like a lot of parking lots is subject to various conditions dealing with trash, landscaping, whatever, 10 years from now if there is a new regulation that says you have to pave your lot to make it -- not pave it, make it pervious instead of impervious, that just because they are subject to a BZA order that talks about some conditions, doesn't mean that they are not going to be required to change their lot to pervious surface. Is that right?

MR. BERGSTEIN: Well, actually, that's true for all. Once you have a C of O, you are only required to comply with the Zoning Regulations in effect as of the date of the C of O. That's what nonconformity is all about. Any Zoning Regulation -- in fact, by

regulation, all regulations can only be perspective. That's what the Administrative Procedures Act says.

You cannot have a retroactive effect. If I build a parking lot pursuant to a building permit that was issued before an amendment is adopted and the Zoning Regulations later change the requirement, I'm not compelled to resurface my parking lot. If I need a new building permit to expand the parking lot, then I would be subject to that. But the Zoning Regulations are always perspective.

Nobody who has a lawful use or a lawful structure can be required. If you are in a Zone District and you built a building to 100 feet under a lawful regulation and later the regulations are changed to require only 80 feet, you are not required to lob off those 20 feet. All Zoning Regulations are perspective.

Any use that is -- any use or structure that later becomes nonconforming with a future Zoning Regulation is -- then

comes under the nonconforming regulations of Chapter 20 in terms of expansion of that use or expansion of that structure. But nobody who has a lawful use is compelled to take any action with respect to any area or use regulations that are adopted by the Zoning Regulations after the date the building permit or C of O is issued.

CHAIRPERSON MILLER: Thank you.

VICE CHAIR ETHERLY: Well, Madam Chair, it's been an interesting academic conversation for what has otherwise been a fairly straightforward case. I mean, with that in mind, I am nevertheless not troubled by not imposing a requirement on the applicant to come back. Again, I'm flexible if with that discussion there is a desire to implement a 10 year time frame and the applicant comes back at that time, but I am still not convinced that 5 years is necessary in this case, given the track record that has been demonstrated by the applicant in terms of compliance with all previous orders.

BOARD MEMBER MANN: Madam Chair, one of the reasons why I still believe that there should be no time limit on this is because if you recall, we're not talking about the entire parking lot. We're talking about one portion of a parking lot that is contiguous with a portion that's not even subject to anything that we're talking about today, which is why I think that it becomes fairly moot to talk about regulations that may change in 10 years for a portion of a parking lot when we're not -- when we have no jurisdiction over the rest of the parking lot.

CHAIRPERSON MILLER: I would agree, too. I think it's somewhat speculative and in any event this particular applicant would be in a similar situation to many, many others. So any other discussion? Okay. We're comfortable with the no term? Okay. In which case, I would move to approve Application No. 17638 of Safeway, Inc., pursuant to 11 DCMR section 3104.1, for a special exception to continue an accessory

parking use serving a grocery store under section 214 at premises 3725-29 Morrison Street, N.W., as conditioned by the Board.

VICE CHAIR ETHERLY: Second it, Madam Chair.

CHAIRPERSON MILLER: Any further discussion? All those in favor say aye.

ALL: Aye.

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

MS. BAILEY: The vote is recorded as 5-0-0 to grant the application. Mrs. Miller made the motion, Mr. Etherly second, Mr. Mann, Mr. Loud and Mr. Turnbull support the motion and it's approved with the conditions as identified by the Board.

MR. MOORE: Thank you, Madam Chair, Members of the Board.

CHAIRPERSON MILLER: Thank you very much. Well, let's go to whether we can issue this as a summary order. I believe we can, but we have the ANC who has supported it

with conditions. I just want to look at their conditions one more time.

VICE CHAIR ETHERLY: I mean, just because there was a divergence in some, I think, modest, really I think minor respects from the ANC's approval, perhaps it would be prudent to err on the side of doing a full order just to provide the specificity where necessary in terms of our divergence from the ANC.

Again, the ANC's support spoke to all terms and conditions from a number of the prior orders and in some material ways we did diverge from those previous orders and conditions.

CHAIRPERSON MILLER: Okay. Other comments? Okay. If you want to submit a proposed order, we would consider it, otherwise, in any event, then this will be a full order. Okay. Is there any other business for the morning, Ms. Bailey?

MR. MOORE: Thank you.

MS. BAILEY: No, Madam Chair.

CHAIRPERSON MILLER: Thank you very much. Okay. As our morning has gone an hour late, we're going to be starting our afternoon an hour late. We will be starting at 2:00. Thank you. This meeting is adjourned.

(Whereupon, the Public Hearing was recessed at 12:55 p.m. to reconvene at 2:20 p.m. this same day.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2:20 p.m.

CHAIRPERSON MILLER: Good afternoon, ladies and gentlemen. This hearing will, please, come to order. This is the July 17th Public Hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Ruthanne Miller. I'm the Chair of the BZA and to my right is Mr. Curtis Etherly, who is the Vice Chair, and next to Mr. Etherly is Mr. Turnbull from the Zoning Commission and farthest to the right, Mr. Steve Cochran will be participating from the Office of Planning on, I gather, our first case, in any event.

To my left is Mr. Marc Loud, who is Mayoral appointee on the Board and next to him is Mr. John Mann representing NCPC on the Board. Further down is Ms. Sherry Glazer from the Office of Attorney General and Beverley Bailey from the Office of Zoning.

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

that this proceeding is being recorded by a Court Reporter and is also webcast live. Accordingly, we must ask you to refrain from any disruptive noises or actions in the hearing room.

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

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

The order of procedure for special exceptions and variances is: One, statement and witnesses of the applicant. Two,

Government reports, including Office of Planning, Department of Public Works, DDOT, etcetera. Three, report of the Advisory Neighborhood Commission. Four, parties or persons in support. Five, parties or persons in opposition. Six, closing remarks by the applicant.

The order of procedure for appeal applications will be as follows: One, statement and witnesses of the appellant. Two, the Zoning Administrator or other Government officials case. Three, case for the owner, lessee or operator of the property involved, if not, the appellant. Four, the ANC within which the property is located. Five, intervenor's case, if permitted by the Board. Six, rebuttal and closing statement by appellant.

Pursuant to Sections 3117.4 and 3117.5, the following time constraints will be maintained: The applicant, appellant, persons and parties, except an ANC, in support, including witnesses, 60 minutes collectively.

Appellees, persons and parties, except an ANC, in opposition, including witnesses, 60 minutes collectively. In cases other than appeals, individuals, 3 minutes.

These time restraints do not include cross examination and/or questions from the Board. Cross examination of witnesses is permitted by the applicant or parties. The ANC within which the property is located is automatically a party in a special exception or variance case.

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

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

accepted by the Board.

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

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

Please, turn off all beepers and cell phones, at this time, so as not to disrupt the proceedings. The Board will make every effort to conclude the Public Hearing as near as possible to 6:00 p.m. If the afternoon cases are not completed at 6:00, the Board will assess whether it can complete the pending case or cases remaining on the agenda.

At this time, the Board will consider any preliminary matters. Preliminary matters are those that relate to whether a case will or should be heard today, such as requests for postponement, continuance or withdrawal or whether proper and adequate notice of the hearing has been given. If you are not prepared to go forward with a case today or if you believe that the Board should not proceed, now is the time to raise such a matter.

Does the staff have any preliminary matters?

MS. BAILEY: Madam Chair, Members of the Board, to everyone, good afternoon. Staff does not have any preliminary matters.

CHAIRPERSON MILLER: Okay. Then at this time, would all individuals wishing to testify today, please, rise to take the oath?

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

(Whereupon, the witnesses were sworn.)

MS. BAILEY: Thank you.

CHAIRPERSON MILLER: Ms. Bailey, would you call the first case, please?

MS. BAILEY: Thank you. And that is of ARCH Training Center, Inc., the number is 17639, the application is pursuant to 11 DCMR 3104.1, for a special exception to construct a new 8 unit apartment building under section 353. The property is Zoned R-5-A and it's located at 1642-1648 V Street, S.E., Square 5777 and it's also located on Lot 824.

CHAIRPERSON MILLER: Thank you. I just want to inquire if the ANC is here in this case? Okay. I don't see them. Why don't you introduce yourselves, please.

MR. GROSS: Good afternoon, Madam Chair. I am Nathan W. Gross, a City Planner at the Law Firm of Arnold and Porter. We will have three presenters today. To my left, Duane Gautier is President and CEO of ARCH Training Center. He will begin testifying as to the background of the project, its program

and community participation. To my right is Greg Kearley, a Principal at Inscape Studio Architects, who will present the project plans. And then I will conclude with brief comments on the compliance with the special exception criteria. Mr. Gautier?

MR. GAUTIER: Good afternoon, Madam Chairman, Members of the Board. My name is Duane Gautier. I live at 7929 Edinburgh Drive, Springfield, Virginia 22153. I'm the President and Chief Executive Officer of the ARCH Training Center, Inc. ARCH is a 20 year-old community-based not for profit 501(c)(3) organization, whose mission is to serve as a catalyst primarily in Ward 8, east of the Anacostia River, insuring individuals and families access to quality education, livable wage jobs, cultural activities, affordable housing, neighborhood businesses and access to effective health and social services.

ARCH is the largest job training program in Ward 7 and 8 and ARCH has developed or provided rehab or weatherization services

to over 600 units of housing in our last 20 years.

ARCH, unfortunately, is also the largest non-Government employer in historic Anacostia and that just goes to show we need more jobs in Anacostia.

This property that we are talking about today was purchased from the D.C. Government under its Homestead Program. The property was originally, when it was built, a four two-unit garden apartment. In other words, eight garden apartments with four addresses. The property prior to being vacant was used as a halfway house and shelter and then remained dormant and vacant for, approximately, 13 years when ARCH purchased it through the Homestead Program. It is currently vacant.

ARCH will demolish the current buildings and build eight units of condo for-sale housing. ARCH will finance the property with a combination of its own building funds, which we will use as equity, and a loan from

either PNC or City First Bank, both of which have given us preliminary statements that they are interested in doing that.

Since the property was purchased under the Homestead Program, all units will be sold to first time D.C. home buyers who meet the income qualifications set by the DC Department of Housing and Community Development, which is, approximately, 50 to 80 percent of area median income.

On ARCH's last three completed development projects, 1706 16th Street, S.E., which was four unit condo project; 1511 Isherwood, which is a two unit condo project, and 1241 Good Hope, which is an art gallery. Over 90 percent of the contractors in dollars were minority and over 90 percent of the workers on the project were minority. ARCH projects a similar percentage in this project.

ARCH made presentations on this project, the Anacostia Coordinating Council, Mainstreet Anacostia and the Ward 8 Economic Development Committee. Attempts to reach the

ANC-8A began on 9 March 2007. You have that in your copy. The letter was hand-delivered and mailed to the ANC. We were told by our outreach worker, who met with the head of the ANC, that we make a presentation at the May meeting.

When we showed up, we were told we were not on the agenda. We wrote a second letter on May 7th, also in your packet. We were told to show up again and then told there would be no presentation made that evening, but a special meeting would be held. None was scheduled. So we started the process in asking for an ANC meeting all the way back in March.

At that point, staff and students of the ARCH Training Center went directly to the community to tell them about the project and asked them to sign a petition in favor. The petition with over 120 names is presented as part of the packet. Thank you very much.

CHAIRPERSON MILLER: Thank you. Any questions from the Board, at this time?

Okay.

MR. KEARLEY: I'm Greg Kearley. I'm a Principal at Inscape Studio and I've been working with ARCH for a number of years and are the architect of record for this project. I can take you through a little bit of architecture in the site right now. I'll move this over here.

I just wanted to show the first exhibit here is the existing conditions. It's the property that's located at 1642-48. The property is in disrepair and so it made a lot more sense to build new than to try to come in and renovate and redo the existing structure.

Does that work? Okay. We're going for a special exception and not a variance today, so I don't know how much of the actual building I need to describe, but I can describe a few things. We're doing everything else as a matter-of-right. If we're talking about parking, lot occupancy, lot size, FAR, we're staying within all the regulations, the current Zoning Regulations,

so we do have eight parking spaces. It will be an 8 unit building, so we have one designed space for each particular unit.

Let's see if we can --

CHAIRPERSON MILLER: How does it compare with the rest of the neighborhood?

MR. KEARLEY: In terms of parking or in terms of the building itself?

CHAIRPERSON MILLER: No, I'm sorry. In terms of the building itself.

MR. KEARLEY: Well, right next to it we're doing a project. We're renovating a 29 unit building which is a four story building, which is actually taller than the building, than this particular building that we're doing. And that's as you are facing -- so that would be this building right here. You don't see it on the site map, but it's just east of this development.

West of the development it's more typically townhomes, two story townhomes and this is a three story building. So it sort of bridges the four story and the two story

buildings and we have three stories of structure on this particular project.

The different units range in size from about 550 to about 1,200 square feet. We wanted to get a mix of size of units, so you could have families or first time buyers. The average size unit is probably about 800 square feet. We have a mix from studios to two bedroom, two baths in the development. We're also doing the -- everything that we do at Inscape Studio is typically environmentally sensitive. So we will be going for a LEED-rating on this.

We're doing a number of things to mitigate storm water management. One is using pervious pavers for the parking. We had talked to Office of Planning about a couple of these items and we'll be working with Office of Planning and any other groups that we need to in terms of confirming these things. We're planning a green roof. We're using -- the way the project is designed, we actually carved into the project, into the building itself to

get a central court.

The reason we did that is for daylighting to just lower the energy costs during the day to mitigate daylighting using a lot of recycled content in the materials of the project from hardy board on the outside of the project to different flooring options on the inside of the project. So just in short that we want to make this environmentally sensitive.

So the -- I don't know if I need to go through all of the plan's particular units, but I can maybe show you the elevations, it might be more helpful.

CHAIRPERSON MILLER: I just want to ask you a basic question.

MR. KEARLEY: Um-hum.

CHAIRPERSON MILLER: Since you want a lot of these units, it sounds like, to be for families, why is it that there aren't any three bedroom units?

MR. KEARLEY: Well, a lot of it had to do with just pricing the units. The

larger the units, the more inherently cost to build and the more they cost to sell. And so there is really a point where we didn't want to go over in terms of a price point, you know, somewhere between about $250,000 plus or minus. And once you get into larger units, you really go past that threshold.

And I guess the point was not to have all families here, but to have options for different purchasers, whether they are first time purchasers, whether they are, you know, families, whether they are single parents. So we wanted to have a mix of unit sizes, but there is sort of a threshold in terms of the cap in price that we were cognizant of and didn't really want to go.

You know, we know we can -- we know it's going to cost us $225 to $250 a square foot to build. You know, we're not in Kalorama, so we can't charge $500 or $600 a square foot. We can charge $250 a square foot for the space. So it was sort of a cap that we have.

CHAIRPERSON MILLER: Yes, I just was asking because I've heard this dialogue before like at the Council or whatever with there aren't enough condominiums for families --

MR. KEARLEY: Sure.

CHAIRPERSON MILLER: -- of a certain size and so that's why I wanted to find out, you know, at least what your rationale was here, because you, obviously, want to reach certain families. So you are reaching starting families, in any event?

MR. KEARLEY: Starting families, yes. And I think, you know, in terms of first time buyers and families that might be purchasing for the first time if you have small children that can share a room and parents that can share a room, that would probably be -- and then hopefully that start gives them the equity to build up to buy homes and things of that nature.

MR. GROSS: Mr. Gautier can add a little bit to that, Madam Chair.

MR. GAUTIER: Since the property was bought on the DC Homestead Program, there is absolutely income guidelines that -- to make the houses affordable. Okay. And as I mentioned, they have to be between 50 and 80 percent of median income, which basically, you know, is somewhere around, maximum around $56 to $62,000. So if you project that up, you can know, approximately, what people can get a mortgage at with families. That's one of the reasons we had to keep it at those levels, because we are under guidelines from the DC Department of Housing and Community Development's Homestead Program.

CHAIRPERSON MILLER: Thank you.

MR. KEARLEY: And it's also an environmental issue. If you have efficient units, you use less materials, it's better for the environment, so that was sort of a strategy we had in terms of trying to have very efficient units, but also have flexible sized units. These are just some renderings of the exterior of the building from V Street.

1 So this would be sort of the massing of the
2 two unit -- two story townhomes and then this
3 is Fendall.
4 This is the four story building on
5 the corner, which is at Fendall and V, which
6 is a 29 unit building, which ARCH is also
7 renovating and we have a permit on that
8 building. And we had come through the BZA
9 last year in terms of parking issues and had--
10 was granted a variance on the parking for that
11 particular project.
12 So that project should be starting
13 construction this fall on 29 units, so, you
14 know, we have images of the front. Again,
15 we're not asking for any variances that are
16 particular to any of the issues, the design
17 issues we did. This is really for your -- to
18 take a look at the project, but we are staying
19 within the height, setback, parking and
20 everything else. And we're just asking for
21 the variance -- for the special exception for
22 building a multi-family in an R-5 District.
23 CHAIRPERSON MILLER: Well, what

are the materials on the building?

MR. KEARLEY: The primary material is hardy board and hardy plank. I don't know if you are familiar with that, but hardy board is a siding material that replicates a lot of traditional wood siding. It's used in maybe a little bit more of a creative way on this particular project, but it's a cement-based material made of recycled -- a high content of recycled materials. And it is typically painted. So that's the primary.

And we would have aluminum and wood windows, aluminum clad wood windows. There is some concrete block or masonry at the base, as you can see down here. This is actually looking up from the parking and you can see the base of that particular -- of the building would be a split-face, not your typical CMU block, but a more decorative masonry unit that would replicate stone.

COMMISSIONER TURNBULL: In our drawings, you indicate plaster. Is it real plaster or is it the synthetic plaster, vinyl

plaster, stucco?

MR. KEARLEY: There would be parts of it would have small parts of it would be stucco, but I think it's typically we are looking at about 90 percent of it would be done with the hardy board.

COMMISSIONER TURNBULL: Hardy board?

MR. KEARLEY: Yes. So it would be limited use of any type of exterior plaster or stucco.

COMMISSIONER TURNBULL: And the metal mesh railings?

MR. KEARLEY: On the balconies, we're developing that with steel and wire mesh. I think you have probably seen those types of balconies that have, in terms of it's an in-fill you have, the vertical and horizontal members and you are in-filled with some type of wire mesh. I mean, these are very -- we're in the schematic stage. We haven't -- you know, once we get through this process we get more into design development

and construction documents, and so we'll start detailing those, the particular parts of the project, but that's the design intent right now.

COMMISSIONER TURNBULL: I had a question on your green roof.

MR. KEARLEY: Um-hum.

COMMISSIONER TURNBULL: Is that going to be a sedum roof then basically?

MR. KEARLEY: It wouldn't be. Yes, it would not be a green roof that we would have the depth to do, you know, shrubs and trees.

COMMISSIONER TURNBULL: Right.

MR. KEARLEY: And those types of things. But we would want to use native planting, so we don't have to use a lot of water to plant these. But it would be -- you know, it's probably an assembly of maybe 4 inches, the assembly of the green roof itself.

COMMISSIONER TURNBULL: Is there any intent of people going up there to be on it?

MR. KEARLEY: Well, let me show you the plan of the green roof here, the areas that we're talking about. There isn't a plan to be on it, no. These are the areas that we would have the green roof right here.

COMMISSIONER TURNBULL: And there looks like the stairway goes all the way up to it though.

MR. KEARLEY: There is one portion that you would have that wouldn't be the green roof that would -- which is a lower portion of it that we would have. We were talking about having it -- those areas could be occupied. And also, you would need access to it regardless, so we have the stairs for service access on those areas as well.

COMMISSIONER TURNBULL: Yes, I guess I was just trying to -- on your roof plan A104, it looks like the stair goes up and somebody could actually go up to that roof level.

MR. KEARLEY: You can get on the roof level from the stairs, yes.

COMMISSIONER TURNBULL: Well, I mean, aren't you -- I mean, the parapet is only 1 foot 6 inches high.

MR. KEARLEY: Yes.

COMMISSIONER TURNBULL: Aren't you -- I mean, there is a safety issue of somebody getting up here and little kids getting up here.

MR. KEARLEY: Again, we can have-- we're in the schematic stage and so in terms of working with security on that, but, obviously, with the parapet size, we can't be occupiable, but we do want to have -- we need to have the roof serviced in terms of maintenance or if there is problems with any of the green roof that people need a way to get up there.

So we can work with that in terms of having security on those -- on that portion of the stairs to have that locked and that wouldn't be a very hard thing to do.

COMMISSIONER TURNBULL: Okay. Thank you.

CHAIRPERSON MILLER: I just have one other question.

MR. KEARLEY: Um-hum.

CHAIRPERSON MILLER: Since you've built the building right next door, I'm assuming that maybe you can explain that these buildings compliment each other somehow.

MR. KEARLEY: I think the scale of it compliments each other. Now, the building -- the Fendall Street building is an existing building, so it's not something that was built from the ground up. So you had an existing structure, an existing shell which was somewhat an art deco type building that we're going to restore the character of that particular building.

So I think in terms of the scale and proportions of the building, we tried to relate to both the buildings east and west and that's why we sort of came up with a three story building bridging, transitioning between the multi-family and the single-family homes.

CHAIRPERSON MILLER: And how about

the landscaping? I think that the Office of Planning indicated in their report that you were going to be giving us some more details on that at the hearing. Are you?

MR. KEARLEY: Well, we had done some work that we had sent to Office of Planning prior to the hearing and we were going to hire a landscape architect to execute the things that we talked about, but we really don't -- we haven't taken it through, done the exercise of doing the landscaping per se in any type of detail, but we had done some reworking of the entry and those type of issues that we worked with with Office of Planning and sent them information on that.

But in terms of a landscape plan, we don't have a landscape plan right now.

CHAIRPERSON MILLER: But is that something that you are going to be continuing to work with Office of Planning on?

MR. KEARLEY: Yes, we anticipate working with them through design development when we bring the landscape architect to

execute issues that they raised and that we addressed in terms of making sure that those things are implemented and that we continued the conversation with them. It really is just almost an economic issue and, you know, I'm trying to not spend a lot of Duane's money until we know, you know, that things are a go.

So we have the basic design intent and we graphically and in a narrative responded to Office of Planning's comments and then we'll be working with them as they see fit in order to implement the issues that we talked about.

CHAIRPERSON MILLER: Okay. We don't have any of that. Is that correct? That's just the correspondence between you and Office of Planning?

MR. KEARLEY: I don't know how much of that was in their report. I think some of it was in the report. Some of the issues that we spoke about.

CHAIRPERSON MILLER: All right. When we get to Office of Planning, I guess,

Mr. Cochran will clarify that. Okay. Any other questions?

MR. GROSS: It's not directly a requirement in the Zoning Regulations. You could subsume it somehow, you know, that under public plans and policies if one of the policies in the Comp Plan says good quality, urban design and development, good landscaping, you could take a look at it, but it's not strictly a part of the special exception criteria.

BOARD MEMBER LOUD: Good afternoon. I was wondering if you could elaborate just a little on how the project was made to appeal to artists? I think you referenced that in several places in some of the pleadings.

MR. KEARLEY: Um-hum.

BOARD MEMBER LOUD: And just if you could elaborate on that?

MR. KEARLEY: Okay. A little bit, I think, just in terms of the massing of the building itself by carving into the building,

you are able to bring a lot of natural light into each of the units. On the basement, there is a community space on the basement that could be used for tenants and depending on, you know, condo docks and how the project develops, it could be used for community activities.

So there is a space which opens up at grade at the rear that is a large open space, so that was a couple of the things that we did. Just the nature of the apartments themselves in terms of the loft-type feel of it and the open nature of the plans are conducive to working with artists.

I don't think it's specifically for artists only, too. I think that was something where part of the mission of ARCH is developing parts of Anacostia for ARCH-based housing and there is a galley that Inscape designed recently that opened up on Good Hope Road. So I think it's something where it would be great, you know, but it's for the entire community. It's not -- we don't want

to limit it to say this is who is going to buy it, but it's something where we wanted to have some flexible space for the community and for the residents to use, whether they are artists or whether they are, you know, work for Office of Zoning or any other place.

So it's something where we did want to have some type of community space within the building for the residents.

MR. GAUTIER: Maybe I can elaborate a little bit. We have been working with the DC Arts and Humanities Commission. We have -- they have helped us fund four units of our housing, which is about three blocks from there on 16th Street, and we just did another two unit building in Congress Heights that was exclusively for artists.

There is an art group east of the river, an artist group, that has been working with us through DHCD, etcetera, on developing a critical mass of artists in Anacostia, both single-family and not, to try to bring together an economic development. As I said,

we have just opened an art gallery. We're about ready to open a photography gallery on Martin Luther King. So this is just part of what we are doing, so it will be marketed somewhat to artists, but once again, the Department of Housing and Community Development's Homestead Program will make the final decision. They actually have the final decision on who can buy the units or not.

CHAIRPERSON MILLER: I just want to ask a follow-up question to Mr. Gross. When you said that the regulations don't require landscaping plans, my version of the regulations, 353.4, says -- is it 353? No, 353.5 "In addition to other filing requirements, the developer shall submit to the Board with the application four site plans and two sets of typical floor plans and elevations, grading plans, landscaping plans and plans for all new rights of way and easements."

So why don't you think --

MR. GROSS: Oh, okay.

CHAIRPERSON MILLER: -- that landscaping plans need to be submitted?

MR. GROSS: Well, I stand corrected, Madam Chair, maybe you are right. I forget how that -- I don't have the full wording of that there as to whether it makes it a condition of approval or it just says submit it. The -- can you read that whole thing?

CHAIRPERSON MILLER: All right.

MR. GROSS: Or just a new conclusion of it, if it says anything.

CHAIRPERSON MILLER: It's 353.5.

MR. GROSS: Okay.

CHAIRPERSON MILLER: When you want to go back to it.

MR. GROSS: Um-hum.

CHAIRPERSON MILLER: It talks about filing requirements and "The developer shall submit to the Board with the application" and then one of the things that's listed here is landscaping plan.

MR. GROSS: Oh, okay. I'm sorry.

CHAIRPERSON MILLER: Okay.

MR. GROSS: I guess we were showed on that.

MR. KEARLEY: Well, in terms of the site plan that we have, we do show topography. We do show areas that will be landscaped. So we do have the basic schematic down. We don't have a particular planting schedule, but in the plan we do have all the topography. We do show all the setbacks. We do show all the areas where there will be landscaping. So we're at the schematic stage for everything.

So it's -- we do, I think, fulfill all the requirements that were in there at a certain level, but then as we move forward, we'll have to go in and get more detailed and add a lot of layers of information. But we do have all the topography. We do have all those other -- you know, the hard scape and parking and all those other items that you listed.

CHAIRPERSON MILLER: Right. I mean, it doesn't say how detailed the

landscaping plan has to be, but some type of landscaping plan.

MR. KEARLEY: Yes.

CHAIRPERSON MILLER: Okay.

MR. KEARLEY: You can see these areas here where we -- you can see on the plans where we will have landscaping and green space.

CHAIRPERSON MILLER: So if we were to look at your revised plans, where would we look to see what's reflected for landscaping? The site plan?

MR. KEARLEY: That's the same drawing, A010, the new site plan.

CHAIRPERSON MILLER: Okay.

COMMISSIONER TURNBULL: Where is the trash pick-up? The trash, garbage.

MR. KEARLEY: Trash, we will have -- there is a couple of areas that we haven't specifically designated. Let me just put this on. We have an area out here that we have or we have an area designated. We would have an area designated within the common space.

There will be two potential areas for the trash pick-up. One would be in the parking area and one would be in the common space down at the basement.

COMMISSIONER TURNBULL: You have one parking space at 11 foot, 11 foot wide?

MR. KEARLEY: Yes. We wanted to have one space that would be -- accommodate a handicapped vehicle, if necessary, so we have one a little bit wider.

COMMISSIONER TURNBULL: But there is no way for a handicapped person to get up their stairs getting into the building from that level, right?

MR. KEARLEY: If they are dropped off, we do have accessibility from the front of the place and it would be the drive coming up if there is -- if they are coming up the drive.

COMMISSIONER TURNBULL: So somebody would have to drop them off?

MR. KEARLEY: Yes.

COMMISSIONER TURNBULL: So if they

1 were partially handicapped, I mean, I'm just
2 saying there is no way if they parked down
3 there they can get up into the building?
4 MR. KEARLEY: Sure. That's
5 correct.
6 MR. GROSS: If there are no other
7 questions, I'll go ahead with the special
8 exception criteria. What you found in section
9 353 of the Regulations, 353.2 asks whether
10 local public schools can accommodate children
11 expected to reside in the development. In
12 this case, the small in-fill building with six
13 one bedroom units and two two bedroom units
14 will likely have a small number of children
15 which -- who will readily be accommodated by
16 the local schools.
17 353.3 requires agency referrals to
18 address three issues. First, the adequacy of
19 public streets. We have observed, the team
20 has, on several occasions that there is a full
21 street right in this vicinity and that it
22 seems to adequately serve the moderate density
23 residential neighborhood with no particular

traffic problems and this small building is not likely to create an adverse traffic conditions.

As to recreational facilities, the very large Fort Stanton Park and Recreation Center is located only two blocks from the proposed apartment building. As to public plans and policies, the proposed development is clearly not inconsistent with the moderate density residential designation on the Future Land Use Map of the Comprehensive Plan.

Second, replacement of a derelict vacant building with a nice new building will be a visual and public safety improvement in the neighborhood. Moreover, the production of affordable ownership housing in the neighborhood is supported strongly by a number of policies in the housing element of the Comprehensive Plan.

And, finally, the Office of Planning very thoroughly addresses various public policies that come to bear on the project and we certainly thank OP for its

thorough and favorable report.

As to the purpose and intent of the Zoning Regulations, this is a proposed low density apartment house in the R-5-A Zone, which is a low density apartment house zone, primarily. And so you can consider it an allowed and preferred use meeting the intent of the Zoning Regulations and Map.

And secondly, as Mr. Kearley has indicated, the project complies with all of the area requirements of the R-5-A Zone. And that concludes our case, Madam Chair, and we would be happy to respond to any additional questions.

BOARD MEMBER LOUD: Just one question. Previously, when it was 8 units, how many of those units were one bedroom and how many were two bedrooms?

MR. GAUTIER: All of them were one bedroom units.

BOARD MEMBER LOUD: Thanks.

COMMISSIONER TURNBULL: Is there a fence or any type of screening around the site

or will there be any provided?

MR. KEARLEY: That was one of the issues we talked with Office of Planning about and there will be some type of fencing and screening. We're hoping to do it minimally. We don't want it to feel like you're, you know, crossing through a fortress, but we will have some security at the pedestrian level. And then as you go down, we would like to have the security farther down the drive for the parking area, so it's not right at the street level.

COMMISSIONER TURNBULL: How about exterior lighting?

MR. KEARLEY: And yes, exterior, that was another issue that we talked about with Office of Planning in terms of the entry and having, you know, a sympathetic pedestrian entry, but we haven't done an electrical plan right now, but we are planning to have some type of landscape lighting as part of the landscaping plan.

COMMISSIONER TURNBULL: Okay.

Thank you.

CHAIRPERSON MILLER: Anything else? Okay. Then we can turn to the Office of Planning. Good afternoon, Mr. Cochran.

MR. COCHRAN: Thank you, Madam Chair. For the record, my name is Steve Cochran. I'm speaking for the District of Columbia Office of Planning today. The Office of Planning believes that the applicant has met all of the criteria for section 353 and for 3104 and recommends that you approve the requested special exception.

I would like to stand on the Office's report and then just address a couple of the questions that you have asked today with respect to the landscape, in particular. There had been a combination of landscaping and how does the building meet the street question on the part of the Office of Planning.

The applicant revised its plans and submitted new ones that show a planter box on V Street with representational, not

specified, plantings in it. You should have that. You should also have a perspective drawing of it. It considerably softens the edge. It gives a passerby a feeling that the building is not walling itself off from V Street. We were very concerned about that.

Also, in response to that concern, the applicant changed the entry, so that it establishes more of a presence, since the building is entered from the side with a pretty clever floor plan, we still wanted to acknowledge that it's a part of V Street. The applicant made a number of revisions to do that.

With respect to the way in which the retaining walls will be softened, we had hoped that the architect would be able to come back today with some more specifications about, you know, is it going to be ivy? Is it going to be bushes? We don't know. I'm not sure that the question is so significant that it would require upholding a decision, because we have worked with the applicant as the

applicant has said and we believe that they will continue to work with our office on the types of landscaping that they will be doing. And we're happy to do that beyond any decision you might make on the case.

The other issue had been the driveway. DDOT had a concern about the width of the driveway at 12 feet. The applicant has redesigned again and reconfigured the building in small ways and allowed it to come up with a 14 foot driveway, which has satisfied Department of Transportation. And therefore, there are just no issues that remain.

One other thing you addressed though was how does it look in the neighborhood? It sort of depends on where you are entering the neighborhood from. If you are coming from the west along V Street, you are surprised when you get over to Fendall Street because of the height of the buildings.

On the other hand, if you are coming from the south, as you can see on Attachment 2 to our report, the Office of

Planning report, the last page, it's a double-sided submission, I have gone through and indicated the various heights of buildings that are over two stories. And you can see that there are a number of garden apartments that are three stories plus a basement.

And because of the topography, they really read as four story buildings. This building will read as a three story building from the street, not from the backyard. So you have a number of, let's call them, bare bones modernist buildings from a couple of decades ago that simply don't establish a row house neighborhood from any of the other directions.

So it's a complicated neighborhood. It depends on literally your point of view. That concludes the Office of Planning report. I'm happy to answer any questions.

CHAIRPERSON MILLER: Thank you. You really basically did answer my questions which I had thrown out earlier, but just to

recap, you are of the opinion that we do have enough indication about the landscaping to be able to render the decision today and that further development of it will go on between the applicant and the Office of Planning, regardless of whether we have already issued a decision, right?

MR. COCHRAN: Yes, Madam Chair.

CHAIRPERSON MILLER: Okay. I don't have any other questions. Anybody else have questions?

COMMISSIONER TURNBULL: I guess my only question is just a comment. I guess I am -- really don't have any objection to the project per se and what it's trying to do. Normally, we do have most of those details whether it is the trash, the lighting for the site, how it's going to impact the neighbors, the fence. Normally, we're able to assess that a little bit more and here we don't.

I mean, I understand what you're saying that they are going to get there, but again, as I say, I think the project is well-

defined. I have no problem with the architecture on it. But some of those issues normally we have those on the drawings and we -- you know how we like to nitpick on some of those things just to assure the impact for the rest of the neighbors.

The prospectus does show us something, but I just wish there was just a little bit more that would define how they are going to contain the trash and the lighting and some of those other issues, that's all.

MR. COCHRAN: I can understand your concern. If this were the norm, I think we would be --

COMMISSIONER TURNBULL: Yes.

MR. COCHRAN: -- we would want to address the norm upward.

CHAIRPERSON MILLER: Well, let me ask you then if it's a timing thing, is there an urgency that, you know, this go forward today if it, you know, meets all the requirements or could we get the remaining information within the next couple of weeks?

What is the status?

MR. COCHRAN: I can't answer for the applicant.

CHAIRPERSON MILLER: Okay. I can turn it to the applicant then.

MR. GAUTIER: We are under somewhat of a deadline with Department of Housing and Community Development. This project has been four years in this planning. Okay. Part of the issue, obviously, has been the affordability in the neighborhood. As you know, this is not technically in the Historic District, but it's three blocks out of the Historic District and the District has been slowly having some good positive signs in it.

I don't know how to answer this. We are very anxious to do this. We have the funding in place. I honestly do not believe and I will not say so that we would lose the funding if there was a two week delay, but if there was a substantial delay, I think we would lose the funding.

All I can tell you is that if the

-- and I don't know, my attorney is most likely to answer this one, but if you would like to put, you know, some criteria with an approval stating that we have to work with the Office of Planning, if that's appropriate, and provide them with all the details that they consider as appropriate, I have no problems with that whatsoever.

CHAIRPERSON MILLER: Well, I just want to explore before we, you know, finish this.

MR. GAUTIER: Okay.

CHAIRPERSON MILLER: If there is certain information, for instance, that Mr. Turnbull is particularly interested in, such as, you know, exterior lighting or a fence or whatever, is that even information that you could really pull together, you know, within the next two weeks? We have a decision making on July 31st, so that's our other option.

MR. KEARLEY: I would have to know some specific -- what specifically we do. Typically, we do do some more information with

a special exception. You know, we have to do these things when we are going to permit and a lot of the lighting issues and those issues are something that you are working with DCRA to do.

So I guess the thought process was that we wanted to do -- to get you enough information for the special exception, but we'll be doing -- typically when we bring on-- we do the power plans and the lighting plans and those types of things at the next phase of design. But we are glad to review with Office of Planning or any other groups, but I guess our process was that those things are done as a matter of course when we go through the permit process with DCRA.

And so since we weren't asking for a variance and any type of -- any part of the architecture or setbacks and things like that that we didn't necessarily -- I didn't know that that was specifically relevant for the special exception.

MR. GAUTIER: There is also,

1 obviously, a cost element from us. We are not
2 for profit and I don't know what the
3 additional costs would be in something that we
4 would have to do anyhow to get a building
5 permit. So, you know, on my basis, you know
6 every $1,000 we can save is substantial.
7 CHAIRPERSON MILLER: I guess it's
8 just a comfort level thing. I mean, if I read
9 the regulations, it's not necessarily
10 required. We review it under the special
11 exception standard, but, in general, this
12 might be matter-of-right if it were not in a
13 multi-family. So I just think it's a
14 decision. It sounds like it would be hard for
15 them to provide that information perhaps in
16 the next couple of weeks. They're going to be
17 working on it probably more systematically
18 towards permitting with Office of Planning.
19 I guess, I'll let you, Mr. Turnbull. I feel
20 I could make perhaps a decision without that
21 specific information.
22 COMMISSIONER TURNBULL: Well,
23 Madam Chair, the only reason -- you had also

brought up the landscape plan issue, so, I mean, I don't know what your comfort level is.

CHAIRPERSON MILLER: Well, I guess, under the specific provision, I'm less worried than it were to be a regular addition under a special exception. We haven't really heard of, you know, any negative impacts on neighbors or anything. And actually, they own one of the neighboring properties.

It is unusual, I guess, for Office of Planning to say that they are going to continue to work beyond our decision, but it looks like they are all working cooperatively and they will have to provide that information for permitting.

MR. COCHRAN: It's an unusual project that provides a little affordable housing immediately adjacent to an Historic District. It will help to revitalize the neighborhood. We do zoning. We do planning. We don't -- of course, we'll be continuing to work with them.

CHAIRPERSON MILLER: Okay. I

think we're all right with leaving it as it is. So does the applicant have any cross examination of the Office of Planning?

MR. GROSS: No, we don't, Madam Chair.

CHAIRPERSON MILLER: Okay. And let me just see, is there anybody else in the audience who is here to testify? Okay. Would you, please, come forward? I mean, maybe we'll hear something different to decide otherwise, but come to the table.

MR. FRANKLIN: My name is Walter Franklin. I live next door to -- I live at 1640 V, right next door to this. And I think it's going to be a good thing if they have something there, because mostly that's a drug area. And they use that -- the apartments that are there now, they use that to hide the drugs and everything.

If they put somebody in there to live, then I think it will run -- they will run the drugs a different place. They won't be there. And I live right next door. The

only complaint I have I'm glad they're going to put something there, but I've been there almost 40 years and all the trees that come from that building at 1642 falls -- all the limbs fall in my yard. And I've been cleaning them up for 40 years and I'm tired of it.

I'm hoping that they will cut all them trees down back there and make a parking lot out of it and get the limb off of my -- off the wires in my backyard. I had to replace the phone, you know, the phone lines about three times and now there's a big tree limb, I've got a picture of it, a big tree limb on top of my wires on the electric and the telephone.

All I want to do -- and I talked to him and they say they're going to cut it off, so I'll be satisfied, and just take it out of my yard and throw it back over there where it belongs. But this is a picture of the limb. It's on my wires back there and it's causing a lot -- you know, we can't hardly get good phone communication and some

1 people are having problems with electric,
2 because the limb has been up there for about
3 three or four years.
4 I've been running -- trying to
5 find out who owned the property, because it
6 has changed to too many -- so many different
7 people. First, it was people, you know, that
8 was renting at first. When I first moved in,
9 they were renting there. All right. I had
10 three bicycles. When I first moved in, three
11 bicycles there. They come right over the
12 little fence and took all three of my
13 bicycles.
14 All right. Then after that, they
15 had St. Elizabeth patients in there and they
16 wouldn't no trouble. The people that was
17 supposed to be crazy wasn't no trouble. It
18 was the people that supposed to have good
19 sense give me all the problems. But, you
20 know, I don't have nothing against it. I
21 don't have nothing against it. I just want --
22 all I want is that limb cut off and out of my
23 backyard. And them trees and all that stuff

1 won't keep falling in my yard. That's all I
2 have to say.
3 CHAIRPERSON MILLER: Thank you
4 very much. Are there any questions?
5 BOARD MEMBER LOUD: Mr. Franklin?
6 MR. FRANKLIN: Yes?
7 BOARD MEMBER LOUD: Just one
8 quick. Had you tried contacting Pepco? I'm
9 sorry, Marc Loud. Have you tried contacting--
10 MR. FRANKLIN: I called Pepco.
11 They won't cut it down.
12 BOARD MEMBER LOUD: All right.
13 MR. FRANKLIN: I called the
14 telephone company. They won't cut it off.
15 I've wrote this lady, I can't think of her
16 name, but --
17 BOARD MEMBER LOUD: Well, it's
18 beyond our scope as BZA, but I just wanted to
19 let you know that's one of the few instances
20 where Pepco is supposed to come out
21 immediately.
22 MR. FRANKLIN: Yes, I tried it,
23 they won't do it.

BOARD MEMBER LOUD: If you tell them --

MR. FRANKLIN: They won't -- they want --

BOARD MEMBER LOUD: -- and describe the trees being on the wire.

MR. FRANKLIN: And especially when all -- you know, when all the trees are falling on the lines, I tried it again and they still wouldn't take it down.

BOARD MEMBER LOUD: It's almost worth trying one more time.

MR. FRANKLIN: Well, that's why I'm hoping that maybe talking here would get it off, that's the main thing I want. He said he is going to take it off.

MR. GAUTIER: Mr. Loud, in three weeks we are going to take that tree down and around it, okay, my construction manager is here, got the message loud and clear.

BOARD MEMBER LOUD: All right.

MR. FRANKLIN: Okay. That's all I have to say.

CHAIRPERSON MILLER: Well, thank you. Usually people come to us and ask us to preserve the trees, so --

MR. FRANKLIN: I mean, not if they have to clean it every time it rain and every time the wind blow. I got to pick them up.

CHAIRPERSON MILLER: Okay. Thank you very much. I assume you don't have any questions? Okay. Okay. Any other questions? I just want to make sure when we are making the decision about the landscaping plan that what's in our record that we should look to is just A010, that's the most comprehensive. Okay. And it reflects landscaping areas. Okay. And a planter in that. Okay. Okay.

I guess then it's time for closing remarks. There isn't anybody else in the audience to testify on this application, correct? Okay.

MR. GROSS: I don't believe we have anything further, Madam Chair. We hope you will be able to see your way clear to a decision today. Thank you.

CHAIRPERSON MILLER: Thank you. Well, I think we're addressing the question of whether or not to go forward today and decide this application. Basically, they have presented a full case addressing the 353. There is no opposition. It's a very good project. The one aspect that we were just dealing with was whether or not the landscaping plan was sufficient for purposes of our doing our 353 analysis.

So I think we pretty much did discuss this, but just to clarify before we go forward, I guess it would be my position that we do have sufficient information in this case to deliberate under 353 and that we do have a site plan that does identify the landscaping areas and then we also have a representation by the Office of Planning that they are going to continue to work with the applicant up through the permit process and no information on the record that there is a concern of any adverse impacts on neighboring properties, one of which is owned by them, and the other side

the owner has come forward in support of the application.

Does anybody have an objection to going forward at this time then? Okay. Let me I guess start. 353 really is a very basic straightforward part of our regulations which applies to multi-family residences. And I think Mr. Gross went through this pretty straightforwardly as well, but 353.2 deals with whether or not the school system could absorb the expected number of students that might come from the residence in the development.

And in this case, it's a pretty small building and there is information that the school nearby can adequately absorb them. And there is no indication that the roads couldn't absorb this development. Again, it's a small development with very little impact on traffic. There is recreation sites in the area to meet the recreational needs of the residents.

353.4 talks about referring the

application to the Office of Planning for comment and recommendation on the site plan, arrangement of buildings and structures and provisions of light, air, parking, recreation, landscaping and grading as they relate to the future residents of the project and the surrounding area.

We did spend a lot of time on this and it appears that the applicant is working very closely with the Office of Planning in anticipation of this hearing and they have represented they are going to continue to do so. And the project, I think, as presented to us, I think, is quite attractive for this neighborhood and interesting and in character of certainly the scale. They address the heights of the buildings around it.

And then 353.5 talks about filing site plans, floor plans and grading plans, etcetera, which I think we have in the record under the revised plans and we've already discussed why we don't think we need a fully developed landscape plan in this case. It is

a project that is going to do a lot of good for the city, for the neighborhood and I see no reason why it shouldn't be approved.

Other comments? Do I have a motion? Okay. I will move to approve Application 17639 of ARCH Training Center, Inc., pursuant to 11 DCMR 3104.1, for a special exception to construct a new 8 unit apartment building under section 353 at premises 1642-1648 V Street, S.E. Do I have a second?

BOARD MEMBER LOUD: Second, Madam Chair.

CHAIRPERSON MILLER: Further deliberation? All those in favor say aye.

ALL: Aye.

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

MS. BAILEY: The vote is recorded as 5-0-0 to grant the application. Mrs. Miller made the motion, Mr. Loud second, Mr. Mann, Mr. Etherly and Mr. Turnbull support the

motion.

CHAIRPERSON MILLER: Thank you. And I would also suggest that we waive our rules and regulations for issuing a full order with full findings of fact and conclusions of law and issue a summary order in this case in that there is no party in opposition. Is that the consensus of the Board? Okay. A summary order then. Thank you. Thank you very much.

MR. GAUTIER: Thank you very much.

MR. GROSS: Thank you.

CHAIRPERSON MILLER: Ms. Bailey, we're ready when you are to call the next case.

MS. BAILEY: Application No. 17640 of Timothy Popoola, pursuant to 11 DCMR 3103.2, for a variance from the floor area ratio requirements under section 402, and a variance from the lot occupancy requirements under section 403, to allow an addition to an existing apartment building. The property is located in the R-5-A District at premises 427 60th Street, N.E., Square 5261, Lot 34.

Members of the Board, we received an Affidavit of Posting yesterday on this project. I will be passing out in just a moment. It is my understanding that the property was posted for the requisite 15 days. And additionally, arriving today was a report from ANC Commission 7C. And I must note that the report is specifically from the Commissioner of 7C05 and I'll be passing those items now.

CHAIRPERSON MILLER: Thank you, Ms. Bailey. Why don't you introduce yourselves for the record while she is passing those documents to us.

MR. POPOOLA: My name is Timothy Popoola.

CHAIRPERSON MILLER: And you are?

MR. PREDEI: My name is Keith Predei, an engineer with the District of Columbia and I'm here to assist Mr. Popoola with his presentation.

CHAIRPERSON MILLER: I'm sorry, I missed your last name. Keith what?

MR. PREDEI: Predei, P-R-E-D-E-I.

CHAIRPERSON MILLER: Predei, okay. Mr. Popoola, do you want to address just as a preliminary matter why your Affidavit of Posting is -- is it one day late, Ms. Bailey? Is that it?

MS. BAILEY: No, Madam.

CHAIRPERSON MILLER: No, it's more than one?

MS. BAILEY: We received it -- yes.

CHAIRPERSON MILLER: Okay. You just received it today?

MS. BAILEY: We received it yesterday and it should have been filed last week, so it was filed one day before the hearing and five days are required.

CHAIRPERSON MILLER: Thank you. Okay.

MR. PREDEI: I can answer that. That was probably my fault. I went around and put up the posters, took the photographs and then I went away and I really kind of missed

the deadline to return the photographs. I missed it. So that was totally my fault, not Mr. Popoola.

CHAIRPERSON MILLER: Okay. But the posting was done in time, correct?

MR. PREDEI: Yes.

CHAIRPERSON MILLER: That's really the most important.

MR. PREDEI: Yes.

CHAIRPERSON MILLER: So we have the ability to waive that requirement, so we can do that in this case? All right.

MR. PREDEI: Thank you.

CHAIRPERSON MILLER: Okay. So I just want to take a moment to read the ANC report. Is anyone from the ANC here on this case? Okay. Do you have a copy of the ANC report? Okay. Good. Okay. Did you all read it? Okay. Did you present at the ANC meeting?

MR. POPOOLA: Yes.

CHAIRPERSON MILLER: You were there. This was a special meeting it says,

1 but they gave notice of the meeting and you
2 were there and you presented? Okay. And then
3 they voted, correct?
4 MR. POPOOLA: Yes.
5 CHAIRPERSON MILLER: Okay. I
6 don't see any reason why we wouldn't give this
7 -- well, we would need to -- this document is
8 late as well, so we would need to waive our
9 rules to accept the ANC report. When should
10 this have been filed, Ms. Bailey?
11 MS. BAILEY: It's due seven days
12 prior to the hearing and we received it today.
13 CHAIRPERSON MILLER: Okay. So is
14 it the consensus of the Board to waive that
15 rule and accept this document into the record?
16 BOARD MEMBER MANN: Madam Chair, I
17 have a question.
18 CHAIRPERSON MILLER: Yes?
19 BOARD MEMBER MANN: Perhaps I'm
20 misreading something or not comprehending
21 something, but I don't understand Exhibit 24
22 versus Exhibit 26, which is -- Exhibit 24 is
23 from the Chairperson, Muriel Chambers, of ANC-

7C. And Exhibit 26 is from the Chairperson of SMD 7C05. And if I'm reading them correctly, they appear to be at odds with each other, but maybe I'm missing something here.

CHAIRPERSON MILLER: When I look at them, I'm glad you pointed that out, they are certainly different, because the one we just received today is on Single Member District stationery. This one represents that there was a vote to unanimously approve the applicant, but the one from the ANC Chair represents that he did not get the approval of the ANC Commissioners.

MR. POPOOLA: I didn't know anything about that.

CHAIRPERSON MILLER: You don't know anything about it?

MR. PREDEI: I can probably explain part of that.

CHAIRPERSON MILLER: Okay.

MR. PREDEI: I called the ANC some time ago and I was told that they meet every Monday, second Monday of each month. I spoke

to the secretary and they told me that the meeting will be sometime in July. Then we got a call from a Dr. Gaffney who said that we should come to the meeting on Friday. So I asked her I thought the meeting was on Monday and she said since it was summer, they were vacationing and they have to hold a special meeting.

And we went to the meeting and we met with who we thought were the ANC, apparently, and they had -- we went to the presentation and they took a vote. And then Sunday I got a call from a lady who said you did not meet with the ANC Commissioner and I said what are you talking about. She said -- I said I met with dr. Gaffney and she kept saying the lady is not a doctor.

So I kept saying well, that's who we met with. Said she is Mrs. Gaffney. And I said well, you know, that's not really my problem. She said she was a doctor. And she went on saying I did not meet with the ANC and I told her that's who we met with. They

1 called us and gave us a special meeting.
2 So she called me back again and I
3 told her listen, apparently, there is some
4 confusion. I don't want to get involved in
5 this, but as far as I'm concerned, we met with
6 the ANC. That's who the people we met with
7 said they were. We met at the same church and
8 everything and they said it was a special
9 meeting. So I don't know what went on between
10 the two parties. We met with who we thought
11 were the representatives for the ANC.
12 CHAIRPERSON MILLER: This later
13 letter, from the ANC Single Member person, it
14 doesn't seem to indicate whether there, if I'm
15 wrong, was a quorum and what the vote was
16 exactly. They just said it was unanimous. So
17 we can't really tell whether -- you know, how
18 many on the ANC met there to be voted on this.
19 Anyway --
20 MR. PREDEI: Five or six people.
21 CHAIRPERSON MILLER: I think
22 that's a different issue. I would suggest we
23 wouldn't give great weight to this other,

certainly the second letter, Exhibit 26, for those reasons. They don't meet the requirements that would answer those questions for us. In particular, was there a quorum and what was the vote? Not just unanimous, but how many people? And there is a big question between -- yes, that's raised by they contradict each other. They are both dated July 16th.

MR. PREDEI: Actually, the lady who called me called -- thought the project was on 63rd Street, so I told her this is on 60th Street, so I don't know where the confusion is.

CHAIRPERSON MILLER: No, I'm saying the date of these two letters are the same.

MR. PREDEI: The same.

CHAIRPERSON MILLER: And they say different things. So I don't know. The first question was should we even accept this into the record? We usually accept an ANC report, even if it's late, because it's important to

have in the record what the community -- the community's views on a project.

Any comments on that?

BOARD MEMBER MANN: Well, it appears that it represents the views of a particular Single Member District. I mean, I suppose we could accept it into the record reflecting -- you know, with the understanding that it doesn't necessarily meet the requirements for the great weight for the ANC.

CHAIRPERSON MILLER: Yeah, I think that would be fine with me. We'll take it in for the record and for what it's worth. Okay.

MR. PREDEI: Thank you.

CHAIRPERSON MILLER: All right. Moving on to the variance. Do you want to present your case for the variance?

MR. PREDEI: I'll present it.

MR. POPOOLA: Yes.

MR. PREDEI: The building is at 427 60th Street, N.E. The area has a lot of apartment buildings and some single-family houses. In this area where his apartment is

located, there are about four apartments to the north. To the south, it's mostly single-family. And it seems to be the only building that sits in that area that occupies maybe 40 percent of the lot. All other buildings occupy 60 to 70 percent of the lot and this made his building stand out.

When he bought the building, there was only like one bedroom units and it's very difficult to get the tenants in one bedroom units. You end up with, I don't want to say the word riff-raff, but you end up with tenants that you might not really want. So his idea was to increase the size of the building, without increasing the occupant load as far as units.

Instead of four units into six units, he kept it to four units, which means he can accommodate families who might want to be, you know, in assisted-living or a better clientele he would like to have. So increasing the building would give him more space, maybe two bedrooms and two bathrooms

instead of one bedroom and one bathroom, attract a better clientele.

And the area, the landscape of the area leaves a lot to be desired. So his hope was by putting this in the back, it would give him a little more space to do landscaping. And we wouldn't have to landscape 60 feet. He would only have to landscape 30 feet.

So the main idea of this was to increase the size of the building, so he could increase his capability and his -- the tenants that he would have.

Actually, when he called me, the architect that first drew the building probably did not research the Zoning Code, so he was given a set of plans that he couldn't use, was rejected by DCRA, because it was occupying 60 percent instead of 40 percent. I reduced the drawings the architect gave me and I ended up with 54 percent, which has a variance of 14 percent from the 60 percent.

It give me a little more FAR instead of .9, I ended up with 1.09, so he

could get a better class of tenant. Right now, he has only one person in the building, this four unit building. And as you know, the area is infested with drugs and he would hope to get a better clientele, so that he can at least recover his costs.

Do you have anything to add?

MR. POPOOLA: No.

MR. PREDEI: Thank you.

CHAIRPERSON MILLER: Okay. Let me just ask you a couple of questions as we walk through the variance test. This is a specific test. The first prong is what's exceptional about the property, which leads into they have to be connected. Something exceptional about your property that leads into a practical difficulty.

Okay. And I'm hearing one thing and I've read something else and I want to -- maybe they both apply or whatever. First of all, you are saying that the property is exceptional because it's the only one, and I'm not sure in what area, I want to pin it down,

that has 40 percent lot occupancy. That all the others in the area, I think you say, have 60 to 70 percent or what?

MR. PREDEI: Yes, 60 to 70 percent.

CHAIRPERSON MILLER: Okay. What's the area we're looking at? Is it the block? Is it a square? How exceptional is this?

MR. PREDEI: The north half of the square.

CHAIRPERSON MILLER: The north half of the square?

MR. PREDEI: Um-hum.

CHAIRPERSON MILLER: Like how many houses are we talking about?

MR. PREDEI: How many apartment buildings? About four.

CHAIRPERSON MILLER: It's the only one of four?

MR. PREDEI: Yes.

CHAIRPERSON MILLER: It's the only one of four that has this lot occupancy --

MR. PREDEI: Yes.

CHAIRPERSON MILLER: -- that's less than the others?

MR. PREDEI: Less than all the rest, yes.

CHAIRPERSON MILLER: Okay. I'm not sure whether I read this in Office of Planning's report or your application, but there was something about it being substandard. The building being substandard in the sense, maybe it was Office of Planning then, that it had all these smaller -- it was built before the Zoning Regulations and it has all these substandard units and that's why you are having trouble renting them.

MR. PREDEI: Yes, small substandard, I guess, substitute for the word small.

CHAIRPERSON MILLER: Small.

MR. PREDEI: Very small.

CHAIRPERSON MILLER: Now, is that an exceptional situation?

MR. PREDEI: Not totally exceptional, but in this day and time, I would

call it unusual, because the whole -- it's 600 and something square feet per unit. And normally, units nowadays are at least 700 to 800 square feet. Even the condos that build from single-family houses are much larger than that.

CHAIRPERSON MILLER: I'm sure Office of Planning will comment on it as well, but I just want to understand your answer on that. I know it's small compared to today's standards.

MR. PREDEI: Um-hum.

CHAIRPERSON MILLER: Okay. How exceptional is that either in the neighborhood or in general that there are these size apartments?

MR. PREDEI: I can say in the general or in the neighborhood, I really haven't been in the other units, but from the size of the buildings, I would say in the neighborhood it would be considered exceptional. Those units are larger. I mean, I can see just from the outside. The other

building is like 30 feet longer than this building, so the units are larger.

CHAIRPERSON MILLER: Okay. So from your observation, you believe that the other buildings have much larger units?

MR. PREDEI: Yes.

CHAIRPERSON MILLER: Okay. So let's go. All right. I did also see a reference to exceptional grading or topography.

MR. PREDEI: This has a deep drop.

CHAIRPERSON MILLER: Does that play into your practical difficulty of renting to better tenants or renting more?

MR. PREDEI: I would think so. I would think if you have a better lawn, better play area for children, it would probably give you a better clientele, better type of people might want to live there. They can play. Instead of playing outside on the sidewalk, they can have swings and stuff if you created the ground, the level after --

CHAIRPERSON MILLER: The lot

occupancy isn't stopping --

MR. PREDEI: I know.

CHAIRPERSON MILLER: -- you. Okay.

MR. PREDEI: I understand that.

CHAIRPERSON MILLER: Okay.

MR. PREDEI: But still the size of the building is stopping the type of client you want to -- if you can get the type of client you want and then give them some other play area, it would be even better for you. Right now, they use the back room as trash. People throw all their bicycles and trash, you know.

CHAIRPERSON MILLER: Okay. It sounds like though you are saying if you were able to expand the building and rent out the apartments, then you would have more money to improve the landscaping.

MR. PREDEI: To improve the landscaping.

CHAIRPERSON MILLER: Okay. But that's not really -- the topography isn't

causing your practical difficulty?

MR. PREDEI: Well, yes, it's not causing, but it would be improved.

CHAIRPERSON MILLER: It would be. Okay. Now, your practical difficulty, just, you know, we do these analyses all the time, so it fits into these boxes. The exceptional situation of either the 40 percent or connected to just the small units, you are having a practical difficulty renting them, basically.

MR. PREDEI: Right.

CHAIRPERSON MILLER: You are renting them to a certain type of person or I don't know. Can you elaborate on that practical difficulty?

MR. PREDEI: Yes. The major problem is that when you rent to a single-family mostly, when you put an ad in the Washington Post, most of the people that give you a call are the people that have like two or three kids. So they want like two or three bedrooms. It is very difficult to get one

bedroom apartments to be rented, because they want like two or three.

So at times, the apartments will stand there for months. Now, for most a year now, they are just empty. So it's a real problem which economy can -- you know, it's so -- so my plan is that if you can make it livable for adult single-family, you know, with two or three bedrooms, you know, it would be manageable.

CHAIRPERSON MILLER: So you are going to add two or three bedrooms to these if you can?

MR. PREDEI: Yes. More --

CHAIRPERSON MILLER: Two?

MR. PREDEI: Mostly, yes.

CHAIRPERSON MILLER: Okay.

MR. PREDEI: So it would be nice.

CHAIRPERSON MILLER: How long have you owned the building?

MR. PREDEI: More than 10 years now.

CHAIRPERSON MILLER: So what's

1 been happening for all those 10 years?
2 MR. PREDEI: I've been going
3 through hell.
4 CHAIRPERSON MILLER: Has it gotten
5 worse recently?
6 MR. PREDEI: It's getting better
7 now, but it was -- it has been hell.
8 CHAIRPERSON MILLER: Okay. All
9 right. Any other questions from the Board?
10 Okay. Why don't we go to the Office of
11 Planning then? Good afternoon, Mr. Moore.
12 MR. MOORE: Good afternoon, Madam
13 Chair and Members of the Board. John Moore
14 with the Office of Planning. I'll generally
15 stand on the record in support of the
16 application, but the costs are varying, I will
17 offer some explanation.
18 The building -- I hope your
19 photographs in the back of the report, Office
20 of Planning report --
21 CHAIRPERSON MILLER: Can you pull
22 your mike closer to you? I'm missing some of
23 your words. Okay.

MR. MOORE: The one I have is black and white. If you look at the rear of the properties where the arrows are, you can easily tell that that building is smaller in size, as you look at the rear of it, and looking at the buildings on both sides of it, and the other buildings on the block.

If you were to, and I didn't get pictures, of course, of the inside of the building, that means that the inside of the building itself is much smaller than the units next door. What you get when you have small buildings, as you all know by now, when you look at all of -- and I'm going to focus particularly on southeast and northeast Washington.

When you have buildings built prior to the Zoning Regulations of 1958, you have buildings sometimes that are small, that were not soundly built and those buildings begin to fall down. As a matter of fact, many of the applications you have got lately for vacant parcels had buildings on it like this.

So here is an owner who owned one such building and I just want you to focus on, for a second, when I met the applicant and his representative on the site, and when I looked at it, I said you don't have a variance yet. As we were talking, this is in the rear yard, the one resident who lives in that building came to her back door. She didn't know I could see her, but she was intently interested in what we were saying.

When we finished the discussion, by the way when I left the applicant, I told them we can't support your application, we got to the front of the property, she came to the front of her property. You could look at the lady's face and tell that she was intently interested in will something happen to the building, so I can feel like I live in a place that's suitable, that's sizable.

Now, I made a mistake that I normally don't do, because normally I would go and talk to such a person and in this case I didn't. What I did do though is as I talked

to the applicant in front of the property, said the best chance you have in terms of making the uniqueness test here is that this building is smaller by comparison to other buildings in the block on this side as well as the other side of the block.

It's also one of the dying breed of apartments in that area, as I mentioned earlier, that's dying out, because they cannot accommodate families and that whole area is really inundated with families. I told them to focus on that in terms of trying to make the variance test.

Of course, the practical difficulty is he can't rent the properties, so his only property is vacant and that's not what private owners go into business for. In that regard, the Office of Planning thinks that the applicant has met the test.

And if you look at the third prong of the test in the Office of Planning's report -- I mean, response, we have asked the applicant, although we didn't convert it to a

condition, that he would consider facade improvements on the front of the building, because we didn't think we wanted it to be a flagship. If we're going to change, let's make a change for maximum good.

So let's do something to the facade of the building, paint, there's some cracks in the brick work and do substantial landscaping around the property. There is a wall in front of it that has got cracks in it and we asked him to improve that. That then becomes a beacon for the other people who own adjacent buildings that if you do it, this is the standard that you're going to be held by.

With that, I'll entertain any questions you may have hopefully.

CHAIRPERSON MILLER: Thank you. I don't know how long you have been following this area, but you're saying that it has a lot of families in it now. Is that something that has been growing over the years? Has there been a change in the demographics that way of this part of the neighborhood?

MR. MOORE: I'm been following it for about 40 years now. There is an emerging change. We must again be mindful that as recent as 1960, they had few sidewalks in much of southeast and northeast Washington. They even had outhouses in that period in 1960. It's embarrassing, but they did. They were there.

Many of the buildings were built by previous owners who had no lawn, income screens to build buildings and so, therefore, they weren't built properly. What you got was what was considered, at that time, a row unit. But the row unit in many cases was less than 15 feet in width. And you try to stuff families in it. There was no sensitivity for a play area, so therefore, there was no recreation space outside, so kids played in those little small cramped places. And that's a lot of stress on the building itself and many of them didn't survive.

This owner probably bought these 10 years ago for some minimal cost, because of

its condition, as many in the area. But the investment that he made thinking that it would realize the four units, when a person look at it and say is this where I want to live, because we could ask ourselves the same question. Is it where you want to live? The answer is no.

So what can he do to make a living? He can either walk away from his investment and sell it to someone else or try to make it habitable. And we note that the applicant didn't come in to ask for more units, which traditionally an owner would get. He just wants to expand the one -- the size of the ones he has got.

Now, I did have some question about the size of the increase and I discussed it with the applicant. I thought that the 25 feet that he wanted to add on was a bit much. I thought it should have been reduced and, as a matter of fact, I've asked him again today if it come to that, would he consider reducing the size and therefore the FAR would come

down.

I don't know if I've answered your question specific or not, but that was my intent.

CHAIRPERSON MILLER: Could you just articulate what you are saying you think the extent of the variance should be and where it is under the application we're considering? You're saying 25 feet?

MR. MOORE: The applicant is asking to increase the rear of the building by 25 feet.

CHAIRPERSON MILLER: And you believe it should be what?

MR. MOORE: I believe because we want to stick as close as we can to the regulations, because that would make the lot occupancy 54 percent, we want to get it closer to 40, which it's supposed to be as opposed to 50 percent, 54, which is almost double. So we asked him in the field if he would consider reducing it to 15, just off the top of my head without doing numbers.

And, of course, that would reduce the FAR substantially and it would be more in line with what the regulation would allow.

CHAIRPERSON MILLER: Okay. I just want to make sure I'm on the right page with you, Mr. Moore. I'm looking at the chart that you have.

MR. MOORE: Yes.

CHAIRPERSON MILLER: On page 2. And we're talking about the rear yard, right?

MR. MOORE: Yes. The addition would be at the rear of the building.

CHAIRPERSON MILLER: Okay. Right. It says proposed rear yard 38 feet. What does that refer to?

MR. MOORE: That's the rear yard itself from the building line to the end of the property.

CHAIRPERSON MILLER: Oh, okay. Not the extension into the rear yard?

MR. MOORE: No, no, no.

CHAIRPERSON MILLER: Okay.

MR. MOORE: The extension would be

25 feet.

CHAIRPERSON MILLER: Okay.

MR. MOORE: By the way, Madam Chair, the applicant's representative mentioned the topography of the property. The property actually is sloped so bad in the rear at that 38 feet line that the owner actually has two fences there. There is one, say, that's one the area of the safe, because below that it drops off so far, he has put another fence in that area that's going to become wooded. I have some concerns about that, but I can understand why he did it.

CHAIRPERSON MILLER: All right. Let me just ask you about this number of feet into the rear yard. If we look at your picture on page 4, the applicant's proposal for 25 feet into the rear yard, where does it take the building in the connection with the two neighboring properties?

MR. MOORE: It will still be short of the adjacent building on the, I believe, south side. Where those windows are like

exposed, it will still be shorter than that building. It could cover up one set of windows, but the other ones would still be open.

CHAIRPERSON MILLER: Well, it expand further than the other property, neighboring property?

MR. MOORE: No, no.

CHAIRPERSON MILLER: No.

MR. MOORE: It would still be shortest building on the block.

CHAIRPERSON MILLER: Shorter than both?

MR. MOORE: But it would extend beyond the first set of windows on the adjacent building to the south side.

CHAIRPERSON MILLER: Okay.

VICE CHAIR ETHERLY: If I may, Madam Chair, just to follow-up or follow along your line of questioning. Thank you very much, Mr. Moore, as always for your ability to put applications, especially perhaps some of the more, I don't want to characterize this

and say it's difficult, but in terms of the context of the evolution of a particular community, thank you for very much putting a context on the table.

Let me ask very quickly just because you just mentioned it, in terms of the windows on that adjacent building where you indicated the first set would be covered, but there would be a second set of windows which would remain open. From the standpoint of the variance test that that speaks to, if you would, kind of substantial detriment, is there -- you indicated on page 3 of the report that the additional covered windows on the adjacent party wall, but in those zone those are compromised windows. I just wanted to kind of clarify what did you mean by that?

MR. MOORE: Well, actually, the windows in the R-5-A District shouldn't have been built on the party wall in the first place.

VICE CHAIR ETHERLY: I see.

MR. MOORE: I did ask the

applicant to go and meet with the owner of that building to let him know what he was doing and try to get their support.

VICE CHAIR ETHERLY: Okay. Okay.

MR. MOORE: He can answer himself.

VICE CHAIR ETHERLY: Okay. Mr. Predei, would you be able to speak to whether or not --

MR. PREDEI: Yes. Well, I tried to get him to write a letter, but I couldn't find him, but he had no problem on this. You'll have to take my word for it.

VICE CHAIR ETHERLY: I understand.

MR. PREDEI: He had no problem with it, but as Mr. Moore says, the party wall should not have had windows, unless you are a certain distance from the property line in the R-5-A, R-4 you cannot put windows.

VICE CHAIR ETHERLY: Okay. So it's your representation that you spoke with the adjacent property owner.

MR. PREDEI: Yes, Mr. Lonmon.

VICE CHAIR ETHERLY: You shared

the plans with the adjacent property owner.

MR. PREDEI: He said he had no problem.

VICE CHAIR ETHERLY: Excellent. Okay. Thank you very much, sir, for that. Mr. Moore, one, perhaps, final question. As you indicated with this appearing in Ward 7, to an extent, I was put in the mind of some of the more recent applications that we have had coming out of Ward 7, not necessarily particularly this SMD, but just generally speaking, my colleagues will recall some of the Title and de-mooring cases where in many instances we were dealing with existing apartment buildings.

But I believe in maybe one or two of the cases we were dealing with vacant plots of land. And as you indicated, Mr. Moore, if those plots, and this could perhaps just be, shall we say, a little bit of -- I don't want to say guess work, but you would hazard a guess that many of those vacant plots, as you indicated, had properties that, at one point,

looked like this.

MR. MOORE: Yes, they did.

VICE CHAIR ETHERLY: Small and substandard by today's standards, if you will.

MR. MOORE: Yes.

VICE CHAIR ETHERLY: Okay. Do you recall, and this might be a question better put to Mr. Predei, but for the rear portion of the subject property, of the applicant's property, are those bedrooms on that rear portion or bedrooms both on the front and the rear of the subject property?

MR. MOORE: I believe they were bedrooms on the rear, but the applicant should answer that.

MR. PREDEI: The rear.

VICE CHAIR ETHERLY: Okay.

MR. PREDEI: Because of the windows. Well, why mostly the rear is when you put the building next to the adjacent building, you have no -- can't put windows against, so mostly on the rear. And you would increase in the middle, of course, would be

more bathroom and kitchen space, because you don't need windows necessarily for kitchen or bathroom.

VICE CHAIR ETHERLY: Okay. So is it safe to say that there continues to be a need for that, essentially, same layout to still exist? Meaning, you don't have any options for locating bedrooms elsewhere in terms of expanding the property. Your bedrooms have to be oriented towards the rear.

MR. PREDEI: Yes, because the front takes up the living room and the dining room, which need ventilation. Except with the new code, they allow you to have a space between rooms if you can look to another space and have ventilation. Like if you have a door here, but no windows and you have another door that would give you ventilation.

But basically, you try to put the living room and dining room up front, the kitchen and the bath in between and the bedrooms in the rear.

VICE CHAIR ETHERLY: Okay. Thank

you. Thank you, Madam Chair. Thank you, Mr. Moore.

COMMISSIONER TURNBULL: Madam Chair, I wonder if I could?

CHAIRPERSON MILLER: Yes.

COMMISSIONER TURNBULL: Mr. Moore, I'm just curious. The building across the street on page 4, I don't know if that's a duplex or --

MR. MOORE: It's a duplex.

COMMISSIONER TURNBULL: Now, that doesn't look very big. It looks like -- does that have bedrooms? I guess it's upstairs and downstairs, so it's --

MR. MOORE: Actually --

COMMISSIONER TURNBULL: Or is it four units again?

MR. MOORE: That is a four unit building and though I didn't go into the backyard, I could tell from the angle lot, how parking, that it was deeper than the building we're talking about now.

COMMISSIONER TURNBULL: Okay. So

that they may be one bedroom units also?

MR. MOORE: I believe all four of them are one bedroom.

COMMISSIONER TURNBULL: Okay. I'm just curious. You had said earlier that the addition should only be 15 feet, rather than 25. Is that correct?

MR. MOORE: Yes. In essence, I was just saying I thought that the addition should be reduced, be more respective of the lot occupancy number being 40.

COMMISSIONER TURNBULL: So that would just basically give them one bedroom that he would be adding on, I'm assuming, roughly?

MR. MOORE: That would give him what he is asking for to expand the existing bedroom.

COMMISSIONER TURNBULL: Okay. The -- I guess the only thing is that the bedrooms on the inner apartment, which have a party wall, would lose their -- what would be their outside back window and that space, I don't

know what that becomes. And so, you know what I'm saying?

MR. MOORE: It would become what the applicant is saying that he would be doing to the property next door.

COMMISSIONER TURNBULL: Right.

MR. MOORE: He wouldn't have any windows either.

COMMISSIONER TURNBULL: So in theory, he would only really have two one bedrooms still and two two bedrooms?

MR. MOORE: As I mentioned to him that issue, especially with light, including use of skylights or whatever to bring more light into the building if he was go to that route.

COMMISSIONER TURNBULL: Okay. Well, I didn't ask the applicant, but the elevation doesn't show what kind of material if it's going to brick or do you know?

MR. MOORE: The existing material is brick.

COMMISSIONER TURNBULL: Is brick.

MR. MOORE: Yes.

COMMISSIONER TURNBULL: But the addition, do you know what the addition is proposed to be?

MR. MOORE: No.

MR. PREDEI: It would be the same material.

COMMISSIONER TURNBULL: It would be brick?

MR. PREDEI: Brick.

COMMISSIONER TURNBULL: Okay. It just seems he has got a little bit of a dilemma still trying to -- he wants two bedroom apartments on the one -- especially one unit could be a little bit difficult.

MR. MOORE: There could be some difficulties, yes.

COMMISSIONER TURNBULL: Okay. Thank you.

CHAIRPERSON MILLER: Mr. Moore, I just have one more question, I think. You talk about the exceptional situation with respect to the lot occupancy and it being much

smaller than the surrounding buildings. How about the question about the substandard units, the way that it's configured inside? Is that an exceptional condition in the area or in this particular block?

MR. MOORE: Of course, I would be being critical of architects who designed before it was built, but the answer is yes, from my perspective.

CHAIRPERSON MILLER: Okay. Any other questions?

BOARD MEMBER MANN: Yes. Do you know what the change in grade is from the rear of the existing building to the .25 feet out where the proposed rear of the building would be?

MR. MOORE: It's only slight to that point. When you get beyond that point, of course, is when it drops off severely.

BOARD MEMBER MANN: Okay. Thank you.

CHAIRPERSON MILLER: Any other Board questions? Does the applicant have any

questions for the Office of Planning?

MR. POPOOLA: No, please.

CHAIRPERSON MILLER: And do you have a copy of the Office of Planning's report?

MR. POPOOLA: This one?

CHAIRPERSON MILLER: Okay. Is there anybody here from the ANC? Okay. Not seeing anyone come forward, is there anybody else here who wishes to testify on this application, either in support or opposition? Okay. Not seeing anyone come forward, then I turn to the applicant for any closing remarks.

MR. PREDEI: It would really benefit the owner, Mr. Popoola, if you were to allow him to do the extension. Basically, as Mr. Moore said, it will probably help the area and people would want to have better looking apartments and appeal to a better clientele of people. In these areas, we are still trying to get them free of the -- I don't want to use the word drugs, but unwanted people. Okay. Thank you.

CHAIRPERSON MILLER: Thank you very much. Is the Board ready to deliberate on this today?

VICE CHAIR ETHERLY: Madam Chair, perhaps to answer your question and get us started, I would be comfortable moving forward and perhaps would suggest that we do so under a motion. And I would be prepared to start off our variance discussion.

I would move approval of Application No. 17640 of Timothy Popoola, pursuant to 11 DCMR 3103.2, for a variance from the floor area ratio requirements under section 402, and a variance from the lot occupancy requirements under section 403, to allow an addition to an existing apartment building at premises 427 60th Street, N.E., and would invite a second.

CHAIRPERSON MILLER: Second.

VICE CHAIR ETHERLY: Thank you very much, Madam Chair. Just to start perhaps I'll mirror the Office of Planning's approach, Mr. Moore's approach with respect to the

1 context of the property and where the
2 applicant, and more importantly, where the
3 applicant's building finds itself situated.
4 And I think it's perhaps most important to
5 start with the fact that it is a nonconforming
6 structure built, if I recall, before the
7 advert of the Zoning Regulations.
8 And so we are, in fact, dealing
9 with a property, as indicated by the Office of
10 Planning, which is substandard in nature. If
11 my memory serves me correctly, there is
12 precedence under our variance case laws that
13 relates to, in particular, the Gil Martin
14 case, if I recall, Madam Chair, from our
15 conversation in cases past.
16 But specific, with regard to this
17 case, where it is more than appropriate for
18 the Board to consider when looking at the
19 various prongs of the variance test or I
20 should say more importantly the first prong of
21 the variance test with respect to the
22 exceptional situation or condition.
23 Here, in part, we have a

nonconforming building, which is, in fact, substandard in nature, especially when compared with adjacent properties in the immediate vicinity as testified to both by the applicant as well as the Office of Planning. I am not necessarily of a mind that a change in grade is a significant aspect of that, but I think it does, indeed, add to some of the difficulties that are encountered.

But I believe most importantly, it is the nature of the existing structure on the property that contributes to the exceptional situation or condition. As indicated in the Office of Planning's report, I think the overhead picture at page 4 is very instructive in terms of when you look at the two adjacent buildings on either side of the subject property you, in fact, see that difference, that uniqueness, that exceptional condition very, very clearly with respect to the size of this particular property as it currently exists.

I think the owner has

demonstrated, I think the applicant has demonstrated the strict application of the Zoning Regulations here would result in a practical difficulty for the owner. As indicated, the owner has encountered significant and I think the record would support a finding that there has been significant difficulty on the part of this owner to continue making profitable and advantageous use of the subject property from the standpoint of securing renters or shall I say just tenants of the property.

As my colleagues will recall in our discussion, the orientation of the property suggests that the bedrooms have to be in the rear in order to achieve a more marketable unit mix. And again the owner is not looking, the applicant is not looking to add units here. The applicant is simply looking to expand its existing units.

I'm not going to necessarily make an argument that that creates, shall we say, a de minimis aspect to the variance relief

that's sought here, because it was indicated by the Office of Planning there would perhaps be some desire to see maybe less of an expansion than what is sought by the applicant.

But again from the standpoint of the applicant's options with regard to creating larger units, the applicant has to move towards the rear of the property in order to accomplish that.

And then finally with respect to the issue of can this relief be granted without substantial detriment to the public good or substantial impairment of the Zone Plan, I think that is perhaps where the Office of Planning's report and insight in that of Mr. Moore has been most effective and most helpful with respect to addressing the need for family rental housing options.

There will not be a negative impact on the community, as again, we're not increasing -- the applicant is not seeking to increase the number of units nor would the

1 addition be visible from 60th Street. There
2 was perhaps a little bit of pause on my part
3 about the loss of windows on that adjacent
4 property, but as was indicated by the
5 representative of the applicant, discussion
6 has been broached and held with that adjacent
7 property owner and the applicant has
8 represented that that property owner would not
9 have -- does not have any disagreement with
10 respect to the loss of the first row of those
11 windows on that adjacent building.
12 With that, Madam Chair, I would
13 argue, therefore, that the variance test has
14 been met with respect to this particular
15 application. And again, I would just simply
16 want to highlight the Office of Planning's
17 work and that of Mr. Moore's in this regard,
18 because there are cases like this that this
19 Board grapples with very, very frequently.
20 And at times, perhaps it might be
21 safe to say that we oftentimes diverge in
22 terms of our viewpoints perhaps with the
23 Zoning Commission itself in regards to how you

deal with these cases, but they are not unusual from the standpoint of the challenge of trying to bring either existing properties, like this, that predate the Zoning Regulations back into productive use or dealing with unimproved lots that were in existence before the Zoning Regulation where we have applicants who are looking to bring them into productive use.

And ultimately, the objective should continue to be creation or the expansion of housing options, especially those for our families. That's a little bit of just an additional side or dicta conversation. But again, from the standpoint of the variance test, Madam Chair, I believe the application has been successfully made with respect to all three of the variance problems. Thank you, Madam Chair.

CHAIRPERSON MILLER: Thank you, Mr. Etherly. That was very, very thorough. I'm just going to just add a few thoughts to that briefly. You know, we look at it's a

variance test. There are three prongs. I think you meet them.

The first one is exceptional situation. And as Mr. Etherly says, it doesn't necessarily have to be the topography. It can be the condition of building on the property. And in your case, it appears that it is a building. It predated the regulations. It's lot occupancy. It's smaller than all the other surrounding buildings and it has substandard units unlike the other surrounding buildings that have given rise to a practical difficulty in renting out those units.

And then another thing that we look at is that the times have changed and maybe where those units served a purpose at one time, they now may be outdated. And it appears that they are, in this case. You made a good case that it has been 10 years. You have had struggled to rent the apartments. That's clearly a practical difficulty.

And then finally, I would say that

granting the variance would not result in any adverse impact. In fact, it appears that if we grant the variance and you're able to do your project and bring in a profit, you would then be able to fix up your backyard, your front facade, which would be certainly not an adverse impact and, in fact, would be a public benefit to the neighborhood and the community. Others?

BOARD MEMBER MANN: Yeah, Madam Chair, I have a slightly different viewpoint on this. I understand the uniqueness test that was made, although there were actually a couple of different sort of uniqueness tests that were made. I didn't think either was particularly strong, but either way, I didn't actually believe that a practical difficulty arose from the uniqueness test that I heard.

And I don't want to belabor it, but I'm not going to support this application. I thought that there were other ways that the applicant could have achieved what I heard was the objective and that was to upgrade the

building and bring sort of a new usefulness and new life to it, but I don't support the application as I heard it presented.

CHAIRPERSON MILLER: Did you hear other ways that they could do this? I didn't hear it.

BOARD MEMBER MANN: I didn't hear so much. What I heard was that there was -- the only way to sort of revitalize and get an economical life out of this building was to increase the size of the building beyond the point allowed as a matter-of-right to which the variance was -- were required. But I wasn't convinced that (A) There was -- that the uniqueness of the property presented the practical difficulty in improving the property.

I thought there were other ways that the property could have been improved without triggering the variance relief that would have also achieved the objectives of improving the property and increasing its economic value and life.

MR. POPOOLA: May I say something?

CHAIRPERSON MILLER: No, not right now. I don't think so, unless the Board wants to go out of deliberation. When we are in deliberation --

MR. POPOOLA: Okay.

CHAIRPERSON MILLER: -- okay. Unless somebody on the Board wants more information, I can't do that.

COMMISSIONER TURNBULL: Madam Chair, I would agree with Mr. Mann. I have problems. I guess there's more. The other thing is we do not have a lot of support from the ANC, which I think we should really have. Mr. Moore, although it's not in his report, has talked about only 15 feet, rather than 25. And I think that architecturally the solutions still are troubling as to how to access light in the, especially the, inside bedrooms on the first floor.

And I think that the solution could have been better worked to achieve a variance request. So I guess I'm not

convinced, at this point, so I will not be in favor.

CHAIRPERSON MILLER: Mr. Turnbull, let me ask you would you want more information in order to make your decision or do you have enough information and that's the position that you are taking?

COMMISSIONER TURNBULL: Well, I think without the ANC's support, I feel very uncomfortable with the decision. But as far as the variance itself, I'm not convinced that the uniqueness -- there is a building across the street which has four one bedroom apartments in it. So I'm just -- and we just approved a project that out of the eight units, six are one bedroom, so I'm a little bit confused on how we are looking at this. So right now, I'm troubled by approving this in light of what we have been doing.

VICE CHAIR ETHERLY: And I'll note, Madam Chair, just as we continue to move forward in our deliberations, again, these types -- these cases are never necessarily

easy nor do I always necessarily suggest that my powers of persuasion are as nimble and as fresh as I would like them to be.

I think with regard to this particular case a couple of reasons why I didn't move perhaps in a certain direction with regard to, shall we say, alternative approaches. I believe with respect to a little bit of the conversation that the Office of Planning broached, regarding whether or not the same objective could be achieved by perhaps a somewhat smaller expansion, is again I was comforted by the applicant's representation that a conversation did ensue in some detail with the adjacent property owner, who would be impacted by some loss of the windows on that party wall.

As was noted by the Office of Planning in its presentation, the expansion as it is currently proposed would not necessarily exceed or perhaps I think the best representation would be would not eclipse the current sizing, if you will, of the adjacent

1 properties on either side of the building.
2 I can't say that I was absolutely
3 certain that I heard in the Office of
4 Planning's -- I think I heard in the Office of
5 Planning's report, let me phrase it that way,
6 that the expansion -- if the expansion were
7 approved and went forward, it would not result
8 in a building that would be larger at the rear
9 or would extend past the two adjacent
10 properties.
11 So there was a comfort level there
12 with the expansion as it was currently
13 proposed and I didn't want to necessarily get
14 into, I don't want to say, a nickel and dime
15 discourse, but I didn't want to necessarily
16 begin to parse square footage with the
17 applicant regarding what would be a size in
18 terms of those bedroom units that you would be
19 able to live with.
20 I just felt that the relief that
21 was sought was in step and consistent with
22 what I had heard in the presentation. Again,
23 as it relates to some of the adjacent

properties, the Office of Planning's report did indicate that this building was, indeed, substandard in terms of its current size and orientation, if you will. But most importantly it's current size as compared to the adjacent properties.

Again, it's a little bit of an informal and rough assessment by virtue of simply an overhead picture, but I would hazard a guess that as you look at, of course, the adjacent buildings and the apartment buildings would appear to be multi-unit buildings across the street from the subject property. This property does indeed stand out in terms of its size.

So for those reasons, I had a comfort level in terms of moving forward with the relief as it has been crafted by the applicant. It's not easy. It absolutely is not easy and a variance as all of my colleagues know is indeed the highest test that this Board has to apply, short of going for a use variance, which gets even more

1 difficult.

2 But I think with respect to those

3 aspects of the Office of Planning's

4 presentation that I did not perhaps agree

5 with, I just wanted to provide my applicants

6 with a little bit of insight into my thinking

7 in that regard.

8 Again, Madam Chair, I am

9 comfortable moving forward as the project is

10 currently formulated. Thank you.

11 CHAIRPERSON MILLER: Thank you.

12 And I also want to address Mr. Turnbull's

13 concerns a little bit. Certainly, with

14 respect to the degree of the variance, I also

15 didn't pursue it too much, the difference

16 between what Office of Planning suggested,

17 that being 15 feet, and applicant's proposal

18 of 25 feet, because the only rationale I heard

19 from Office of Planning for that difference

20 was that it was just less of a variance.

21 But Office of Planning didn't say

22 that the full relief would cause an adverse

23 impact on the Zone Plan, which we sometimes

hear or have any other adverse impact. Also, with respect to the ANC, I'm not sure that the applicant should be penalized by the fact that the ANC didn't clearly state their views to us.

We have two different letters which hardly require great weight in the sense that they don't really even address the issues. But neither one of them are in opposition to the application. One from the Single Member District is in support and the one from the Chair just says that they didn't vote on it, I believe.

They didn't hear from them and they didn't vote on it. So I'm not concerned at least that we have an ANC that has real concerns about this development.

BOARD MEMBER LOUD: Madam Chair and colleagues, I'm also in favor of the application. I think there being sufficient testimony both in the record and at the hearing today regarding the nonconforming structure prior to our current zoning regime.

By definition of the property being substandard and that causing particular small units that are creating this practical difficulty for this applicant, which are manifesting as his inability over a significant period of time to be able to rent these units.

I know it's a close call, but I think in his particular case it's a practical difficulty. I'm not aware on today's record how many of these surrounding units are fully occupied or not and not focusing in on that issue. But I do think that the testimony for today is adequate that this applicant is having a tremendous difficulty on these facts with making functional use of this property.

Any other comments? Okay. Then I think the Board is prepared to vote on the motion. It has been seconded.

All those in favor say aye.

VICE CHAIR ETHERLY: Aye.

CHAIRPERSON MILLER: Aye.

BOARD MEMBER LOUD: Aye.

CHAIRPERSON MILLER: All those opposed?

BOARD MEMBER MANN: Oppose.

COMMISSIONER TURNBULL: Oppose.

CHAIRPERSON MILLER: All those abstaining? Would you call the vote, please?

MS. BAILEY: The vote is recorded as 3-2-0 to approve the application. The motion was made by Mr. Etherly, seconded by Mrs. Miller, Mr. Loud supports the motion. Commissioner Turnbull and Mr. Mann are both opposed to the motion.

CHAIRPERSON MILLER: Thank you. As there are no parties in opposition to this application, I would suggest that we waive our rules and regulations for issuing a full order with full findings of fact and conclusions of law and issue a summary order in this case. Is there any opposition to that? Okay. It will be a summary order.

MS. BAILEY: Yes, Madam.

CHAIRPERSON MILLER: Thank you very much.

MR. POPOOLA: Yes, thank you.

MR. PREDEI: Can I ask a question?

CHAIRPERSON MILLER: Yes, you can.

MR. PREDEI: Summary, what do you mean by summary order?

CHAIRPERSON MILLER: That means you're going to get an order pretty quickly like maybe this week. It's very brief and basically saying that you are being granted the variance. A full order would list all sorts of findings of fact and then go into the legal analysis for a variance, etcetera.

MR. PREDEI: Thank you very much.

CHAIRPERSON MILLER: Unless you want a full order. You would have to wait long enough to --

MR. PREDEI: I'll take a summary.

CHAIRPERSON MILLER: Okay.

MR. PREDEI: Thank you.

CHAIRPERSON MILLER: All right.

MR. POPOOLA: Okay. Thank you very much.

CHAIRPERSON MILLER: Thank you.

While the next case gets set up, we're just going to take a five minute break.

(Whereupon, at 4:23 p.m. a recess until 4:37 p.m.)

CHAIRPERSON MILLER: Okay. Ms. Bailey, would you like to call the next case, please?

MS. BAILEY: Madam Chair, this is an appeal and the number is 17615 and it's of William J. Harnett, pursuant to 11 DCMR 3112, from the November 17, 2006 Administrative Decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue a Building Permit No. 101019, permitting the alteration and repair, including striping five new parking spaces in the owner's parking garage identified in yellow as spaces P-1 through P-5. The property is located at 3030 K Street, N.W. It's in the W-3 District. It's also in Square 1173 on Lot 102.

CHAIRPERSON MILLER: Thank you. Good afternoon. Would you all at the table

1 introduce yourselves for the record, please?
2 MR. JOHNSON: Good afternoon,
3 Madam Chair and Members of the Board, Vernon
4 Johnson from Nixon Peabody on behalf of the
5 appellant, William J. Harnett, who is with us
6 in the room in back of me. With me at the
7 table is Ellen McCarthy, who was in the midst
8 of testifying on cross examination when we
9 last broke on June 5th.
10 MR. TAYLOR: Good afternoon, Madam
11 Chair and Board, Dennis Taylor, Assistant
12 Attorney General, representing DCRA and the
13 Office of Zoning Administrator. With me at
14 the table is Acting Zoning Administrator
15 Matthew LeGrant.
16 MS. VAIAS: Good afternoon, Emily
17 Vaias with Linowes and Blocker representing
18 the Association and with me is Joe Lapan also
19 from Linowes and Blocker and we have two
20 witnesses in the audience should we get that
21 far this evening.
22 CHAIRPERSON MILLER: Thank you.
23 Let me just start here. Ms. McCarthy, we're

wondering if you might or Mr. Johnson just set the stage again for the appeal and then we can pick up with the cross examination.

MS. McCARTHY: You want to or you want me to?

MR. JOHNSON: I'll go ahead if you want me to.

MS. McCARTHY: Well, why don't you do the general and I'll do the zoning.

MR. JOHNSON: Thank you. Members of the Board, this appeal was filed from the Zoning Administrator's decision that the building permit issued on November 17, 2006 could be issued as a matter-of-right. And what the building permit essentially did was to permit the addition of five parking spaces in an already existing parking garage, which had been in place for over 20 years.

And in the materials that we provided with our prehearing statement at Exhibit 4, there is a diagram that shows what we're talking about and the five spaces that were added actually in 2004, even though the

application for the building permit wasn't filed and wasn't granted until 2006, those five spaces are marked in yellow highlighter.

Mr. Harnett, who is the appellant has a particular interest in this, because his space P-12, which he owns in fee simple absolute and which is marked in blue on Exhibit 4, cannot be used now that spaces 2 and 3 are there when vehicles are placed there.

And there are a number of issues with 2 and 3 in terms of the aisle width that's provided, whatever it actually is can vary, because there is no end line there, no wheel stop, no other barrier to prevent vehicles from entering the drive aisle or protecting pedestrians who may be walking and that's one of the issues that we had talked about.

We identified a number of specific Zoning Regulations that are violated by this action taken by the association to insert these parking spaces and we show that Mr.

Harnett literally hasn't been able to move his car for over two years. And that's the basis for our appeal. We are asking the Board to reverse the decision of the Zoning Administrator and make a determination that this building permit could not have issued and should not have issued as a matter-of-right.

CHAIRPERSON MILLER: Thank you.

MS. McCARTHY: And then in terms of the specific zoning issues -- is this clear? It sounds real fuzzy. Okay. In terms of the specific zoning issues that we were dealing with, it was the issue of whether or not these spaces met the requirements of the drive aisle with the vertical clearance. And I think Mr. Etherly's line of questioning was getting at a nub of the issue, which was we maintained that when this building permit was issued, that essentially, 21.6 or the Zoning Regulations require that before you can submit -- or with a building permit you have to have a parking plan that shows the dimensions of all of the spaces and the approaches to those

spaces.

Your Certificate of Occupancy can't be granted unless you have built your parking spaces according to that plan. And then you are required by, I think it is, 217.1 that the spaces required by this chapter shall be provided and maintained so long as the structure that the parking spaces are designed to serve exist.

And I think that the condominium board is trying to say oh, well, that only applies for required parking spaces and we can decide at any time which are the required and which are the non-required spaces. I think our response to that has been you've got to know at the point in time in which you submitted to this Zoning Administrator, the Zoning Administrator needs to know which spaces you are saying are not required and which ones are required, so he can determine if you have sufficient required spaces to meet the Zoning Regulations.

And that since these spaces were

never indicated as not -- since Mr. Harnett's space was never indicated as being a non-required space, you can't just arbitrarily after he spent $60,000 on this space 20 years ago decide that the aisle width that he was entitled to as having a required space, that 20 feet, is now not relevant, because the condominium board has decided that it's not a required space.

I think in a lot of ways that's what it comes down to and there are other issues about the dimensions of some of the other spaces with the slanting columns, that some of the spaces don't make the vertical clearance. There are issues about them not having wheel stops, not having pedestrian pathways indicated.

And, you know, we spent a lot of time, I think, in the testimony and in the cross examination looking at issues about 216.9 that the Board may impose conditions on any accessory or non-accessory parking spaces as to screening, coping, setback, fences,

locations of entrances and exits.

But I think it's really important to read that as well with 216.8. And that is that accessory parking spaces. And remember, these are all accessory parking spaces. This is not a commercial parking garage. These are spaces that are provided accessory to the primary residential use on this site.

"Accessory parking spaces shall be located so as to furnish reasonable and convenient parking facilities for the occupants or guests of the building or structures they are designed to serve." So I think that really helps sum up that there are all kinds of protections that are written in here to the fact that you can't say you have a parking space, have somebody buy it and then change the dimensions or the access to that space. So I think that's about where we were.

CHAIRPERSON MILLER: I just have a question and that is I thought there was an argument about was this garage as a whole approved at one time for a certain number of

spaces, and therefore additional spaces couldn't be added without special exception relief. Was that an argument that was made or else I'm interested in that question.

MS. McCARTHY: I don't think it was that. I think that we drew the analogy to other provisions of the Zoning Regulations which say if you are going to make all kinds of changes in buildings that would affect your parking if you increase the intensity of use, if you decrease the -- or change the use, you have to still maintain the parking spaces.

And there was some discussion of the fact that some of the spaces that were later created and licensed by the Board were based on what Mr. Harnett had been told initially had been submitted by the developer and had been deemed as inappropriate spaces when the original parking plan was approved. But we didn't have proof of that.

CHAIRPERSON MILLER: But the parking plan that was approved, when was it approved?

MS. McCARTHY: No, you know, when the building was built.

CHAIRPERSON MILLER: It was approved in conjunction with the building?

MS. McCARTHY: Right.

CHAIRPERSON MILLER: In that plan was a specific number of spots, right?

MS. McCARTHY: Right, five fewer than what --

CHAIRPERSON MILLER: Five fewer.

MS. McCARTHY: -- are in there today.

CHAIRPERSON MILLER: Okay. And was that just approved by DCRA or was that approved -- the whole building for the building permit was just a regular matter-of-right approval. Is that right?

MS. McCARTHY: We --

MR. JOHNSON: I don't know that there is a way to precisely answer your question, because we weren't able to find what DCRA -- the original building permit application or the details of that.

CHAIRPERSON MILLER: Okay.

MR. JOHNSON: All we know is that the condominium was built and the units were sold and the information that we have seems to indicate that there was an application and it was approved for 48 spaces in the parking garage, but the specifics of that and the documentation behind that, I'm just not sure is even available, because we're talking about something that was done in the mid-1980s.

And literally wasn't changed from the mid-1980s until 2004 when the association took the action that ultimately led to the building permit in November and then the appeal.

CHAIRPERSON MILLER: Okay. I just want to ask one other question. Ms. McCarthy, you made a statement about how we need to look at this as accessory parking spaces and not as a commercial parking garage. What's the regulation that -- I know where accessory parking spaces are. Is there different regulations that go to commercial parking

garages that you are saying are inapplicable?

MS. McCARTHY: No, no. I just meant that one of the regulations refer to accessory parking spaces that all of them have to be usable and convenient. This is not -- that means all of the spaces in here. It wasn't necessarily saying only the required -- it wasn't using required or non-required. It was saying accessory spaces. And since it's not, you know, a parking garage in which it would be a primary use, a primary space, it's an accessory space, that applies to all the spaces in the facility.

CHAIRPERSON MILLER: Okay. Great. Any other questions before we go on with cross? Who was doing the cross at that point?

MR. TAYLOR: Madam Chairman, the cross had yet to begin. I believe I would be the first in line for that followed by Ms. Vaias.

CHAIRPERSON MILLER: I agree. Okay.

CROSS EXAMINATION

BY MR. TAYLOR:

Q Allow me to welcome you back, Ms. McCarthy. Let me get the microphone in a little bit better place, so I can look at you and talk into the microphone at the same time. And I'm remembering that the Nationals put on a pretty good show for you the night that we adjourned. I hope you enjoyed it.

A I believe they did, yes.

Q Now, you testified that a pedestrian walkway was obliterated by the creation of spaces P-2 and P-3, didn't you?

A I believe I mentioned it. I know Mr. Harnett discussed it.

Q And you've also indicated the area of the supposed pedestrian walkway was marked by cross striping. Is that correct?

A That's correct.

Q And the striping for what you believe to have been a walkway then would have also created an aisle between P-12 and -- excuse me, P-112 and that walkway, would it not?

A No. P-112 is next to a wall. The walkway was created behind where P-112 is located, so that people could come down that walkway and then turn right into the garage. I'm sorry, I mean, into the elevator lobby.

Q And so the 19 feet 5 inches between the back line of P-112 and where the-- this walkway would have begun, you say that that was not an aisleway?

A There were no spaces for it to be an aisle of. You know, the Zoning Regulations require the creation of a drive aisle between two parked cars. There were no cars parked there, so there was not a 20 foot drive aisle requirement there. There was, you know, a huge drive aisle.

Q Okay. If I could refresh your recollection, you testified at the previous hearing "When the cars are parked to maximize the distance between spaces 112 and 2 and 3, then the cars in 2 and 3 encroach in the drive aisle width and the opposite side." Now, when you said that, you were referring to a

1 situation in which the location of a vehicle
2 in space P-2 is 20 feet or more from the end
3 of space P-112, were you not?
4 A I'm sorry. Could you repeat that?
5 Q Shall I say that again?
6 A Yes.
7 Q Yes. Your statement was "When the
8 cars are parked to maximize the distance
9 between spaces 112 and 2 and 3, then the cars
10 in 2 and 3 encroach in the drive aisle width
11 and the opposite side."
12 A The drive aisle width that's
13 behind them basically between them and car --
14 and space 142. And I believe your own photo
15 in your list of exhibits, DCRA 24, shows that
16 there is only 19 feet 2 inches to begin with
17 between the end of the stripe for P-2 and the
18 beginning of space 142. And so that drive
19 aisle doesn't even meet the dimensions from
20 the stripe. If they adjust their cars so that
21 they are parking at the back end of that and
22 maybe even hang over the stripe in order to
23 create the 20 feet between 2 and 3 and Mr.

Harnett's space, then they are encroaching in the drive aisle for 142 and the cars on the opposite wall.

Q And in your opinion, how far would a vehicle in P-2 encroach onto the drive aisle?

A Well, it depends on where the spaces -- where the car is parked. But if you recall the testimony of Mr. Albers, he measured the entire garage, then subtracted two 20 foot drive aisles, then subtracted the required length of the parking spaces and showed that you -- the -- you can't provide 20 foot drive aisles when you put spaces 2 and 3 in there.

There is just not sufficient width of the entire parking garage, no matter if you push 2 and 3 up a little bit or back a little bit. You can't -- the walls of the parking garage are not elastic, so therefore you just don't have enough width in the parking garage to accommodate the Zoning Regulations if you put spaces 2 and 3 in there.

Q Well, you also testified "We are talking about spaces that were originally identified as required spaces and even if spaces 2 and 3 are deemed non-required, they have effected the drive aisle that affects previously required spaces."

My first question, what is a required parking space?

A A space that's required by the Zoning Regulations by 2101.

Q What is a non-required parking space?

A That's one that's not required by 2101.

Q In your opinion, what are the minimum dimensions of a non-required parking space?

A The Zoning Regulations don't indicate required dimensions for non-required parking spaces.

Q So in -- I believe you were qualified as a zoning expert. In your expert opinion, what would be the minimum size

1 necessary for a non-required space?
2 A My expert opinion is as to what
3 the Zoning Regulations require. The Zoning
4 Regulations don't address that issue.
5 Q And did you have an opinion as to
6 why the Zoning Regulations do not indicate
7 minimum dimensions for non-required parking
8 spaces?
9 A No, I don't have an opinion with
10 regard to that.
11 Q Okay. Do you still stand by your
12 previous testimony that you may have some
13 spaces that do not meet the requirements of
14 the Zoning Regulations?
15 A Yes, in fact, I'm sure the Board
16 will require the Citadel case and Brooks
17 School and many others in which the plans that
18 came before the Board indicated some spaces
19 were required and met the dimensions and those
20 were counted in the required -- as the
21 required spaces. Other spaces were
22 dimensioned and indicated that they didn't
23 meet the requirements, but that the Zoning

Administrator when he reviewed those building permits was able to see which ones were other and which ones were the required spaces and met the appropriate dimensions.

And that's all we're saying here is absent that indication in the building permit, the purchasers of those spaces had every right to expect that all of those spaces met the zoning requirements as if they were all required spaces.

Q So if I remember my question, whether you stand by the statement "That you may have some spaces that don't meet the requirements of the Zoning Regulations," your answer would be yes?

A Yes.

Q Okay. Hypothetically, speaking as a zoning expert again, if spaces 2, 3, 110, 111 and 112 were all non-required spaces, would that not remove them from the aisle width requirements of 2117.5?

A If they had been so indicated on the parking plan when it was approved, yes.

Q Is there any regulation, to your knowledge, that requires an applicant for a building permit to indicate whether a parking space is required or not required?

(Whereupon, at 5:00 p.m. the Public Hearing continued into the evening session.)

E-V-E-N-I-N-G S-E-S-S-I-O-N

5:00 p.m.

A They have to provide the Zoning Administrator with -- let's see. 2100.2 says "No application for a building permit for a building or structure to be erected on or after May 12, 1958 shall be approved unless there is included with the plans for the building or structure a parking plan showing the location, dimensions and grades of all parking spaces and approaches thereto in accordance with the provisions of this chapter."

Q And so it is your opinion that that requires the applicant to indicate this space as a required parking space and this space is not a required parking space?

A It certainly requires the applicant to indicate the dimensions of all spaces, which then permit the Zoning Administrator to determine whether that meets the dimensions of a required parking space or not.

Q Okay. Let me see if I can ask this another way. We're not communicating well. Is there any regulation requiring the applicant to write down on the building plan this space is a required space or this space is a non-required space?

A And I'm saying there is a requirement that you have to show whether it meets the dimensions of a required space or not, because you have to show the dimensions. There is nothing that says that you have to put the word required space or non-required space on there. But there are many examples and I know the Board has seen several of them in cases like Citadel where you have a delineation, a little box at the bottom of the parking plan that will say this many spaces meet the requirements.

They are the required spaces and this many are other, they don't meet the requirements, but we are putting them in there. They are parking spaces. And the Zoning Administrator is then free to determine

whether they are sufficient parking spaces, whether they meet other requirements like 2116.8 or whatever that I read about having convenient access.

Q So would it be fair to characterize your testimony as it might be a nice touch, but it's not a requirement?

A I think it would be fair to characterize my testimony as saying the requirement is that all of the spaces be dimensioned.

Q Okay. Now, you testified in the previous hearing that because of the slanted columns that permeate this garage, space P-5 does not have a full 6 foot 6 inch vertical clearance. Is that correct?

A Yes, I believe that Mr. Albers is the one that actually talked about the measurements, the specific measurements. I alluded to it in my testimony, but he was the parking dimensions expert, so he is the one that actually measured those.

Q And would you, please, take a look

at Government's Exhibit 019, please?

A Yes, that's with regard to space 143, which is not what we're talking about.

Q Actually, I haven't asked a question yet.

A Oh, okay.

Q If you don't mind. Let me do my job. Is that the type of slated column to which you are referencing?

A I don't know, because what I was looking at was column -- was space 5, I believe.

Q So --

A So I didn't look at 143, because that wasn't a concern to me.

Q Okay. Well, would you look at 143 now and tell me if, in your opinion, that makes the parking space unlawful?

A Without any dimensions, I can't tell.

Q Do you have specific dimensions for the column that abuts space 5?

A Mr. Albers had the specific

dimensions. He was the one that was talking about that.

Q And --

A And I think -- but if you look at this, it's pretty clear if you were to measure 6 foot 6 inches up from this point, which is part of the required width of the parking space, you don't measure 6 foot 6 inches and you don't get 6 foot 6 inches here and that column is encroaching over the height of the space.

Q So would that make it an unlawful parking space?

A Well, if the regulation says 6 foot 6 inch vertical clearance is required, then I would think so.

Q You have testified that you have visited that garage. Did you happen to notice how many spaces in the garage then you would not consider to be code compliant, because they have such columns?

A I only visited the garage to look at the parking spaces that were in question.

I didn't go and look at each of the other parking spaces.

Q So the only space that you are challenging today because of the slanted column is space 5?

A That's --

Q Is that correct?

A -- what we named in the brief, I believe.

MR. JOHNSON: Yeah, we will stipulate to that.

BY MR. TAYLOR:

Q Do you have any evidence that the owners of any space containing a slanted column has ever filed a complaint about that column?

A It's kind of irrelevant, isn't it?

Q The question --

MR. JOHNSON: I object, Madam Chair. I mean, we're spending a lot of time on things that I don't see have anything to do with what we are here for.

MR. TAYLOR: Madam Chair, we --

CHAIRPERSON MILLER: What's the relevance?

MR. TAYLOR: I mean, you are told that the convenience of the use of these parking spaces is something that you are here to judge and --

CHAIRPERSON MILLER: I don't think so. I thought we were here to judge whether they were compliant with the regulations.

MR. TAYLOR: Then maybe I misunderstood, Ms. --

CHAIRPERSON MILLER: Am I wrong?

MR. TAYLOR: -- McCarthy's testimony --

CHAIRPERSON MILLER: Are you --

MR. TAYLOR: -- that she indicated that that was one of the elements you were to be adjudicating.

MR. JOHNSON: No, I'm sure it's not deliberate, but Mr. Taylor is confusing a couple of the arguments that we're making. And we did refer to 2116.8, which talks about reasonable and convenient parking facilities

and 2116.9, those provisions may be relevant depending on how the Board decides this. But those are in particular reference with respect to parking space 112 and the effect that 2 and 3, the newly created 2 and 3, have on 112. It doesn't have anything to do with the vertical clearance issue.

CHAIRPERSON MILLER: Okay. Yes.

MR. JOHNSON: Which applies only to 5.

CHAIRPERSON MILLER: Okay. Yeah, I would think that the question should go to only the claims that they are making, otherwise, it's not relevant.

BY MR. TAYLOR:

Q You testified at the previous hearing that both spaces 4 and 5 have what appear to be utility lines over the space, not necessarily within the 6 foot 6 inch requirement. Are those bare wires?

A Yes, that was not in our complaint. That was an observation I made that it -- that that didn't seem appropriate

to the space, but I was not suggesting that that was part of our suggestion that those spaces didn't comply.

Q But that was part of your direct testimony, was it not?

A No, I think my direct testimony said that wasn't part of our concern about the vertical clearance.

Q Okay. I would like to direct you, if I may, to page 194 of the transcript of your previous testimony. And if you would check out on this copy the second highlighted section on that page. Would you, please, confirm that it says "We have pointed out that both spaces 4 and 5 have what appear to be utility lines over the space, not necessarily within the 6 foot 6 inch requirement."

A Yes, you mean where I say that and then I say "But that's not, strictly speaking, a zoning issue, so I'm not going to deal with that potentially dangerous situation as part of this."

Q That's the one. So it appears

that it might -- well, let me just put it this way. What is the vertical clearance of whatever those items are?

A Of the column?

Q No, the -- what appear to be utility lines.

A I'm not alleging that they are violating the 6 feet 6 inches, so I didn't measure the utility lines.

Q So you're not --

A The vertical clearance --

Q -- so you --

A -- issue is only to deal with the slanted column.

CHAIRPERSON MILLER: Mr. Taylor?

BY MR. TAYLOR:

Q But I just --

CHAIRPERSON MILLER: Mr. Taylor? Mr. Taylor? All right. You know that when we're going to be analyzing this case we're going to be looking at whether the regs were violated. And if that's not a claim that they are making, we're not going to be considering

it. So I don't see why you want to go down that road, unless you want to give us a reason why, but we really want to look at -- we want to hear about what will help us resolve the appeal.

MR. TAYLOR: Merely, that if Ms. McCarthy thought it was important to bring that out, then I thought it was important enough to clarify it for you. That having been said, I will move on.

BY MR. TAYLOR:

Q You have testified regarding the application of section 2117.7 regarding private walkways and driveways. Would you be able to indicate on the drawing on the easel over here where there is a driveway?

A I believe we were not -- we didn't talk about driveways. We talked about the drive aisles. The driveway is the entrance to the garage and the exit from the garage.

Q Could you, please, identify over on that chart where the private walkways are?

A Well, I don't believe the private

walkway is left any more.

MR. JOHNSON: Is there a remote mike?

CHAIRPERSON MILLER: There was. Oh, you got it? Okay.

THE WITNESS: Yes. Do you mind if I use the larger map, because the smaller one is pretty small?

BY MR. TAYLOR:

Q I would prefer you use the actual building plan that was approved.

A Okay. I think that's where this came from, but, oh, this one that --

Q Yes, ma'am.

A Yes. Okay.

CHAIRPERSON MILLER: I assume that's probably in our record, is it not?

MR. TAYLOR: Yes, it is Exhibit 002 in your notebooks.

MR. JOHNSON: DCRA's exhibit notebook.

CHAIRPERSON MILLER: I'm sorry, I didn't bring that out. I just wanted to -- if

you're going to be referring to that notebook of exhibits --

MR. TAYLOR: Several times.

CHAIRPERSON MILLER: Okay. Let's just give the Board Members a chance to go get it.

MR. TAYLOR: Yes, madam.

CHAIRPERSON MILLER: Okay.

(Whereupon, at 5:12 p.m. a recess until 5:14 p.m.)

CHAIRPERSON MILLER: Thank you. Which exhibit is that again?

MR. TAYLOR: It's 002.

CHAIRPERSON MILLER: Okay.

MR. TAYLOR: Which, admittedly, is also small in your notebook.

CHAIRPERSON MILLER: We're ready.

BY MR. TAYLOR:

Q And I believe the question, Ms. McCarthy, can you, please, point out on there where there is a private walkway?

A I believe that what Mr. Harnett showed me was where the walkway was

1 originally, which was here, and I could see
2 where the stripes had been painted over black
3 to eliminate it. So now, the only walkways
4 that exist are people having to share the --
5 they either have to brush past the cars that
6 are there, there is a sign right now that
7 indicates P-16 is the -- P-116 is the walkway,
8 but that's, as you can see, a parking space.
9 So if somebody has got a car or
10 it's wintertime and the cars are dirty as they
11 are whenever people go through slush, then
12 they have to walk all the way around to get to
13 the elevator, which is here. As before there
14 was a walkway that was right here which was
15 far more convenient.
16 Q Okay. We will get to P-116 in a
17 moment, but you testified at the previous
18 hearing that the area now comprising spaces 2
19 and 3 "still functions as the only practical
20 private walkway for the cars in that whole
21 corner of the garage for spaces 101 through
22 113." Is that still your testimony?
23 A That's the way that they would get

to the elevator. The only convenient way for them to get to the elevator.

Q So the only -- if you are in space 101 through 113, the only convenient way to get to the elevator is walking through what is now spaces 2 and 3?

A No, I believe what I said was walking by them. The point that I was making was there is no wheel block or any protection. There is not even an end line to tell the cars here that they have to stop, so they don't hit the pedestrians or people that are going -- that are walking now in what's -- the pedestrians now have to share the drive aisle.

Q Okay. Can you find space 122 on that diagram?

A I can.

Q As a zoning expert, what would you consider to be the practical route for the owner of that space to take to the elevator?

A As far as I know, that owner has to also go this way.

Q So you're essentially saying that

that person currently has to walk the entire way in the driving aisleway, whereas prior to 2004, they could cut off a corner partially on the way. Is that your testimony?

A I think that's -- I think you are saying what I was saying.

Q So it's -- okay. I'm through there. Is there a regulation requiring there to be a separate private walkway in this garage?

A No.

Q Okay. You may come back. We're done with that map. Now, where are we? Okay. Ms. McCarthy, would you, please, turn to Exhibit 003 in the exhibit notebook? And then on the -- if you have the notebook, turn to -- I'm sorry, the words are failing me. The opposite of a portrait layout.

A Landscape.

Q Thank you. To a landscape layout in the upper left hand corner you see a sign. Is that the one you are referencing as -- when you talked about indicating that that was a

private walkway?

A Indicating that a sign had been up to say that was the walkway, yes.

Q Okay.

A You see the wheel block right there on 116 incidentally.

Q When Mr. Mann asked you at the previous hearing whether there were previously wheel bumper guards for the section that you are considering to be a private walkway or the area that you say was a private walkway, you testified there were no spaces, there were no cars that accessed that.

A Right. There were no parking spaces there, so there were no need for a wheel block, right.

Q So if cars did park there, would that have been a violation?

A I'm sorry?

Q If cars did park there, would that have been a violation?

A If a parking space had been put there without a wheel block to separate the

pedestrian way from the parking space, yes.

Q But as long as there was no official parking space created there, your testimony is it's fine for cars to park there?

MR. JOHNSON: Well, I object. I think we got a little bit into this last time. We're not talking about Zoning Regulation issues now with that question. We're talking about some sort of a parking enforcement issue, which isn't again what we're here for.

MR. TAYLOR: To the contrary, Madam Chair, there has been testimony at the previous hearing that cars, including the appellant, were frequently parking in that area, turning those into de facto parking spaces. And what I am trying to elicit is if it is a dangerous condition not to have those barriers there in previous years? How does it become dangerous to have cars parking there and not -- and if it's dangerous to have cars parking there now, why was it not dangerous back then?

CHAIRPERSON MILLER: Well, which

is your question? Does it go to the dangerousness of the situation or does it go to the first question I heard you ask, was if cars parked there before and there weren't spaces marked, would that have been a violation? I assume a violation of the Zoning Regulations. Was that your question?

MR. TAYLOR: Correct, yes.

CHAIRPERSON MILLER: I don't think that's an unfair question to ask someone who has been qualified as an expert in Zoning Regulations. I don't think it's totally -- and also I would say if you said -- Mr. Johnson said well, it goes to enforcement. Well, if it does, that sounds like you are saying that might have been a violation. How relevant it is to whether the spaces marked are violations, I don't know, but it's close. So can you answer that? It doesn't go to your testimony I don't believe, so, you know.

THE WITNESS: Right. Well, that's what I was going to say. I don't believe that I testified about dangerousness. I testified

that the regulations require wheel blocks to separate where cars park from where people walk. And that was all that my testimony addressed.

BY MR. TAYLOR:

Q But you did testify that there were no wheel blocks there previously and there didn't need to be, because there were no cars that accessed the space.

A No, I said they weren't there previously and there didn't need to be, because there was no parking space indicated there. There was no striping, no parking space created there.

Q Okay. The record will clarify that. So let me phrase it this way. If, for example, Mr. Harnett would have parked in that area on a constant basis, would that have created a de facto parking space in that area?

A First of all, I didn't testify about Mr. Harnett parking there, so it's not cross examination, because --

Q You --

A -- it's not my testimony.

Q -- are here to -- okay.

MR. JOHNSON: Well, no, I --

BY MR. TAYLOR:

Q You are an expert, so let me ask it hypothetically.

MR. JOHNSON: I object. It's beyond the scope.

CHAIRPERSON MILLER: Again, I would say you have to remember what it is the Board has to decide and it does sound like you are going afield. We have to decide whether these spaces as lined or not marked in ways they should have been or not dimensioned are a violation of the code or not. That's really it. I don't see why you do have to pursue a line of questions with Ms. McCarthy about well, what if they weren't lined at all or that's all very hypotheticals that don't help us answer the question at hand.

MR. TAYLOR: I'll withdraw it, Madam Chair.

BY MR. TAYLOR:

Q Ms. McCarthy, you testified at the previous hearing that you were "sure if we had the owners from spaces 111 and 110, perhaps we would be hearing some of the same considerations." Was that relevant to your case?

MR. JOHNSON: May we have a page number perhaps, so she can actually -- I mean, I don't understand this.

MR. TAYLOR: Page 229.

THE WITNESS: I believe the quotation was "I'm sure if we had the owners from 111 and 110, perhaps we would be hearing some of the same considerations."

BY MR. TAYLOR:

Q That is what I read, yes.

A Right. That's what I said.

Q Is that relevant to your case?

A Yes, I think the point that I was making was that there were three parking spaces that were all affected by not having 20 foot drive aisles behind them any more, but the one that -- the person that's here that

has that -- that's experiencing that adverse impact is Mr. Harnett, so that's the one that I'm addressing directly.

Q Do you have any evidence that the owners of 110 and 111 have expressed those same concerns as Mr. Harnett?

A Well, I believe Mr. Harnett testified to that effect that one of the gentlemen had complained to him, but that he frequently is out of the country on business and so wasn't as directly as affected as Mr. Harnett. That's what Mr. Harnett said if you want to cross examine him on that.

Q And then they --

A That would probably make more sense.

MR. TAYLOR: I have no further questions.

CHAIRPERSON MILLER: Do you have questions of any -- of their other witnesses?

MR. TAYLOR: Madam Chair, I have already had that opportunity and I appreciate the offer, but I respectfully will stand on

what I have already asked there.

CHAIRPERSON MILLER: Okay. I thought we had done some cross. Okay. Now, then we turn to the intervenor. Do you have cross examination questions?

MS. VAIAS: Yes, just a few.

CHAIRPERSON MILLER: That's of Ms. McCarthy?

MS. VAIAS: Yes, yes.

CHAIRPERSON MILLER: Okay.

BY MS. VAIAS:

Q You are alleging that space 112 is a required space. Is that correct?

A Is not -- yes.

Q And but that spaces P-2 and P-3, are they required spaces, in your opinion?

A No.

Q And the base -- what is the basis for your determination that P-112 is required?

A Because there is nothing to indicate that it was not a required space.

Q Okay. So and is there anything in the code that says how you determine which

spaces are required and which are not required?

A There is lots in the code that determines what has to be part of a required space.

Q Okay. But nothing that says who determines which spaces are required or which are not required?

A I believe the Zoning Administrator determines what is required and what's not required.

Q And that would be based then on the dimensions that meeting the criteria for required spaces or for non-required spaces?

A Right.

Q Is that --

A And I --

Q -- how it would be determined?

A But I think we're also saying absent any warning or information to somebody who is buying a parking space that the space that they are buying is not a required space and is therefore not subject to legal

protections that go with having access, then--

Q But that would be something --

A -- that's --

Q Is that not up to the Zoning Administrator?

MR. JOHNSON: May she finish her answer?

MS. VAIAS: She did, I think.

THE WITNESS: I was just saying that absent any kind of other determination that a person that buys a space should be able to count on the fact that that space meets basic zoning requirements for access and convenience of use.

BY MS. VAIAS:

Q Okay. So based on that person's individual expectations?

A Based on the fact that they are buying a parking space that has been approved by the Zoning Administrator and it has a building permit and a Certificate of Occupancy and the rest of it, yes.

Q But also the Zoning Administrator

approves non-required spaces as well. Is that correct?

A The Zoning Administrator approves the parking plan and the building permit.

Q Okay. And that would show both required and non-required spaces. Is that correct?

A Generally, they do.

Q Okay.

A Or let me be more precise. When a parking space is submitted that doesn't meet the requirements, it's supposed to be identified with its dimensions, so the Zoning Administrator can determine whether or not that still meets the requirements of 2116.8 in terms of convenience of access.

Q Okay. And that would be the basis then for the granting of a building permit as was done in this case then, determining that it is safe and efficient and those other things.

A Right.

Q Okay.

MS. VAIAS: Okay. Nothing further.

CHAIRPERSON MILLER: Could you refresh my memory, did you also cross examine the other witnesses already?

MS. VAIAS: Yes.

CHAIRPERSON MILLER: Okay. So then at this point, do Board Members have any other questions? All right. Then we'll turn to the Zoning Administrator's case. Mr. Taylor?

MR. TAYLOR: Thank you, Madam Chair. The Government calls for it's first witness, Mr. Lindsley Williams.

CHAIRPERSON MILLER: Mr. Williams, you haven't been sworn in yet?

MR. WILLIAMS: No.

CHAIRPERSON MILLER: Oh, neither has Mr. LeGrant, so they are both going to be sworn in now.

MS. BAILEY: Okay.

(Whereupon, the witnesses were sworn.)

MS. BAILEY: Okay.

CHAIRPERSON MILLER: Why don't we start with your introducing yourself for the record, please?

THE WITNESS: Good afternoon, Members of the Board, my name is Lindsley Williams. I reside at 3307 Highland Place, N.W., Washington, D.C. And at a point in my past life, I served on the Zoning Commission and I'm rather familiar with Case No. 82-5, which is the core of all of this discussion.

DIRECT EXAMINATION

BY MR. TAYLOR:

Q Mr. Williams, were you a member of the Zoning Commission of the District of Columbia?

A Yes, from, approximately, 1981 to 1988 or thereabouts, two terms.

Q So were you a member of the Zoning Commission that drafted the current parking regulations?

A Absolutely, yes. In terms of you'll see in the citations that it refers

typically to the publication that was issued in the DC Register on December 28, 1984, regulations that became, basically, effective March 1, 1985.

Q Was it the intention of those drafting the regulations that among the accessory parking spaces in the District would be both the required and non-required spaces?

A The Zoning Regulations as drafted made a strong effort to identify standards that could be administered reasonably by the Zoning Administrator for certain required spaces, typically being 9 x 19 with various vertical clearances. It also provided for certain smaller, what's called "compact" spaces, clustered, etcetera, etcetera. I won't go into all of the details.

But between the regular spaces that were at least 9 x 19 by at least a vertical distance and at least the dimensions for the compact spaces, all of those could be used if they satisfied the whole four corners of the regulations, could be counted as spaces

that met the requirements as to number of parking spaces that were figured out as a function of other provisions of Chapter 21 that were based on use.

In this case, it would have been a function of there were so many apartments in the complex, they would have therefore in the W Zone or wherever it is located had to have produced at least so many required parking spaces. The other parking spaces are allowed to be provided.

And the only thing I would like to introduce as a semantic concept for you this afternoon in your deliberations is that they are not required, but it would not be, I think, healthy to regard them as unlawful. They are simply ones that are not allowed to be counted. But they are not like they are felon parking spaces.

Q Are there any specific dimensions that the regulations intend for those spaces?

A No. They are basically left for the market to determine if they will work, if

they have reasonable access and the like. There are standards that say that the whole thing has to be operated in a manner that's safe and convenient, but the specific standards say that you need to have, for example, aisles that approach and depart the required parking spaces that meet certain requirements.

You can have tandem parking spaces, a concept that I don't believe that's in play at this, but where spaces are put back to back and typically one person will have control of both spaces. And if they have two cars, one can be stacked behind the other or other arrangements can be made so that the two spaces functionally work. That's an illustration.

Q Thank you.

MR. TAYLOR: I have no further questions.

CHAIRPERSON MILLER: I just want to ask you a question. So normally, when you have required parking, stacked parking

wouldn't meet the required parking number?

THE WITNESS: The exposed space of a stacked parking space, the one that adjoins an aisle, for example, could count. The one that is behind it, whether it is on the property or in vault space, on public space that penetrates out through the property line would not be able to be counted, but it might be very effective to the building in terms of meeting its market demand for parking.

CHAIRPERSON MILLER: Mr. Williams, I don't know the circumstances upon which this whole parking plan was approved, but is it your position that if the original parking plan met the required number of spaces, that the owner could add additional spaces that weren't necessarily compliant with the regulations?

THE WITNESS: Ms. Miller, I would love to be able to answer that question. I don't feel I have enough involvement -- information about the dynamics of this case. I was concerned about the distinction between

parking that is required and what is not required and felt it would be appropriate to help illuminate that, but to get into the greater details and issues of the case is beyond any expertise I could bring today.

CHAIRPERSON MILLER: Thank you. Mr. Etherly?

VICE CHAIR ETHERLY: Mr. Williams, thank you for your testimony. With your answer to Ms. Miller's last question in mind, this is, I'm fairly certain, going to be a much better question put to presumably additional witnesses that Mr. Taylor may bring forward directly from DCRA, but perhaps let me ask you, because of your familiarity with this distinction, if you will, between required and non-required parking.

Do you have a sense of perhaps in practice how these spaces are dealt with when typically a developer or a property owner presents a plan of some sort? Are they typically denoted in some specific way?

THE WITNESS: Mr. Etherly, I can

give you an answer to that, but it is a contemporary answer. That is to say I think I can speak with some certainty as to how it has operated from the year 2000 to the present. How it operated back when this building was built whenever that was and under whatever rules then applied, it was about at the cusp of this March 1st date, I don't know whether it was under the old rules or the new rules.

But required and non-required was not something we invented, but something we continued deliberately in the rule making that was done in Case 82-5.

VICE CHAIR ETHERLY: Okay.

THE WITNESS: And the practice today, if you want me to go there?

VICE CHAIR ETHERLY: Please, do.

THE WITNESS: Would be to draw out the level in plan showing the columns, showing the perimeter walls, showing the other built features that have to be kind of dealt with on the plan to then lay out with -- in a

diagrammatic form parking spaces that show with the letter R or something like that for required regular parking spaces, at least 9 x 19, at least 6 foot 6 clear, not having sprinkler heads, water line drains, anything that comes into this basically rectangular solid that's in an imaginary form.

And if the plan can say there is nothing that comes into that, we'll give that a count as a regular parking space, a 9 x 19. C would be a designation typically put for a space that is smaller than 9 x 19, but at least meeting the other dimensions of a compact space.

And spaces that are tandem, which are located behind, spaces that have a column encroachment of the slightest degree, an inch is enough to kill a parking space, you would work to make the column move if that were the case. But you will note the spaces that have any irregularity or whose corner projects over, for example, a required aisle dimension, because if it does, the corner gives way, the

aisle stands and the 20 foot requirement or whatever the width is that applies, that is basically the highest priority, preserve that with -- so that you don't have to bring a case to the BZA.

VICE CHAIR ETHERLY: Okay. Again, with your caveat in mind that we're talking about your understanding and experience with contemporary practice or practice since 2000, let me then ask so would it be unusual if a project has spaces involved, if a project has required and non-required parking involved in it, it would be typical, based on your understanding since about 2000, for some type of notation to appear on a parking plan?

THE WITNESS: Typical, but you will not find that in the regulations. It's just the practice that the way you go through and come down with diagrams to show the Zoning Administrator.

VICE CHAIR ETHERLY: Understood.

THE WITNESS: Here is the tally. Here are the ones that work. Here are the

ones that don't. Basically take the need for them to go out with protractors and scale devices and measure everything. No. The plan preparer will do that and be able to show them to a level that they are satisfied that the parking requirement is met or if there is a shortfall how the --

THE WITNESS: How it's short.

THE WITNESS: Exactly how the shortfall is occurring. Whether it is because of a dimensional issue in the space, a dimensional issue in the aisle, a vertical clearance, a slanted column, a wheel stop, whatever it is.

VICE CHAIR ETHERLY: Okay. Now, in the instance where a property owner for whatever reason may go above and beyond the call of duty, i.e., has more than sufficient required parking and also has, of course, non-required parking, let's say there is just an over abundance of parking spaces, such that the property owner conceivably has a lot of flexibility to jiggle around, by jiggle I mean

if you have more, if you have surplus required parking and surplus non-required parking, would a property owner, again based on your understanding since about 2000, be required to report back to the ZA if it decides to reallocate required parking within its garage or within its setting?

THE WITNESS: I'm not going to answer the question as a matter of law.

VICE CHAIR ETHERLY: Okay.

THE WITNESS: That's not my area of expertise. I will say that if a client came to me and said I would like to try and get some more juice out of this stone or whatever and I need to change my parking layout from what is in my approved plan, I would say, please, take the plan down to DCRA again and get it confirmed that this is now the plan against which you will be judged in terms of Certificate of Occupancy and the like.

VICE CHAIR ETHERLY: I appreciate that. Thank you. I appreciate that. And

also let me just emphasize for the purposes of our conversation, I appreciate the caveat that you're not answering that as a matter of law. I am asking that simply as a hypothetical. Of course, as a hypothetical that's perhaps closely aligned to one of the key questions in this case, but I just wanted to get a sense as to whether or not that is something that, in your experience, you've seen happen or is it something that would be unusual.

THE WITNESS: I've seen a lot happen, Mr. Etherly.

VICE CHAIR ETHERLY: You've seen a lot happen. But again, it would be your suggestion or our counsel in that hypothetical situation to show it to the --

THE WITNESS: It would not be my counsel. It would be my advice.

VICE CHAIR ETHERLY: Your advice. Excellent. Thank you. Thank you, Madam Chair.

CHAIRPERSON MILLER: I have a question about what you have seen happen.

THE WITNESS: Well, I may have to take another --

CHAIRPERSON MILLER: I'll withdraw. I'll ask the Zoning Administrator.

VICE CHAIR ETHERLY: You're under oath, Mr. Williams.

CHAIRPERSON MILLER: But when there is a parking plan that's going to go to be reviewed by the Zoning Administrator and DCRA, in your experience, does the Zoning Administrator rely on the plans or do they actually go out and look at the parking situation? Look at the parking spaces?

THE WITNESS: My experience has been at the stage of permit review and not Certificate of Occupancy review. And the reason I'm mentioning that is that at the plan level, there is not often something to go out and look at, except a piece of ground that's covered with some other structures that are going to be razed to make way for the future building.

And my own personal experience has

not taken me to what happens at C of O time when they are actually trying to say okay, is this what got built, which would be where the eyeball could come to the reality of what's there.

CHAIRPERSON MILLER: Okay. Thank you very much.

THE WITNESS: Any other questions?

CHAIRPERSON MILLER: Any other Board questions? Is there cross by the appellant?

MR. JOHNSON: Yes, thank you, Madam Chair.

CROSS EXAMINATION

BY MR. JOHNSON:

Q Mr. Williams, let me ask you, you've come here and testified voluntarily. Is that correct?

A Absolutely, yes, sir.

Q And when did you first become aware that you were going to come and testify in this case?

A This week.

Q And how did you become aware?

A Well, actually, I didn't know that I was going to testify until I was called and, you know, that I was allowed to testify. So-- but I saw something of these proceedings and it was concern that there might be a theory advanced that would somehow jeopardize the practice of allowing the non-required spaces to operate with some greater freedoms and that was the intent of the policies in 82-5. And I wanted to make sure that that, how should I say that, theory and that that practice was not jeopardized because it has impacts on basically all the buildings that are being built now and operated and C of Os out in the land.

Q Did you find this case on your own then or did somebody contact you and tell you about this case?

A I read some materials that were in communications that were circulating in the private sector about the case. I was not asked to do something by anybody.

Q Well --

A Not anybody.

Q -- when you say communications, where were these communications from?

MR. TAYLOR: Madam Chair, I object. Is this relevant at all?

CHAIRPERSON MILLER: I was really waiting to see about that.

MR. JOHNSON: I think we need to know what information he had in order to find out how that may have affected his testimony. I mean, that's what you would ask any witness what information they are basing their testimony on, what their understanding was, where their information came from, an expert or anybody else. I don't see why we don't --

CHAIRPERSON MILLER: I think that question would be if you're asking him what his testimony is based on, I mean, that would go to -- I mean, he could answer that question. But you are asking really more what goes to like motives. How did he get here, that kind of thing.

MR. JOHNSON: Well, that's part --

CHAIRPERSON MILLER: We don't really -- I mean, everybody could go through that kind of grilling and that's -- unless you are trying to discredit him somehow, I don't see the reason to go down that road.

MR. JOHNSON: Well, I don't know. I mean, I don't know what he is basing his testimony on, because, obviously, there was --

CHAIRPERSON MILLER: Well, that's a question. Ask him what he is basing his testimony on.

MR. TAYLOR: Madam Chair, I would object there. It's already asked and answered.

MR. JOHNSON: I don't think so. I mean, he referred to some communication that was being circulated. I mean, is that something you have a copy of that we could get a copy of?

CHAIRPERSON MILLER: No, because-- no. That's not what he said he is basing his testimony on. Mr. Williams, what are you

basing your testimony on? Not why are you here, but what's your testimony based on?

THE WITNESS: Essentially, my testimony is based on the history of Case 82-5 and the principles that it stands for, which I believe continue to be the core of guidance of the Zoning Regulations that are in effect now, even though the schedule has been amended and various other changes have been done to it. I was trying to explain what my understanding was of the theory. And if that's helpful to the Board, I wish it well. If it's not helpful, please, ignore it.

BY MR. JOHNSON:

Q Well, let me see if I can hone on in what I think you said your concern was and if I'm getting this wrong, let me know. But I think your concern is that there is a distinction in the regs between required and non-required spaces. Is that a fair general statement?

A Yes, sir.

Q And on your direct testimony, I

1 think you used the term "I don't want people
2 to think that non-required means like a felon
3 space." Is that right?
4 A Well, the context of that remark,
5 sir, was that there was some description of it
6 earlier in the afternoon which described these
7 spaces as "unlawful." And what I didn't want
8 to be seen is that there was somehow a space
9 that was so afflicted with conditions that
10 somehow you had to sneak into the space and
11 stealthily leave it the next morning in order
12 not to be caught parking in it.
13 Q Well, so you're not saying --
14 you're saying non-required doesn't mean
15 necessarily unlawful, right?
16 A That's exactly correct, sir.
17 Q Okay. But I think I would like to
18 direct your attention, there are provisions in
19 the Zoning Regulations that specifically do
20 regulate non-required spaces, correct?
21 A Well --
22 Q I mean, yes?
23 A Yes.

Q Non-required doesn't mean totally unregulated.

A No, it doesn't mean a caveat -- it doesn't mean just whoopie, do anything you want, but it means that you -- I'll stop there.

Q Well, for example, are you familiar with section 2117.7 --

A Bumpers?

Q -- of the Zoning Regulations, the bumpers?

A Yes.

Q That's one that applies to all parking spaces, correct?

A That's correct.

Q Required and non-required?

A Right.

Q So that would apply to non-required as well, correct?

A I believe so.

Q And 2116.8 and 2116.9 apply to accessory spaces. Is that correct?

A I would really rather look at the

pages.

MR. TAYLOR: Madam Chair, may I have a moment to show the witness what regulations are being referenced?

THE WITNESS: Yes.

CHAIRPERSON MILLER: Yes.

MR. JOHNSON: I would be happy to show him. I just thought maybe he knew, but--

CHAIRPERSON MILLER: Sure. Let's take the time.

BY MR. JOHNSON:

Q Mr. Williams, I have handed you a sheet that has 2116.8 and 2116.9.

A Thank you.

Q And you can take a minute and review those.

A Yes, those are issues that relate to accessory spaces and they appear to apply to all accessory spaces. Now, the only part that I am a little concerned about in the way you have approached this is that I believe that all of those flow out of the provision of 2116.5, which is in a special exception

1 context.

2 And therefore, I'm not sure that

3 it does necessarily apply to accessory spaces

4 that are not before the Board in the first

5 place under a 2116.5 process. And not being

6 familiar with this case in its particulars,

7 but I don't remember when I tried to figure

8 out as best as I could from -- in the short

9 amount of time that this case originally had

10 any special exceptions to it at all. It was

11 just there were spaces and there is a dispute

12 and that's what I'm getting at.

13 So I'm not sure that I would

14 necessarily read 2116.8 and 9 as applying to

15 the universe of all accessory spaces. I think

16 it may apply just to the special exception

17 spaces that are under the Board's purview

18 under 2116.5 in the first place.

19 Q Is it your opinion that those

20 regulations only apply to spaces that are

21 before the Board in the context of a special

22 exception application or you don't have an

23 opinion on that?

MR. TAYLOR: Objection. Asked and answered.

CHAIRPERSON MILLER: You're not certain of his --

MR. JOHNSON: It wasn't asked and answered. I mean, I think he brought that up on his own, the special exception context.

CHAIRPERSON MILLER: It seems to me he did bring it up on his own.

THE WITNESS: Well, as I said, sir, the provisions appear under a series of paragraphs beginning at 2116., now it's out of my hand, 5 or 6 and it then gives the whole special exception process all of which relate to, among other things, the accessory parking spaces.

And while I won't say the numerology is always abundantly clear in our contemporary regulations, even though I'm guilty of having had a hand in it, I believe that that set of paragraphs is all in the special exception process and that's why I made the distinction that I did.

BY MR. JOHNSON:

Q Well, let me ask you this. 2116 is entitled "Location of Parking Spaces," correct?

A Yes.

Q And that doesn't suggest that the entirety of 2116 only applies in the context of a special exception application. Would you agree with that?

A I would agree that there are parts of 2116 that are beyond the special exception process.

Q And -- okay.

A But for example, in 2116.9 where it begins "The Board," that to me sort of says that has something to do with the Board process that has been described. So I use that as the end point of that which starts at 2116.5.

Q Well --

A I'm not trying to get into a debate. I'm just trying to offer my view of what may be operating here. And again, I'm

coming at this as a land use planner that had some knowledge of how this came about and I will defer to others as a matter of law.

MR. JOHNSON: Those are all the questions I have.

CHAIRPERSON MILLER: Thank you.

BY MS. VAIAS:

Q Just to finalize, I think that 2116.1, I believe, actually draws an exception for paragraph 2116.5. So it does indicate that that section does have a particular --

MR. JOHNSON: This seems like argument more than a question.

BY MS. VAIAS:

Q Is that accurate?

MR. TAYLOR: With all due respect, Madam Chairman, they seem to be equally argumentative, equally questioning questions.

MS. VAIAS: Just trying to bring closure to that question.

CHAIRPERSON MILLER: I'm sorry. I was kind of waiting for the question.

MS. VAIAS: Okay.

BY MS. VAIAS:

Q I guess 2116.1, I think, does that help to clarify why 2116.5 and its succeeding sections apply to special exceptions?

A Let me try it this way.

Q Okay.

A And I -- what I see in 2116 is, essentially, a declaration that says except when other numbered provisions kick in, you have to put all parking spaces on the same lot as the building they are intended to serve. That's all. And in the context of the regulations, I believe that you can't take and provide other parking spaces at a remote location. Meaning, not on this lot, without going through whatever rules apply to being able to use that location for parking.

That is churches, for example, can get a -- there is a provision that allows them to locate parking at another location elsewhere. I won't go through all of that. The general intent of the regulations, 82-5, was to put the -- to have it controlled and

make sure that what was required was clearly understood and clearly satisfied everything.

And I believe that, this is an opinion on my part, just an opinion, it's not law, the essence of this is that when it says all spaces in 2116.1, it's talking about what has to be required, because if it's not required, it doesn't have to be located there at all. And then the rest of it, I think, follows clearly.

Q Okay. Thank you. And as to 2117.7, can you tell us what's your understanding of the intention of that paragraph?

A 2117 is a paragraph within the provisions relating under the general heading of "Access Maintenance and Operation," and it says "public rights of way," which essentially means streets, particularly the sidewalks that are abutting, that are flanking streets as well as private walkways and driveways shall be protected from having, basically, vehicles sticking over and into them, so that the

course of travel along them by a vehicle or by a pedestrian would be -- would intercept a protrusion of a vehicle, because it's in a parking space that extends out, because its wheels may be resting in the space, but the bumper is forward of it, for example. That's the thrust of it is to keep that kind of thing from happening.

And the projects that I'm familiar with where there have been angled spaces, for example, facing an aisleway, there have been wheel stops, there have been railings, there have been other things to clearly delineate and to maintain the vehicle that is parked in the parking area and to keep the aisleway or walkway, in this -- in your case, I haven't looked at your walkways, but in general, to keep the areas that are outside of it that need to be free and clear, free and clear from the incursion of a parked vehicles extent.

Q Okay. And is there a distinction between a driveway and a drive aisle, garage drive aisle, you recall?

A I don't recall the details. I can say that an aisle, to me, is a space more typically that is enclosed or within an area that has got parking on one side or the other or both. Whereas, a driveway, to me, means something, this is to me, not Zoning regulations necessarily, but to me not having researched that precisely, it means the route, the path, the area that a vehicle traverses to get to the point where parking begins, at which point there is aisles and parking spaces.

Q Thank you.

CHAIRPERSON MILLER: I would like to ask a couple of follow-up questions.

THE WITNESS: Sure.

CHAIRPERSON MILLER: 2116.1 refers to all parking spaces. Do you interpret that to mean required and unrequired?

THE WITNESS: I interpret to mean, I'm going to say -- this is planner's speak, more to what is required than to the others, because the others, they fall away. You can't

-- if there -- I don't understand how one could have a plan that is before anybody for review that would have a non-required space being somewhere else that would be within the sphere of what the Zoning Administrator would be contemplating, because it just would be outside of the box of what would be under review for the permit in question or the C of O in question.

CHAIRPERSON MILLER: Okay. And 2117.1 says "The parking spaces required by this chapter," what do you think that means?

THE WITNESS: Oh, very clearly it means the ones that are in the table at the early part of the chapter that says you have to have X number vehicles or compact spaces or full size spaces. But if they are required in that section, they are, baby, required under this section to be there. They are the one and the same.

CHAIRPERSON MILLER: Okay. Thank you very much.

THE WITNESS: Am I released?

CHAIRPERSON MILLER: I don't believe there are any more questions for you. Thank you very much.

(Whereupon, the witness was excused.)

CHAIRPERSON MILLER: It is a little after 6:00. I think we should keep going. Does anybody have any time constraints that we ought to be aware of?

MS. VAIAS: 6:30 I would need to stop this evening.

CHAIRPERSON MILLER: Well, let's see how we go. All right. I don't want to waste any time while I'm pondering that. Mr. Taylor, you want to call your next witness?

MR. TAYLOR: Yes, Madam Chairman, the Government calls Mr. Bill Crews.

DIRECT EXAMINATION

BY MR. TAYLOR:

Q Mr. Crews, for the record, would you, please, state your name and address?

A My name is Bill Crews. I reside at 637 Constitution Avenue, N.E., in

Washington, D.C.

Q Building Permit 101019 issuance of which is being appealed here today was issued in November 2006. Where were you employed at that time?

A I was employed by the District of Columbia Department of Consumer and Regulatory Affairs as the Zoning Administrator for the District of Columbia.

Q And among your duties in that position and the activities that you carried out in that position, did you make the decision that the permit application conformed to the Zoning Regulations?

A I did.

Q Thank you. Would you, please, look through the photo exhibit notebook at the photos marked as Exhibits 003 through 027?

A Okay.

Q Mr. Crews, do you recognize those photographs?

A I do.

Q Did you take those photos?

A I did.

Q Do you recall when you took those photos?

A Not specifically. I no longer have access to my calendar.

Q Okay. Would it be fair to say that it may have been somewhere in May 2007?

A I believe so.

Q And were those photographs taken in the regular course of business?

A Yes.

Q And do they fairly and accurately depict the interior of the parking garage at 3030 K Street on May 24, 2007?

A With the caveat that it definitely was around that time frame, whether it was May 24th I'm not sure, but, yes, definitely just a couple months old.

Q Thank you. Mr. Crews, I would like to just briefly revisit the history of this entire matter to get your perspective on this. When did this address 3030 K Street first come to your attention?

A Shortly after I began my tenure as the Zoning Administrator.

Q And why did it come to your attention?

A Previous to me being employed, the -- on the basis of a complaint, a Notice of Infraction had been issued to the condo association for restriping parking spaces without a building permit. And the attorneys for the condo association contacted me about working on a resolution for that Notice of Infraction.

Q And what was the action then that the condo association took, as you understand it?

A The association agreed to apply for a building permit for the restriping that had occurred.

Q Now, was the Notice of Violation appealed by the condo association?

A It had been appealed.

Q To this Body?

A No, to the Office of

Administrative Hearing, I think, the Notice of Infraction.

Q Hum. Did they make an appeal to this Body?

A It could have been both. I'm not sure. I can't recall exactly, but --

Q Okay. Was there a violation abated?

A Yes. They applied for a building permit and were granted a building permit for the restriping.

Q And so you -- in addition to abated, would you venture to use the word cured, that the violation was cured by that -- by acquisition of that building permit?

A Yes.

Q When you reviewed the construction plan filed with the application for Permit 101019, did you note that the aisle between space P-112 and space P-2 was less than 20 feet?

A I may have noticed it. Neither one of those were considered required parking

spaces and so the aisle width for required parking spaces of 20 feet was not applicable.

Q And why is that?

A Because the provisions requiring aisle width of 20 feet for parallel -- is that right? Not parallel, perpendicular parking apply only to required parking spaces.

Q And was it your evaluation of that plan that neither P-112 nor P-2 was a required parking place?

A That's right. The applicant, with their building permit application, had indicated that the required parking spaces were different locations.

Q And do you recall whether that was indicated in writing or if that was indicated verbally?

A I believe it was indicated on the plans submitted with the building permit.

Q Okay. When -- did you do any investigation as to whether the application of the striping, thus the creation of parking places, would change the size of the driving

area right behind P-112?

A I don't believe so.

Q Okay. Do you -- would you, please, look at Exhibit 002? First, do you recognize this exhibit?

A It definitely is an outline of the parking facility for the condo at 3030 K Street, N.W.

Q Okay. Would you, please, look at spaces P-1, P-4 and P-5?

A Um-hum.

Q Would you be able to conclude from this drawing whether or not, first of all, those spaces are required spaces?

A No, this drawing doesn't have dimensions on the drawing, so -- and there's no designation of which parking spaces are the required parking spaces.

Q Did you ever inquire regarding dimensions?

A I believe that the building permit plans that I approved had parking dimensions on it and had designated spaces for the spaces

that were for the required parking spaces.

Q Okay.

MR. TAYLOR: I have no further questions, at this time.

CHAIRPERSON MILLER: Any Board questions, at this time?

VICE CHAIR ETHERLY: Thank you very much, Madam Chair. Very briefly, Mr. Crews, first of all, good to see you. Welcome back.

THE WITNESS: Thank you.

VICE CHAIR ETHERLY: With respect to -- so if I understand correctly, when you-- actually, let me phrase it this way. Hypothetically speaking, when you typically see parking plans that involve probably required and non-required spaces, how are they denoted? I want to walk through a little bit of a similar discussion of what I had with Mr. Williams just to kind of again backing it up with a little bit of what the practice is from your former seat.

So typically speaking, what

traditionally does the ZA see when a parking plan or when a parking diagram is submitted? Especially with regard to required versus non-required parking. How is it labeled? How is it denoted on your plan, if at all?

THE WITNESS: It varies and that was one of the improvements that I think the office is continuing to work on in terms of having that information made very clear on the drawings and the building permit application, so that it's clear of which parking spaces are considered the ones that are required by the Zoning Regs and that those dimensions are on the drawing, and they certainly should be, in order to be approved.

VICE CHAIR ETHERLY: Okay.

THE WITNESS: And that was kind of the case here, is that if we don't require a building permit for restriping of parking garage, then how are we able to ensure that the required spaces and the required dimensions are maintained?

VICE CHAIR ETHERLY: And again

with respect to the hypothetical that I broached with Mr. Williams, if a property owner desires to make any changes, what is -- is there a required process for those changes or typically is it just a practice that that property owner would come to the ZA and say these are changes that I would like to make?

And I'm just hesitating as I walk through it, because part of me wants to ask and let's just say for the sake of discussion, I'll throw another plan to you, those changes aren't necessarily required changes. They are making changes that may not necessarily ultimately alter the count of required versus non-required spaces. They are just shifting deck chairs, if you will.

THE WITNESS: Again, in order to, I think, effectively administer the regulations and in an order to protect the required parking spaces are maintained, that any change needed to -- should be applied for a building permit, so that the Zoning Administrator's office and the reviewers can

ensure that the changes are not impacting against the regulations, impacting the required parking spaces.

VICE CHAIR ETHERLY: Okay. Thank you, sir. Thank you, Madam Chair.

CHAIRPERSON MILLER: Thank you. When you issued this building permit and reviewed this situation, did you look at the previous approval for the parking and what context that was done?

THE WITNESS: We were not able to acquire that information. And I believe the appellant also indicated that they weren't able to find the original building permit and the plans.

CHAIRPERSON MILLER: So if you couldn't find that, does that mean that this could have been approved as part of a special exception or it could have been approved matter-of-right or was there other information that you could draw upon to at least know that?

THE WITNESS: Well, there wasn't

an indication from the Office of Zoning's records that this was -- you know, to search under that that there was a BZA or a Zoning Commission order on this property. And so then it just, basically, came down to the realization that on the application, the parking spaces that were noted as being the required ones that we reviewed that and saw that those required spaces were of the right dimensions.

CHAIRPERSON MILLER: Okay. I'm sorry, where is it indicated that which ones are required?

THE WITNESS: Apparently, we don't have the actual building permit application and the plans in front of us, but if I could, if my counsel will let me, I guess he's not my counsel, is he, but there is a drawing. Where is that other drawing? Yes, we do have the application, but --

MR. TAYLOR: For the record, the witness is looking at Exhibit 3 of the appellant's appeal statement.

THE WITNESS: And is this their exhibit here?

MR. TAYLOR: That would be Exhibit 6 of the appellant's appeal statement.

THE WITNESS: Okay. This Exhibit 6, I don't know if you all have it or not, is similar to the -- my recollection of the plans I reviewed in approving the building permit, in that the required parking spaces are those that are hatched out. There are three on the bottom side of the main aisle and nine along the north side or the upper side, excuse me, of the picture.

The drive lines, turning radius and such that I think the appellant's traffic guy talked about were not on the picture, but it was some similar drawing that indicated that these were the required spaces as designated by the owner and that they did meet the dimensions required for the required parking spaces.

CHAIRPERSON MILLER: Could you say it again? There was --

THE WITNESS: There was --

CHAIRPERSON MILLER: -- some indication somewhere?

THE WITNESS: -- some indication on the --

CHAIRPERSON MILLER: On what?

THE WITNESS: -- plans submitted with the building permit application.

CHAIRPERSON MILLER: The application for the building permit?

THE WITNESS: Right.

CHAIRPERSON MILLER: Okay. And that --

THE WITNESS: And that -- and it was a similar drawing to this one in terms of all the numbers in the little circles around there and that sort of thing. And then the fact that the 12 required spaces were delineated and did not involve any of the five new spaces nor of space 112.

CHAIRPERSON MILLER: So we don't have the application though in the record that shows the required spaces?

MR. JOHNSON: There is no such application.

CHAIRPERSON MILLER: Mr. Crews, didn't you say you -- somebody --

THE WITNESS: There is an application that's Exhibit 6 of the appellant, right?

MR. TAYLOR: No, 3.

THE WITNESS: No? Oh, Exhibit 3, excuse me.

MR. JOHNSON: I mean, there is a permit stamp on the drawing that's up there that shows that it was received. That's what we were told was filed with the application. And it doesn't have anything on it about required or non-required. That wasn't part of anything that has been produced. And if you look in the exhibit binder that DCRA has submitted, they say Exhibit 2 is plans submitted with application for building permit. That's what you have up on the board, that's what is stamped. That's the only thing that's stamped.

THE WITNESS: Again, Exhibit 2 is not what I recall reviewing for the building permit application. Again, the drawing that I remember seeing was much closer to Exhibit 6 for the appellants, without the wheel tracks, I guess, is how you describe all those lines.

CHAIRPERSON MILLER: Well, is there another document that you could put into the record that you are referring to or not? I mean, because it sounds like Mr. Crews is saying he saw a document that indicated what was required and what was not and that's one of the allegations of the appeal that that's required and that didn't happen here. So if it happened, you should put it into the record. The owners may have it? Do you have any problem putting that into the record?

MS. VAIAS: What we have -- no, we don't have any problem with it, but I don't have the exact letter to Mr. Crews. We have all the letters to his predecessors, but I know that they were all part of the file that

we submitted to him when we were discussing the violation and the filing of the permit.

So that is where his recollection is that he saw this plan that he has been referring to. It was attached to one of the letters that we had submitted to him. This is the plan that he is talking about. I apologize. I found letters to his several predecessors. But I can't find the one that we actually sent with his name on it, but this is the plan that, I believe, he is referring to and it was part of the -- again the record of the permit filing when we were discussing the violation notice.

MR. JOHNSON: Well --

MS. VAIAS: And how to resolve that.

MR. JOHNSON: -- Madam Chair, I think there is a lot being said, but I think what is clear is that the building permit application that was granted in November of '06, which is the subject of this appeal, it had attached to it only the document that you

have on the board here. It did not have anything else attached to it, because if there had been something else attached to it, they would have it with a stamp on it and they would have -- DCRA would have been able to produce it.

The only thing that was submitted to DCRA was the application and the drawing that's over on the board. There's no proof that this other drawing --

CHAIRPERSON MILLER: What you are saying is what was attached to the building permit was that. But Mr. Crews is saying -- oh, sorry, shut that off for a second. I'm not going to -- I mean, he relied on some other plan. And so the question is is the plan that was just put before him by the owner, the plan that he relied on that may not have gotten attached to the building permit?

MR. JOHNSON: But it has to be. I mean, that's what the reg says that in order to do it, you have to provide with building -- in order for the building permit to issue,

there has to be dimensioned plan. And there is no way to prove that there was. In fact, it looks like there wasn't. It looks like the only thing that was provided was a plan that doesn't comply with the Zoning Regulations.

MR. TAYLOR: Okay.

MR. JOHNSON: I mean, may I say something else? And I think this may shed some light on it. There was a prior proceeding with OAH and I think, actually in fairness, Mr. Crews probably didn't recall it, but there was a BZA proceeding. And in that BZA proceeding, this diagram was filed by Washington Harbor as an exhibit to something that they filed. So perhaps he saw it in that context, but it wasn't part of the building permit application that we are contesting here. Otherwise, there would have been a stamp on it showing that it was submitted and received by DCRA and it was part of the file for that application.

MR. TAYLOR: Madam Chair?

MR. JOHNSON: So I don't doubt

that he saw this, but I think that's probably the explanation of where he saw it and how he saw it.

CHAIRPERSON MILLER: Okay. Yes, do you want to respond to that?

MR. TAYLOR: Madam Chair, I think that it is abundantly clear, at this point, that the previous Zoning Administrator, that Mr. Crews would be able to testify that he saw multiple drawings of the parking area.

CHAIRPERSON MILLER: Wait, wait a second. Can I just stop you before you go there? Because I think Mr. Crews should say himself what he might testify to with respect to these plans, instead of your saying it for him, since he is right here.

MR. TAYLOR: Okay. He should have --

CHAIRPERSON MILLER: I think he should respond to --

MR. TAYLOR: Then would it be appropriate for me to ask questions to elicit that of him?

CHAIRPERSON MILLER: Okay. But I think it's pretty obvious that -- to respond to what Mr. Johnson just alleged about the plans and when he saw them and what he relied on, but if you want to elicit that or else, Mr. Crews, time is of the essence, you know.

BY MR. TAYLOR:

Q Mr. Crews, do you see before you the plan that you used to determine the required parking spaces in the 3030 K Street property and the dimensions of the parking spaces, so described?

A I do.

Q And would you, please, identify that to the Board?

A Again, at the -- the intervenor attorney has provided me with the plan that is -- that I recollect that I saw in terms of this deliberation on the parking requirements. Because this was early in my tenure and it did necessitate the close study and acknowledgement of the Zoning Regulations, that Chapter 21 has regulations that refer to

required parking spaces and those that are applicable to all parking spaces in the section 21 -- what is it?

Anyway, it's the definitional section that talks about that at the end of that chapter. I apologize I also don't have my Zoning Regs with me. But the -- but in discussions with the attorneys in resolving this matter, that this definitely is the plan that I looked at that indicates, as up here, required spaces in accordance with No. 12, has them hatched here and you can go through and you can make out the dimensions that they are all a minimum of 19 x 9 feet.

And this is what I relied on in terms of the requirements in Chapter 21 where the required parking spaces must comply and they did meet the requirement and, hence, is why I approved the building permit.

CHAIRPERSON MILLER: I have two questions quickly. One is can you explain why that didn't end up being attached to the building permit?

THE WITNESS: Not specifically, no. But as you are well aware and as the process of continuous improvement at DCRA indicates that they -- you know, the records are not always in the best of shape, to put it mildly, I guess. But again, my recollection, a very strong recollection that in resolving this matter, there was a lot of back and forth between myself and the attorneys in trying to understand and coming to the determination that only the required spaces needed to maintain the dimensions and that this was what I relied upon as part of their application.

Certainly, in my mind, I considered it part of their application that these 12 spaces that are hatched are the required spaces and they are the -- of the correct dimensions.

CHAIRPERSON MILLER: Okay. And finally, you went out also to inspect the spaces and measured?

THE WITNESS: Only in reference to this appeal, not in terms of approving.

CHAIRPERSON MILLER: Okay.

THE WITNESS: There is very, very little pre-building permit approval inspection. Just there is not anywhere close to the resources available to do that.

CHAIRPERSON MILLER: Okay. So you relied on that plan?

THE WITNESS: Right.

CHAIRPERSON MILLER: Okay.

THE WITNESS: Just as we rely on plans for every building permit application.

CHAIRPERSON MILLER: Right. Okay. I just want to assess for a second, since it's 6:30 and Ms. Vaias said she has to leave. Is that correct?

MS. VAIAS: Yeah.

CHAIRPERSON MILLER: I don't know what your, you know, circumstances are and I don't know what everybody else's are, but I would assume it's probably easiest for everybody else if we kept going and finish this up. But I'm not, you know --

MR. TAYLOR: Madam Chair, if I

may, and I am perfectly willing to stay here until 9:00 tonight, although it's not my preference. It seems that there would be a logical break once cross examination of Mr. Crews has finished. But by the time then we have Mr. LeGrant to testify and the witnesses that the intervenors are intending to bring forward, I suspect that we could be here a very long time if we go completely to finish.

CHAIRPERSON MILLER: That's true. Okay. But I don't even know if we can continue cross by Mr. Crews, can we?

MS. VAIAS: Right. Let's try to do that.

CHAIRPERSON MILLER: We could do that and then we'll look at another date. Hopefully, the next one will be the last one. Okay. Are there any other Board questions before we -- okay.

VICE CHAIR ETHERLY: Well, if I may then just to continue with Mr. Crews very briefly, let's say for the sake of discussion that the document that we have come across is,

in fact, what you looked at, again with that earlier question I had in mind, if an owner decides to deviate from that plan, not in a way that changes the amount of required parking that they have, again maybe this is verging too close to one of the million dollar questions on the table here, but is that -- would that be a Zoning Regulation violation, in your opinion, or would it simply just be a bad decision in terms of process regarding changing the parking spaces?

Again, the hypothetical change and I'm talking, I'm not asking you to render a decision on the fly in this case, but in my hypothetical question, the owner makes a change to that diagram, not in a way that changes the amount of required parking, not in a way that otherwise creates any change in zoning compliance issues, but nevertheless they make some changes.

But they don't come to the ZA to do it. A zoning violation or just simply bad decision from a process standpoint?

THE WITNESS: If I understand your hypothetical, it's so that they change -- say hypothetically, they had some space there and they added some parking spaces that may not be 19 x 9 feet dimensionally, but they didn't impact the required spaces and also that those non-required spaces didn't violate the requirements in Chapter 21 that apply to all parking spaces, then it, hypothetically, could be on one hand considered no harm, no foul.

On the other hand, my interpretation at the time was that how do we know that unless they actually apply for a building permit and that the Zoning Regs can be reviewed and the applicability to the proposed changes and the Office of Zoning Administrator can make that determination.

VICE CHAIR ETHERLY: Okay.

THE WITNESS: So that's the hypothetical.

VICE CHAIR ETHERLY: Okay.

THE WITNESS: Yes.

VICE CHAIR ETHERLY: Thank you.

Thank you, Madam Chair.

CHAIRPERSON MILLER: Okay. Cross examination, Mr. Johnson?

MR. JOHNSON: Thank you.

CROSS EXAMINATION

BY MR. JOHNSON:

Q Now, Mr. Crews, during that period of time were you the Zoning Administrator?

A I was -- served as Zoning Administrator from October 3, 2005 until mid-June of this year.

Q And I think you said that it was early on in your tenure as Zoning Administrator when it came to your attention that there were issues involving this parking garage. Is that correct?

A Yes.

Q And so that would have been towards the early or actually fall of 2005. Is that right?

A That's right.

Q And at that point, you began having discussions with representatives of

Washington Harbor. Is that correct?

A Yes.

Q Did that consist of attorneys representing Washington Harbor?

A Yes.

Q Were there other representatives of Washington Harbor that you had dealings with?

A Not that I recall.

Q Who were the attorneys for Washington Harbor that you dealt with.

A There is --

MR. TAYLOR: Objection for relevance.

CHAIRPERSON MILLER: Yes, what's the relevance?

MR. JOHNSON: Well, it's absolutely relevant, because this witness is pulling out documents and saying that he saw them at various times. It's not clear when he saw them and I think we need to pin down exactly what information he was given, who gave it to him, when and in what context, so

that we can figure out what he had when he reviewed this building permit versus what he got at all these other times when he may have been having dialogue with attorneys for Washington Harbor.

CHAIRPERSON MILLER: Okay. I suggest that you -- you have to turn your mike off when my mike is on. That you cut to the chase. It's not like a courtroom where you have to lay your foundation and ask all these questions. I think it's a legitimate question to ask. I think he had answered it already, but, you know, when did you get that document? How did you get it? That kind of thing. But I don't think you have to start, you know, asking these questions like what attorneys did you speak to in general.

Do you want to address how you got that document and when you got it? Who gave it to you or whatever?

THE WITNESS: Well, I mean, I don't have any problem. It was these two counselors right here. And we had --

obviously, again, this was something that came up early in my tenure, but, obviously, was not resolved until later. But in that resolution of the condo association agreeing to apply for a building permit, I can state unequivocally that this drawing was the one that I reviewed for the building permit, because it does have the required spaces marked and it does have their dimensions on it.

BY MR. JOHNSON:

Q Let me see if I can cut to the chase. Generally, can you tell me how many meetings over what period of time you had starting in late 2005? Just generally.

A Several.

Q This was an ongoing thing through May of 2007, when you were taking these pictures that we have seen? Is that fair to say?

A Yes. I mean, at various stages of activity in terms of initially talking about what the regs required, what the violations were, how we could come into -- have the condo

association come into compliance. Then there was an agreement to apply for the building permit and the application for the building permit.

In return for them coming into compliance, we dismissed the Notice of Infraction and then the appeal was taken. And so then we did activities to prepare for the appeal.

Q Okay. There was a Notice of Violation, correct?

A Yes.

Q And that --

A For restriping the parking garage without a building permit.

Q -- was resolved by Washington Harbor agreeing to apply for the building permit, correct?

A Right.

Q And in the context of reaching that resolution, you got the map that's in front of you, correct?

A Right.

Q And then after that resolution, as a separate matter, Washington Harbor went and applied for the building permit, right?

A No, that application occurred prior to what you just asked me about previous of this question.

Q You think the Notice of Infraction was removed before or after the building permit was applied for?

A It was removed after the building permit was applied for, but they were part of the agreement to bring the condo association into compliance.

Q And the bringing into compliance meant that they applied for the building permit?

A Right.

Q And as we sit here today, we have been given by DCRA this notebook. Do you have this notebook in front of you?

A Um-hum.

Q The white notebook?

A Um-hum.

Q The first page looks like it's the building permit itself. Is that right?

A Yes.

Q That's the permit that was actually issued, right?

A Yes.

Q And we don't have a copy of the application in this notebook, I guess. Is that right?

A I don't believe it's in this notebook, but it was previously --

Q Okay.

A -- placed as part of the record here.

Q In order for this permit to issue, there had to be an application, right?

A Yes.

Q And when the application was filed, it would be stamped in at DCRA, right?

A Stamped in is a bit of a generalization, I guess. There's nothing actually stamped on it. The permit number is written in at the top of the application and

it is put into an electronic data system.

Q Okay. You're looking at Exhibit 3 to the statement in support of appeal that was filed by the appellant. Am I right?

A Yes.

Q Okay. And there is no actual stamp on this document, but somebody assigns it a permit number and it's entered into the system at DCRA, correct?

A Correct.

Q And the Zoning Regulations require that dimensioned plans be submitted with that application, right?

A Right.

Q And those plans would be stamped in at DCRA, correct?

A No. Not that I recall that they-- I was not involved in the application submittal process as the Zoning Administrator. That was handled by the permit division. And the -- at the time, it was the Building and Land Regulation Administration. So I would just get an application and a set of plans.

In this case, because of the genesis of the building permit application as part of our agreement to have the condo association come into compliance, it happened relatively simultaneously and I don't have an explanation for the process route. All I can say is that it was my understanding and my reliance on this map that indicated that required parking spaces were not being tampered with and, therefore, that the building permit could be -- and that all the spaces complied with all the applicable regulations and that the building permit could be approved.

Q Okay. If you would take a look in the DCRA notebook at DCRA 002?

A Um-hum.

Q Could you turn to that page?

A That's this one here, right? Um-hum.

Q At the sort of almost to the top on the right hand side there is a stamp. Do you see that?

A Um, well, I see -- on this one, I see part of a stamp which is different. I don't know where that came from, but it's a different stamp.

Q What you have in front of you is a permit stamp, right?

A I would say that what I have up in the upper right hand corner of the diagram with these wheel lines on it, tire tracks or whatever you want to call them, I have part of a stamp PERM.

Q Do you know what that means?

A I'm not aware of any stamp that -- where that would finish out saying permit. What I would speculate would be that it might be a stamp that says permanent record.

Q So it's part of the permanent record that DC --

A Well, I don't know. I don't know. But I don't know that it has any relevance or meaning from what I can see here.

Q You don't know one way or another?

A Right, from this particular

drawing.

Q When you reviewed the application for this building permit, did you have in front of you page 002?

A Not that I recall. No, I had this here.

Q Was page 002 part of what you reviewed in the course of reviewing this building permit?

A Not that I can recall.

Q All right. Now --

CHAIRPERSON MILLER: Can I interrupt you? I understand that you have concerns about this document. But I want to suggest that the Board get a copy of the document, because you're all referring to this document, so we're kind of out of it, which we shouldn't be. All right. I think that Mr. Crews' document is different from the document. Is that correct? So could --

MR. TAYLOR: Madam Chair, I guess, Ms. Bailey has indicated she would be able to make that copy right now, otherwise, DCRA

would be happy to make copies and send them to you.

CHAIRPERSON MILLER: Right. It's just that you are all talking about this document and we can't look at it. So I think it would be -- it's only one sheet. It probably wouldn't take very long to do that. Okay. Ms. Bailey, would you be able to do that? If you need that document, what we can do is go out of sequence and talk about when we're going to meet again, also.

We're heading towards our summer recess and so, where's my calendar, we're going to lose one Member either next week or the following week, but that Member can read the transcript. If you all can come next week, we would add you onto the calendar, third in the afternoon again. It might go all day, but I think we ought to, if you can do it and then plan on finishing.

How is that with -- we're going to -- Mr. Crews, we're going to finish with you today, I think, so you don't have to worry.

Everybody else?

MR. TAYLOR: The 24th? My recollection is I --

CHAIRPERSON MILLER: Yes, the 24th.

MR. TAYLOR: -- would be free that afternoon.

CHAIRPERSON MILLER: Your witnesses? And your witness, Mr. LeGrant, are you going to be able to come?

MR. TAYLOR: Mr. LeGrant can make himself available that day.

CHAIRPERSON MILLER: Thank you. Are you all all right on that, appellant?

MR. JOHNSON: Yes.

CHAIRPERSON MILLER: Okay. Owners?

MS. VAIAS: We're not.

CHAIRPERSON MILLER: You're not available? That leaves us --

MR. TAYLOR: Madam Chair, would it be within the balance of propriety for the parties to stipulate that the soon departing Member could retain the Chair for purposes of

continuing this hearing already started?

CHAIRPERSON MILLER: No, I don't think so. Hold on a second though. Let me just confer with my other Board Members. How about the 31st? That's our last day before our recess.

MR. TAYLOR: The Government does not have an issue with that date.

CHAIRPERSON MILLER: Actually, we just have one case in the afternoon, so we might have a little more time. Are you all right with that date?

MR. JOHNSON: That's fine.

CHAIRPERSON MILLER: Ms. Vaias?

MR. TAYLOR: Madam Chair, is there any estimate of when the confirmation date for the new Zoning Commission nomination might be before the Council?

CHAIRPERSON MILLER: It's not going to be before September. Council is in recess, so we know that.

MR. TAYLOR: So it might -- so we might get lucky if we went in early September

and beat the Council to the punch here.

CHAIRPERSON MILLER: I just think it would be preferable to have finished within the next couple of weeks while it's fresh, otherwise, we're really going to not, you know -- so, I'm sorry, I forgot your name. Yes, are you counsel, also? So can you represent the owner? Are we okay on the 31st then? Okay. All right.

MR. TAYLOR: Well, Ms. Vaias, will all your witnesses be available on that date?

MS. VAIAS: I can check.

MR. TAYLOR: I'm uncomfortable with moving forward with them not being able to put on the case that they have prepared.

CHAIRPERSON MILLER: I haven't heard that from them. There are two counsels at the table, two attorneys, and so I just inquired whether, you know, the other attorney might be able to do this. If there's a problem with witnesses, there's a problem with, you know, jeopardizing the case, I haven't heard that yet. If you want to

address that?

MS. VAIAS: Well, the problem is the alternative witness is not here, so I can't ask him if he would be available, so I will have to confirm that, since we know Mr. Joy, who was going to testify, is not available. So I guess I'm crossing my fingers that the alternative witness will be available from the association to be here. But I can't contact him right now. He wasn't available tonight, so Mr. Joy was here.

CHAIRPERSON MILLER: All right. Hold on a second then. We're going to just take a look at the calendar for September. We still will have Mr. Etherly with us at the beginning of September.

MR. JOHNSON: Can we see maybe if there is somebody they could call to see if they are available? I mean, it seems like a lot of -- if we can get this finished in a week or two would be preferable to waiting until September.

CHAIRPERSON MILLER: Okay. Let me

say this. Is there a phone call you could make right now?

MS. VAIAS: Can we schedule it and then if we have to get back to you, I know he is on a plane, so I don't believe that I --

CHAIRPERSON MILLER: Okay. The question is -- I mean, the problem is that, yes, you know if we schedule it and say then it doesn't work, how do we -- we're all here together right now. How do we then come up with the next date? That has usually been the problem. Not that it's impossible, I mean.

MS. VAIAS: We're willing to, I guess, I don't know take a little bit of risk that he -- someone would be available to fill in, but I guess I can't say affirmatively at this moment that. I mean, I would like to think there will be someone we can get here, but I guess reserving a little bit of right if we can't get them -- somebody here, that we would have that opportunity.

CHAIRPERSON MILLER: I just want to comment. Also, I understand that you are

concerned about, you know, let's finish it up and everything, but what's going to happen also is we're going to run into our August recess in which -- so we wouldn't be deciding this case, at this point, until September. So that's why we thought well, maybe we could look at September. Unless there's, you know, a real disadvantage.

Certainly, in August, you could be submitting proposed findings of fact or something like that. So, yes, there would be some time lost, but does the appellant feel strongly that it not go to September?

MR. JOHNSON: I just -- we just want to move it along. And it seemed like most of the people were available and, you know, if we can do that, it would be great.

CHAIRPERSON MILLER: Yes. Okay.

MS. VAIAS: We don't disagree. I just apologize the scheduling has just been difficult. We agree to try and move it along, but we do need our witnesses to be here. That's no problem.

CHAIRPERSON MILLER: Okay. Let me just back up for one more second. Your witness -- we had two possible dates that we threw out. Now, both dates were not good for you, but now, we have determined that your co-counsel --

MS. VAIAS: Right, right.

CHAIRPERSON MILLER: -- could do this.

MS. VAIAS: No, it's not the attorneys any more.

CHAIRPERSON MILLER: Now, do you have --

MS. VAIAS: It's just now the witnesses.

CHAIRPERSON MILLER: -- a problem with a witness on both dates or only on one of the dates?

MS. VAIAS: I have a problem with my traffic engineer on the first date you offered and a problem with my association expert on the second date that you offered.

CHAIRPERSON MILLER: What's an

1 associate --

2 MR. JOY: I'm just the President

3 of the Association.

4 MS. VAIAS: The owner, the owner

5 of the building.

6 CHAIRPERSON MILLER: Okay.

7 MS. VAIAS: Not the association.

8 MR. JOY: But I'm gone the 31st. I

9 scheduled six hours here today.

10 CHAIRPERSON MILLER: Okay. All

11 right. I have one other thought to throw out,

12 that we finish -- I don't know what your time

13 constraints are for tonight, but that we could

14 finish with Mr. Crews and then just go out of

15 order and have you present your witness

16 tonight, who is here.

17 MS. VAIAS: Okay. And then --

18 CHAIRPERSON MILLER: Would that

19 work?

20 MS. VAIAS: Okay. We could do

21 that, because his testimony --

22 CHAIRPERSON MILLER: Then which

23 date?

MS. VAIAS: -- will be assured. And then will the July 31st date works for you, right?

CHAIRPERSON MILLER: Okay.

MS. VAIAS: Okay.

CHAIRPERSON MILLER: What do the parties think about that solution?

MR. TAYLOR: The Government would find that acceptable.

CHAIRPERSON MILLER: Okay.

MS. VAIAS: I'm going to have to make a call.

CHAIRPERSON MILLER: Okay. The Court Reporter has to go in 20 minutes, so where are we with Mr. Crews on cross? Are we up to the owner, your cross examination?

MR. JOHNSON: Not yet. I don't -- if the question is is 20 minutes enough time, I don't think 20 minutes is enough time. There is a lot to go through. I mean, he is a critical witness on this thing.

CHAIRPERSON MILLER: Okay. Then we're not going to finish with Mr. Crews

tonight. Okay. So that leaves us with continuing it to July 31st, which I think -- okay. How about -- but we still have the problem with your witness and how much time do we need? We're going to need more than 20 minutes for the association witness.

MS. VAIAS: Right. Oh, you mean--

CHAIRPERSON MILLER: No? Is this going to be pretty quick?

MS. VAIAS: You mean to try and do it tonight? To do him tonight?

CHAIRPERSON MILLER: Because he is not available, yes. I think we should stop with Mr. Crews, because --

MS. VAIAS: Okay.

CHAIRPERSON MILLER: -- he is more than 20 minutes and he is available on the 31st. Is that correct?

THE WITNESS: Yes.

CHAIRPERSON MILLER: Okay.

(Whereupon, the witness was temporarily excused.)

CHAIRPERSON MILLER: So let's go

ahead and try to finish -- do the witness that is not available on the 31st.

MS. VAIAS: Okay. Okay.

CHAIRPERSON MILLER: Are the parties all amenable? Okay.

MS. VAIAS: We don't know yet. 1:00?

CHAIRPERSON MILLER: I'm sorry. Okay. On the 31st you would not be 1:00, but you would be sometime thereafter, unless the other case disappears. We have one case before you.

MS. VAIAS: Okay.

CHAIRPERSON MILLER: So it probably wouldn't be before 2:00, but you ought to check with the Office of Zoning, you know, if you're going to come at --

MS. VAIAS: Okay.

CHAIRPERSON MILLER: -- if you're not going to be here at 1:00.

MS. VAIAS: Okay.

CHAIRPERSON MILLER: Or watch on the webcast. But it would be number two in

the afternoon.

MS. VAIAS: Okay.

CHAIRPERSON MILLER: Okay.

MS. VAIAS: You were sworn in, right?

MR. JOY: Yes, I was sworn in.

DIRECT EXAMINATION

BY MS. VAIAS:

Q Okay. Your name and address?

A Is this on?

Q Yes, it is on.

A Hi, sorry about the vacation thing, but it's --

CHAIRPERSON MILLER: That's totally understandable.

THE WITNESS: Yes. My name is Ken Joy. I live at 3030 K and I am President of the Washington Harbor Condominium Association. I have been president about -- probably about four years now.

BY MS. VAIAS:

Q And are you familiar with the parking situation in the garage?

A Yes.

Q And with regard to space 112, is that Mr. Harnett's space?

A Yes, after -- yes.

Q And have you ever pulled into or out of that parking space?

A Yes, I have.

Q And could you explain for the Board how difficult or easy that was to maneuver?

A Well, shortly before we held our auction, Bill Harnett had complained to me that it was going to be impossible to get in and out of his place. And I had looked at it and I couldn't imagine why it would be all that difficult. But before we held our auction, one morning I was heading out from my space, which is midway here on the aisle. I happened to notice that that space 112 was open, so I said okay, I'll give it a try, because I want to make sure we're doing the right thing.

And so I without ever looking at

the place before just pulled over, backed around, backed in the corner and backed in perfectly without one adjustment, which is better than I do on my own place. I then said okay, let me give it another try, so I pulled back out just around the corner, backed right back in, had to make one slight adjustment, because I was a little too close to the wall, backed in and said okay, this is a piece of cake.

I don't get the issue. So at that point, I felt from a moral standpoint considering Bill's questions that that issue was a dead issue. I mean, if I could do it with never ever even trying before and pull right in, back right in, then I figured that issue was -- we could proceed and I had felt good about that we were doing the right thing.

Q And is there ever an issue with regard to people walking from their spaces to the elevators that you have ever seen?

A No, I don't think so. I think -- I mean, I have never heard a complaint.

MS. VAIAS: That's all.

CHAIRPERSON MILLER: Any Board questions? Cross from the appellant? Oh, I'm sorry, wait we had a Board question.

BOARD MEMBER LOUD: Just one quick question. What kind of car do you drive?

THE WITNESS: That then was about -- it was a 54 -- BMW mid-size 545i.

BOARD MEMBER LOUD: And what kind of car does Mr. Harnett drive?

THE WITNESS: A Mercedes. Well, he has got about five of them, but I mean --

BOARD MEMBER LOUD: The one that's parked in --

THE WITNESS: You mean that space there?

BOARD MEMBER LOUD: Yes, in 112.

THE WITNESS: It's a Mercedes. A stand -- I think it's their regular sedan, not the extra long one.

BOARD MEMBER LOUD: Okay.

THE WITNESS: I think.

BOARD MEMBER LOUD: We'll find

out, I'm sure.

CHAIRPERSON MILLER: Okay. Thank you. Okay.

CROSS EXAMINATION

BY MR. JOHNSON:

Q Mr. Joy, what is the space that you referred to that is your space? What number?

A I think it's 131.

Q And so you pulled out of 131 and did this maneuver or you backed into 112? Is that right?

A Yes.

Q Was anybody parked in what is now P-2 or P-3 when you did that maneuver?

A I can't recall. I think somebody was in P-2, but I mean, I couldn't -- it was three or four years ago. I can't recall.

Q All right. And that was a back-in maneuver that you did both times, right?

A Correct. The only way you ever get in a parking place is backing in. I mean, anybody knows that if it's a difficult spot or

it could be a difficult spot, you back in.

Q Well --

A I back into my spot every day.

Q -- you can pull front in to a parking space, right?

A But it's much harder.

Q Right.

A Anybody -- I mean, anybody that drives knows that.

Q But there is a way to do that, right?

A Of course.

Q You can pull in.

A Right.

Q Okay. Did you pull in front end to P-112?

A No.

Q Did you ever try to do that?

A No.

Q Do you know whether it is possible to do that one way or another?

A Well, obviously, his car is in there pulled in.

Q With somebody in P-2 and P-3?

A It wouldn't make any difference. It's just much harder. Anybody that drives a car and goes into an underground parking lot where there are tight spaces, knows that it's -- should know that it's much harder to pull in. Yes, I guarantee I could get into his spot. I might have to maneuver a bit as opposed to when you back in. It's absolutely a slam dunk. Pulling in would be harder, much harder.

Q You might have to make a number of back and forth maneuvers?

A Yes, I would think so.

Q Okay. Now, 131 --

A Or at least -- you know, I don't know. I never pull in, so --

Q Were you involved in submitting the application to DCRA that's at issue in this case?

A No.

Q Did you ever see the application?

A I don't recall.

Q Did you ever see the drawing that as submitted with the hatch marks?

A Yes, I've seen this drawing before, yes.

Q Is that something that the Board of Directors created?

A I don't recall.

Q Did the --

A I don't think so, no.

Q Did the board ever authorize that drawing to be created?

A Yes.

Q When did that happen?

A Well, I don't -- we hired the attorney. As soon as we found out, as soon as we had the violation, we hired the attorneys. And from there, they pretty much proceeded with the whole process that we have heard described here earlier.

Q When was that drawing submitted to the board and approved by the board?

A I have no idea.

Q Did that ever happen?

A I don't recall.

Q You don't recall one way or another?

A No.

Q In fact, that didn't ever happen, did it?

A I'm not saying that. You're saying that. I'm saying I don't recall. We have -- I probably have 10 emails a day working with -- on the association on various issues and most of them are not parking issues.

Q Emails from other directors and residents and things like that?

A Phone calls, yes.

Q And emails?

A Certainly.

Q Okay.

A But not normally from residents, mostly phone calls.

Q Okay. Emails would be from other board members?

A Residential director, yes.

Q Okay.

A That works with me.

Q Now, there is a letter in the record that you signed as Board President saying that Linowes and Blocker was hired on June 27, 2007. Is that correct?

A Renewed.

Q The letter doesn't say renewed, does it?

A I don't recall.

Q Was there a prior vote where authorization was given?

MR. TAYLOR: Objection. Can the witness have a look at the letter in question before answer that question?

MR. JOHNSON: Sure. I thought he knew what I was talking about.

THE WITNESS: I do.

BY MR. JOHNSON:

Q Would you like --

A The letter --

CHAIRPERSON MILLER: Wait, wait, wait. Excuse me. Wait. Mr. Taylor, you can

object on behalf of your own witness, not on behalf of the owner's. Okay. So if they feel a need to see that letter, they will speak up.

MR. TAYLOR: May I read that letter, please?

CHAIRPERSON MILLER: Sure.

THE WITNESS: I don't need to see it.

MR. JOHNSON: You have a copy. Okay.

CHAIRPERSON MILLER: Yes.

MR. JOHNSON: Okay. He doesn't need to see it.

THE WITNESS: I'm okay. I don't need to see it.

BY MR. JOHNSON:

Q Was there a prior authorization?

A Yes.

Q When was that?

A I have no clue.

Q Would that be reflected in the minutes of a board meeting?

A I -- you would have to check the

minutes.

Q Now, with respect to the map that was submitted, I want to be sure that I understand whether specific authorization was ever given for somebody to mark by hatch marks a series of required parking spaces in the parking garage. Was that ever authorized?

A I can't remember. What was authorized was we hired them to represent us to make sure we were doing everything the right way.

Q Well, did they put the hatch marks as far as you understand it?

A I don't know.

Q Did they do it on their own?

A I can tell you that I didn't. That's all that I can tell you.

Q Did anybody from the Board of Directors do that?

MS. VAIAS: Objection. He has already answered the question.

THE WITNESS: I don't know.

MS. VAIAS: He has --

CHAIRPERSON MILLER: Is your answer you don't know --

THE WITNESS: Yes.

CHAIRPERSON MILLER: -- who put the hatch marks on or how -- okay.

THE WITNESS: Correct. I have no idea.

BY MR. JOHNSON:

Q And have you looked at the map?

A Yes.

Q Do you know whether space 131 was marked as a required space?

A Which would be my space?

Q Right.

A Apparently, it's not, but I wouldn't have had any idea.

Q That's news to you as we sit here today?

A Right. And I'm sure I looked at it here three years ago, but I don't recall.

Q Okay. Now, just so it's clear, the owner of those spaces, all those spaces in the parking garage is not the condominium

association, right?

A Individuals own them.

Q They own each one of those spaces in fee simple absolute, right, except for the five that were --

A Except for the -- yes, correct.

Q Okay. The 48 are all owned by people?

A Correct.

Q They are the owners of those spots, right?

A Correct.

Q Do you know if those owners ever were told that certain spaces were being designated as required and others were not being designated as required?

A I don't -- I would doubt it.

MR. JOHNSON: Those are all the questions I have.

THE WITNESS: Yes, I'm not even very familiar with the term. I learned more about required and not required here in the past six hours than I had any idea.

MR. JOHNSON: That's all I have.

THE WITNESS: So I -- I'm sorry.

MR. JOHNSON: You can finish your answer.

THE WITNESS: So I don't think so.

CHAIRPERSON MILLER: You're done? I have a question.

THE WITNESS: Yes, ma'am.

CHAIRPERSON MILLER: Is it your opinion that your attorneys would know who put the marks on the map?

THE WITNESS: I would hope so.

CHAIRPERSON MILLER: Okay.

THE WITNESS: Yes, ma'am.

CHAIRPERSON MILLER: Mr. Taylor, do you have cross examination?

MR. TAYLOR: I have no questions for this witness, Madam Chair.

CHAIRPERSON MILLER: Ms. Vaias, do you want to enlighten us further about this map? No?

MS. VAIAS: Sure. I said oh, sure.

CHAIRPERSON MILLER: Oh, okay.

MS. VAIAS: Yes, and I guess I just wasn't sure how exactly to get all of this in, but there were letters as Mr. Crews had testified to that we sent to the prior Zoning Administrator. There were three before him who we communicated with and that document was attached to those letters.

So I guess next time when we continue with Mr. Crews, we can introduce the letter that was attached, that that plan was attached to which we did as a representative of the association in filing the permits and resolving the violation issue drew the lines to show which spaces were required.

CHAIRPERSON MILLER: So did you just decide yourself, your attorneys like you needed a certain number?

MS. VAIAS: Basically --

CHAIRPERSON MILLER: And so you just --

MS. VAIAS: No, based upon the aisle widths and the dimensions that we had to

show that they met the requirements of the required spaces between us and the traffic engineer and the plans that we had. We identified the spaces that met the requirements and highlighted those.

CHAIRPERSON MILLER: Thank you.

MR. JOHNSON: May we ask who actually did it? Was it one of the attorneys who actually put the hatch marks?

MS. VAIAS: Yes.

CHAIRPERSON MILLER: That's what she said.

MR. JOHNSON: Okay.

CHAIRPERSON MILLER: Any other questions? Okay. No other questions. So I guess we can wrap it up for tonight.

MS. VAIAS: Thank you.

MR. TAYLOR: Thank you, Madam Chair.

MR. JOHNSON: Thank you.

CHAIRPERSON MILLER: Thank you. So we'll see you all on the 31st. It should be earlier, the second case in the afternoon, and

we'll plan to finish at that time.

MR. JOHNSON: Thank you. I think we all appreciate that.

CHAIRPERSON MILLER: Okay. Good. Thank you very much.

(Whereupon, the Public Hearing was concluded at 7:14 p.m.)