

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

DECEMBER 20, 2005

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice, at 10:14 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice Chairperson
CURTIS L. ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

MICHAEL TURNBULL	Commissioner (AOC)
------------------	--------------------

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Sr. Zoning Specialist
JOHN NYARKU	Zoning Specialist
TRACEY W. ROSE	Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

OFFICE OF PLANNING STAFF PRESENT:

JOEL LAWSON
STEPHEN MORDFIN
JOHN MOORE

This transcript constitutes the minutes
from the Public Hearing held on December 20, 2005.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

C-O-N-T-E-N-T-S

<u>AGENDA ITEM</u>	<u>PAGE</u>
PRELIMINARY MATTERS	9
<u>APPLICATION OF KESHER ISRAEL CONGREGATION:</u>	
<u>17407 ANC-2E</u>	10
<u>APPLICATION OF DANA PERINO:</u>	
<u>17406 ANC-6B</u>	29
<u>APPLICATION OF BILL AND KIM ALMS:</u>	
<u>17413 ANC-2E</u>	44
<u>APPLICATION OF KARL H. LASS FAMILY TRUST:</u>	
<u>17402 ANC-2F</u>	59
<u>APPLICATION OF WALNUT STREET LLC, ON BEHALF</u> <u>OF 917 M STREET, LP, c/o PHILIP ABRAHAM:</u>	
<u>17403 ANC-2F</u>	163
<u>APPEAL OF BANNUM, INC.:</u>	
<u>17356</u>	191

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

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

(10:14 a.m.)

CHAIRPERSON GRIFFIS: With that, let me call, as we replace those up here, and also ask our Zoning Commissioner to join us, Mr. Turnbull, who will be with us, as Mr. Mann also will join us for our morning hearing.

And, of course, it is still the 20th of December 2005, and I welcome you all and say good morning. This is the Public Hearing of the Board of Zoning Adjustment of the District of Columbia.

My name is Geoff Griffis, Chairperson; Ms. Miller, and our other esteemed colleague and Board member, Mr. Etherly.

As I've indicated, we have a new Zoning Commissioner, who is joining us, Mr. Turnbull. We welcome him this morning for a full and rigorous day of hearings.

Take a little side note, we kind of spoiled him last week with a holiday party, and so he came back expecting cookies and tea all day. However, we're going to get down to business very quickly here.

And, of course, Mr. Mann representing the National Capital Planning Commission.

Copies of today's hearing agenda are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 available for you. They are located at the table
2 where you entered into the hearing room. You can pick
3 it up and see where we are. We are going to make up
4 an awful lot of time as we get going now.

5 I would normally at this time say that
6 there are numerous ways that we are being recorded and
7 broadcast. The most important, of course, is the
8 Court Reporter, who is sitting on the floor to my
9 right. There are several things attendant to that
10 which you will need to make note.

11 First of all, before coming forward to
12 speak to the Board, you will need to fill out two
13 witness cards. Witness cards are available where you
14 entered in the hearing room, and also on the table
15 where you will provide testimony right in front of us.
16 Those two cards should go to the Recorder prior to
17 coming forward.

18 We are finishing up the entire renovation
19 of this hearing room and the Office of Zoning, to
20 better serve the public and have easier public access.
21 We are not fully connected, so we are not being
22 broadcast live on the Office of Zoning's website, as
23 we will be shortly, probably within the next couple of
24 weeks. But today that is not the case.

25 However, we would ask that you still turn

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 off cell phones, beepers, or any other distractive
2 noise-makers, so that we don't have a disruption of
3 the testimony or the transmission for the Court
4 Reporter.

5 The procedure in special exception -- for
6 special exceptions -- the procedure for special
7 exceptions and variances is as follows. First, we
8 hear from the applicant in their case presentation.
9 Secondly, we will hear any government reports
10 attendant to the application. Third, we will hear
11 from the Advisory Neighborhood Commission. Fourth, we
12 will hear from persons or parties in support of an
13 application. Fifth, would be persons or parties in
14 opposition to an application. And, sixth, finally we
15 give an opportunity for the applicant to give us
16 summations or conclusions or, in fact, provide
17 rebuttal testimony, if required.

18 Cross examination of witnesses is
19 permitted by the applicant and parties in a case. The
20 ANC within which the property is located is
21 automatically a party in the case, and, therefore,
22 participates as a full party, which includes the
23 ability to cross examine witnesses.

24 I will give direction and time constraints
25 on cross examination, if needed, as we get into

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 specific cases. I don't anticipate any in this
2 morning's agenda.

3 Let me make an important note that all --
4 the Board will deliberate on each of the cases that
5 are heard today, and I imagine that we will hear the
6 full cases today in this morning's session. It should
7 be noted that we will deliberate solely on that
8 information that is put into the record, so it's very
9 important, of course, to get either in written forum
10 or in oral testimony what you want the Board to
11 deliberate on in the case.

12 Attendant to that also, we ask people that
13 are present today not engage Board members in private
14 conversations today in and around the hearing room, so
15 we do not give the appearance of receiving information
16 outside of the record.

17 The Sunshine Act requires us to conduct
18 all our hearings in the open -- all our proceedings,
19 rather, in the open and before the public. This Board
20 does enter into Executive Session during and after
21 hearings on cases. We use our Executive Sessions for
22 reviewing facts of a case, but we also, in limited
23 times, deliberate on cases.

24 This is in accordance with our rules,
25 regulations, and procedures. It is also in accordance

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 with the Sunshine Act.

2 Let me ask all of those who are here today
3 who are anticipating or will be testifying before the
4 Board, providing us information, if you would please
5 stand and give your attention to Ms. Bailey, who is on
6 my very far right -- left, rather, and I will say a
7 very good morning to Ms. Bailey -- she is going to
8 swear you in.

9 MS. BAILEY: Please raise your right hand.

10 (Whereupon, an oath was administered to
11 those persons planning to offer
12 testimony.)

13 CHAIRPERSON GRIFFIS: Excellent. thank you
14 all very much.

15 Very well. At this point, then, we are
16 ready for any preliminary matters. Preliminary
17 matters are those which relate to whether a case will
18 or should be heard today. Requests for postponements,
19 continuances, or withdrawals, or whether proper or
20 adequate notice has been provided -- these are
21 elements of preliminary matters.

22 Some familiar with our proceedings will
23 know that I will now say if you have a preliminary
24 matter, come forward, have a seat at the table, as an
25 indication of having a preliminary matter.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I will ask Ms. Bailey if you're aware of
2 any preliminary matters for the Board's attention at
3 this time.

4 MS. BAILEY: Mr. Chairman, members of the
5 Board, and to everyone, good morning.

6 CHAIRPERSON GRIFFIS: Good morning.

7 MS. BAILEY: Happy Holidays. I hope
8 that's an appropriate thing to say.

9 (Laughter.)

10 There is two requests, Mr. Chairman, for
11 postponement, and it has to do with Application 17413,
12 Kim -- Bill and Kim Alms, and the other one is 17407,
13 Keshet Israel Congregation. Those are two
14 applications scheduled that are requesting a
15 postponement, Mr. Chairman.

16 CHAIRPERSON GRIFFIS: Excellent. Why
17 don't I have everyone introduce themselves for the
18 record at this point. I forgot to say that in my
19 opening, but when you come forward to speak to the
20 Board you will need to state your name and address for
21 the record just once, so that we have that correctly
22 on the record.

23 Mr. Gell?

24 MR. GELL: Yes, Mr. Chairman. My name is
25 Stephen Gell. I'm representing both Dr. Alms and his

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 wife and Kesher Israel Congregation. My address is
2 Fifth Floor, 1101 30th Street, N.W.

3 And I would ask that the Board take them
4 in reverse order, if you would, with Kesher Israel
5 first and then Dr. Alms second. I note that there are
6 a great many people here who have an interest in the
7 Kesher Israel case, and I have no problem with
8 resolving any postponement on that one first.

9 The other reason is that I think the date
10 that we select for postponing the hearing would be
11 more critical for Kesher Israel than for Dr. Alms.

12 CHAIRPERSON GRIFFIS: And why are we
13 looking at a postponement of this case?

14 MR. GELL: The -- I'm sorry. Which case?

15 CHAIRPERSON GRIFFIS: The Kesher Israel.

16 MR. GELL: The reason we're asking for the
17 postponement is that when we met with the community we
18 discovered that there were a great many issues that we
19 had not anticipated. Kesher Israel decided that they
20 really should rethink the size and scope of the
21 proposed daycare center. And we are in negotiations,
22 we agreed with the ANC that we would ask for
23 postponement, and that --

24 CHAIRPERSON GRIFFIS: I understand that.

25 MR. GELL: -- would give us some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 additional time.

2 CHAIRPERSON GRIFFIS: It doesn't seem like
3 there's much objection to it administratively -- is
4 here, not objecting also, and we'll get to him. I
5 guess my concern is this: do we need to -- do we need
6 to expand our time of which applications need to come
7 in? Should we set it off a year that you need to put
8 an application in?

9 Because I don't understand why you would
10 not have had enough time to have at least understood
11 the issues you need to address. I mean, our
12 regulations under 205, which you're coming, are fairly
13 -- fairly clear what needs to be addressed. I guess
14 I'm concerned, Mr. Gell, that we have some -- that we
15 have again a schedule for hearings, and that we won't
16 be able to proceed with them.

17 So help me understand why you would not
18 have been aware of these elements, and why the time
19 previously -- you've been on this for a bit, right?
20 So we'll -- where was the inadequacy of time?

21 MR. GELL: Well, that's a fair question,
22 and, frankly, we regarded a 24-student school as being
23 such a small facility that it would not have -- it
24 would not generate the kinds of concerns with traffic
25 and parking that have been generated. We were I won't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 say blind-sided because it's nobody's fault but ours,
2 but we really didn't anticipate the reaction that
3 we've gotten from the neighbors.

4 And we just feel that we -- it would be
5 unfair to us and to the neighbors, really, to try to
6 proceed under these circumstances. And I agree, we
7 had a couple of months. There might have been time,
8 had we known earlier on that there would be that
9 reaction.

10 CHAIRPERSON GRIFFIS: Okay. And who is
11 with you, or not? Do you want to introduce yourself,
12 please?

13 MS. MOORE: Yes. I'm Pamla Moore, and I
14 am an ANC Commissioner, 2E-06. The --

15 CHAIRPERSON GRIFFIS: Excellent.

16 MS. MOORE: -- Keshet Israel Congregation
17 is in my district. I believe you have a letter from
18 our chairman appointing me to represent the ANC.

19 CHAIRPERSON GRIFFIS: Yes, indeed so.
20 Exhibit Number 34.

21 MS. MOORE: My address is 2725 Dumbarton
22 Street.

23 CHAIRPERSON GRIFFIS: Good.

24 MS. MOORE: Washington, D.C.

25 CHAIRPERSON GRIFFIS: Well, welcome, Ms.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Moore, we appreciate you being here. Did you have a
2 position that you wanted to state regarding the
3 postponement?

4 MS. MOORE: The ANC did take a position at
5 its December meeting in support of postponing.

6 CHAIRPERSON GRIFFIS: Okay. Good morning.

7 MR. AGUGLIA: Good morning. Richard
8 Aguglia with the law firm of Hunton & Williams at
9 Suite 1200, 1900 K Street, N.W. I'm representing
10 Walter and Cathy Isaacson. They are the neighbors who
11 are immediately adjacent to the proposed child care
12 development center, and would be most greatly
13 adversely impacted.

14 We are opposed to the application. We are
15 not opposed to a continuance. We would like if we
16 could have -- if the Board could review our party
17 status request.

18 CHAIRPERSON GRIFFIS: Right. And I'm
19 sorry, I should have stated that, but it's -- it's
20 clearly our intent to establish parties in this case,
21 so that we can then get to the motion for a
22 continuance, but -- as we have somewhat no opposition
23 or concern about continuing. I probably stepped ahead
24 of it too quickly.

25 Okay. Board members, any other additional

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 preliminary questions at this time?

2 VICE CHAIRPERSON MILLER: I'm just curious
3 when this issue was first brought to the ANC, not the
4 postponement question but the issue of the child
5 development center in general.

6 MS. MOORE: Well, I believe it's -- I
7 believe that it's your Board of Zoning Adjustment that
8 sends out that notice, and we did receive that -- I'd
9 have to go back to my notes. But I will be very
10 honest, I think we received it back in October, and I
11 did contact Mr. Gell asking for an opportunity to
12 bring the neighbors together to discuss this. It did
13 not happen for a long time.

14 CHAIRPERSON GRIFFIS: Okay. Well, I'm
15 certain you all share our concern also. You don't
16 need to make two trips down here. So we'll work very
17 hard and vigilantly not to have this happen again, but
18 we are faced with what we have today.

19 So let's move ahead. Unless there are
20 other preliminary questions, at this time I'd like to
21 go through the request for party status. We have
22 Exhibit Number 32, Teel Oliver. Are they present?
23 Oliver?

24 MR. AGUGLIA: I was told that they were
25 not present, but would -- we're opposed to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 application, but we're not opposed to the continuance.

2 CHAIRPERSON GRIFFIS: Okay. Jennifer
3 Meade Hatcher present? Mr. Kornack? Ms. Enders?
4 Yes, very good morning to you, sir.

5 And, Mr. Aguglia, you are representing the
6 Isaacsons with 1314 28th Street, N.W. Mr. Aguglia,
7 did you have time -- an opportunity to speak to any of
8 the other parties that have requested -- or, rather,
9 the persons that have requested party status in terms
10 of joining into a single party in opposition?

11 MR. AGUGLIA: I have not.

12 CHAIRPERSON GRIFFIS: Okay. Mr. Kornack,
13 if you wouldn't mind coming up and having a seat,
14 we're going to probably have a couple of quick
15 questions for you.

16 Mr. Aguglia, you could stay. If we could
17 just get an extra chair.

18 Mr. Kornack, I know you're very aware of
19 the threshold on which we will judge parties and
20 establish parties or not, and we appreciate your very
21 complete request for party status in this case. It's
22 Exhibit Number 24.

23 Of course, there's two primary ways to
24 participate in public hearings, either in support or
25 in opposition for that matter. One is as a person, in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 which case I will call people up to provide testimony.
2 It's a straight testimonial, and the Board will hear
3 you and obviously take into the record all of your
4 testimony.

5 The other is as a party. A party is a
6 full and equal participant as the applicant. So the
7 applicant will present a case. We will then -- any
8 established parties, we will ask them to present a
9 case. You have the ability to cross-examine, as I
10 said a little bit in my opening, but also you have --
11 as you have the ability to do certain things, you have
12 the responsibility, likewise.

13 If the Board asks for additional
14 information or wants certain be it graphic or legal
15 documents created, you will be required to do that, as
16 the applicant would be also.

17 My question to you is twofold. First of
18 all, whether you are willing or wanting to pursue and
19 participate as a party in the case, or as a person,
20 and then, secondly, the -- one of the aspects, and I
21 think the most important, is the last question in the
22 application that goes to, how are you significantly or
23 distinctly uniquely impacted by this?

24 As you have raised similar issues, as Mr.
25 Aguglia has also raised and which he'll have to answer

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 all of these questions, as you have similar issues and
2 elements of concern with this, do you think that you
3 are anywhere -- how are you distinctly impacted? Or
4 have you thought about joining into a single party?
5 I'll repeat any of that, if you need clarification.

6 MR. KORNACK: I think I would like to
7 participate as a person, and I have comments that I
8 could provide in addition to whatever I have provided
9 as -- in my application here.

10 CHAIRPERSON GRIFFIS: Excellent. I think
11 that's well said, and we appreciate that. I think we
12 will look for you to provide additional testimony.
13 This is in the record, and we'll take this as a
14 written part of the testimony -- your application.

15 But absolutely we'll give you an
16 opportunity, when we set the new date on this, to
17 provide additional -- and then, we'd also ask that you
18 have that in writing and you can submit it in. Very
19 well.

20 MR. KORNACK: Okay.

21 CHAIRPERSON GRIFFIS: Excellent. Thank
22 you very much.

23 I don't know -- Board members, assist me
24 in looking at the others that are not participating
25 here. Perhaps the residents of the area that are here

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 know the Hatcher and Oliver parties. Were they not
2 coming in because there was a question of
3 postponement? Yes, I'm sorry. You just need to be up
4 at a microphone.

5 MS. ISAACSON: Mr. Griffis, my name is
6 Cathy Isaacson, and I am represented by Mr. --

7 CHAIRPERSON GRIFFIS: Could you just come
8 up? Because I can't have you talk, because you're not
9 on the record.

10 MS. ISAACSON: I'm represented by Mr.
11 Aguglia here.

12 CHAIRPERSON GRIFFIS: Yes.

13 MS. ISAACSON: But Ms. Teel Oliver and Ms.
14 Jennifer Hatcher are very close neighbors of ours.
15 Ms. Oliver lives directly across the street from the
16 proposed site of the child development center, and Ms.
17 Hatcher lives on Dumbarton Street, right around the
18 corner from the proposed site.

19 CHAIRPERSON GRIFFIS: Okay.

20 MS. ISAACSON: And they are both away
21 because of the holidays. They could not be here.

22 CHAIRPERSON GRIFFIS: I see.

23 MS. ISAACSON: But they would like -- they
24 would like party status. I've talked to both of them.

25 CHAIRPERSON GRIFFIS: Were they aware that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 they could come and provide testimony?

2 MS. ISAACSON: I don't think they were
3 aware that party status would be decided at this
4 particular hearing, no.

5 CHAIRPERSON GRIFFIS: I see. Do you have
6 any objection from your personal view of having them
7 join with you in terms of formulating your case
8 presentation?

9 MS. ISAACSON: I actually think neighbors
10 may have distinct interests in this case.

11 CHAIRPERSON GRIFFIS: Okay.

12 MS. ISAACSON: And may want to remain
13 separate.

14 CHAIRPERSON GRIFFIS: Okay. Comments?

15 VICE CHAIRPERSON MILLER: I'm wondering if
16 you could elaborate on that, how your interest might
17 be different from your neighbor's interest. At least
18 you can speak for yourself. They're not here, but you
19 are.

20 MS. ISAACSON: Well, I'll tell you, in Ms.
21 Oliver's case, for instance, she has a driveway that
22 is directly across the street, an active driveway that
23 she uses that is directly across the street from the
24 proposed site.

25 CHAIRPERSON GRIFFIS: Maybe Mr. Aguglia

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 should speak to it.

2 MR. AGUGLIA: I understand your question,
3 and perhaps we need a little bit of time to talk with
4 the neighbors. I think what my client was saying was
5 there may be different reasons for their opposition.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. AGUGLIA: But the opposition appears
8 to be unified --

9 CHAIRPERSON GRIFFIS: Right.

10 MR. AGUGLIA: -- against. And traffic is,
11 of course, a huge concern. It's a very narrow street.
12 Parking is extremely difficult. These will be small
13 toddlers that will have to be escorted off the bus.
14 No traffic study has been submitted by the applicant,
15 so we will explore -- to assist the Board -- a unified
16 party status of the neighbors, if that is possible.

17 CHAIRPERSON GRIFFIS: Okay.

18 COMMISSIONER TURNBULL: I wonder if I
19 might --

20 CHAIRPERSON GRIFFIS: Oh, yes. Please.

21 COMMISSIONER TURNBULL: I guess in
22 clarifying that, is it our understanding that both of
23 the other parties -- Hatcher -- are in opposition?

24 MR. AGUGLIA: Yes, that is correct.

25 CHAIRPERSON GRIFFIS: Okay. I think we're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 going to leave it at this. I think we can take up
2 Cathy and Walter Isaacson's request for party status
3 at this time, as represented by Mr. Aguglia, who is
4 present.

5 And then, what I'm going to do is hold for
6 further discussion the Hatcher and Enders-Kornack
7 request for party status. We'd anticipate that you
8 will be talking to them, if they could join -- in
9 fact, all of the neighbors. Of course, that makes for
10 a much more concise and perhaps persuasive case
11 presentation.

12 We will allow them to address the Board,
13 so essentially postpone decisions on theirs, unless
14 there is another option. Yes?

15 VICE CHAIRPERSON MILLER: We were just
16 saying that we think you were referring to Hatcher as
17 possibly coming as a party. I think Enders and
18 Cycoran -- sorry, I don't have the name right. But he
19 just said he wanted to participate as a person.

20 CHAIRPERSON GRIFFIS: I'm sorry. Yes,
21 you're absolutely right.

22 VICE CHAIRPERSON MILLER: Okay.

23 CHAIRPERSON GRIFFIS: Right. Right,
24 Hatcher and Oliver. We have those two that are out.
25 Okay. Let's hear -- any additional questions for Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Aguglia, representing the Isaacson household as a
2 party? They are the most proximate neighbors, of
3 course, adjacent to, and there's an important issue of
4 rising to the level of uniqueness.

5 But also, have encompassed all of the
6 elements, of course, under 205, and raise certain
7 substantial concerns that they have said would, in
8 fact, impact them -- be it the traffic, but also in
9 the written submission, also the numbers of children
10 and staff, as long as elements of character have been
11 addressed. We're obviously not talking about the
12 substantive issues here, but naming them as how they
13 might be uniquely, distinctly character -- or impacted
14 if approved.

15 I would support the party request in
16 establishing the Isaacsons as a party, but let me hear
17 from others.

18 MR. KORNACK: Excuse me. May I ask,
19 again, the difference between party and person. I
20 guess I wasn't really fully appreciating the
21 difference.

22 I would like to join the Isaacsons and
23 Teel Oliver and others in the same sense. And I may
24 have misspoke when I said "person," so --

25 CHAIRPERSON GRIFFIS: Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. KORNACK: -- could you --

2 CHAIRPERSON GRIFFIS: I don't necessarily
3 think you may have, but I appreciate your concern.
4 I'm going to keep it open for the next hearing as a
5 preliminary matter, where if there are adjoined
6 neighbors, which you could be a part of --

7 MR. KORNACK: Yes.

8 CHAIRPERSON GRIFFIS: -- that want to
9 bring -- or under one party, I think that would be
10 appropriate to hear with that. Outside of that, I
11 don't see that your interest will be diminished at all
12 --

13 MR. KORNACK: Okay.

14 CHAIRPERSON GRIFFIS: -- as we find
15 duplicity in the opposition of those elements, meaning
16 you will give -- be given an opportunity to speak
17 specifically to what you want to say as a person, and
18 then the party in opposition is also encompassing an
19 awful lot of the larger issues for the block.

20 But I think we'll leave it open for
21 further preliminary matter when we hear this case, if
22 there is a larger party in opposition that is actually
23 created.

24 MR. KORNACK: Okay.

25 CHAIRPERSON GRIFFIS: Is that everyone's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sense?

2 VICE CHAIRPERSON MILLER: I just want to
3 bring the parties' attention and the community's
4 attention to our regulation, which is 3117.4, which
5 talks about how much time parties and persons in
6 opposition shall have to present their case. And it
7 talks about them as collectively having a certain
8 amount of time.

9 So it's to your advantage, not just the
10 Board's efficiency, if -- if you do come together and
11 coordinate as one party before you make your
12 presentation, so that you all have control over your
13 time. So that's why we kind of -- ask those kind of
14 questions, if you have similar enough interest.

15 CHAIRPERSON GRIFFIS: Okay. Anything
16 else? Mr. Gell, comments on the Isaacsons' request
17 for party status?

18 MR. GELL: Mr. Chairman, we have no
19 objection to Ms. Isaacson being a party. We would,
20 for the record, note that we might have objection to
21 the others, but I understand you want to put that off.

22 CHAIRPERSON GRIFFIS: Right. Good.

23 Ms. Moore? Can the ANC take any position
24 on the request for party status of the Isaacsons?

25 MS. MOORE: I would be in support of it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 also.

2 CHAIRPERSON GRIFFIS: Okay. Very well.
3 Anything else? Board members, comments? Is there any
4 objection to establishing the Isaacsons as a party in
5 opposition in this case?

6 (No response.)

7 Not noting any objections, we'll take it
8 as a consensus of the Board to establish Cathy and
9 Walter Isaacson, which are the abutting property
10 owners, as represented by Mr. Aguglia.

11 Good. What else do we have, then, in
12 preliminary matter on this? We need to set a date, if
13 I'm not mistaken. Mr. Gell, what were you proposing?

14 MR. GELL: Mr. Chairman, we would
15 appreciate about two months to get everything squared
16 away, including several meetings we anticipate with
17 the neighbors. We want to complete a traffic study,
18 and so forth.

19 We are a little concerned about pushing it
20 off more than that, and I realize that this is subject
21 to your own calendars. But the school would like to
22 start in September, if they can, and they are going to
23 have to hire staff, and so forth, and it gets more
24 difficult the later the Board's decision is. So
25 that's --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRPERSON GRIFFIS: You're looking for
2 some --

3 MR. GELL: With that in mind, two months
4 would do us fine. But I don't know if you have the
5 time to --

6 CHAIRPERSON GRIFFIS: March? March is
7 what you're looking at?

8 MR. GELL: Either end of February or the
9 end -- or sometime early in March, yes.

10 CHAIRPERSON GRIFFIS: Ms. Bailey? It
11 looks like we could do the 14th of February, or the
12 21st of February. Otherwise, we're going to have to
13 put it off until probably the 3rd --

14 MR. GELL: Maybe the 21st would be better
15 for the ANC.

16 MS. MOORE: I don't have the ANC calendar
17 with me, but I believe it is -- we're early in
18 February, and so it's -- can you be ready to present,
19 I guess.

20 MR. GELL: I believe we can. I think the
21 21st would work for us.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. GELL: I think I have another case on
24 the 14th. Somehow that date strikes a chord.

25 CHAIRPERSON GRIFFIS: It's an important

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 day, not necessarily in zoning.

2 (Laughter.)

3 Okay. Well, let's hear -- Mr. Aguglia,
4 difficulty with the 21st?

5 MR. AGUGLIA: That's fine.

6 CHAIRPERSON GRIFFIS: Okay. Anyone else
7 have a concern on the 21st that's present today?

8 (No response.)

9 Not noting any, Ms. Bailey, why don't we
10 do that? It would be in the afternoon, if I'm not
11 mistaken, correct?

12 MS. BAILEY: First case in the afternoon,
13 sir.

14 CHAIRPERSON GRIFFIS: Great. Very well.
15 Thank you all very much. Appreciate everyone coming
16 down. And, of course, now that we've established
17 parties, you all are well aware you'll be serving, and
18 anything that comes in to the record, of course, will
19 be served on the ANC and the applicant and the party
20 in opposition. So we'll make sure that we have that
21 done.

22 We will see you all on the -- what did I
23 say, 21st? 21st. Good. Thank you.

24 I note Mr. Gell is on the second case of
25 the day, too, which was 17413, but what I'd like to do

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is call the first case this morning. I think we can
2 get through it, and then we can take up the next case,
3 because there is also a preliminary matter on that,
4 which I want to do within the case.

5 So if we're ready, why don't we call up
6 the first case for the morning. I know you have one
7 other case, but we're going to get through this first
8 one that's on the schedule first, and then we're going
9 to come back to you for your case, as you have a
10 preliminary matter that I want to take up within the
11 case.

12 MS. BAILEY: Application Number 17406, of
13 Dana Perino, pursuant to 11 DCMR 3104.1, for a special
14 exception to construct a rear addition to an existing
15 single-family row dwelling under Section 223, not
16 meeting the lot occupancy requirements -- that's
17 Section 403. The property is zoned R-4. It's located
18 at 318 16th Street, S.E., Square 1089, Lot 58.

19 CHAIRPERSON GRIFFIS: Thank you very much,
20 Ms. Bailey.

21 Good morning. Are we ready to go?

22 MR. HOUSTON: Yes.

23 CHAIRPERSON GRIFFIS: Excellent. If you
24 wouldn't mind turning your microphones on, and just
25 stating your name and address for the record.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. HOUSTON: My name is Andre Houston.
2 I'm the architect for the project.

3 MR. McMAHON: My name is Peter McMahon.
4 My wife is the owner of the house, and I reside there
5 --

6 CHAIRPERSON GRIFFIS: Excellent.

7 MR. McMAHON: -- 16th Street, S.E.

8 CHAIRPERSON GRIFFIS: And a very good
9 morning to both of you.

10 First of all, let me just clarify, we do
11 have -- we got this through Exhibit Number 27, which
12 is the ANC report, 6B. Is the ANC represented today
13 for this application? 6B?

14 (No response.)

15 Not noting any representation, let's take
16 this up at this point, just -- it is just a few days
17 tardy. Is there any objection to waiving it into the
18 record?

19 VICE CHAIRPERSON MILLER: No objection.

20 CHAIRPERSON GRIFFIS: Not having any
21 objection, does the applicant have any objection to
22 taking that into the record?

23 (No response.)

24 No objection from the applicant either.
25 Very well. We can move ahead. The record is full

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 with all of the filings, as I understand it.

2 And, of course, this is Section 223. Is
3 there anything else you'd like to highlight for us?

4 MR. HOUSTON: Excuse me?

5 CHAIRPERSON GRIFFIS: Any highlights you'd
6 like to provide for the Board's attention, outside of
7 that which you've already put into the record?

8 MR. HOUSTON: No.

9 CHAIRPERSON GRIFFIS: Okay. Is there any
10 questions for the Board for clarifications at this
11 point?

12 MR. HOUSTON: Oh. I was asked by someone
13 to provide a front elevation, which is here. There
14 was a misunderstanding. This is not in a historic
15 district. Someone said it was, but I called the HPRB
16 people and it's not in a historic district.

17 CHAIRPERSON GRIFFIS: I see. Okay. Good.
18 Excellent clarification, then.

19 So just for -- the front elevation, which
20 you've just held up there, reflects the section which
21 is what's in the record.

22 MR. HOUSTON: Yes.

23 CHAIRPERSON GRIFFIS: Is that correct?

24 MR. HOUSTON: Yes.

25 CHAIRPERSON GRIFFIS: And the front was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 looking at the open deck.

2 MR. HOUSTON: Yes.

3 CHAIRPERSON GRIFFIS: And we see that kind
4 of in the flat elevation.

5 MR. HOUSTON: That's right.

6 CHAIRPERSON GRIFFIS: Indeed. And then,
7 there's that one master bedroom that's added on to
8 that level.

9 Okay. Any other clarifications?

10 VICE CHAIRPERSON MILLER: I have a basic
11 question. The addition in the back that -- it's
12 replacing the porch, is it going further back than the
13 porch extended?

14 MR. HOUSTON: Yes, it will be going
15 further back.

16 VICE CHAIRPERSON MILLER: How much further
17 back?

18 MR. HOUSTON: The porch goes about five
19 feet. It's going about 15 feet.

20 VICE CHAIRPERSON MILLER: Okay. Thank
21 you.

22 CHAIRPERSON GRIFFIS: Okay. Let's look,
23 if you don't mind, at your Exhibit 6 in the
24 submission, which is the photographs.

25 MR. HOUSTON: Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON GRIFFIS: There's a photograph
2 of the rear of the building.

3 MR. HOUSTON: Yes.

4 CHAIRPERSON GRIFFIS: And there's a
5 covered area where you walk out, and there's this
6 covered area. That is essentially, you said, how
7 much? What's the dimension of that?

8 MR. HOUSTON: The existing porch is about
9 five feet.

10 CHAIRPERSON GRIFFIS: So that's only -- so
11 it's a covered -- okay. And so that's coming down.

12 MR. HOUSTON: Yes.

13 CHAIRPERSON GRIFFIS: There's a two-story
14 addition going back on of about 15 feet.

15 MR. HOUSTON: That's right.

16 CHAIRPERSON GRIFFIS: And then, beyond
17 that, there is the new entrance.

18 MR. HOUSTON: A little dog leg, that's
19 correct.

20 CHAIRPERSON GRIFFIS: And then, there's
21 the -- there's this kind of a screened porch on top of
22 that.

23 MR. HOUSTON: That's correct.

24 CHAIRPERSON GRIFFIS: I see. I see.
25 Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 COMMISSIONER TURNBULL: I wonder if I
2 might ask a question.

3 CHAIRPERSON GRIFFIS: Yes, please.

4 COMMISSIONER TURNBULL: In the photograph,
5 does -- am I assuming that the addition, then, goes up
6 to where the parking space is?

7 MR. HOUSTON: Yes. That's the furthest
8 extent where the little dog leg pops out.

9 COMMISSIONER TURNBULL: So there's still
10 a parking space where you --

11 MR. HOUSTON: Yes. There's 20 feet, which
12 is enough for parking, and it's enough for a rear yard
13 requirement. So we're not asking for any variance or
14 any special exception for the rear yard. And the dog
15 leg defines an open court, which meets the criteria
16 for an open court, so we don't need a special
17 exception for that either.

18 CHAIRPERSON GRIFFIS: Okay. Any other
19 clarifications? Questions?

20 (No response.)

21 Let's move ahead. If there are any
22 others, we can pick them up.

23 Let's go to the Office of Planning. Very
24 good morning.

25 MR. MOORE: Good morning, Mr. Chair,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 members of the Board. I'm John Moore, the Office of
2 Planning. We stand on the record in support of the
3 application.

4 CHAIRPERSON GRIFFIS: Indeed. Thank you
5 very much. Excellent report and very full. It is an
6 interesting analysis that is done that speaks about
7 the -- the unique characterization of the alley and
8 the open space behind. Of course, this isn't a
9 variance, but a special exception, but it goes right
10 to those levels of elements of special exception,
11 whether, in fact, the light and air use and enjoyment
12 of the adjacent properties would be impacted.

13 Obviously, the Office of Planning is
14 supporting the application, having found that it would
15 not be detrimental in those respects.

16 Is there any questions of the Office of
17 Planning, then, from the Board? Yes, Ms. Miller?

18 VICE CHAIRPERSON MILLER: I just have a
19 question about the impact on the adjacent neighbors.
20 I think you made the statement that they're used to
21 amassing, because the porch was there anyway. But
22 this is going to be a greater massing, and -- but
23 there is no problems with that that you see, or that
24 you've heard from the neighbors?

25 MR. MOORE: There is a great amassing. I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 don't think it will be that much of a problem, again,
2 looking at the depth beyond the alley and the lack of
3 structured development in that area. And the neighbor
4 I think is already on record in terms of supporting --
5 the adjacent neighbor in terms of supporting the
6 application.

7 VICE CHAIRPERSON MILLER: Both of them do?
8 They are both -- both neighbors?

9 MR. MOORE: I think it's the one on the
10 one side. It could be both.

11 MR. McMAHON: May I make a statement at
12 this point? I do, in fact, have letters from the
13 adjacent neighbors, two houses on either side, who
14 have written that they have no objections. I also
15 did, in fact, go around the entire street, and
16 everybody on the street said they have no objections.

17 As it happens, the neighbors on either
18 side adjacent to it, and also the second house to the
19 south, say that they may well indeed want to make an
20 extension to their house themselves. So everybody is
21 happy.

22 VICE CHAIRPERSON MILLER: Okay. Thank you
23 very much.

24 MR. HOUSTON: The houses are about 40 feet
25 deep. They're not deep houses, so they could use an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 extension, all of them.

2 CHAIRPERSON GRIFFIS: Well, I think that's
3 an important point to note. As we look at 223.2,
4 there's a lot occupancy that, you know, beyond 70
5 percent you cannot come in under special exception.
6 But even in the R-4 there's allowable 60 percent lot
7 occupancy. This is so below that actual lot occupancy
8 for the zone district that it's in.

9 So your point is these are 40 feet deep,
10 meaning they don't occupy what we would look to as the
11 standard R-4 lot occupancy. This is bringing it up to
12 just a little bit above nine percent above what would
13 be matter of right.

14 MR. HOUSTON: Right.

15 CHAIRPERSON GRIFFIS: Okay. Very well.
16 Any other questions, then, for Office of Planning?
17 Thank you very much, Mr. Moore. Excellent report as
18 usual, and I must say that the -- the kind of oblique
19 aerial photograph, if you've seen their report, you
20 should get a copy of it. But it's very assisting in
21 noting the location and the setting of the applicant's
22 property. So it's a critical point for our own
23 deliberation and analysis.

24 Very well. We did have an indication that
25 Ms. -- that this was not in the historic -- in a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 historic district?

2 MR. HOUSTON: That's correct.

3 CHAIRPERSON GRIFFIS: You walked through
4 it with staff already?

5 MR. HOUSTON: Someone -- there is some
6 report that it is, but --

7 CHAIRPERSON GRIFFIS: I see.

8 MR. HOUSTON: -- I clarified that with
9 HPRB. It is not.

10 CHAIRPERSON GRIFFIS: Okay. Okay. In
11 either case, there was some support to it, but we
12 won't have to even continue further on that. Let me,
13 then, go to the ANC-6B again, ask if the ANC
14 representative is here today.

15 (No response.)

16 Not noting any ANC representative, we'll
17 take note of Exhibit 27 in which the ANC voted seven
18 to zero on the 15th of December to recommend approval
19 of the application. And I don't have any other
20 further additional comments on that, unless other
21 Board members do, or the applicant has any
22 embellishments on that.

23 (No response.)

24 Not noting that, we do have additional --
25 let us go to any persons present in support of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Application 17406, or in opposition, to come forward
2 at this time, persons to provide testimony in this
3 application.

4 (No response.)

5 Not noting additional persons or persons
6 present today --

7 MR. HOUSTON: We have a letter from the
8 Restoration Society. I thought it was submitted;
9 perhaps it wasn't. But anyway, they support it, too.

10 CHAIRPERSON GRIFFIS: Indeed. I do have
11 that.

12 MR. HOUSTON: Okay.

13 CHAIRPERSON GRIFFIS: And we'll go through
14 the list of, also, the other documents that we have in
15 terms of support. We have the petition, which is
16 Exhibit Number 24, and we also have, as was said, the
17 Capitol Hill Restoration Society, Exhibit Number 22,
18 in the record.

19 We have a letter, Exhibit Number 20 if I'm
20 not mistaken. I don't think we need to make note of
21 that.

22 Okay. Am I not noting any other
23 submission letters from persons that you're aware of?

24 MR. HOUSTON: No.

25 CHAIRPERSON GRIFFIS: Okay. Excellent.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So that's 22. Very well.

2 Let's turn it over to you for any question
3 marks you might have.

4 MR. HOUSTON: We would ask you for a bench
5 decision, since there is no opposition.

6 CHAIRPERSON GRIFFIS: Okay. Any other
7 further clarification or questions from the Board?
8 Even if there was opposition, we might do a bench
9 decision.

10 MR. HOUSTON: Okay.

11 CHAIRPERSON GRIFFIS: We can handle all
12 sorts of information and quickly deliberate and decide
13 certain things. And certainly and especially in a
14 Section 223, which is a great section, of course --
15 other regulations which allow these existing single-
16 family homes to be added onto or reconfigured in order
17 to bring us into some contemporary living situations.

18 That being said, I will hold my general
19 comments to a brief note, and I would move approval of
20 Application 17406, pursuant to the special exception
21 which would allow the construction of the rear
22 addition to the existing single-family row dwelling
23 that will not meet lot occupancy, at premises 318 16th
24 Street, S.E., and would ask for a second.

25 VICE CHAIRPERSON MILLER: Second.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON GRIFFIS: Thank you very much.

2 I think it is quite clear the record is
3 absolutely full on this. And although it is to note
4 one of the requirements in the special exception under
5 the 223 is to provide adequate graphic representation
6 to 223.2(d) in order for the Board's full
7 understanding of what is being proposed. I think we
8 have cured that element of having that front
9 elevation, which just illuminates and perhaps
10 clarifies what was being proposed and how it might
11 impact or tend to impact the surrounding area.

12 We move to, of course, the availability of
13 light and air use and enjoyment of the adjacent
14 properties. There has been no evidence on the record
15 that it would, in fact, create an undue burden in
16 those elements, and the rest of the requirements under
17 223 and the special exception itself, whether this
18 would be in harmony with the zone plan and map.
19 Certainly, there is support that it would be in
20 harmony, and there is no evidence to the contrary.

21 That being said, I will open it up to any
22 other further deliberation on the application.

23 (No response.)

24 Not noting any further deliberation or
25 comments to the application, we have a motion before

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 us. It has been seconded. I would ask for all those
2 in favor to signify by saying aye.

3 (Chorus of ayes.)

4 And opposed?

5 (No response.)

6 Abstaining?

7 (No response.)

8 Very well. Why don't we record the vote.

9 MS. BAILEY: Mr. Chairman?

10 CHAIRPERSON GRIFFIS: Yes.

11 MS. BAILEY: The Board has voted five,
12 zero, zero, to approve the application. Mr. Griffis
13 made the made, Mrs. Miller seconded. Mr. Etherly, Mr.
14 Mann, Mr. Turnbull are in support, and we're doing a
15 summary order, Mr. Chairman.

16 CHAIRPERSON GRIFFIS: Yes, I think a
17 summary order is appropriate. We can waive our rules
18 and regulations and issue that, unless there's any
19 objection from Board members on that.

20 (No response.)

21 Not noting any objection, we'll do that.

22 While I have you here, though, let me ask
23 just briefly. The materials for the property line
24 wall as it goes up, what were they proposed to be?

25 MR. HOUSTON: Cement board.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON GRIFFIS: Okay.

2 MR. HOUSTON: Stucco, basically. Stucco
3 board.

4 CHAIRPERSON GRIFFIS: Excellent.
5 Excellent. And I'm sure as you've had the petition
6 and talked about with the neighbors that you'll
7 coordinate with the colors and all of that, and, of
8 course, construction.

9 Very well. I think that's all we need to
10 do, then.

11 MR. HOUSTON: Do you want this?

12 CHAIRPERSON GRIFFIS: We must have it, in
13 fact.

14 MR. HOUSTON: All right.

15 CHAIRPERSON GRIFFIS: As it has been
16 presented as evidence, we're going to put that in the
17 record. If you need copies of it, let's get copies
18 in. But, yes, that will go into the record at this
19 point.

20 Very well. I don't think there's anything
21 else for us today. Thank you very much.

22 MR. HOUSTON: Thank you.

23 CHAIRPERSON GRIFFIS: Thank you for
24 bringing the application.

25 Let's move ahead to the next case.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MS. BAILEY: Mr. Chairman, the next case
2 was Bill and Kim Alms, and that is the request for a
3 postponement.

4 CHAIRPERSON GRIFFIS: Excellent. Let me
5 just ask, is a Ms. Gesell present? 3304 N Street.

6 (No response.)

7 Okay. Mr. Gell?

8 MR. GELL: Shall I -- shall I begin or --

9 CHAIRPERSON GRIFFIS: I don't know.

10 MR. GELL: All right.

11 CHAIRPERSON GRIFFIS: No. Actually, are
12 you aware of who Gesell is, 3304 N Street?

13 MR. GELL: No.

14 CHAIRPERSON GRIFFIS: Were you aware that
15 there was a request for party status in this case?

16 MR. GELL: I didn't check the file in the
17 last couple of weeks.

18 CHAIRPERSON GRIFFIS: Okay. To be quite
19 direct, I'm not sure that it's a full request for
20 party status. I mean, they've crossed out that they
21 will -- they are requesting to appear. It doesn't
22 make a lot of sense. We're just trying to find
23 clarification. It may have -- and, frankly, our
24 assumption is that they were given -- obviously, they
25 were sent the mailings and the announcements, and in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that also is the party status application. And it was
2 filled out, sent in, although it doesn't look like
3 it's actually requesting party status.

4 MR. GELL: May I ask what the address is?

5 CHAIRPERSON GRIFFIS: 3304 N Street.

6 MR. GELL: That strikes me as being
7 several doors away from 3317.

8 CHAIRPERSON GRIFFIS: Okay. Well, if
9 they're not here, I don't think we need to spend more
10 time in delivery. Quite frankly, I don't think this
11 was intended to be a request for status in this case.
12 So we can move ahead.

13 And here we are again. Mr. Gell?

14 MR. GELL: Yes, Mr. Chairman. I would
15 appreciate it if we could -- if the Board would permit
16 us to hold this hearing at a later time. This
17 apparently was a miscommunication on a couple of
18 levels. The doctor who is renovating this house does
19 not live there, so it was difficult for him to contact
20 the neighbors on either side. He did attempt to do
21 so.

22 And, in fact, some months before we filed
23 the application I believe, or certainly before this
24 hearing, he showed the plans to the neighbor on one
25 side -- Murphy, or to his wife, I've forgotten now

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 which it was, but his -- his impression was that they
2 really didn't have a problem.

3 Their impression, and I shouldn't speak
4 for them, but their impression was that it was very
5 general, they weren't quite sure what they were
6 looking at, and when they began to realize what the
7 addition was going to do they felt they did have a
8 problem, and, therefore, we thought it better before
9 -- rather than bring it to the ANC with a neighbor who
10 was going to be opposed, and we have not heard from
11 the other neighbor, but there are rumblings that,
12 apparently, there is -- they are not happy either.

13 We decided it would be better if we could
14 negotiate some of the issues with them. I had several
15 discussions with Mr. Murphy, and we talked about
16 tailoring the project a bit. And we came closer, but
17 we haven't gotten to the point where we are in
18 agreement. So rather than present that to the Board
19 in a contentious way, I thought it might be better if
20 we could somehow reach an agreement, if that's
21 possible.

22 CHAIRPERSON GRIFFIS: Okay. Understood.
23 So, essentially, you're not prepared to go forward
24 today.

25 MR. GELL: That's correct.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON GRIFFIS: Okay.

2 MR. GELL: Also, the Advisory Neighborhood
3 Commission, Mr. Kelsey, has very strongly urged us to
4 ask for a postponement. And that was true in the
5 other case as well. We had several members of the
6 Commission saying that they had heard from neighbors,
7 and, therefore, they wanted us to ask for
8 postponement. The same is true here.

9 So we -- for another -- for the other
10 reason, that we didn't want to upset the ANC, we
11 thought we ought to give this a try.

12 CHAIRPERSON GRIFFIS: Sure. I can see in
13 the prior -- and I think that it makes an awful lot of
14 sense -- that you may not have anticipated, rightly or
15 wrongly, the need for additional information and
16 substantive information.

17 I guess my point would be to caution that
18 we -- the Board doesn't look to have everything, as
19 you well know, Mr. Gell, everything neat, tidy, and
20 everyone in agreement. And I would just say that --
21 don't be afraid to come in and deal with the facts as
22 they are going to be presented.

23 So I guess -- I don't think this is ready
24 to go forward today. It's too bad, because I think we
25 could get through an awful lot of it. But I think

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 next is, you know, tell them to bring it here. I
2 mean, we can certainly weed through very quickly the
3 substantive elements of it.

4 Obviously, if things can get resolved
5 outside, that's probably a more amenable way for
6 everybody than to have it all on the record and before
7 our proceeding. But, again, this is -- this is a 223.
8 It's pretty straightforward of what has to be met or
9 not met, or how one would address those elements and
10 issues.

11 Okay. So what are we proposing? What
12 date? How much time do you need?

13 MR. GELL: We're pretty much open on that.

14 BOARD MEMBER MANN: Can I ask Mr. Gell a
15 question first?

16 CHAIRPERSON GRIFFIS: Yes, please.

17 BOARD MEMBER MANN: Has this project -- it
18 has some requirement to go through like Old Georgetown
19 Board or HPRB?

20 MR. GELL: It has been through the Old
21 Georgetown Board.

22 BOARD MEMBER MANN: So those issues have
23 already been resolved.

24 MR. GELL: That's right. In terms of the
25 appearance in the back of this addition, the Old

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Georgetown Board was in agreement. I suppose if we
2 make some changes, at some point we may have to go
3 back, but the changes would not be dramatic. They
4 might be a shortening or a -- or pulling back a little
5 bit, but the basic design would be the same.

6 BOARD MEMBER MANN: Okay. I was just
7 trying to ascertain which -- which parties you had to
8 reach some resolution with.

9 MR. GELL: Yes.

10 CHAIRPERSON GRIFFIS: You have -- you're
11 hearing that there is concern from the adjacent
12 neighbors, is that correct?

13 MR. GELL: The next-door neighbor, yes.

14 CHAIRPERSON GRIFFIS: Okay. Okay. Yes?

15 MR. GELL: And we're, of course, more
16 particularly concerned about the neighbor to the north
17 or west, Mr. Murphy.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. GELL: But, again, if I -- you know,
20 if I didn't think that there were -- there was a
21 resolution to this that was a likely one, I wouldn't
22 go to the trouble of trying to bring the parties
23 together. Where I think that we're at least close
24 enough so there's a real possibility, then that's my
25 preference, to try to bring something better to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Board than a contentious issue. And I've had, you
2 know, some good luck with that. So --

3 CHAIRPERSON GRIFFIS: Okay.

4 VICE CHAIRPERSON MILLER: I'm just
5 wondering if you know where in the process Office of
6 Planning is with this application.

7 MR. GELL: The Office of Planning -- I
8 have discussed it with them, and I think they were
9 happy to hear that it was being put off, so that -- I
10 mean, maybe I shouldn't put it that way.

11 They had not done very much work on it at
12 the point where I told them it was likely we were
13 going to ask for a postponement. And when it became
14 clear that we were, they felt, okay, they wouldn't
15 rush to get the thing done. But, no, they haven't
16 made any decisions.

17 CHAIRPERSON GRIFFIS: Anything else?

18 MR. GELL: As far as a date, two months
19 would be fine with us. If you want to put it on the
20 14th, I think I have the Maharai case on the 14th,
21 which is fine, but I can do this one as well or I can
22 do it in March.

23 CHAIRPERSON GRIFFIS: Ms. Bailey, what
24 does the morning look like on the 14th? I have it.
25 One, two -- so why don't we do it first in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 afternoon, Ms. Bailey?

2 MS. BAILEY: Yes, Mr. Chairman.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. GELL: So I'll be back-to-back cases.

5 Is that it?

6 CHAIRPERSON GRIFFIS: That's right. The
7 14th of February, first in the afternoon. We had set
8 time limits on the other case in that afternoon, I
9 believe, so you can review that. But we'll call this
10 one first, get through it, and move on to the next.

11 MS. BAILEY: Okay.

12 CHAIRPERSON GRIFFIS: Good. Good.
13 Anything else?

14 MR. GELL: I'm sorry. You said something
15 about time limits, and my hearing is a little impaired
16 with this cold that I have.

17 CHAIRPERSON GRIFFIS: Oh. For the second
18 case, I believe -- I was just looking at some notes --
19 I thought we had set some time limits for the second
20 case. But we can review the record.

21 MR. GELL: I'm not familiar with -- for
22 the Maharai case?

23 CHAIRPERSON GRIFFIS: Yes.

24 MR. GELL: I don't recall.

25 CHAIRPERSON GRIFFIS: We'll look into it.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. GELL: Yes. Thank you.

2 CHAIRPERSON GRIFFIS: Okay. Anything
3 else, Ms. Bailey?

4 MS. BAILEY: Not for the morning, Mr.
5 Chairman.

6 CHAIRPERSON GRIFFIS: Excellent. If
7 there's no other further business for the morning
8 session, then, let's adjourn.

9 (Whereupon, at 11:08 a.m., the
10 proceedings in the foregoing matter were
11 adjourned.)
12

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

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

2 (1:24 p.m.)

3 CHAIRPERSON GRIFFIS: Good afternoon.

4 This is a continuation of the 20th of December 2005
5 public meeting of the Board of Zoning Adjustment of
6 the District of Columbia.

7 My name is Geoff Griffis, Chairperson.
8 Joining me today is Ms. Miller, Vice Chair, and Mr.
9 Etherly. Representing the National Capital Planning
10 Commission is Mr. Mann, and representing the Zoning
11 Commission with us, we welcome to our afternoon public
12 hearing, Mr. Turnbull.

13 Copies of the hearing agenda are available
14 for you. They are located where you entered into the
15 hearing room. Pick it up. You can see where you are
16 in our chronology for this afternoon's events.

17 Let me make a couple of quick opening
18 statements. First of all, I'd ask that everyone
19 please be aware that we are going to be creating an
20 official record. An official record is being created
21 by the Court Reporter sitting to my right on the
22 floor. There are several things attendant to that
23 that we ask of you.

24 First, we'd ask that everyone turn off
25 their cell phones, beepers, pagers, etcetera, so that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 we don't disrupt people's testimony, and also the
2 transmission.

3 Secondly, when coming forward to speak to
4 the Board, I would ask that you fill out two witness
5 cards. Witness cards should be filled out prior to
6 coming forward, and they can be given to the Court
7 Reporter sitting to my right. They should be -- there
8 should be some in front on the table where you will
9 provide testimony. They are also on the table where
10 you entered into the hearing room.

11 Lastly, attendant to that, I would ask
12 that when you do come forward you state your name and
13 address for the record. You need to only do this
14 once, and that way, obviously, we will get you on the
15 transcript and correctly credited with all of those
16 important things that you will provide the Board.

17 And you will provide those in the order
18 for special exceptions and variances, which is this.
19 First, we will hear from the applicant, their
20 statements and the case presentation. Secondly, we
21 will hear from all government reports and agencies
22 reporting to the application. Third, will be from the
23 Advisory Neighborhood Commission within which the
24 property is located. Fourth, will be persons or
25 parties in support of an application. Fifth, would be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 persons or parties in opposition to the application.
2 Sixth, finally, our last step in this process will be
3 asking the applicant to make any conclusionary
4 remarks, closing statements, or bringing rebuttal
5 testimony, if required.

6 Cross examination of witnesses in the case
7 presentation -- cross examination of those witnesses
8 is permitted by the applicant in the case. It is also
9 permitted by all parties in a case. We will establish
10 individual parties in a case. However, the ANC within
11 which the property is located is automatically a party
12 in the case, and, therefore, will be able to conduct
13 cross examination.

14 The record will be closed at the
15 conclusion of the hearings on the case, and I would
16 imagine that we will complete the hearings on all of
17 the cases this afternoon.

18 The Board, at times, asks for additional
19 information to be submitted into the record. We will
20 keep the record open in order to receive that
21 information, and we will be very specific on what is
22 to be submitted and when it is to be submitted into
23 the Office of Zoning.

24 That will all happen at the end of the
25 hearing, so you will not be in any way unaware that we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 are awaiting additional information.

2 The Sunshine Act requires that the Board
3 conducts its hearings in the open, and before the
4 public. This Board does enter into Executive Session,
5 both during and after hearings on a case. This is in
6 accordance with the Sunshine Act. It's also in
7 accordance with our rules, regulations, and
8 procedures, and, quite frankly, we use Executive
9 Sessions for reviewing the record on certain cases in
10 order to prepare fully for our own deliberations.

11 The decisions of the Board must be based
12 exclusively on this record I have now talked about
13 being created before us today. It must be based
14 exclusively on that record. So we ask that people
15 present today not engage Board members in private
16 conversations during the hearings on this case, so
17 that we do not give the appearance of receiving
18 information outside of the official record.

19 Let me say a very good afternoon to Ms.
20 Bailey, who is with the Office of Zoning, on my very
21 far left, and Mr. Moy on my right, not on the farthest
22 right but closest to the farthest, from the Office of
23 Zoning. The Office of Planning is represented with
24 us, as is the OAG, and they will be introduced as they
25 are called to address the Board.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 At this time, I'd ask that everyone
2 planning to testify before the Board, if you would
3 please stand give your attention to Ms. Bailey, she's
4 going to swear you in.

5 MS. BAILEY: Would you please raise your
6 right hand.

7 (Whereupon, an oath was administered to
8 those persons planning to offer
9 testimony.)

10 CHAIRPERSON GRIFFIS: Excellent. Thank
11 you all very much.

12 With that, the Board will consider any
13 preliminary matters attendant to any of the cases on
14 the afternoon schedule. Preliminary matters are those
15 which relate to whether a case will or should be heard
16 today. Requests for postponements, continuances,
17 withdrawals, or whether proper and adequate notice has
18 been provided -- these are all elements of preliminary
19 matter.

20 If you have a preliminary matter for the
21 Board's attention, I would have you come forward and
22 have a seat at the table in front of us as an
23 indication. I will ask Ms. Bailey if you're aware of
24 any preliminary matters for the Board's attention at
25 this time.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MS. BAILEY: Mr. Chairman, members of the
2 Board, and to everyone, good afternoon. No, sir,
3 staff does not have any preliminary matters.

4 CHAIRPERSON GRIFFIS: Okay. Not noting
5 any other indication of preliminary matters from
6 anyone else present, let's call our first case.

7 MS. BAILEY: Application 17402 of Karl H.
8 Lass Family Trust, pursuant to 11 DCMR 3103.2, for a
9 variance from the residential recreation space
10 requirement under Section 773, and a variance from the
11 area and width requirements for a closed court under
12 Section 776, to allow an addition to an existing
13 multiple dwelling in the C-2-C District at premises
14 1109 M Street, N.W., Square 314, Lot 3.

15 CHAIRPERSON GRIFFIS: Thank you very much,
16 Ms. Bailey.

17 I understand that there is a request for
18 party status by the SAXA Condominium Association. Is
19 Ms. Ferster represented today?

20 PARTICIPANT: (Inaudible comment from an
21 unmiked location.)

22 CHAIRPERSON GRIFFIS: Excellent. We're
23 going to need you at the table.

24 One other thing I don't say in my opening
25 is in order to be on the record you must speak into a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 microphone, and that microphone should be on. So with
2 all of those together, you are all seated at the table
3 very comfortably. I'm going to have a preliminary
4 matter of my own. I will not be hearing this case.
5 I'm going to recuse myself as the architectural firm
6 is my past employer.

7 I'm going to turn it over to Ms. Miller.
8 But I am going to ask the architect if they'd bring
9 those boards much closer to the table, because, one,
10 we want to see them, and also you're going to need to
11 speak into a microphone when you go and address those.

12 With that, Ms. Miller, I turn it over to
13 you to establish the preliminary matter and party
14 status in this case.

15 VICE CHAIRPERSON MILLER: Good afternoon.
16 Could you introduce yourself for the record, please?

17 MS. HEARNE: My name is Shelley Hearne.
18 I am a resident at 1111 M Street, and also president
19 of the SAXA Condominium Association.

20 VICE CHAIRPERSON MILLER: And you'll be
21 representing SAXA Condominium Association today?

22 MS. HEARNE: Correct. There also were
23 actually several other people who were going to
24 attend, including other neighbors, at 1103 and other
25 locations, but I can -- I can include in my comments,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 my brief comments, their concerns and issues also.

2 VICE CHAIRPERSON MILLER: Okay. And the
3 applicant is here. Mr. Collins is here for the
4 applicant?

5 MR. COLLINS: Good afternoon. My name is
6 Christopher Collins with the law firm of Holland &
7 Knight, representing the applicant in this case.

8 With request -- with regard to the request
9 for party status in this case, I would request that
10 the Board pay careful attention in this -- in
11 evaluating this request to Section 3106.3 of the
12 regulations that appear at page 31-13 of 11 DCMR.

13 This section states the following. "In
14 considering any request for party status, the Board
15 shall grant party status only if the person requesting
16 party status has clearly demonstrated that the
17 person's interests would likely be more significantly,
18 distinctively, or uniquely affected in character or
19 kind by the proposed zoning relief than those of other
20 persons in the general public."

21 There is no doubt that 1111 M Street is
22 located directly next to 1109, which is the subject of
23 this application. However, in looking at the request
24 for party status, there is nothing to demonstrate in
25 that request how the grant of zoning relief would have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 any impact on them.

2 This is a C-2-C zone. This zone allows a
3 height -- maximum height of 90 feet, maximum FAR of
4 6.0, rear yard requirement 15 feet, no side yard
5 requirement. If you look at the pleading on page 3
6 that was filed by 1111 M, you'll see that the concerns
7 that are expressed there include the following. The
8 space between the two buildings will be reduced to
9 leave only certain inches between 1111 and its lot
10 line.

11 The rear addition will be within three
12 feet of the dividing property line, creating windows
13 at risk in violation of a building code requirement.
14 The rear addition will impair the existing
15 ingress/egress from the rear of 1111 by reducing the
16 passageway between the buildings to less than two feet
17 in some places, creating a tunnel effect that will
18 limit the ability of residents to remove bicycles and
19 other large objects from their storage space, which is
20 accessible from the rear.

21 Well, these all have to do with the space
22 on the property of 1111 M. They have nothing to do
23 with 1109. This building could be built to a height,
24 under zoning, of 90 feet on the lot line. There is
25 nothing that -- we're not asking for a side yard

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 variance. We're not asking for a height variance.
2 We're not asking for a rear yard variance. We're not
3 asking for anything that would have any impact on 1111
4 M.

5 The closed court is on the other side of
6 the wall that faces 1111 M. They will not see the
7 closed court from their building. The residents'
8 recreation space variance that we're requesting would
9 have nothing to do, would have no impact on 1111 M
10 unless they were alleging something like there's not
11 enough room in the gyms in the neighborhood to allow
12 these nine people to go to the gym.

13 There is nothing in their allegations that
14 has anything to do with the zoning issues before you.
15 So when the Board considers whether to grant party
16 status, I would request that you pay careful attention
17 to that provision that the Zoning Commission recently
18 amended in order to tighten up the party status
19 requirements.

20 Thank you.

21 VICE CHAIRPERSON MILLER: Okay. You'll
22 certainly get a chance to address this. Usually you
23 would go first, but Mr. Collins piped right in, so now
24 you know what his issues are.

25 But I also want to ask if the ANC

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 representative is here.

2 (No response.)

3 Okay. Would you like to address why you
4 should be --

5 MS. HEARNE: Thank you.

6 VICE CHAIRPERSON MILLER: -- granted party
7 status.

8 MS. HEARNE: While I appreciate that this
9 is an open process and that this is -- this is a
10 dialogue that we can participate, are -- are --
11 because of the nature of the variances requested, it
12 does alter the type of building that's being created,
13 and it has a very direct impact and actually will
14 interfere with both our access, our light and air, and
15 even our privacy in a very significant way.

16 Much of how it's designed, everything from
17 location of the HVAC units, because of the variance
18 structures, including how we can get access to our
19 main rear egress, which is where all of our materials
20 -- bikes, etcetera -- are stored, it does require --
21 we actually have a shared passage.

22 There is going to be a requirement for
23 them to obtain an easement from us. The passage, if
24 built as configured, would make it essentially
25 inaccessible for its use in our building.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 In addition, I think there are some very
2 significant points about what they have made claims in
3 terms of recreation for this major unit, particularly
4 claims -- everything from restaurants and stores,
5 which are not allowed in the zoning requirements. The
6 ideas that are being proposed in terms of parks, which
7 are required to be safe, secure, and suitably equipped
8 or landscaped for active or passive recreation.

9 Places like Thomas Circle, which is what
10 they were proposing, do not qualify as safe and --
11 literally, you could try to climb over the barriers or
12 sneak behind fences for many of the locations.

13 This is a space, because of the nature of
14 their request for a variance, it is going to be a very
15 different building. It will have significant impact
16 on us. It's something where, while we would like to
17 and are absolutely in favor of development and
18 expansion in this area and this location, the current
19 variances do not -- are not required in order to have
20 this development continue.

21 But as currently configured, it does have
22 a significant impact on us, which is why we would like
23 to participate and be part of this dialogue and
24 conversation of the variances that are being
25 considered, because, again, of access, privacy, air

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and light issues that will be very relevant to our
2 well being.

3 VICE CHAIRPERSON MILLER: Now, can you
4 just address how your interests are going to be
5 affected differently from the general public? That's
6 part of the standards.

7 MS. HEARNE: Sure. Regardless of the
8 merits --

9 VICE CHAIRPERSON MILLER: I'll give you a
10 basic example, just -- it's my own personal and
11 perhaps parochial, but it will explain. I own a unit
12 in 1111, which is on the top floor. As this is
13 currently designed and configured, I am the only unit
14 that has an outdoor roof space patio.

15 The design has, by artist rendition, all
16 of the -- all nine of the HVAC large units being
17 placed directly next to my patio. Now, they could be
18 put in the back where the new building is being built,
19 where there is no other roof access in any other
20 location -- our building, neighborhood buildings.

21 But that -- while we have asked for those
22 types of concessions with the developers, that has not
23 been something that they've been willing to do, which
24 is, again, why it has been so important for us to be
25 involved in the administrative process here and be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 part of the citizen dialogue.

2 Again, I could give you many examples, but
3 I'm sure you don't want to hear them.

4 MS. HEARNE: I know. I actually think
5 that it's kind of obvious, that by proximity you're
6 affected more directly than the general public, which
7 I think is the test. And I think Mr. Collins is
8 getting to the point that, well, you're not really
9 affected by the relief that's being requested, but
10 you're affected by the project.

11 Is that correct, Mr. Collins?

12 MR. COLLINS: They are next to the
13 project. I won't concede that they're adversely
14 affected by the project, but they're certainly next to
15 it. But you're -- for the rest of the statement,
16 you're right.

17 VICE CHAIRPERSON MILLER: Do Board members
18 have any questions?

19 BOARD MEMBER ETHERLY: If I could jump in,
20 Madam Chair. I believe I understand -- this is a
21 question that's also -- ultimately directed to you,
22 Ms. Hearne, but it perhaps has ample preface to it.
23 As the Vice Chair exchanged with Mr. Collins, I think
24 the nature of his objection is the concern that the
25 relief that is being sought here could -- let me

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 rephrase it another way.

2 The impacts that are highlighted in your
3 party status application are impacts that could,
4 nevertheless, be experienced as a matter of right,
5 meaning if they were to do what they were able to do
6 as a matter of right without coming before this body,
7 you would still suffer the impacts that you complain
8 of.

9 So, essentially, the relief that they're
10 seeking here impacts you in a way that you would
11 otherwise have to deal with without relief. I'm
12 saying that a little awkwardly, but hopefully I think
13 by your nodding you kind of understand where I'm
14 getting at.

15 MS. HEARNE: I'm hoping I do.

16 BOARD MEMBER ETHERLY: Okay. Okay.

17 MS. HEARNE: Let me try to give you an
18 answer, in that this is a property which the
19 developers are making the case is an exceptional lot
20 dynamic that requires a variance in order for them to
21 fully utilize and economically utilize a site.

22 BOARD MEMBER ETHERLY: Broadly speaking,
23 yes.

24 MS. HEARNE: It's actually not
25 exceptional, which is part of the heart of this whole

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 variance. There are many different ways, and many
2 other developers have brought this to our attention,
3 that you could build this site without those variances
4 --

5 BOARD MEMBER ETHERLY: Okay. Well, let me
6 --

7 MS. HEARNE: -- that would actually have
8 less impact.

9 BOARD MEMBER ETHERLY: Let me politely
10 pause you there, because I just -- I don't want us to
11 veer too far into the substance of the matter.

12 Is there -- gosh. Let me then turn to Mr.
13 Collins, because I -- because I think that helped me.
14 Is there -- gosh, I'm trying to figure out what I'm
15 struggling with, Mr. Collins, is -- is trying to
16 answer a question that perhaps goes a little too close
17 to substance, and I don't want to take us there.

18 Gosh, I'll leave it at that. I think I --
19 I think I have a little bit of an understanding of
20 kind of what the issue is. So I'll leave it there,
21 Madam Chair.

22 Thank you.

23 VICE CHAIRPERSON MILLER: Ms. Hearne, are
24 you saying that it's your position that the project
25 could be modified so that it would not have an adverse

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 impact upon you? And is that why you want to
2 participate in this proceeding?

3 MS. HEARNE: That's correct. Again, we
4 are not in full opposition to the project
5 conceptually. We are in opposition to how it is
6 currently designed, because we believe it will
7 adversely impact our, again, air, privacy, quality of
8 life issues.

9 VICE CHAIRPERSON MILLER: Okay.

10 COMMISSIONER TURNBULL: I wonder if I --
11 I wonder if I might ask a question. It's -- maybe Mr.
12 Collins can clarify it. You are right to build as --
13 under the right of the project. But in one of your --
14 one of the pieces of paper that I'm looking at, doing
15 that strictly according to code is -- would be
16 difficult for your building program. That's why
17 you're asking for the variance.

18 MR. COLLINS: That's correct. And to take
19 a cue from Mr. Etherly, without getting too much into
20 the merits of the case --

21 COMMISSIONER TURNBULL: Right.

22 MR. COLLINS: -- there are factors that
23 affect the ability to build under the matter-of-right
24 scenario.

25 COMMISSIONER TURNBULL: Right.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. COLLINS: And there are two variances
2 that we are requesting because of that, and one is --
3 is the residents' recreation space, and the other is
4 the width of the court.

5 COMMISSIONER TURNBULL: Okay. Thank you.

6 VICE CHAIRPERSON MILLER: In looking at
7 3106.3, we look at whether the person has demonstrated
8 that their interest would likely be more
9 significantly, distinctly, or uniquely affected, in
10 character and kind, by the proposed zoning relief than
11 those of other persons in the general public.

12 And I think what we're struggling with
13 maybe is, you know, the question of the proposed
14 zoning relief, what does that mean. And as I look at
15 this, because of the proximity of the building, I
16 think that the individuals who are requesting party
17 status are certainly going to be more significantly,
18 distinctly, or uniquely affected, in character and
19 kind, by certainly the project.

20 And I think, you know, it's a question of
21 how narrow or broadly we read this. And I think
22 because it sounds like the project is not possible
23 without the proposed zoning relief that in this case
24 if we were to err, if you want to even say it's err,
25 on any side I think it would be to grant party status

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in this case. And that when we get to the merits of
2 the case, then we may be focusing differently on
3 impact and stuff.

4 But special -- I mean, in the variance
5 case we do deal with adverse impacts, and you've
6 raised an issue that there may be adverse impacts.
7 And so I wouldn't want to preclude it by not granting
8 party status in this case, so I would be in favor of
9 granting party status.

10 BOARD MEMBER ETHERLY: Madam Chair, I will
11 agree with your read. I will perhaps take a step
12 forward and offer a bit of direction. If it is the
13 case that the SAXA is successful with their party
14 status application, then I believe Mr. Collins'
15 observations are very, very much a factor that you
16 will have to deal with, and that is being very clear
17 about what the requirements are with respect to the
18 variance test, because I think it does establish a
19 fairly high bar, not only for the applicant, but in
20 this particular instance there is quite a bit that --
21 that this applicant can do as a matter of right that
22 would still offer some frustration for you.

23 So I think I would -- I would tend to
24 agree with you. I don't believe that the -- the
25 relief that's being complained of here, because it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 could, in fact, still be done to a significant extent
2 as a matter of right, necessarily torpedoed your party
3 status application. I think all of the other factors
4 are fairly straightforward and work in your favor.

5 But I think as -- once again, if your
6 application is successful -- and I would support it --
7 I think you will have a very difficult bar to deal
8 with in terms of speaking specifically to the variance
9 analysis. You began to talk a little bit about that
10 -- the issue of uniqueness here -- and some of the
11 other aspects of the test.

12 So I agree with you, Madam Vice Chair, and
13 I'm prepared to move forward accordingly.

14 Thank you.

15 BOARD MEMBER MANN: I'm also in agreement.
16 I think a slightly broader interpretation of 3106.3 in
17 this case will allow us to perhaps get to some of the
18 facts that weren't articulated as fully as perhaps
19 they should have been in the party status application.

20 COMMISSIONER TURNBULL: I would concur
21 with the party status.

22 VICE CHAIRPERSON MILLER: Okay. In which
23 case at this time I would move to grant the request of
24 SAXA Condominium Association for status as a party in
25 opposition to the application.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 BOARD MEMBER ETHERLY: Second it, Madam
2 Chair.

3 VICE CHAIRPERSON MILLER: All those in
4 favor?

5 (Chorus of ayes.)

6 All those opposed?

7 (No response.)

8 Okay. All those abstaining?

9 (No response.)

10 Okay. All right. In which case you have
11 been granted party status.

12 MS. HEARNE: Thank you. I just -- I want
13 just for the record to note that several other of the
14 neighbors have joined and are welcomed and
15 appreciative of being part of this dialogue.

16 VICE CHAIRPERSON MILLER: Okay. But you
17 will be the main representative for the group?

18 MS. HEARNE: I can -- yes, for SAXA.

19 VICE CHAIRPERSON MILLER: For today?

20 MS. HEARNE: There is also a member of the
21 neighborhood also from 1103 M Street who did not -- is
22 not part of the applicant status but is here with
23 similar issues and concerns.

24 VICE CHAIRPERSON MILLER: Okay. I --

25 MS. HEARNE: I can talk for the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 neighborhood and kind of the overall issues, and I
2 think that will be helpful, at least for this specific
3 discussion.

4 VICE CHAIRPERSON MILLER: Okay. That
5 would be fine. And you know -- do you understand what
6 you have an opportunity to do as a party? I mean,
7 you'll have the opportunity to cross examine and --

8 MS. HEARNE: Yes, I apologize. I'm not a
9 lawyer, and our counsel was not able to attend. But
10 she has versed me on appropriate protocol and the
11 process. So I will try, as my layman abilities can,
12 to be brief and engaged in the process appropriately.

13 VICE CHAIRPERSON MILLER: Okay.

14 MR. COLLINS: Could I just get some
15 clarification? Is Ms. Hearne going to appear as a
16 representative?

17 VICE CHAIRPERSON MILLER: Is Ms. Ferster
18 going to appear?

19 MR. COLLINS: No. Is Ms. Hearne going to
20 appear as a representative of the neighbors who are
21 not part of the condo? Is that what was said?

22 VICE CHAIRPERSON MILLER: Do you have
23 their --

24 MS. HEARNE: She's here. I'm just simply
25 -- I just want to acknowledge that other members of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the neighborhood who had wanted to participate are
2 here.

3 VICE CHAIRPERSON MILLER: Okay. I think
4 Mr. Collins wants it clarified. I think there are two
5 different ways to participate. One is they can join
6 you and be part of your party, and you can represent
7 them and even put them -- them on as witnesses. Or
8 they can just talk themselves as persons in opposition
9 or support.

10 MS. HEARNE: They'll join with us.

11 VICE CHAIRPERSON MILLER: They'll join
12 with you. Okay.

13 So if you can get their names later, and
14 we'll have it in the record as to who exactly is in
15 this party. Okay. Thank you.

16 So at this point, then, I'll turn to Mr.
17 Collins to present the applicant's case. Yes, you can
18 go sit down over there, and then I'll call you or ask
19 you if you want to ask any questions when they're
20 done. Okay.

21 BOARD MEMBER ETHERLY: Madam Chair, I'll
22 just note as everyone is getting prepared, if the
23 party in opposition or any other members of the
24 audience want to position themselves so you have an
25 opportunity to see the presentation boards, please

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 feel free to do so.

2 VICE CHAIRPERSON MILLER: Thank you, Mr.
3 Etherly.

4 BOARD MEMBER ETHERLY: You're welcome.

5 MR. COLLINS: Good afternoon, members of
6 the Board. My name is Christopher Collins with the
7 law firm of Holland & Knight. Seated behind me is Tom
8 Carroll of our office as well. Seated to my immediate
9 right is Mr. Karl Lass, Jr., the owner of the property
10 that's the subject of this application, and to my far
11 right Mr. Ron Schneck from Hickok, Warner, Kohl
12 Architects. Mr. Schneck is the project architect for
13 this project.

14 This is an application, as you've heard,
15 for two variances -- number one, a reduction in the
16 residential recreation space requirement; and,
17 secondly, a decrease in the minimum closed court width
18 requirement and the closed court area requirement.

19 The site is in the C-2-C zone. This zone
20 allows a height of 90 feet maximum, and a maximum FAR
21 of 6.0, and does not have a side yard requirement.

22 The site is also in the Shaw Historic
23 District. This historic district limits the ability
24 to construct onsite height and density up to the
25 maximum permitted by zoning. The site is improved

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 with a three-story building which was formerly
2 occupied as a dental lab and a three-unit residential
3 building.

4 The proposal is to create a nine-unit
5 residential condo building with the existing building
6 in the front and a four-story plus basement addition
7 at the rear. This application has the support of the
8 ANC, the Historic Preservation Review Board, and the
9 Office of Planning.

10 I have two witnesses this afternoon, and
11 they will testify as follows. First of all, with
12 respect to the exceptional situation or condition of
13 the property, the property is a long and narrow site.
14 It is less than 25 feet wide, and is 125 feet long,
15 which is unusual for a C-2-C zone.

16 The long and narrow site -- in the square
17 there is only one other similar long and narrow site
18 in the square, and that's the property immediately
19 next door at 1111, which is substantially developed
20 with a building that extends back to the rear lot
21 line, to a similar extent that the proposed building
22 will go.

23 In addition, there is a small three-story
24 building on the site with an articulated front facade
25 and an articulated rear facade. That building

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 occupies about one-third of the lot, about 37 percent,
2 and it's 46 feet in height.

3 Because of the historic preservation
4 limitations, the building must be preserved on the
5 site. Also because of the historic preservation
6 limitations, the rear facade cannot be removed and
7 cannot be built up against to create one long
8 building.

9 The existence of the building in the front
10 of the site, the 15-foot rear yard requirement setback
11 at the alley, the fact that there is no side yard
12 requirement, there is -- the fact that there is a need
13 to maintain the rear facade of the existing building,
14 all of these factors dictate the footprint and
15 envelope of this addition, of where it can go. That's
16 why it is where it is.

17 With respect to the closed court, the
18 practical difficulty with regard to the closed court,
19 the addition that's being proposed is set back 12-1/2
20 feet from the rear facade of the building. Above the
21 second floor, there is a bay window in the back for
22 two stories. Above the second floor, the setback is
23 greater -- about 16 feet back from the addition.

24 The requirement for a closed court is that
25 the court must measure four inches per foot of height

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of court but not less than 15 feet. That's a width
2 requirement. And a closed court must meet width in
3 both dimensions.

4 The closed court with requirement, if you
5 look at the definition, is the minimum horizontal
6 dimension. So it's measurable north-south and east-
7 west, to see which one is the minimum. Based on the
8 high of the court, as shown in the plans, of 52 feet,
9 2 inches, the minimum required width is 17 feet, 4
10 inches, and the area requirement is 604 feet.

11 The court is 12-1/2 feet wide where the
12 bay windows are for the first two levels, and above
13 that is about 16 feet. And the area is 235 square
14 feet. The width is 17.25 feet, measured east-west.

15 Full compliance with the closed court
16 requirements would increase the court area by about
17 370 square feet and cut the footprint of the addition
18 by about a third, which would require that in order
19 for this to be built all -- what's -- when you pull
20 back from the main building, you'd have to put this
21 lost area on top of the addition, meaning the addition
22 would get higher, taller.

23 Zoning would allow that to happen, because
24 the maximum height is 90 feet. But Historic
25 Preservation would not. So we cannot make up the lost

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 space, and the addition would become about two-thirds
2 of its size. Specifically, cutting 370 square feet
3 for five levels would mean a reduction of 1,850 square
4 feet in the building. Total building 9,220 -- 9,220
5 square feet in size, so this is about a 20 percent
6 reduction in the building size, which would make the
7 project infeasible.

8 The residential recreation space practical
9 difficulty is that, first and foremost, the lot is
10 less than 25 feet wide, and, therefore, there can be
11 no complying residential recreation space on the roof,
12 because there's a minimum dimension of 25 feet. there
13 is no residential access to the roof in any event.

14 On the ground level, the open area in the
15 front of the building is public space, so that would
16 not count. The rear -- the open space to the rear,
17 the rear yard, the 15 feet is going to be used for
18 parking. That's about 348 square feet.

19 And we found that in many instances the --
20 the residents of the building would prefer parking
21 availability over residential recreation space
22 availability.

23 The only other open area is in the closed
24 court. The building has 9,220 square feet of
25 residential space, so, therefore, the area

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 requirement, the recreational requirement is 15
2 percent, or in this case 1,383 square feet. At least
3 50 percent of that must be outside.

4 The closed court is 235 square feet. So
5 increasing the closed court area to 692 square feet
6 would cut the footprint of the addition in half, and
7 make the project infeasible. It would require that
8 there be an additional 457 square feet of area in the
9 court. If you add 457 square feet of additional space
10 times the five levels, it results in a reduction of
11 2,285 square feet, because, as I said before, Historic
12 Preservation would not allow you to take that lost
13 area and put it on top of the addition to up to 90
14 feet in height.

15 That would result in a 24 percent
16 reduction in the project size. Almost a quarter of
17 the project would have to be eliminated. Therefore,
18 the project would not be feasible.

19 In addition, even if you -- if you granted
20 that variance for the outdoor residential recreation
21 space, there is also an indoor recreation space
22 requirement to provide 692 square feet of complying
23 rec space indoors. This is the equivalent of one of
24 the units in the building.

25 So you'd have to take one of the nine

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 units and devote it to residential recreation space.
2 Because you couldn't sell that unit, the other eight
3 units would have to bear the cost. The sales price of
4 the other eight units would each increase by 12.5
5 percent, and you'd get to the point there where the --
6 spreading the cost over all of the units to increase
7 all of them by 12.5 percent would take the sales price
8 of these units out of the range of the market and
9 would make the project not feasible.

10 So that's a summary of the variance
11 relief. And unless there are any questions about
12 that, I'd like to go to my first witness, Mr. Karl
13 Lass.

14 VICE CHAIRPERSON MILLER: I have a
15 question, and it's a general question, and either you
16 can answer it now or maybe your witnesses might want
17 to address it as they go along. You generally refer
18 to Historic Preservation limitations that require the
19 building to be built in certain ways.

20 And you refer to them pretty generally,
21 and I know that there's a report in our record, but I
22 would just be interested in knowing whether those
23 limitations flow from the HPRB report that's specific
24 to this case, or whether there are also other
25 regulations out there that you're operating under that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 are affecting the project that haven't been really
2 identified for us.

3 MR. COLLINS: It's not so much the
4 regulations, although there are regulations that give
5 guidance to Historic Preservation projects, very
6 specifically on windows and doors and things of that
7 nature, roofs, and other elements. But this is as a
8 result of discussions with HPRB and going -- having
9 discussions with the staff and going to HPRB on
10 several occasions and having the rulings that they've
11 made.

12 So the configuration, the setback from the
13 main building to the addition, are all mandated by
14 HPRB as part of their review process, specific review
15 process. And it's very much an ad hoc case-by-case
16 process at the HPRB.

17 VICE CHAIRPERSON MILLER: Okay. For
18 instance, if you make a statement that, you know, you
19 couldn't demolish something, is that based on your
20 discussions with HPRB, or is that based on general
21 rulings of HPRB in that area that you know you
22 wouldn't be able to demolish something, or --

23 MR. COLLINS: Buildings that contribute to
24 the character of the historic district are generally
25 prohibited from being demolished. There is in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 law, D.C. Law 2-144, the Historic Landmark/Historic
2 District Protection Act of 1978 does provide a means
3 by which you can apply for demolition, and that's in
4 the regulation specifically so that the law is not
5 declared unconstitutional.

6 And there is a process for that, but there
7 has not, to my knowledge, ever been a building that is
8 found to be contributing to the character of the
9 historic district to be able to be demolished. And if
10 there is one to be demolished, it is -- it has to meet
11 certain threshold requirements that are so high as to
12 be in the public interest.

13 For instance, the former Convention Center
14 that was built is a special merit case. It was found
15 -- a church, an existing church was demolished to make
16 way for the Convention Center, and that was to provide
17 a public benefit -- to have a Convention Center for
18 the city, things like that.

19 So a small project like this individual
20 private development project, contributing buildings
21 are not -- have not been found to be allowed to be
22 demolished, except in circumstances where the building
23 is perhaps falling down or is demolished anyway, or is
24 partially demolished, or is about to collapse, or has
25 been condemned.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 VICE CHAIRPERSON MILLER: Thank you. And
2 one other just really kind of basic question. You
3 were going through the individual variances and
4 talking about, if you didn't get the relief, what the
5 consequence would be. Now, basically, the -- if you
6 didn't get either of the variances, would the
7 consequence be -- and I could study that application
8 again, but that you would -- you could only build
9 eight units, and it wouldn't be feasible. Or is that
10 simplifying it too much, and that's only related to
11 the residential rec requirements?

12 MR. COLLINS: That may be simplifying it
13 too much.

14 VICE CHAIRPERSON MILLER: Okay.

15 MR. COLLINS: If we didn't get those two
16 variances, we may come back with a rear yard variance,
17 for instance, to move the building back to increase
18 the height -- the width of the court and the area of
19 the court. And maybe we would introduce an elevator
20 onto the roofs and see if we could get some rooftop
21 recreation space on top, which would allow the rooftop
22 to be used for recreation.

23 Right now, there is none, because there is
24 no elevator, because the goal is to keep the building
25 height as low as possible.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON MILLER: So you would
2 need some variance relief in any event.

3 MR. COLLINS: I would believe that we
4 would, in order to make this project work, yes.

5 VICE CHAIRPERSON MILLER: Okay. Thank
6 you.

7 Any other questions?

8 BOARD MEMBER ETHERLY: Yes, Madam Chair,
9 if I could just follow up on a little bit of your line
10 of questioning. Allow me to be simple for a moment.
11 What would the -- in the absence of the two variances,
12 what would the consequences be in terms of your total
13 unit count? What would you lose? It sounds as with
14 the residential rec space requirement, in particular
15 the interior requirement, you definitely would lose
16 one unit of the proposed number that you currently
17 have. With -- in the absence of the closed court
18 relief, what would you -- what would you lose there?

19 MR. COLLINS: Well, if we -- we might have
20 to come back for rear yard variance.

21 BOARD MEMBER ETHERLY: Gotcha. But just
22 for the sake of discussion, what does that -- if I
23 understand your presentation correctly, the opening
24 remarks, there would be a 20 percent reduction in the
25 footprint of the building if you were forced to comply

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 with the closed court area and width requirement.
2 What is that -- is that reduction across the entire
3 footprint of the existing building and the addition,
4 or you would lose 20 percent of the addition?

5 MR. COLLINS: It's 20 percent of the gross
6 floor area of the project.

7 BOARD MEMBER ETHERLY: Of the overall
8 project. Okay.

9 MR. COLLINS: Not the footprint, but the
10 overall gross floor area.

11 BOARD MEMBER ETHERLY: Okay. With respect
12 to the feasibility issue, I always hesitate to kind of
13 get into it, because, you know, you can look at
14 numbers and everyone can kind of argue and quibble
15 somewhat over what's a feasible selling point -- you
16 know, price for a unit, or what have you, but you did
17 kind of verge into that area a little bit in your
18 opening statement.

19 So I wanted to kind of anticipate perhaps
20 some questions or some conversation on that and
21 inquire, did you -- did you take a look at -- and this
22 perhaps might come up in the presentation as you move
23 into some of your other witnesses, did you take a look
24 at kind of the market in this particular area, to kind
25 of price what these condos would go for?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And as you considered the loss of that one
2 unit, as it related to the interior rec space
3 requirement and your need to then perhaps spread out
4 the cost of that remaining unit, of that lost unit
5 over the remaining units, what was your sense of what
6 that would do? I understand you're saying it takes
7 you out of the range for what you would want to set
8 the number of at these units, how far -- is it still
9 close?

10 Does it -- does it just disproportionately
11 knock you out of the ball park and you go from a
12 \$300,000 or \$400,000 to a \$700,000 condo in order to
13 make it work? I just want to kind of get a sense of
14 that, because as you presented it that is a little
15 part of the difficulty. So I want to make sure we
16 kind of just parse that out.

17 MR. COLLINS: Sure. In this -- in this
18 market with prices stabilizing, and even in some areas
19 softening a bit, it's going to become more and more
20 competitive. To add 12-1/2 percent to the sales price
21 of a unit in order to comply with the regulation that
22 the Zoning Commission is poised to eliminate in three
23 months seems to us to be a little bit burdensome.

24 BOARD MEMBER ETHERLY: Okay. Thank you.

25 Thank you, Madam Vice Chair.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 BOARD MEMBER MANN: Madam Chair?

2 VICE CHAIRPERSON MILLER: Yes.

3 BOARD MEMBER MANN: A couple of questions.
4 In the -- in the alternative, in this zone district,
5 could you have pursued a non-residential building?

6 MR. COLLINS: Yes, we could. The zoning
7 regulations allow a 6.0 FAR, of which 2.0 can be non-
8 residential. And the site is 2,906 square feet, so
9 5,812 square feet of gross floor area could be
10 commercial. But in looking at it, I think that Mr.
11 Lass would look at that when he will talk to you about
12 the options for -- for development that they looked at
13 when it was determined to redevelop the site.

14 BOARD MEMBER MANN: And so did you address
15 lot -- maximum lot occupancy?

16 MR. COLLINS: Lot occupancy is 80 percent
17 in a residential -- for a residential, and 100 percent
18 for non-residential.

19 BOARD MEMBER MANN: Had you chosen to
20 develop non-residential, though, you still would have
21 been faced with limitations from HPRB?

22 MR. COLLINS: Yes, of course. Actually,
23 I should -- I shouldn't say of course. Yes, we would
24 have -- the height, the -- things like that.

25 BOARD MEMBER MANN: Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. COLLINS: Sure. Unless there are any
2 other questions, I'd like to go to Mr. Lass.

3 MR. LASS: Good afternoon. My name is
4 Karl Lass, Jr. I am one of the owners of the property
5 at 1109 M Street. I inherited the property from my
6 father about two years ago when he passed away, my
7 sister and I. She is not able to be present today.
8 She is taking exams. So I'm here on behalf of both of
9 us.

10 The existing building was purchased by my
11 family in 1980, and was used by my father for a dental
12 lab and his personal residence, as well as two
13 additional efficiency apartments in the basement,
14 which were used by my sister and myself. For the last
15 two years since my father passed away, the building
16 has been vacant, and we have pursued various options
17 of use.

18 Our original thought was to rent it
19 commercially, but because of the unique design of the
20 interior, there would have been substantial
21 reinvestment by anyone coming in and using the
22 building for their use, that the price point for
23 rental or any -- or leasing opportunities became
24 unrealistic over the five- to seven-year period.

25 We then pursued reselling the property as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 a residential property as is, which it is actually
2 currently still on the market, and that seems to not
3 be -- also reached a level of non-feasibility based on
4 the current structure and the amount of money that
5 would have to be poured into the property and its
6 current market value to redevelop it for that use.

7 After a substantial amount of research, my
8 sister and I met with Chris Etherington of Ashburn
9 Properties and went through some -- whom we were
10 actually introduced to by a commercial real estate
11 agent whom we had contacted originally to try and
12 lease the property. That relationship has evolved
13 over the last year and a half to bring us here where
14 we have subsequently moved forward to develop the
15 condominiums.

16 We employed Hickok Warner to do the
17 schematic designs and have proceeded through the Logan
18 Circle Community Association, the CDC, the ANC, and
19 the HPRB, to bring us here for final zoning approval.
20 All of the agencies that we have visited to date have
21 supported us. Our concept has always been to try and
22 maintain consistency with the current structure and
23 the existing building.

24 Our new building pretty much mirrors the
25 1111 structure in size and scope and occupancy of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 property, so we feel that it is consistent with the
2 neighborhood, as did the HPRB and the ANC.

3 Beyond that, I'm not an expert on most of
4 the other features, so I'm going to let Ron Schneck
5 address any of the more technical aspects of this.
6 And if you have any other questions for me, I'd be
7 happy to answer them.

8 VICE CHAIRPERSON MILLER: I have a quick
9 question for you. I just wonder if you could
10 elaborate on what you said. You tried to sell it as
11 is, and you couldn't?

12 MR. LASS: We are right now. It's been on
13 the market since September.

14 VICE CHAIRPERSON MILLER: And -- okay,
15 it's been on the market since September. Okay.

16 Any other questions?

17 (No response.)

18 Okay. Go ahead. Thank you.

19 MR. SCHNECK: Good afternoon. My name is
20 Ron Schneck, and I'm an associate with Hickok, Warner,
21 Kohl Architects. In addition to 1109, I've designed
22 two other multi-family projects in the immediate
23 vicinity, one at 13th and N and one at 1425 11th
24 Street.

25 The 1109 project is located mid-block on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 M Street between 11th and 12th Streets. The
2 neighborhood consists of commercial buildings, single-
3 family and multi-family residential. The immediate
4 block bounded by 11th and 12th Streets and M and N
5 Streets is primarily residential. It is located in
6 zone C-2-C in the Shaw Historic District. It is
7 protected by the Historic Preservation Review Board.

8 We have discussed this project with them
9 from the beginning and have received HPRB conceptual
10 design review. We continue to work with HPRB and
11 staff on its development.

12 Architecturally, the project consists of
13 the renovation to an existing three-story plus
14 basement row house into four condominiums and addition
15 of a four-story plus cellar building containing five
16 condominiums.

17 What we've talked about briefly is the
18 project's massing is determined by a unique set of
19 restrictions. First, during our initial meeting with
20 HPRB, there was a mandate to spatially separate the
21 new row home from the addition. By creating a court,
22 we are able to achieve this. This also allowed us to
23 get natural light and air to all of the units.

24 Secondly, complying to the 15-foot rear
25 yard setback, this limits our building footprint, and,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 therefore, limits the amount of square footage that we
2 have available for the units.

3 Thirdly, also in discussions with HPRB, we
4 had to limit the proposed height of the proposed
5 addition to the lowest height of the existing row
6 house, or 39 feet. You know, this resulted in a much
7 -- a higher court height and area width requirement,
8 but we still need the variance relief and that's why
9 we're here.

10 Now, I'm going to go into sort of the
11 specific zoning variance reliefs, unless there's
12 questions sort of generally about the project.

13 MR. COLLINS: Can I ask for a
14 clarification?

15 MR. SCHNECK: Yes.

16 MR. COLLINS: What you said -- it would
17 result in a higher court height?

18 MR. SCHNECK: I'm sorry, a lower court
19 height. Yes.

20 In terms of the zoning variance relief for
21 the residential rec space requirement, as mentioned
22 before the existing site is exceptionally long and
23 narrow compared to the neighboring sites. It's only
24 23 feet wide by 125 feet long. Only one other lot of
25 similar dimensions is like this in the square, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 this is 1111 M Street. Next door it is already
2 developed, like Mr. Lass said, with a building that
3 extends approximately the same distance to the rear as
4 our proposed addition.

5 In addition, the existing row home
6 occupies 37 percent of the site. Combine this with
7 the building massing restrictions previously
8 mentioned, the HPRB preservation setback, the rear
9 yard setback, and the height limitation, it creates a
10 practical difficulty for strictly complying with the
11 residential recreation requirement.

12 To meet those requirements, we would have
13 had to reduce the addition by approximately 50
14 percent. This would have made the addition itself no
15 longer spatially feasible for, you know, a certain
16 depth is required for a living unit. It would also be
17 financially feasible -- it also wouldn't be
18 financially feasible or desirable to replace an entire
19 residential floor with a portion of the residential
20 recreation equipment.

21 We still wouldn't fully comply, and in our
22 experience, especially in this neighborhood, residents
23 would much prefer to use sort of the local indoor
24 venues such as gyms and coffee houses to socialize
25 than, you know, be on a treadmill in the basement. We

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 do find that even when we've had indoor recreation
2 rooms they usually go unused.

3 Another option, obviously, would be to put
4 the residential requirement on the roof. But as Mr.
5 Collins said, due to the narrowness of the site, we
6 would be unable to meet the square foot requirements
7 as well as the minimum width requirement. By the time
8 you'd put in guard rails alone, we'd probably be lucky
9 to get 16 feet wide.

10 So in terms of variance relief being
11 granted without substantial detriment to the public
12 good, and without impairing the intent, purpose, and
13 integrity of the zone plan, in the context of only
14 nine units we are providing an ample size recreation
15 space in the closed court. At its smallest, it's over
16 12 feet by 17 feet, and it widens at the top due to
17 the absence of the bay window.

18 And, in addition, each unit will provide
19 considerable space for the individual interior passive
20 recreation for residents. The closed court is
21 intended to have benches, plants, decorative lighting,
22 and other features, making it a nice space to be in.

23 In addition, as mentioned, there are
24 numerous opportunities in the neighborhood for both
25 passive and active recreation -- Logan Circle, Mount

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Vernon Square, Thomas Circle, to name a few.

2 Now on to the variance relief for the area
3 and width requirements for a closed court. Again, the
4 site is extraordinarily narrow compared to the
5 neighboring sites, combining this with the massing
6 restrictions previously mentioned, the HPRB
7 preservation setback, the rear yard setback, and the
8 height limitation, creates a practical difficulty for
9 strictly complying with the area and width
10 requirements of a closed court.

11 The minimum width of 15 feet is required,
12 and we can only achieve 12 foot 6 due to the
13 connection that is required between the two -- between
14 the existing row home and the addition. And,
15 basically, the minimum calculated area would be 450
16 square feet. We only have 235.

17 For compliance with the closed court
18 requirements -- full compliance with the closed court
19 requirements would mean that the court area would need
20 to be increased by about 370 square feet. Again, to
21 meet those requirements, we would have to cut the
22 addition by about a third, or 370 square feet. On
23 five floors, that would be a loss of about 1,800
24 square feet, which is 20 percent of the total building
25 area, as Mr. Collins mentioned. this would have made

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the addition itself no longer feasible.

2 Our only other option would have been to
3 keep the spatial separation between the existing
4 townhouse and the addition, but enclosing it by an
5 atrium, no longer defining it a court. This, however,
6 would not have been acceptable by HPRB and would not
7 allow us to use the space for natural air and light
8 requirements.

9 And in terms of variance relief being
10 granted without substantial detriment to the public
11 good, and without impairing the intent, purpose, and
12 integrity of the zone plan, the reduced size of the
13 court will not impair public good. The court is
14 internal to the building, accessible only to the
15 building residents. It's near the center of the
16 property and is largely hidden from view, and will not
17 impact any adjacent property.

18 The court area and widths are sufficient
19 to satisfy historic preservation concerns, and they
20 are sufficient for this size of project.

21 Any questions?

22 BOARD MEMBER ETHERLY: If I could, Madam
23 Chair, this perhaps might be an awkward question, but
24 I just want to be -- I want to first kind of just
25 orient myself, to be sure I understand kind of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 contours of the property. At Exhibit Number -- I
2 believe it's Exhibit Number 8, which is a set of
3 photographs that we have included in our file -- and
4 I'm holding up that set -- the -- I believe that's the
5 third paragraph in, which shows the perspective
6 looking back towards the rear.

7 I just want to get a sense -- and I'll
8 show this to my colleagues, so that they have a sense
9 of which photograph, and for the Office of Planning's
10 benefit, which photograph I'm looking at. As you look
11 towards the rear of the property, I'm looking at the
12 third photograph that shows the court as it exists
13 now. I just want to be sure I understand, one, where
14 the -- where kind of the lot line ends, where the
15 parking pad would come into play.

16 As you look back towards that rear -- that
17 rear gate there, back towards the big green container,
18 is that the property line there, or does the property
19 -- does the rear property line extend beyond that
20 gate?

21 MR. LASS: Let me address that. If you
22 notice from the picture, there's a steel beam next to
23 the gate. That's the property line right there. So
24 right now the -- the guy who is walking through there
25 is walking right along the property line. To the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 right is the -- is just the backyard. That's where
2 the new structure will be.

3 The court itself will actually be closer
4 than what you're currently seeing.

5 BOARD MEMBER ETHERLY: Okay.

6 MR. LASS: It will be between basically
7 the railing where the lamppost is --

8 BOARD MEMBER ETHERLY: Yes.

9 MR. LASS: -- and the existing house.

10 BOARD MEMBER ETHERLY: Okay. And as you
11 head back towards the rear, so the -- the -- where the
12 current -- I guess is that a gate towards the back of
13 the property there?

14 MR. LASS: That's a gate towards the back
15 of the property, and behind there is where the parking
16 area will be.

17 BOARD MEMBER ETHERLY: Okay. I see. So
18 the addition will extend to where that gate is at?

19 MR. LASS: The addition will basically be
20 from where the lamppost area is, somewhere in that
21 general vicinity, back to the existing gate.

22 BOARD MEMBER ETHERLY: Okay.

23 MR. LASS: Which will mirror the building
24 that you see to the left, which is 1111.

25 BOARD MEMBER ETHERLY: Okay. Excellent.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Now here's my awkward question. But because we have
2 the benefit with the applicant's presentation of the
3 diagrams and the overhead, and, of course, the benefit
4 of the esteemed architect from Hickok Warner, I want
5 to get a sense of this passageway that we will, of
6 course, have some conversation about when the opposing
7 party does their presentation.

8 Could you perhaps kind of orient us as to
9 where that space is located?

10 MR. SCHNECK: Pointing at this plan -- I'm
11 sorry. Pointing at this plan right here, essentially
12 this void of space is the passageway that you're
13 referring to. And, essentially, according to the
14 survey that we have, it's essentially three feet, one
15 inch from their exterior wall to our property line.
16 So right along there.

17 MR. COLLINS: And what you're gesturing to
18 is A-4?

19 MR. SCHNECK: That's correct.

20 BOARD MEMBER ETHERLY: Thank you.

21 MR. SCHNECK: Okay.

22 BOARD MEMBER ETHERLY: And as a matter of
23 right, could you indicate just for the record what you
24 would be able to do with the present building? I
25 mean, with the addition, if you were -- just for the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sake of discussion, but I think it's an important
2 point to include on the record in the applicant's
3 case, if you were just building as a matter of right
4 all of the other considerations not being an issue
5 right now, how would you be able to build in that
6 space?

7 MR. SCHNECK: We can build directly onto
8 the property line.

9 BOARD MEMBER ETHERLY: Okay. And by
10 building onto the property line, that would, of
11 course, decrease the current existing space that is
12 there now, correct?

13 MR. SCHNECK: Correct.

14 BOARD MEMBER ETHERLY: Okay. Thanks. And
15 do you know offhand how much that decrease would be?

16 MR. LASS: Well, three feet. I mean, it
17 would be three feet, one inch. I mean, there's
18 nothing there now, so it's --

19 BOARD MEMBER ETHERLY: Okay.

20 MR. LASS: -- it's 23 feet plus three
21 feet, one inch.

22 BOARD MEMBER ETHERLY: Okay.

23 MR. LASS: If we were to build, it would
24 be three feet, one inch.

25 BOARD MEMBER ETHERLY: Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. LASS: I want to be clear here that
2 they have no access onto my property currently. They
3 just -- there just simply isn't anything to keep them
4 off of it.

5 BOARD MEMBER ETHERLY: Okay.

6 MR. LASS: They have no grant or easement
7 or anything else that gives them access to my
8 property.

9 BOARD MEMBER ETHERLY: Okay.

10 MR. LASS: We are offering, in effect,
11 originally -- was easement two feet onto my property,
12 to grant them access to their door. They currently
13 don't have anything to grant them such access.

14 BOARD MEMBER ETHERLY: Okay. Okay. Thank
15 you.

16 Let me come back to Mr. Schneck, if I
17 could, on the issue of uniqueness. As you are aware,
18 uniqueness is part of the variance analysis, and I
19 just want to be sure to put a pin in this portion of
20 the conversation around the uniqueness of the subject
21 property. And it's excellent that you have some
22 experience with other properties in the immediate
23 vicinity.

24 As you indicated in your testimony, there
25 is -- there really are no other lots in this area.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Maybe the closest comparable would be the lot
2 immediately next to it, in terms of the length and
3 width and narrowness. So could you just speak to --
4 speak to that again?

5 The lot that's immediately adjacent, which
6 would be 1111 M Street, if I'm correct, is the only
7 lot in your experience that -- that comes somewhat
8 close to the configuration that we see with the
9 subject lot here, correct?

10 MR. SCHNECK: Correct.

11 BOARD MEMBER ETHERLY: Okay. Okay. That
12 concludes my questions.

13 MR. SCHNECK: On 1111 M Street, basically,
14 when they did their addition, they essentially just
15 tacked it on to the original building years and years
16 ago.

17 And, basically, what we're up against is
18 that we can't tack it on -- nor I don't think we would
19 want to tack it on to the existing row home, and this
20 was very -- HPRB made this very clear, that, you know,
21 this is a historic structure, it's in good condition,
22 it's a beautiful building. We have no desire to
23 attack right on to it.

24 So what we want to do is create this
25 courtyard, and HPRB wants us to create some type of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 court separating the two buildings. So that sort of
2 -- in terms of massing, that's the big difference
3 between our building and 1111.

4 BOARD MEMBER ETHERLY: Okay. Thank you.

5 Thank you, Madam Vice Chair.

6 COMMISSIONER TURNBULL: Madam Chair, if I
7 could ask a question.

8 VICE CHAIRPERSON MILLER: Yes, go ahead.

9 COMMISSIONER TURNBULL: Mr. Lass, you had
10 mentioned that you had -- at one point were thinking
11 of offering an easement onto your property there for
12 access?

13 MR. LASS: Yes. We had approached the
14 residents of 1111 in an effort to resolve any
15 differences or problems that they may have with our
16 development. And since their door -- rear door is
17 located down here, it becomes difficult for them to
18 access their property, because it's too close to the
19 property line.

20 COMMISSIONER TURNBULL: Well, what
21 happened with that process?

22 MR. LASS: What happened with?

23 COMMISSIONER TURNBULL: The offering of
24 the easement.

25 MR. LASS: It's still on the table, but

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 they -- they have requested additional things beyond
2 what we have offered.

3 COMMISSIONER TURNBULL: I see.

4 MR. LASS: Including they would like me to
5 pay for a rear gate in their backyard to protect their
6 cars, and new -- and they want to be able to dictate
7 where we place the air conditioning units, which is
8 really subject to the construction of the building.

9 We have no -- Shelley Hearne mentioned
10 earlier that we have placed them all in one specific
11 area. That was simply for the drawing. The way the
12 mechanicals are laid out by the mechanical engineer
13 will dictate where those go. We will make every
14 effort -- and we've made it clear in several e-mails
15 that we will make every effort to deaden the sound in
16 what way we can.

17 COMMISSIONER TURNBULL: Yes.

18 MR. LASS: But they're going to have to go
19 where they have to go, based on what the mechanicals
20 allow.

21 COMMISSIONER TURNBULL: Right now,
22 speaking of that, it looks like, if I look on the
23 section on the roof plan, they appear to be on the
24 sloped rear portion of the existing structure, and
25 then going on to the roof of the bridge structure that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 goes across -- is what I'm understanding.

2 MR. LASS: That's correct.

3 MR. SCHNECK: The intention there, and
4 basically it was sort of a request by HPRB, was to
5 keep them as far away from -- from sort of public view
6 as possible, which means pushing them sort of as far
7 into the left of the site.

8 COMMISSIONER TURNBULL: So it is your
9 intent, though, to continue to work with the location
10 of those units.

11 MR. SCHNECK: That's exactly right. We
12 don't even have a mechanical engineer on board yet.
13 So we're only going to have so much flexibility with
14 placing them. However, they will be placed, you know,
15 according to code and according to zoning.
16 Absolutely.

17 COMMISSIONER TURNBULL: Okay. Thank you.

18 MR. COLLINS: Just to clarify, Mr.
19 Schneck, are those units less than four feet above the
20 height of the roof?

21 MR. SCHNECK: No, they're not. They're
22 probably two foot, six inches above the roof.

23 MR. COLLINS: So, therefore, they wouldn't
24 -- they would be -- so the answer is yes?

25 MR. SCHNECK: Yes. The answer is yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. COLLINS: So that means they would be
2 allowed to be located anywhere, regardless of any kind
3 of one-for-one setback requirement under the zoning
4 regulations?

5 MR. SCHNECK: Yes.

6 MR. COLLINS: Okay. Thank you.

7 BOARD MEMBER MANN: Madam Chair?

8 VICE CHAIRPERSON MILLER: Go ahead.

9 BOARD MEMBER MANN: I have a question
10 concerning that western property line. By moving the
11 western wall of your building two feet to the east,
12 doesn't that create another -- another nonconforming
13 court on the western side of the property?

14 MR. SCHNECK: I believe we're basically,
15 then, extending over on the third and the fourth floor
16 to close that top. As you can see here, it continues
17 over to the property line.

18 BOARD MEMBER MANN: So when it's -- well,
19 I guess I'll just take it on its face, then, that when
20 -- when that wall is moved back over above that, then
21 that -- any creation of a court goes away.

22 MR. SCHNECK: That's correct.

23 BOARD MEMBER MANN: Okay. Thank you.

24 MR. SCHNECK: It no longer meets the
25 definition of a court.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON MILLER: I think I need
2 some clarification about what's happening on the site
3 also, then. You're not building to the lot line, or
4 you are building to the lot line?

5 MR. SCHNECK: We are not building to the
6 lot line on the cellar floor and the first floor, and
7 then we are building to the lot line on the second
8 floor, third floor, and fourth floor.

9 VICE CHAIRPERSON MILLER: Okay. Then,
10 this might go to Mr. Collins or maybe you, I don't
11 now. What about a side yard -- does this mean that
12 you -- you don't have to have a required side yard
13 because of -- you're going over -- you're going to the
14 lot line on the second, third, and fourth floor?

15 MR. COLLINS: There are several reasons
16 why that's not a side yard. A side yard is defined in
17 the regulations as being for the full depth of the
18 building. So this is not -- number one, it's not a
19 side yard. It's not a court, because it's not open to
20 the sky. It's only there -- it's an indentation --

21 VICE CHAIRPERSON MILLER: Wait. Wait.
22 Okay. It's not the full depth of the building,
23 because the -- the existing building goes to the lot
24 line?

25 MR. COLLINS: Because there's a party wall

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 between the two buildings for the first --

2 VICE CHAIRPERSON MILLER: In the front.

3 MR. COLLINS: In the front.

4 VICE CHAIRPERSON MILLER: Okay.

5 MR. COLLINS: So it's not for the full
6 depth, so it's not a yard. It could possibly be a
7 court if the setback was for the full height of the
8 building and open to the sky, but it's an indentation
9 -- if you picture it more as an indentation in the
10 building for two feet at the basement or first floor
11 levels, with cantilevering back over at the upper
12 levels, so that's specifically done so we did not
13 create a nonconforming court.

14 VICE CHAIRPERSON MILLER: Okay. Thank you
15 very much.

16 COMMISSIONER TURNBULL: Madam Chair, on
17 Drawing A-6, there's an Elevation 3, alley elevation
18 south, which I think shows what they're talking about.

19 MR. COLLINS: That's correct.

20 VICE CHAIRPERSON MILLER: Thank you.

21 I have one other question for the panel,
22 and it's just -- I'm just curious what your response
23 is. It's in the filing where you talk about
24 residential recreation space, and I understand, you
25 know, we're talking about this, and I understand the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Zoning Commission may do away with this all together,
2 but -- or is going to change it.

3 But I want to know what you mean by the
4 statement that each of the units provides ample space
5 for individual interior passive recreation by the
6 residents. I think that's the first I've read about
7 recreation in the units themselves.

8 MR. COLLINS: We have used that rationale
9 in several cases. If you have a living room and a
10 nice television, passive recreation can mean sitting
11 and reading a book or watching a game.

12 VICE CHAIRPERSON MILLER: Right. Okay.

13 MR. COLLINS: There's active recreation
14 and passive recreation, and both are called for in the
15 regulations, both active and passive recreation.
16 Playing cards.

17 VICE CHAIRPERSON MILLER: Right.

18 MR. COLLINS: Playing a board game.

19 VICE CHAIRPERSON MILLER: It's not counted
20 within the units, but you're saying they have their --
21 these other opportunities.

22 MR. COLLINS: They have opportunities
23 inside, sure. They don't have to go to the party room
24 and sit and watch TV or read a book. They can do it
25 in their own unit.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON MILLER: Thank you.

2 MR. COLLINS: Sure.

3 BOARD MEMBER ETHERLY: Or perhaps sitting
4 at home watching the Redskins and Dallas play. That
5 could be --

6 MR. COLLINS: That would probably be
7 active recreation.

8 BOARD MEMBER ETHERLY: -- active
9 recreation.

10 (Laughter.)

11 Okay. Thank you, Madam Chair.

12 VICE CHAIRPERSON MILLER: Okay. Are there
13 any other questions?

14 (No response.)

15 Have you all completed what you wanted to
16 present at this point?

17 MR. COLLINS: Yes.

18 VICE CHAIRPERSON MILLER: Okay. Then, I
19 guess, Ms. Hearne, this is your opportunity for cross
20 examination questions, if you have any. Sure, come on
21 forward, and put on your microphone when you get here.

22 MS. HEARNE: I was going to say, I
23 actually differ with any time watching Dallas that
24 it's a passive experience. I root for anyone who
25 plays against Dallas quite vociferously.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 If I can open this as an open question to
2 the development team, are you aware of the
3 requirements of the building code that window openings
4 on the wall of the --

5 MR. COLLINS: I would object. This is not
6 a zoning issue.

7 MS. HEARNE: I actually would like to just
8 point out that it is relevant, because if code
9 requires that a wall with windows, openings must be
10 set back three feet off the property when it's not a
11 high-rise. And if that code were met, it actually
12 would change their whole need for the variances.

13 VICE CHAIRPERSON MILLER: Okay. This is
14 what I'd like to say on this. You can ask what might
15 refer to adverse impacts, because I think that's where
16 your case is coming from. And it should relate to --
17 your questions should relate to their testimony.

18 I understand what Mr. Collins is saying,
19 but I think I would like to let you ask the question,
20 because otherwise you're going to testify about it.
21 Well, the other way we go is that she testifies later
22 and you answer in rebuttal.

23 So, do you see a problem going either way,
24 Mr. Collins? Because, I mean, I -- it's going to come
25 out either way. If you prefer that it be done

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 strictly that you didn't raise that issue, and so
2 cross examination only deals with what has been
3 raised, we can deal with it, and the other way in
4 which she'll testify, and then you'll get an
5 opportunity to rebut.

6 MR. COLLINS: Yes. That's the way I'd
7 prefer.

8 VICE CHAIRPERSON MILLER: Okay.

9 MR. COLLINS: We did not testify on that,
10 and so it's not --

11 VICE CHAIRPERSON MILLER: Okay. So, Ms.
12 Hearne, you will have an opportunity to address that
13 issue, then, in that way.

14 MS. HEARNE: Fine. That's fine.

15 VICE CHAIRPERSON MILLER: Okay.

16 MS. HEARNE: I just -- I just wanted to
17 clarify, because there was some different phrasing,
18 but are you aware that this building is not a historic
19 building?

20 MR. SCHNECK: Yes, I am aware of that.

21 MS. HEARNE: And as such, do you have
22 actual language or rulings by the Historic
23 Preservation Board that specifically prohibits the
24 contiguous joining of the addition to the existing
25 building?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. SCHNECK: Not with me. I mean, there
2 is -- there is a pretty thorough report that I believe
3 is in the -- what was submitted to BZA. I'm sure I
4 have notes from talking to HPRB staff.

5 MS. HEARNE: Okay. And can you explain
6 with the charts that you have how the rear egress will
7 occur with your proposed owners of the rear
8 development?

9 MR. SCHNECK: Basically, all of the
10 residents would use the stair in the existing building
11 for vertical circulation. And then, to egress you
12 could either go out the front door, or you can egress
13 out through the back through this corridor, all of
14 which stays on our property line, and then it goes out
15 to the publicway, which is the alley.

16 MS. HEARNE: So -- I'm sorry. So the --
17 you're stating you do not require an egress -- I'm
18 sorry, an easement from the 1111 in order to meet
19 those standards.

20 MR. SCHNECK: That's correct. We do not
21 require an easement.

22 MS. HEARNE: Okay. At this stage, for
23 cross that's all I have.

24 VICE CHAIRPERSON MILLER: Okay. Thank you
25 very much.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. COLLINS: Can I ask some on redirect?

2 VICE CHAIRPERSON MILLER: Okay.

3 MR. COLLINS: Mr. Schneck, you were asked,
4 if I recall correctly, the question whether you were
5 aware that this building is not a historic building,
6 and you answered yes.

7 MR. SCHNECK: I don't believe it's
8 historically landmarked. It's in a historic district.

9 MR. COLLINS: So it's not an individual
10 landmark?

11 MR. SCHNECK: That's correct.

12 MR. COLLINS: But it is governed by the
13 Historic District and Historic Protection Act?

14 MR. SCHNECK: That's absolutely correct.

15 MR. COLLINS: Because it's in a historic
16 district.

17 MR. SCHNECK: That's correct.

18 MR. COLLINS: And -- okay. You were asked
19 specifically whether any rulings that state that you
20 cannot adjoin -- that you couldn't connect the two
21 buildings together, and you said that there were some
22 that you were -- you didn't have them. But did you
23 ever have any discussion with the staff about that?

24 MR. SCHNECK: Absolutely. I mean, we --
25 when we do these projects, we go down, we meet with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 HPRB staff. And they make their recommendations, and
2 we do our best to comply to their recommendations.
3 And this was one of their recommendations.

4 MR. COLLINS: And was there any discussion
5 about that at the HPRB review proceeding?

6 MR. SCHNECK: Absolutely.

7 MR. COLLINS: And what was that -- what
8 was the result of those discussions?

9 MR. SCHNECK: At the review meeting, we
10 basically brought it up, because we -- we sort of
11 presented to the Board that in talking to staff that
12 was one of the staff's recommendations, and we were
13 concurring with the staff recommendation and we
14 presented that. And that was, you know, fully
15 approved by the Board at our conceptual design review
16 meeting.

17 MR. COLLINS: And is one of the factors
18 the fact that this rear wall, because of the bay
19 window and the design, that it is an articulated
20 facade?

21 MR. SCHNECK: That's correct.

22 MR. COLLINS: And, therefore, facades
23 under the regulations are treated differently than
24 simple rear walls of buildings?

25 MR. SCHNECK: That's correct.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. COLLINS: Okay. Thank you.

2 VICE CHAIRPERSON MILLER: Thank you.

3 I think we're ready for Office of Planning
4 now.

5 MR. MORDFIN: Good afternoon, Chair and
6 members of the Board. I'm Stephen Mordfin with the
7 Office of Planning. The subject property is unique in
8 that it is narrow and improved with an existing
9 building within the Shaw Historic District that cannot
10 be removed. The existing building impacts the ability
11 of the applicants to design the site.

12 The application request for residential
13 recreation space of 2.5 percent -- however, the narrow
14 width of the property -- 23.25 feet -- is too narrow
15 to allow for rooftop recreation space, which is
16 required to be a minimum of 25 feet in width. The
17 narrowness of the property also impacts the ability of
18 the applicant to provide an expansive lobby that can
19 double as recreation space.

20 The proposed building is only slightly
21 more than half of what is permitted by zoning.
22 Despite this, the applicant is unable to provide the
23 required amount of residential recreation space due to
24 the physical constraints of the lot and the physical
25 improvements on the lot.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Therefore, it would be a peculiar and
2 exceptional practical difficulty for the applicant to
3 provide the residential recreation space as required.
4 The application also requested a variance to the
5 minimum width of -- excuse me, the minimum width and
6 area of a closed court. The minimum court width of
7 18.3 feet is required, almost the width of the lot.

8 However, above the second floor, the width
9 of the court does expand by almost two feet, allowing
10 for more light and air to enter from above. In
11 addition, the applicant cannot build higher because of
12 the historic district, resulting in a more horizontal
13 development of the property.

14 Therefore, it would be a peculiar,
15 exceptional, practical difficulty to provide the
16 minimum court width and areas required.

17 The Office of Planning recommends approval
18 of the application as submitted by the applicant, and
19 that concludes the presentation by the Office of
20 Planning.

21 VICE CHAIRPERSON MILLER: Thank you.

22 I just want to ask you a couple of general
23 questions. One is Office of Planning didn't find any
24 adverse impacts, at least rising to the level of
25 defeating the relief that's requested in this case, to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the neighbor in particular, the condominium
2 association?

3 MR. MORDFIN: Correct. The Office of
4 Planning did not see that the residential rec space
5 variance or the closed court variances would adversely
6 affect the adjoining property.

7 VICE CHAIRPERSON MILLER: Do you have any
8 comments in general on the filing of the condominium
9 association in which they requested party status for
10 certain reasons in which they alleged they had adverse
11 impacts?

12 MR. MORDFIN: Are you speaking of the --
13 what they --

14 VICE CHAIRPERSON MILLER: I think I'm
15 speaking in -- with respect to the creation of windows
16 "at risk."

17 MR. MORDFIN: Those aren't zoning -- those
18 are not contained within the zoning regulations. It's
19 the building code, and we do not review for building
20 code.

21 VICE CHAIRPERSON MILLER: Okay. So you
22 didn't review for building code, but you do look at
23 the impact on the neighboring property, and you found
24 that there wasn't an adverse impact. Is that correct?

25 MR. MORDFIN: Correct.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON MILLER: Okay. Thank
2 you.

3 BOARD MEMBER ETHERLY: I think if I can
4 follow up very briefly, Madam Vice Chair, with the
5 Office of Planning, with respect to your report, which
6 I thought was very, very well done, as always, you
7 highlight under the site plan and area description at
8 page 2 of your report, two pieces that I just wanted
9 to I think emphasize.

10 One is, in looking at the zone district
11 that is at issue here, and that is the C-2-C District,
12 my first of just two questions are: do you view the
13 existing building or the existing application as being
14 consistent with the C-2-C zone district?

15 MR. MORDFIN: The existing building?

16 BOARD MEMBER ETHERLY: Yes. Well, the
17 proposed project.

18 MR. MORDFIN: The proposed project, yes.

19 BOARD MEMBER ETHERLY: Okay. Thank you.

20 And then, with respect to the issue of the
21 generalized land use map, you would also view the
22 existing project as proposed as being consistent with
23 the land use map in this area.

24 MR. MORDFIN: Yes. The recommendation is
25 moderate density residential, which I think this is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 consistent with.

2 BOARD MEMBER ETHERLY: Excellent. My
3 final question -- I highlighted two, but I neglected
4 to mention that one. My third question comes to page
5 4 of your report, which addresses in part the
6 comprehensive plan, and in particular you highlight
7 portions of the Ward 2 part of the plan, 1304.1(a),
8 1319.1(d), and 1304.1(d).

9 With respect to -- and my question goes
10 directly to 1319.1(d) as it relates to the
11 preservation and protection of existing buildings. I
12 believe you answered it with respect to the Vice
13 Chairman's question regarding the impact -- any
14 impacts on 1111 M Street, but I just wanted to kind of
15 place that question, again, in the context of the
16 comprehensive plan, because you could conceivably read
17 it both ways.

18 Obviously, part of the objective is to
19 protect existing buildings, and in this case I think
20 a significant component of HPRB's discussion was the
21 protection of the existing property, both the front
22 facade and the rear facade. But perhaps I think there
23 also is something to be said about the protection of
24 adjacent buildings with regard to renovation work or
25 new construction.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 As far as the comprehensive plan and, in
2 particular, the Ward 2 objectives are concerned, do
3 you -- do you see any issues or concerns that are
4 called into question by the proposed application?

5 MR. MORDFIN: No, I do not.

6 BOARD MEMBER ETHERLY: Okay. Thank you.
7 Thank you, Madam Chair.

8 VICE CHAIRPERSON MILLER: Thank you.

9 I actually have one more question. There
10 were some questions here with respect to the historic
11 status of the property, and that it's not a landmark.
12 But it is in a historic district, and I think by that
13 it's contributing to a historic district. And maybe
14 you can just clarify this a little bit, and what's the
15 difference between the limitations on a contributing
16 property and a landmark property.

17 MR. MORDFIN: Well, I'm not sure I know
18 exactly how to answer that. It is within a historic
19 district. It's not a landmark building specifically
20 as it -- sometimes they will landmark a specific
21 building to be protected for certain reasons --
22 something happened there, or the architecture, things
23 like that.

24 In this case, it's just it contributes to
25 the historic district, because it's a part of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 fabric of the entire historic district. And that's
2 what this building is. It's not a specific landmark,
3 but it is part of the fabric of the Shaw Historic
4 District.

5 VICE CHAIRPERSON MILLER: And do you also
6 concur with Mr. Collins' explanation of why that's not
7 a side yard, the part that's open next to the
8 neighboring condominium association property?

9 MR. MORDFIN: Yes, I do.

10 VICE CHAIRPERSON MILLER: Okay. Thank you
11 very much.

12 Any other questions? Ms. Hearne, do you
13 have any questions for the Office of Planning? If you
14 do, you need to come to the table.

15 Mr. Collins, did you have any questions?

16 MR. COLLINS: No, I do not.

17 VICE CHAIRPERSON MILLER: Okay.

18 MR. COLLINS: Thank you.

19 VICE CHAIRPERSON MILLER: I think I'll ask
20 again, is there any representative here from the ANC?

21 (No response.)

22 Okay. Not noting any, then I think at
23 this point, Ms. Hearne, you can come forward and
24 present your case.

25 MR. COLLINS: Did you call for persons and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 parties in support?

2 VICE CHAIRPERSON MILLER: No, I did not.
3 Are there persons or parties in support that want to
4 come forward first? I'm sorry. That is the right
5 order.

6 MR. COLLINS: I believe there's a letter
7 in the file. At least one letter in the file.

8 VICE CHAIRPERSON MILLER: Okay. Let me
9 check. Is there anybody here who wants to testify in
10 support?

11 (No response.)

12 Okay. Not noting any -- okay. Yes, we're
13 not going to read the letter that's in support, but we
14 do have in our file a letter that came in in support
15 today. Thank you.

16 So, Ms. Hearne, you can go forward when
17 you're ready.

18 MS. HEARNE: Again, thank you for this
19 opportunity, and forgive me if I don't follow the
20 quite proper prescription, but you'll counsel me, I'm
21 sure.

22 VICE CHAIRPERSON MILLER: We will.

23 MS. HEARNE: Let me just highlight a few
24 points, and I actually just also, because of our
25 learning this process as going along, we actually did

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 not present our case and information to the Planning
2 Board. That was our -- our mistake, our fault, but
3 they did go through the process without our
4 perspective and information.

5 One, I'd just like to start -- we actually
6 do not believe that the applicant has made a case for
7 a variance, because there is no exceptional or
8 extraordinary condition, or even situation that's
9 related to this property, that creates a practical
10 difficulty for the owner to comply with the zoning
11 regulations.

12 I think it has been highlighted several
13 times that this is an exceptionally long and narrow
14 point, but at the same time the applicant several
15 times pointed out how it's exactly the same as many
16 different properties in the same area, including ours
17 and other adjacent properties.

18 There are at least two that are
19 immediately flanking ours that are similar in this
20 nature. In fact, their space is longer than our
21 space. It actually gives them additional length,
22 which would make it easier, not harder, to satisfy the
23 recreational space and closed court width
24 requirements.

25 The reason I ask this question to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 highlight about the historic status of the building,
2 we are very proud of that building. The facade is an
3 extraordinary one, and it does add to the character of
4 the historic district. It is a contributing building,
5 but it's important in some of those pictures that have
6 been pointed out in the -- in the applicant's package,
7 it's not a unique structure in the back.

8 And, in fact, many of the contributing
9 buildings in this same district have gone through
10 similar restrictions and abilities to develop their
11 property, and have found ways to do it. So, again, I
12 just want to emphasize it's not a historic building.
13 It is one to be valued, and the front is being
14 protected, as we would encourage, but there are
15 alternative ways, including not having an enclosed
16 court, to do this.

17 I also want to highlight -- we don't
18 believe that the sites that were located or identified
19 -- Logan Circle, which is quite a distance from this
20 property, Compress Park, Mount Vernon Square, Franklin
21 Square, Thomas Circle, or, even quite in a distance,
22 Thompson School Park -- those do not provide adequate
23 recreational space.

24 These are required to be safe, secure, and
25 suitably equipped or landscaped for active or passive

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 recreation use. I don't know how many of you at night
2 have tried to travel to some of those spaces, but they
3 certainly would not fall into those categories.

4 Also, shops and restaurants, which the
5 applicant cited, have never been and are not
6 considered recreational uses, though I suppose there
7 are many that define that time that way. But that is
8 not what qualifies here in this -- in this point.

9 I also just want to point out, and it was
10 an issue that you had raised also, is that the space
11 for passive recreation in individual units is not
12 something that zoning regulations recognize. The
13 space must be physically accessible to all residents
14 of the building. And I would appreciate they might
15 get invited to play card games, and they're fellow
16 residents, but that's not going to qualify for passive
17 space.

18 In addition, we're opposed to the
19 requested variances because of the nature of this
20 building being so close to our property that it does
21 impede on both access and privacy.

22 There were some moments that were taken to
23 go through some of these visuals. Let me just clarify
24 there was the one -- I think it was with the rear
25 egress, where one point to make is that our building

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 at that point is about 23 inches from the proposed new
2 building.

3 In addition, that shared staircase that
4 will be as pointed -- be utilized by both buildings,
5 if what is allowed by having this second, third, and
6 fourth floor jut out over that staircase, it makes it
7 practically infeasible to be used to effectively
8 transport any materials out.

9 I'm about six foot. If I carry my bicycle
10 up the stairs, which because they are so steep you
11 have to just hoist it up onto your shoulder, I could
12 not pass through there. Now, that's a primary use,
13 not only as a primary egress for our building, but it
14 sounds as though it will be with this other building.

15 It is a very narrow space, and it will
16 then become a tight space that's almost a tunnel being
17 formed, and I think it's one that you need to look at
18 carefully in terms of appropriate uses.

19 The other -- the reason I raised this
20 point about the code -- D.C. Code requirement for the
21 setback of the building line -- I don't have a laser
22 pointer, but in the submission plans here you'll see
23 that the new building being proposed is -- is quite
24 close to the property line.

25 D.C. Code requires if there are any

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 windows on that wall for it to be set back three feet
2 off. Unless --

3 MR. COLLINS: I'm going to object again.
4 There was no testimony about windows on the lot line
5 in this case by the applicant.

6 MS. HEARNE: You can't have it both ways.
7 He answered your question when you asked.

8 VICE CHAIRPERSON MILLER: I'm sorry. Just
9 to understand what you're saying, Mr. Collins, you're
10 saying that -- that there are not going to be windows
11 on that side?

12 MS. HEARNE: No, that's not what he's
13 saying. He's saying I can't bring it up.

14 VICE CHAIRPERSON MILLER: I understood
15 your first point is -- your first point was it's
16 building code, you can't bring it up. But your second
17 point was?

18 MR. COLLINS: There's no --

19 VICE CHAIRPERSON MILLER: There are no
20 windows?

21 MR. COLLINS: The current plans do not
22 have windows on the lot -- if and when we do plan to
23 do that, if that happens, we'll comply with the code.
24 But right now, there's no -- no windows shown.

25 VICE CHAIRPERSON MILLER: Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. HEARNE: I tend to be a practical
2 person, and tend to recognize that it would be
3 virtually impossible to sell a condominium unit in
4 this location without windows. No one is going to be
5 paying at the cost that they are claiming to be
6 economically feasible to be a building space without
7 windows.

8 Recognizing that there will be windows,
9 the code does require it. And as such, if the setback
10 is set, there is a very different requirement for
11 variances. It may make this whole proceeding moot.
12 And, again, it's -- it's a critical issue.

13 The only time there's an exemption from
14 the window setback requirement is when it's a high
15 rise. This high rise must be 75 feet or more, which
16 this property does not meet. That is, I have a letter
17 that I'd be happy to submit to the Zoning Board
18 directly from the Building and Land Regulation
19 Administration. The Office of the Administrator
20 himself, under Consumer and Regulatory Affairs, has
21 made a determination specifically on this question
22 here. And I'm happy to submit that as part of our
23 record.

24 VICE CHAIRPERSON MILLER: Let me just ask
25 you this. It seems to me that what Mr. Collins is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 saying, though, is, you know, that's before that
2 agency. And if they're not going to be allowed to do
3 it, if it's going to be a violation of the code, that
4 agency is the one that's going to deal with that.

5 MS. HEARNE: Which means the proposal
6 before you is not an appropriate one, because it's not
7 reflecting the actual building, which would change the
8 variance requirements.

9 MR. COLLINS: There is no plan submitted
10 by the applicant before you that shows any windows on
11 that wall.

12 MS. HEARNE: Yes. They actually will show
13 in their own testimony --

14 MR. COLLINS: That's the east wall.

15 MS. HEARNE: It's the same issue.

16 MR. COLLINS: That's the east wall.

17 MS. HEARNE: Again, their own plans
18 showing windows, it's the same rule on both sides.
19 There must be a three-foot setback. Regardless of if
20 it's next to our building or next to our neighbors who
21 are here, the requirements -- the requirement, they
22 are showing windows. Their zoning plan is not showing
23 it.

24 MR. COLLINS: There's no plan showing
25 windows adjacent to the building that Ms. Hearne is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 representing. There's no windows in the plan.

2 VICE CHAIRPERSON MILLER: Okay. I think
3 we've heard -- you've --

4 MS. HEARNE: Right.

5 VICE CHAIRPERSON MILLER: You've made your
6 point anyway, so --

7 MS. HEARNE: And, again, I'm making the
8 point there's been a lot of variations, as we go
9 before each group, of what's here and what's not. Of
10 additional concern is the HVAC units. That is a
11 direct and very significant impact on our building,
12 specifically my unit.

13 There is huge range and ability to
14 differently locate, just as our building has done.
15 Our building placed those units in the extreme back of
16 our building. We're asking, at a minimum, that the
17 Zoning Board, should you decide, which I'm hoping you
18 will not, to go forward with these variances, but
19 should in the case that you do, that a series of
20 conditions be met, including, while I appreciate the
21 mechanicals have not been written, and that there is
22 an intent on their part to be considerate, because of
23 our concerns of both privacy impact, air quality and
24 light, we would ask that conditions be specifically
25 included in the zoning variance that state about

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 location, that state about if there are not going to
2 be windows on this building.

3 I mean, again, this is being stated that
4 there are none, which I think will change, and you
5 will see coming before you again. You can pay me now
6 or pay me later, but this is not a design that's going
7 to stand the test of time, and you're going to be
8 seeing this case again.

9 It's only appropriate that we have a
10 conversation about what are the actual plans that
11 would be feasible for these issues before the Zoning
12 Board. And it's where it has made it difficult for us
13 to have the conversation, because it has been a moving
14 target.

15 Again, I will submit this letter to the
16 record about this issue, and I appreciate their
17 stating there are no windows now. But, again, this is
18 a very practical group that knows the realities of
19 development in the city.

20 Let me just -- a moment, just catch my --
21 so, again, in terms of conditions, one, we would ask
22 that it be noted that the three-foot setback would be
23 met if windows are placed on those property lines. We
24 would ask that none of the windows be directly
25 adjacent to existing neighbors' windows. Again, an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 issue of privacy.

2 The location of the HVAC units not -- as
3 they currently are, and let me just visually explain.
4 This is the top floor. The units are right here.

5 VICE CHAIRPERSON MILLER: I think you
6 might need to still talk into a mike.

7 BOARD MEMBER ETHERLY: Feel free to pick
8 it up. You can --

9 MS. HEARNE: Is this working? Are you
10 able to -- okay. Again, this location right here, if
11 you were to imagine this is 1111 M Street, right next
12 door, it's about 23 inches' separation, I can --
13 again, I've got some good height. It's an easy -- I
14 can practically touch from my patio where these are
15 being drawn.

16 The option to put them in the back here,
17 there's no open rooftop units anywhere on -- else on
18 our building, or, for that matter, anywhere else in
19 the neighborhood. That's the only open location, and
20 yet it's the only place that they've cited those HVAC
21 units.

22 I appreciate that that may be a temporal
23 drawing, because things are fluid in this process, but
24 then that requires -- we'd ask as a condition that it
25 be clear that they not be placed at the one spot that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 they would have the greatest impact on privacy, noise,
2 and impact.

3 And, lastly, in terms of conditions, we'd
4 just ask that the buildout above our shared egress be
5 extended, so that the buildout only takes place on the
6 third and fourth height, find -- create the tunnel,
7 but have it be so that it does not impede and prohibit
8 the effective use of that only rear egress for both --
9 both properties.

10 With that, I would like to turn to an
11 additional witness that we have.

12 MR. BLACK: I own the unit at 1111 M
13 Street.

14 VICE CHAIRPERSON MILLER: Could you
15 identify yourself, please?

16 MR. BLACK: Oh, I'm sorry. I'm Sam -- is
17 it on? Is it on? I'm sorry. I'm Sam Black, and I
18 own the unit at 1111 M Street, which is at the very
19 end of -- my unit would be here on the first floor,
20 basement and first floor.

21 VICE CHAIRPERSON MILLER: You also need to
22 have a mike. Oh, if you're going to be over there.
23 Okay.

24 MR. BLACK: Yes. I just wanted you to
25 know where it is. Just a point of clarity, first of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 all, again, I would like to offer my apologies. We're
2 not technicians. We're not lawyers. We're trying to
3 be as brief as we can, and trying to give you a
4 picture of what's going on.

5 And Mr. Lass has put together a very
6 impressive team, and for that I commend him.

7 The key issue here -- one of the key
8 issues is that they are going two feet away from their
9 property line for the first floor, for whatever
10 reasons they want to do that. Then, they go up one
11 story, and then they come back out over that first
12 area to the property line, creating an overhang.

13 So the first floor, as you walk in, you
14 have an overhang above. And what Shelley just said
15 was that when -- if you're on the site and you walk
16 it, and you're really there, you will experience the
17 narrowness of it, the closeness of it, that at least
18 perhaps architects are able to do it, or other people.
19 I can't. This is a well-done design. But if you
20 stood there, you would see just how tight and close it
21 is. We're facing each other. We're really tight.

22 And when you come in, especially I'm
23 thinking of fire -- if there's a fire, or whatever,
24 you have -- you're walking into a tunnel that is from
25 a sound, from a light, from a noise point of view,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 it's all captured there.

2 And so one of the suggestions we made to
3 the developer was, how about making that -- that
4 tunnel, so to speak, a floor higher, so that it would
5 open up the space and the light and the air and
6 whatever else, just giving us an opportunity to carry
7 -- not only carry bikes, but we're going to be all
8 living very close together with those -- if there are
9 windows, which we think they're going to try and
10 build, and perhaps they'll prevail.

11 The space is such that you're going to
12 have window to window, or very close to it, I imagine
13 -- I'm not an architect. And so that's a major impact
14 on us. I mean, I think I wouldn't have to go -- to
15 explain it to you if we were standing on the site. I
16 don't know how much you can get from these drawings.

17 So I just wanted to say that we have our
18 -- we walked down along our side of our building to
19 the back. We don't go on Mr. Lass' property. He's
20 correct about that. He has asked us for an easement
21 to come onto our property and to use our property to
22 go into the back, and we have -- we were in
23 discussions, and then they decided that they didn't
24 want to go that route. And that's fine.

25 But he's correct that we don't go on his

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 property right now to -- and we don't need his
2 property, and he doesn't need our property the way
3 they've drawn it. But we do need some relief in terms
4 of that tunnel effect that is -- that they are
5 creating by their design. It is a real -- very
6 serious negative impact that it's going to have on us.
7 I just wanted to clarify that, for whatever it's
8 worth.

9 VICE CHAIRPERSON MILLER: We have
10 clarification. There's going to be a stairway that
11 both -- that both buildings are going to use. And
12 whose property is that on?

13 MS. HEARNE: It's a shared staircase.

14 VICE CHAIRPERSON MILLER: But it's got to
15 be on somebody's --

16 MS. HEARNE: No, it's --

17 VICE CHAIRPERSON MILLER: It straddles the
18 property?

19 MS. HEARNE: -- split down the middle.

20 VICE CHAIRPERSON MILLER: Okay.

21 MS. HEARNE: The last family used to own
22 1111 M Street. They sold it for development purposes.

23 VICE CHAIRPERSON MILLER: Okay. So --

24 MS. HEARNE: The building itself was never
25 changed. The addition was made back in the late

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 1800s. According to fire code plans that we have
2 looked back on, it actually looks to be in 1868 that
3 that addition took place.

4 VICE CHAIRPERSON MILLER: And one of the
5 impacts of the narrowness is that you can't get your
6 bikes through there very well.

7 MS. HEARNE: Literally, it's -- and Sam is
8 even taller than I am. It's not usable for egress.
9 To be honest, it's a little frightening. It's a very
10 steep staircase. It's going to have a narrow top to
11 it. It's going to be a dark passage. I mean, we'll
12 have lighting, but we're going to probably have to
13 have shared lighting. We do already have a set there.

14 This -- you know, again, we have been
15 wanting to work in cooperation. This has not been one
16 in conflict, but it has been one of little information
17 being shared and little opportunities.

18 VICE CHAIRPERSON MILLER: How will raising
19 the roof about one floor affect your being able to
20 manipulate your bicycle?

21 MS. HEARNE: We will be able to use that
22 egress. Also, I think it was an important point of
23 just the air volume -- it's -- again, as a six-foot
24 person, a seven-foot passage for containing safety,
25 etcetera, again, the idea if something were on fire --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 VICE CHAIRPERSON MILLER: Okay.

2 MS. HEARNE: -- and it's directly above
3 your head. It would -- it would improve it.

4 VICE CHAIRPERSON MILLER: And just to get
5 the whole picture, you could bring your bicycles in
6 through the front?

7 MS. HEARNE: Yes, you could. And then,
8 navigate it through a series of doors and down -- the
9 fire doors and down the stairs.

10 MR. BLACK: Can I say something?

11 VICE CHAIRPERSON MILLER: Sure.

12 MR. BLACK: I don't own a bicycle, so I
13 don't really care that much about the bicycle issue.
14 And it seems trivial in a way. The issue really for
15 us I think -- I mean, as well as the whole myriad of
16 issues -- is how close we are in terms of the air and
17 the sound and the visual connectedness of it. And
18 there is that tunnel effect that it will be creating.

19 Even if we didn't have bicycles, putting
20 that aside, I think if you were standing on that site
21 you would see just -- I think there's 23 inches to our
22 property line that we have to walk at certain points
23 to go to the back. And so we're very -- it's a very
24 tight space. It's a very, very tight space.

25 COMMISSIONER TURNBULL: Madam Chair, can

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 I ask a question?

2 VICE CHAIRPERSON MILLER: Absolutely.

3 COMMISSIONER TURNBULL: Mr. Black, I'm a
4 little bit confused, and maybe you can clarify it. I
5 thought you had testified earlier that you do not use
6 Mr. Lass' space, but the overhang that they're talking
7 about is on his property. So there is nothing on your
8 property that would impede what you have already.

9 So I wonder if you could clarify what
10 you're -- what you meant by the tunnel effect and how
11 that affects you, since it's on his property and not
12 your property.

13 MR. BLACK: Yes. The -- he is not going
14 on our property at all. His design, as I understand
15 it, it's absolutely true. There will be a two-foot
16 indentation, though, a portion of, as we walk back
17 there. I think it's 20 feet or some amount of feet
18 that you go as you're walking to the back of our --

19 COMMISSIONER TURNBULL: But I thought you
20 testified earlier you don't use that space.

21 MR. BLACK: No, no, we don't use the space
22 to walk on it, but there will be that expanse that
23 will be there in terms of between the two buildings.

24 MS. HEARNE: Can I just --

25 COMMISSIONER TURNBULL: So how does that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 affect --

2 MS. HEARNE: Can I clarify? When he was
3 saying we don't use it, literally, again, this -- you
4 know, the staircase is a small staircase. We jointly
5 own it. You could walk up the stairs without stepping
6 onto their side of the stair. But if I ate a little
7 bit too much while watching that Washington Redskins
8 game, I'm going to probably be having a little bit of
9 an overhang as I -- my feet aren't on the property,
10 but any kind of carriage, package -- this is a shared
11 space. It's a very tight and narrow space.

12 So you could walk down the staircase. But
13 if you're actually using it, as most people would, as
14 an egress and a staircase, you -- you're -- while your
15 feet may not, you are going to be going over and using
16 that space, as well as their tenants will. You cannot
17 enforce and would not be able to put a wall down that
18 staircase -- again, because it's so narrow.

19 So, in a certain respect, this -- this is
20 a -- will be utilized by both parties. I have no
21 doubt as they egress they will step onto our portion
22 of the --

23 COMMISSIONER TURNBULL: So you do rely on
24 his space, then.

25 MS. HEARNE: Yes. We could do a sidewalk,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 but it -- again, the entire space and, again, the feel
2 and presence of this, it's a very narrow, tight
3 configuration. We could get away with not doing it,
4 but it is the whole space that's being created that we
5 would have to be shimmying down to use this space
6 without having any -- any impact on each other.

7 This is not legalese, but "shimmying"
8 probably works. Right?

9 COMMISSIONER TURNBULL: I guess I just
10 wanted to clarify the fact that this property has a
11 problem in its own right, and it has to use the other
12 property to do things.

13 VICE CHAIRPERSON MILLER: Okay. Are there
14 any other Board questions?

15 (No response.)

16 Mr. Collins, do you have cross?

17 MR. COLLINS: No.

18 VICE CHAIRPERSON MILLER: Okay. Thank
19 you.

20 MR. SCHNECK: Thank you.

21 VICE CHAIRPERSON MILLER: And are there
22 any other persons in the audience that want to come
23 forward and testify in opposition?

24 COMMISSIONER TURNBULL: I wonder if I
25 could just ask one --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON MILLER: Sure.

2 COMMISSIONER TURNBULL: -- one point of
3 clarification that was raised by Ms. Hearne, and maybe
4 the architect for the applicant can clarify that. The
5 elevation which she was pointing to I believe -- and
6 she was confusing whether there was windows on the
7 other side -- I believe is on the eastern elevation of
8 the red portion of the building by what is designated
9 as a parking lot area.

10 Could she -- I mean, maybe you could show
11 that on the elevation for -- or clarify where that --
12 I'm looking at what was referred to as this elevation
13 here, on A-5, elevation -- east elevation 2. That's
14 correct.

15 MR. SCHNECK: I'm sorry. What was the
16 question?

17 COMMISSIONER TURNBULL: I just wanted to
18 clarify that there was -- there was some confusion I
19 think as to where windows were, and what part of the
20 building -- I think there was some confusion that
21 there was going to be windows on the side facing the
22 narrow courtyard facing the other building, the
23 property at 1109, when actually what your elevation
24 shows, if I'm -- and you can clarify this -- is that
25 this is the eastern elevation, which is actually

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 facing the parking lot, and you'd have to go back to
2 the site plan underneath that -- that board.

3 MR. SCHNECK: That's correct. We're
4 showing this elevation -- this is sort of our primary
5 elevation here. This was their primary concern. This
6 is the one that -- that's why we're showing this.

7 COMMISSIONER TURNBULL: And could you show
8 that elevation, then, on the site plan?

9 MR. SCHNECK: It would be looking this
10 way.

11 COMMISSIONER TURNBULL: Maybe take off the
12 elevation board and go to the larger site plan, and
13 show it on the red one.

14 MR. SCHNECK: Looking this way?

15 COMMISSIONER TURNBULL: Right.

16 MR. SCHNECK: This elevation, the parking
17 lot.

18 COMMISSIONER TURNBULL: Correct. Okay.
19 I just wanted to clarify that, so that everybody
20 understood where that was.

21 VICE CHAIRPERSON MILLER: Thank you.
22 Actually, while you're here, I want to ask you one
23 more question -- where the stairs are. Are they
24 connected -- are they going to be attached to the
25 corridor of the new building?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. SCHNECK: These existing stairs?

2 VICE CHAIRPERSON MILLER: The little --
3 the little lines between the two buildings, are those
4 the stairs that are being discussed, or not?

5 MR. SCHNECK: Yes. But we're not relying
6 on them in any way. And this plan here basically --
7 these are stairs that they were referring to, and
8 essentially we are not relying on them in any way.
9 Our egress out of the building is through our own
10 corridor that sits back here, and there we have stairs
11 that takes us out to the publicway.

12 MR. COLLINS: And you're pointing to A-7,
13 is that right?

14 MR. SCHNECK: That's correct, A-7.

15 VICE CHAIRPERSON MILLER: Okay. The
16 stairs exist right now, correct?

17 MR. SCHNECK: These stairs, yes.

18 VICE CHAIRPERSON MILLER: Yes. If you --
19 if you didn't have the corridor, I know you'd have
20 another problem. But if you didn't have the corridor,
21 that would alleviate their problem. There would be
22 open space again, is that right?

23 MR. SCHNECK: If there was an agreement to
24 share some sort of egress, yes. I guess I don't
25 understand the question.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON MILLER: No. I
2 understand that -- what the connector is there for,
3 and I just -- I'm just hypothetically asking you these
4 questions for the impact of, you know, various
5 designs. If you didn't have that corridor, it looks
6 like -- would -- it looks like you wouldn't have the
7 problem impacting the light and air of their stairs,
8 or whatever.

9 But also, what would happen to the court
10 requirements? Would you need a variance on the court
11 requirements if you didn't have that?

12 MR. SCHNECK: We would, and we -- we sort
13 of -- we need this connection, because we're using the
14 existing stair as the vertical circulation, and then
15 the bridge is the horizontal connection. So we need
16 some corridor. Whether it goes all the way up for
17 egress, I guess that's your question. But we need the
18 corridor to make -- to make the project work and to
19 allow people to circulate through the building.

20 VICE CHAIRPERSON MILLER: Okay. Thank
21 you.

22 Is there anybody else here who wishes to
23 testify on this case?

24 (No response.)

25 And if there are no more Board questions,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 then I would turn to Mr. Collins for closing.

2 MR. COLLINS: Just a few comments before
3 I ask Mr. Lass to make an observation. That is, on
4 the testimony by the opposition at 1111 M Street, they
5 have made a statement that the property is not
6 affected by an exception situation or condition, and
7 described to the applicant the fact that the applicant
8 said that there were many other properties that were
9 similar.

10 That's simply not the case. The applicant
11 did not testify about that. This is one of only two
12 in the square that are like this, and the other one is
13 fully developed, and it's their property.

14 They mentioned that they did not believe
15 that certain sites were appropriate for residential
16 recreation space. That's, in fact, why we're here for
17 the variance.

18 And this Board in the past has accepted
19 testimony, and credited testimony, where applicants
20 have said that in lieu of the onsite residence
21 recreation space, in certain areas of the city there
22 are many opportunities for active and passive
23 recreation, be it parks or public playgrounds or shops
24 or coffee houses, or concert venues, things of that
25 nature, so that there are recreation -- active

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 recreation simply isn't sweating in the gym any more.

2

3 It's a variety of things, and it's
4 actually a social thing, and the Board has found that
5 on many occasions, that recreation is really a social
6 activity for the type of tenant that is attracted to
7 this type of unit.

8 There was testimony about the rear egress
9 and reliance upon the stairway, and Mr. Lass would
10 like to comment about that issue.

11 MR. LASS: I mean, I think they're just
12 inaccurate. We will not be sharing the egress. The
13 egress is strictly theirs. The -- what we have
14 proposed to them is that we will give them two feet
15 onto our property as an easement, and which would
16 allow them a greater width.

17 They have subsequently come back to us and
18 -- and in that negotiation it would be a shared
19 easement, and then we would architecturally differ
20 from our original plan of having the corridor go out,
21 and access onto that easement. But currently we are
22 not planning that.

23 In addition, we are, by right, allowed to
24 build fully to the property line, which would reduce
25 their width and not give them a tunnel effect. So to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 remove the tunnel effect, all we have to do is build
2 by right to our property line, and then the tunnel
3 concern goes away.

4 MR. COLLINS: Excuse me. I'd like at this
5 point to -- in response to the testimony by the
6 representatives of 1111 M, to submit two items into
7 the record in rebuttal. The first is a building
8 permit for a fence that the -- that 1111 M Street
9 condominium proposes to construct on their property
10 line between the two properties to a height of 10
11 feet.

12 VICE CHAIRPERSON MILLER: And what's the
13 relevance of that?

14 MR. COLLINS: Well, the relevance of that
15 is that they were -- they just testified extensively
16 about the fact that they would have to squeeze
17 through, and this is a very narrow space on their
18 property. They are proposing to build a fence on
19 their property line.

20 And the second is just an exchange of
21 correspondence, e-mails, to which I was a recipient,
22 along with a number of others, from Ms. Hearne to Mr.
23 Etherington, dated November 6th. And you'll get it in
24 a second, and it is highlighted. On the first page of
25 that e-mail it does say from Ms. Hearne's statement as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 follows. "We are not worried about the window
2 placement, because your structure at four stories is
3 not allowed openings unless set back three feet from
4 your property line. But we do not need to debate
5 this, since it is not a zoning issue."

6 And, secondly, she says, "1111 M has
7 obtained a building permit to build a solid fence
8 running 10 feet high from the parking area all the way
9 to our back door. This is permitted to be running
10 along the property line. If 1109 were to build our
11 parking garage gate door, and design a shared back
12 gate garbage can, we would not need to build this
13 fence.

14 "Obviously, if we cannot come to agreement
15 here, we will proceed in the next month with
16 construction of our own gate and fence, which will
17 prohibit you from using our property for both easement
18 and construction staging purposes.

19 "At this stage, we will continue to assume
20 we will oppose 1109's variance request before the D.C.
21 Board of -- Zoning Board, unless reasonable
22 negotiations can be achieved."

23 So what you're seeing -- this opposition
24 you're seeing is really a negotiating tactic. What
25 they testified to really has nothing to do with the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 development on our site. As Mr. Turnbull mentioned,
2 and quite clearly pointed out, there is nothing about
3 our building that impacts on their building, because
4 it's they that have impacted.

5 We have set back on our plans a certain
6 distance on the basement and first floors to allow
7 that access. There is no easement between the
8 properties. There is a stairway that -- I guess the
9 stairway will be demolished or removed when they build
10 their fence on their property line, which will give
11 them the 23 inches that they said is too narrow to
12 use.

13 So we don't understand how the impacts of
14 the building that we're proposing, where zoning allows
15 90 feet in height, allows six FAR, allows no -- zero
16 lot line, side lot line requirement, there is no side
17 yard requirement, and we can build to within 15 feet
18 of the rear yard, how that will have any impact on
19 those zoning issues, will have any impact on them in
20 this case where we're only asking for a recreation
21 space variance, and a court with an area variance,
22 which is on the other side of the building from where
23 they are, and they will never see that court.

24 The issues that they raised are not zoning
25 issues. They have nothing to do with this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 application. They are simply trying to get the
2 builder to build them a gate in the back at \$8,000 to
3 move some air conditioning units, which you've heard
4 may or may not be moved, because they are just placed
5 there as placeholders on the drawings, because the
6 mechanical has not been done. They may, in fact, be
7 moved.

8 They have asked for some conditions, which
9 I can just reiterate. They want a three-foot setback
10 if windows are on the lot line. Whatever DCRA
11 requires is what will be done. If DCRA requires it,
12 and if they decide to put it on, and three feet are
13 required, we have to come back to you to ask for a
14 three-foot setback, I suppose.

15 Windows -- there should be no windows
16 adjacent, neighboring windows. That was their second
17 condition. That really has no impact here.

18 They want to build out above the shared
19 egress, so that they can get their bicycles in their
20 door. But if they put their fence up, I'm not sure
21 that they'll be able to use anything there. So what
22 you're seeing here is really a negotiating tactic by
23 the neighbors in opposition, and they really have
24 nothing to do with the zoning issues before the Board
25 today.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I would request that, if the Board is so
2 inclined to approve the application, that you grant
3 the approval with the flexibility to allow the
4 applicant to continue to work with the Historic
5 Preservation Board, and the staff, as the final
6 designs of the building are approved. It is only
7 conceptual approval at this point. Final approval has
8 not yet been granted, which is typically the case when
9 we come to the Board.

10 But we're specifically asking for the
11 flexibility here that it become a condition of the
12 order, because as the zoning regulations do say that
13 approval of the application does include approval of
14 the plans before the Board. So we would like that
15 flexibility to make those modifications.

16 And with that, we respectfully request
17 that you grant our application.

18 Thank you.

19 VICE CHAIRPERSON MILLER: Thank you.

20 Okay. I think at this point, then, I
21 would suggest that we close the record except for I
22 think it would be useful to receive any proposed
23 conditions in writing, and any responses thereto, and
24 set this for decisionmaking January 10th.

25 So, Ms. Bailey, can you help me with those

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 dates, then, when you -- when the proposed conditions
2 would be due and when responses to them would be due?

3 BOARD MEMBER ETHERLY: Madam Chair, if I
4 could jump in --

5 VICE CHAIRPERSON MILLER: Yes. Do you
6 have a -- yes.

7 BOARD MEMBER ETHERLY: -- just -- there
8 would be another piece of information that I think
9 would be helpful, but I won't require it. I'm looking
10 to the party in opposition, although I think either
11 party could provide it. It would perhaps be helpful
12 to provide a photographic context for these infamous
13 stairs that we've been talking about, so it would be
14 excellent if either the party in opposition or the
15 applicant could provide a photographic picture of that
16 particular area. That would just be helpful to
17 establish the context.

18 So if that could be included in the
19 submittal, I'd appreciate it. Thank you, Madam Vice
20 Chair.

21 VICE CHAIRPERSON MILLER: That's a good
22 point.

23 Is there any other information that any
24 other Board members would like to have?

25 (No response.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Okay.

2 MR. COLLINS: Madam Chair, did you note
3 the existence of an ANC letter in the record when you
4 were --

5 VICE CHAIRPERSON MILLER: No, I didn't
6 notice that. I'm sorry.

7 MR. COLLINS: -- unless you can find --
8 otherwise, it's Tab C to the applicant's statement.

9 VICE CHAIRPERSON MILLER: Thank you. That
10 is our Exhibit Number 13. It is a letter from ANC-2F,
11 in which they pretty comprehensively address this
12 application and state that they unanimously approve --
13 unanimously resolve that the BZA approve the
14 application with respect to the two variances.

15 Thank you.

16 MS. BAILEY: Madam Chair, are you ready
17 for the dates, or --

18 VICE CHAIRPERSON MILLER: Yes, please.
19 Thank you.

20 MS. BAILEY: Okay. December 30th would be
21 the date for the submission, and then the responses
22 would be January 6th.

23 VICE CHAIRPERSON MILLER: It sounds good
24 to me. Does anybody have a problem with that?

25 MR. COLLINS: Is that a Friday? December

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 30th?

2 MS. BAILEY: December 30th is on a Friday.

3 MR. COLLINS: Okay. That's a week from
4 this Friday.

5 MS. BAILEY: Right.

6 MR. COLLINS: Okay.

7 MS. BAILEY: And then, January 6th is also
8 on a Friday.

9 VICE CHAIRPERSON MILLER: I wouldn't
10 expect them to be too different from what we heard
11 today, but basically put in writing. Not that you're
12 limited to that, but -- so I don't think this should
13 be too difficult.

14 Okay. Are there any other questions?
15 Okay. Then, this case is concluded.

16 Thank you.

17 CHAIRPERSON GRIFFIS: Very well. Ms.
18 Bailey, if you wouldn't mind, let's call the next case
19 of the afternoon. And right before she does that, let
20 me just update people on our schedule. Of course, we
21 did have another hearing set for 3:00. We have one
22 case to get through.

23 My view of this, although we haven't
24 gotten into it yet, I think we can get this done
25 fairly expeditiously. However, we'll need a little

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 bit of time. So we appreciate everyone's patience.
2 We will get to the third case in the afternoon.

3 With that, Ms. Bailey, if you wouldn't
4 mind.

5 MS. BAILEY: Application Number 17403, of
6 Walnut Street LLC, on behalf of 917 M Street LP, care
7 of Philip Abraham, pursuant to 11 DCMR 3103.2 and
8 3104.1, for a special exception from the roof
9 structure enclosing wall equal height requirement
10 under subsection 411.11, a variance from the lot
11 occupancy requirement under Section 772, and a
12 variance from the residential recreation space
13 requirement under subsection 773.3, to allow the
14 construction of an apartment building. It's located
15 in the C-2-A District at 917 M Street, N.W.,
16 Square 368, Lot 900.

17 CHAIRPERSON GRIFFIS: Thank you very much,
18 Ms. Bailey.

19 If you wouldn't mind introducing yourself
20 for the record, gentlemen.

21 MR. COLLINS: My name is Christopher
22 Collins with the law firm of Holland & Knight. Seated
23 to my left is Cariss Freeman of our office. To my
24 immediate right is Mark Schacknies with Walnut Street
25 Development, and seated to my far right is Mr. Steve

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Dickens, Director of Design of Walnut Street
2 Development.

3 CHAIRPERSON GRIFFIS: Excellent. Thank
4 you very much, Mr. Collins. I'll make note that
5 Exhibit Number 25 is your preliminary hearing
6 statement. Are you going to add to that, or would you
7 like to highlight that submission?

8 MR. COLLINS: We would simply highlight
9 that submission, and be available for questions as you
10 direct.

11 CHAIRPERSON GRIFFIS: Excellent. I don't
12 think there's any difficulty in my mind, unless there
13 are other Board's objection to having them stand on
14 the record. And the submission, of course, we have
15 received this.

16 One question -- you have the Axon on the
17 board. Was that submitted in the record?

18 MR. DICKENS: Yes. Yes, I think it's
19 Sheet -- I want to say D-5 in Tab D.

20 CHAIRPERSON GRIFFIS: Okay. Good. Got
21 it. Perhaps my sheets are stuck together, then.

22 MR. DICKENS: No, it's D-9. Excuse me.

23 CHAIRPERSON GRIFFIS: Do you have it? Oh,
24 good. Excellent. Okay. Then, there we are.

25 Just to -- to make sure that I'm

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 absolutely clear, this is a proposed addition to that
2 -- the garage structure that's towards the rear of the
3 property. It's supposed to be about 49 units, is that
4 correct?

5 MR. DICKENS: Yes.

6 CHAIRPERSON GRIFFIS: Okay. I don't have
7 any initial questions, then, in terms of the relief
8 that's sought. It seems to be fairly clear in terms
9 of the 411 and also the lot occupancy. The
10 residential rec space we can get into a little bit as
11 we move further on, unless anyone has detailed
12 questions at this time.

13 (No response.)

14 Very well. Let me ask you something off
15 what you have, in fact, requested relief from.
16 There's numerous courts that are set up, and you've
17 labeled them quite substantially. All of those are
18 conforming, is that correct?

19 MR. DICKENS: That is correct.

20 CHAIRPERSON GRIFFIS: Okay. And the ones
21 that abut the alley, or property line, those are
22 anticipated -- or you have addressed those as open
23 courts. Is that correct?

24 MR. DICKENS: That's correct.

25 CHAIRPERSON GRIFFIS: Okay. And then, the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 front -- on the first, second, third, fourth floor,
2 there's small areas in the front, 70 square feet, 88
3 square feet. Those are areaways, or are those courts?
4 How are those looked at?

5 MR. DICKENS: I think part of it is
6 actually a front yard, because the whole face is set
7 back. The little areas in between the bay windows,
8 since we have this unusual condition that the bay
9 windows are not projecting into public space, the area
10 between the bay windows I consider to be a court
11 niche.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. DICKENS: But in any case, they --
14 they comply.

15 CHAIRPERSON GRIFFIS: Okay. I don't
16 disagree. It was interesting. There's an awful lot
17 of attention, obviously, to those and to the square
18 footage, and I just wanted to make sure that I was
19 viewing those correctly.

20 Very well, then. If there's nothing
21 further from the Board, Ms. Miller, did you have any
22 questions regarding the specificity of the submissions
23 from the applicant?

24 VICE CHAIRPERSON MILLER: No, I don't.

25 CHAIRPERSON GRIFFIS: Okay. Mr. Mann, did

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you want to talk briefly about your questions
2 regarding the residential rec space on the roof level?

3 BOARD MEMBER MANN: I'll address those.
4 Sure.

5 CHAIRPERSON GRIFFIS: Okay.

6 BOARD MEMBER MANN: It appears to me that
7 the explanation for the requested relief from the
8 residential rec space on the roof is slightly
9 different than any that I've seen before, and I was
10 wondering if perhaps you could explain to me the
11 connection between, in no particular order, the
12 building code, the requirement for a maximum of 49
13 people, and 735 square feet.

14 It seems -- when I was reading the -- what
15 I was confused or concerned or didn't understand was
16 that it seemed driven by some sort of fire or safety
17 code that only 49 people could occupy that area, and
18 I kept thinking, well, why don't they just limit --
19 why don't they just build a larger roof terrace area,
20 but just limit the occupancy to 49 people. Why
21 couldn't it be addressed that way?

22 MR. DICKENS: This is Steve Dickens
23 talking, for the record. It could be. The building
24 code officials don't prefer it that way, because their
25 basic view is that it will be ignored, and that if you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 simply make the space the right size, then it's a lot
2 harder to ignore it.

3 But the answer is it could be. I've
4 actually done it once in a building before.

5 CHAIRPERSON GRIFFIS: Did you limit it --
6 did it take a building code waiver to post it?

7 MR. DICKENS: Yes.

8 CHAIRPERSON GRIFFIS: Was it for this
9 diminished size?

10 MR. DICKENS: Well, the entire project was
11 much smaller.

12 CHAIRPERSON GRIFFIS: I see. It's an
13 interesting -- it's an interesting question that Mr.
14 Mann has, and it comes from the detail on your page 12
15 submission and the calculations of the occupancy of
16 this area. And it is true, when you look at the
17 amount of space that you might have available, clearly
18 the Board, and I think everyone, is of the
19 understanding if you go above that you're required two
20 means of egress off of the roof, and that's what
21 you're balancing with.

22 Are there other elements to the practical
23 difficulty in complying, or adding more space on the
24 roof?

25 MR. DICKENS: Well, one of the things that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is mentioned in the prehearing information is that --
2 that isn't gone into in complete detail, because it's
3 not what we're showing, but is that, in fact, that
4 there are heat pump farms up there, you know, for the
5 condensers, for the units down below, and they have
6 certain -- they have to be more or less right above
7 the apartments they serve.

8 And the practical effect of that is that
9 it cuts down on the areas that meet the 25-foot rule.
10 In addition to that, the Historic Preservation Review
11 Board specifically asks us to keep off of the front
12 part of this roof. They -- and they said -- I think
13 it was a quote. I think it was approximately the
14 first 25 feet, so that would be this -- the portion I
15 have highlighted here that's on the M Street side of
16 the building.

17 So they wanted to keep us -- us to keep
18 off of that entirely with anything -- you know, guard
19 rail. I don't even think they want like a toilet
20 exhaust up there, which they're going to get. But for
21 the most part, we're doing what we can to avoid that.

22 Another factor with the roof is that,
23 because the building steps back as it goes upward,
24 it's just another incremental factor that reduces the
25 amount of it that ends up being useful for residential

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 recreation space.

2 That, coupled with the fact that when
3 you're in a historic district they normally want the
4 guard rail setback at one to one, i.e. three foot, six
5 inches, and so you end up sort of with this zone
6 around the outside that often adds up to a lot of
7 square footage that -- you know, that you can't use
8 for it. Does that answer your question adequately?

9 BOARD MEMBER MANN: I'll accept that as an
10 adequate explanation. It seems to me that -- and I
11 think you noted -- that there are two alternative ways
12 of doing it, and you chose one of them.

13 MR. DICKENS: Yes. I think it's actually
14 mentioned in the prehearing statement, too, that, you
15 know, the alternative that you allude to would be to
16 have another stair go up, which in this case Historic
17 specifically wanted to keep everything as small as
18 they could up there.

19 Our own feeling was that it didn't -- this
20 building has tons of rec space, and the space it has,
21 I might note, it's of unusually high quality, that the
22 part over the garage in the back, which in the Axon
23 looks like nothing, but, in fact, if you look through
24 your drawings you'll see it's designed with pergolas.
25 There's a hot tub in there. There's an elevation

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 change in it, with some steps that, you know, people
2 could sit on or plant.

3 There is actually a lot more going on
4 there than on your average residential recreation
5 space sort of terrace, which also dovetailed into
6 another thought in this case, which is that Planning
7 has had a longstanding interest, as has the community,
8 in making Blagden Alley a lively place.

9 And so far, aside from drug trade, they
10 haven't been particularly successful, but -- but by
11 pushing the rec space down to the level that is
12 immediately overlooking it, although the alley itself
13 may not be more lively as a result of that, there are
14 more eyes on the street. There's -- I think the
15 security aspect of the alley is improved that way.

16 CHAIRPERSON GRIFFIS: Anything else?

17 The private decks you alluded to, then,
18 what are the square footage? Do you have one that's
19 700 square feet that's noted here? Is that two,
20 though? Is that split on units, on the fourth floor,
21 for instance?

22 MR. DICKENS: I'm sorry. Can you repeat
23 your question?

24 CHAIRPERSON GRIFFIS: The private decks,
25 there's 2,600 plus --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. DICKENS: Yes. Well, it's different
2 things. On the lowest level, there are some patios,
3 which I'm highlighting right now.

4 CHAIRPERSON GRIFFIS: Right.

5 MR. DICKENS: Then, on the first floor,
6 there's actually one patio in the back, and then
7 there's a porch in the front. On the second floor,
8 there's a porch in the front and a couple of roof
9 terraces in back that are private, as well as the
10 large common rec space behind that.

11 CHAIRPERSON GRIFFIS: Excellent.

12 MR. DICKENS: There's a porch on the third
13 floor. On the fourth floor, there are these spaces.
14 The one in the back is, in fact, split between two
15 units. The three in the front are actually all in the
16 same unit, though, so we -- whatever we got in the
17 back we lose in the front.

18 And then, the one that's in the middle on
19 the side is split between two units.

20 CHAIRPERSON GRIFFIS: Okay. Ms. Miller,
21 did you have questions on the residential rec on the
22 roof?

23 VICE CHAIRPERSON MILLER: Yes. And in
24 general, similar to what we were discussing -- or what
25 I raised in the case we just heard, with respect to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 historic preservation restraints -- constraints, and
2 that I understand that there are specific reports that
3 go to this project that impose constraints on it. But
4 I was also -- I'm just wondering, are there other
5 guidelines in general, or is it all very just specific
6 to the case?

7 MR. DICKENS: Well, Historic has what they
8 call the Preservation Design Guidelines, and the
9 problem with them for your application is that they
10 are extremely general and extremely conservative, such
11 that the -- the actual application by the Board is not
12 usually as conservative as the guidelines.

13 And, furthermore, because the guidelines
14 are so general, it does kind of end up being a case-
15 by-case consideration.

16 VICE CHAIRPERSON MILLER: Thank you.

17 CHAIRPERSON GRIFFIS: Okay. So as I
18 understand your testimony and your submission, the
19 clarifications you just made in terms of the
20 residential recreation space that you can provide on
21 the roof, if you were wanting to expand beyond this
22 square footage that would create an occupancy load of
23 over 49 or 50, you would get two means of egress
24 required, which would spread your penthouse structure
25 substantially across the roof and move it towards the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 front, which may not be that amenable to this sort of
2 preservation.

3 But if we even set that aside, it would
4 take up a substantial amount of space. As I'm eyeing
5 this now, it may actually reduce that terrace that you
6 have now to a non-compliant dimension, because you're
7 at 26 feet. But that's just that space that I have.

8 And then, you're saying because of the RTU
9 clusters, you also have limited space in order to
10 utilize.

11 MR. DICKENS: Yes. But what I'm saying is
12 it ends up -- it -- because there's only so -- you can
13 shift them around somewhat, but it's not unlimited.
14 And the practical effect of that is that you end up
15 with areas that don't meet -- of -- of roof terrace
16 that although usable would not meet the 25-foot rule.

17 CHAIRPERSON GRIFFIS: Okay. Good.
18 Anything else? Any other questions, clarifications at
19 this time?

20 (No response.)

21 Very well. Let's move ahead, then, to the
22 Office of Planning. Very good afternoon to you, Mr.
23 Lawson.

24 MR. LAWSON: Thank you, Mr. Chairman,
25 members of the Board. I'm happy to let the report

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 stand on the record as well and be available for
2 questions.

3 CHAIRPERSON GRIFFIS: Excellent. Does the
4 applicant have any cross examination of the Office of
5 Planning?

6 MR. COLLINS: No, sir.

7 CHAIRPERSON GRIFFIS: Does the Board have
8 any questions?

9 (No response.)

10 MS. BAILEY: Mr. Chairman, would the
11 gentleman from the Office of Planning identify
12 himself?

13 CHAIRPERSON GRIFFIS: Certainly.

14 MR. LAWSON: I'm sorry. My apologies. My
15 name is Joel Lawson, and I'm with the D.C. Office of
16 Planning.

17 CHAIRPERSON GRIFFIS: Any highlights? I
18 thank the Office of Planning. It's an excellent
19 report and analysis, and it, in fact, enlightens if
20 not highlights quite a few of the aspects that the
21 applicant has put in in terms of the submission. More
22 specifically, the uniqueness, which I found
23 fascinating in terms of the confluence of things.

24 You know, just being on a side street or
25 on an alley is one thing, but how that actually

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 impacts and goes to the application here I think is
2 important to understand, also in terms of highlighting
3 the HPRB review and approval, or process rather.

4 It's also interesting -- it was somewhat
5 highlighted, but it's certainly highlighted more so in
6 the Office of Planning's report is the total amount of
7 residential recreation space. It's an interesting
8 thing. We've heard an awful lot -- residential
9 recreation space on this Board.

10 And what's fascinating is what we've
11 highlighted here today, is we have these occupancy
12 loads that are based on square footage, you know, and
13 an occupancy for building code and for zoning, all we
14 care about is that you give us tons of square footage.
15 and how those two kind of balance each other.

16 And then, what's interesting with the
17 Office of Planning is putting it in perspective of how
18 much, in terms of what we've looked at at other
19 projects and actually a provision -- how high in
20 proportion to the size of this building, which I think
21 is another detail that is difficult with our
22 regulations, how we deal with smaller -- you know,
23 like 50,000 square foot buildings, or, you know, 48,
24 49 units to 250 units, the proportion of which the
25 residential rec would be handled is -- becomes more

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and more problematic.

2 But in terms of providing, you know, they
3 compare, and I guess that's what I'm trying to
4 highlight -- the 5.8 percent provided across the board
5 as opposed to the 9.5 in this case.

6 But there that is. I don't need to say
7 anything more about it, unless others have other
8 aspects that they'd like highlighted or discussed.

9 (No response.)

10 Very well. Let's move ahead, then. We do
11 have ANC-2F and Exhibit 27. Is ANC represented today,
12 ANC-2F?

13 (No response.)

14 Not noting a representative of the ANC, we
15 can make note of that. They were recommending
16 approval of the application. It was timely filed, and
17 we give it great weight, in which it -- it is
18 afforded.

19 I don't have any other attendant agency
20 reports to this application, unless the applicant is
21 aware of any, noting that they're not Board members,
22 you can bring to my attention if I have missed some of
23 the submissions. If that's the case, then let's move
24 ahead to persons in support or in opposition to
25 Application 17403. Is there any persons here present

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to testify in this application? Come forward at this
2 time.

3 (No response.)

4 Noting that there are none indicating to
5 provide testimony, I'll turn it over to the applicant
6 for their additional comments and closing remarks.

7 MR. COLLINS: Thank you, Mr. Chairman. We
8 do appreciate your going through this with us. We
9 have submitted a fairly detailed statement of the
10 applicant as to -- showing how we meet the
11 requirements for relief here, and the Board did take
12 them in as the applicant's testimony and note them for
13 the record.

14 We did -- in this case, we were prepared
15 to say that the applicant has worked with many of the
16 neighborhood groups and organizations and individuals
17 here, and that is one thing that Walnut Street
18 Development prides itself upon. It has had several
19 successful projects in the city working with members
20 of the community, working with the neighbors, and
21 coming up with designs that have received the support
22 of everyone in this case.

23 We would request, if the Board is so
24 inclined to approve the application, some flexibility
25 with respect to several items. First, certainly for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the final design of the building to be consistent with
2 anything that's mandated by Historic Preservation
3 Review Board and their final approval.

4 We'd also like flexibility to reduce the
5 number of units by combining units. Between 40 and
6 49, we've done some studies -- the applicant and Mr.
7 Dickens has done some studies indicating that possibly
8 combining some studios -- two studios into one -- one-
9 bedroom with den might be more advantageous to
10 prospective owners than having studio apartments.

11 So we'd like that flexibility to do that,
12 not to increase the size of the building, the FAR of
13 the building, the gross floor area of the building,
14 but simply to allow for this flexibility to combine
15 units.

16 Bear with me a second.

17 And in one case, a cellar-level studio
18 that does not appear to work very well would become
19 storage, which is very valuable in a building of this
20 nature.

21 So we would like to have between 40 and
22 49, is that correct?

23 MR. DICKENS: Yes. We'd like to have the
24 flexibility to end up with between 40 and 49 units.
25 What you have shows 49.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. COLLINS: And, secondly, flexibility
2 -- or, thirdly -- the first is flexibility on a design
3 for HPRB. Second is reduction -- combining the units,
4 reduction in the number of units. Third is parking.
5 The issue of parking -- we are showing a plan with two
6 levels of parking. The original plan was a somewhat
7 different parking configuration.

8 In doing further studies, it is not clear
9 to us that everyone who buys a unit here would want a
10 parking space or need a parking space. And they would
11 like to monitor that as they do their pre-sales and
12 determine whether, in fact, a second level would be
13 required, but they would like flexibility to go down
14 from 41 spaces to 22 spaces if the zoning -- I'm
15 sorry, if the demand is not there, they would prefer
16 not to build a second level.

17 However, they would comply with the zoning
18 requirements for parking spaces in the new
19 construction. There would be an exemption for -- in
20 a very strict reading of the regulation, no parking
21 would be required for whatever is put in the historic
22 garage building. But if we went to 22, that would
23 allow 44 units. That would not include any units in
24 the garage.

25 And then, finally a closed court height

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 flexibility that I would like Mr. Dickens to address,
2 please.

3 MR. DICKENS: Okay. What we're looking at
4 is -- perhaps the easiest would be for you to look in
5 your own plans. If you'd look on Sheet D-5, D as in
6 David, 5, at the cellar plan, if you see where the
7 closed court is located, which I am now also pointing
8 out on the drawing, there's a closed court, there is
9 one little teeny studio apartment that's immediately
10 north of it in the drawing.

11 That's the apartment that we are feeling
12 like actually has more value as storage than it does
13 as a residential unit. As such, if it becomes
14 storage, it no longer needs to have a window, and so
15 what we would like to do on the cellar level is just
16 essentially enclose the bottom of the courtyard,
17 making it a shorter courtyard than it currently is.

18 So I think it -- from a zoning
19 perspective, it becomes a better court, because its
20 numbers work out better. Right now, with the 17-foot
21 width, the 51-foot height is the governing factor.
22 But we would go up to 46 feet as the height of the --
23 would go down to 46 feet as the height of the court,
24 which actually is an improvement from a zoning
25 perspective.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON GRIFFIS: Anything else?

2 MR. COLLINS: No, that's it. Thank you.

3 CHAIRPERSON GRIFFIS: You sure? Board
4 members, I think the record is full. I'm prepared to
5 move ahead. Any objection to moving ahead? Any
6 further questions, comments, clarifications needed?

7 (No response.)

8 Very well. Let's move. I would move
9 approval of Application 17403 as Walnut Street LLC on
10 behalf of 917 M Street LP. That would be for the
11 special exception from the roof structure enclosing
12 wall equal height requirement of 411.11, and the
13 variance of the lot occupancy requirement of Section
14 772, and the variance from the residential recreation
15 space requirement under 773.3, which would allow the
16 construction of an apartment building at premises 917
17 M Street, N.W.

18 I would add to that the comments made by
19 the applicant that if this order was to be -- or,
20 rather, this motion was to be approved, the order
21 would reflect the Board's flexibility in design or
22 allowing final design flexibility with regards to the
23 approval of HPRB also in terms of the number of units
24 incorporated in the project.

25 BOARD MEMBER ETHERLY: Second it, Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Chair.

2 CHAIRPERSON GRIFFIS: But I'm not even
3 done yet.

4 (Laughter.)

5 Third would be parking, which obviously we
6 wouldn't touch until we finalize all of these. But
7 the parking requirement, whether one or two decks
8 would be allowed -- or would be built, and also in
9 terms of the court closed, whether it would actually
10 be provided.

11 Thank you, Mr. Etherly, for that second.

12 BOARD MEMBER ETHERLY: Second, Mr. Chair.

13 CHAIRPERSON GRIFFIS: And I would add to
14 all of those elements, if there is -- if there is
15 clarification and flexibility in those, that none of
16 them, as has been provided by the applicant, touches
17 any of the areas of relief that is being sought today.

18
19 In fact, my very quick analysis of this --
20 none of these would, in fact, impact any of the zoning
21 requirements. Outside of major design moves, we have
22 amassing that's essentially what it is, and I wouldn't
23 anticipate that it would change much.

24 But, obviously, if anything dramatic
25 changed that impacted relief that wasn't sought here,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 well, then, there would be a new issue. But I think
2 that's clear for everybody.

3 Let me go through very quickly, because I
4 think this record is entirely full, and the case has
5 been very well made in terms of the written
6 submission. In terms of the 411, we didn't talk much
7 about it, but I think it is -- it's interesting the
8 way this section is actually written. It's for the
9 intent of the better visual environment of our
10 penthouse structures. Although, then they require
11 these all to be consistent, kind of tops of these
12 wedding cakes as we look at commercial buildings.

13 They really aren't -- the 411, I don't
14 think, although in the -- the residential zoning
15 section isn't really written for residential
16 buildings, and we've seen numerous difficulties in
17 doing that. And certainly by the -- allowing a
18 diminished enclosed height of -- of the penthouse
19 structure in this specific case, so that it doesn't
20 rise to the level of the elevator overrun, which would
21 be the highest point, would go directly with the
22 intent. And I think that the special exception
23 requirements are met with that.

24 In terms of the variances, let's start
25 first with the lot occupancy. It was a fascinating

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 case presentation in the written submission in terms
2 of lot occupancy. Here we have an addition to a
3 garage, which is a 49-unit apartment building. You
4 kind of expect it to be the other way around.

5 But in seriousness, the aspect of it --
6 and I think it was made -- trying to make the
7 comparison, I wasn't totally persuaded by the
8 comparison of -- this is a C -- a commercial C-2-A,
9 so, therefore, if it was a commercial use it could be
10 100 percent lot occupancy that would be set back, you
11 know, above 20 feet.

12 But the point and the intent of that is
13 important, because the discussion began in the written
14 submission of, well, why do we have this 60 percent
15 lot occupancy for use, for residential? Well, it's,
16 you know, obviously for light and air, and I don't
17 think we would want to change that at all.

18 But here I think we have a unique aspect
19 based on, one, the depth, the width, which wasn't
20 really pulled out substantially on this, but the depth
21 and the width of the site, but then, the existing
22 historic structure that's attached to it.

23 And then, I think the location in terms of
24 Blagden Alley was an important aspect of the
25 uniqueness. You pull all of those together, you can

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 obviously do an apartment building that allows for
2 adequate, if not more than adequate, light and air.
3 So clearly something here has -- is practically
4 difficult in meeting the strict requirements of the
5 regulations.

6 And I think it does rise out of the
7 uniqueness -- one, having this existing structure,
8 and, two, the shape and the other aspects that I
9 mentioned, and that are in the record.

10 In terms of residential rec space, we've
11 struggled numerous times on this, and I know Office of
12 Planning has worked very strongly. In fact, Mr.
13 Lawson in particular, I believe we can say, has done
14 a great amount of work on this. But be that as it
15 may, it's still a regulation and a requirement. But
16 the variance here is also met.

17 I think it's fairly persuasive in terms
18 of, one, the requirement of outdoor space. It's
19 clearly maximizing those elements that start to work.
20 We look at the roof that's there. It's always a
21 difficult thing getting up to the roof and then
22 egressing.

23 And, again, as we look at 411, and then
24 the historic, and the nature of the location of this,
25 as we would increase or require -- increase the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 penthouse structure and elongate it so that the
2 distance of the stairs would be met and captured with
3 the equipment that's on the roof that's required for
4 the units, you start to realize you're putting so much
5 on the roof, and probably not gaining as much as we
6 might anticipate.

7 That's not the full test of the variance,
8 but I think it goes to the heart of the matter of what
9 is being presented.

10 And that's my overview of this one. I'll
11 let others speak to it, if they have additional
12 comments.

13 (No response.)

14 Very well. If there's nothing further, I
15 would note the applicant's representative, Mr.
16 Collins, had mentioned in the last -- the parking, how
17 it would actually calculate it. I think we're all
18 well aware that there -- that the parking is required
19 on this one because of the intensity of use and the
20 addition to the back. But there may be a diminished
21 calculation in that, which is existing.

22 But I don't think that, again, goes into
23 where we would be needing to look at any sort of
24 relief from parking as it has been stated that it was
25 going to comply with that of the requirements for the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 C-2-A zone.

2 Oh. Lastly, I just want to make note of
3 the residential rec space. I was struck by the
4 quality, if not just the size, of the -- of the space,
5 both private but also some of the more public areas
6 that are provided in something of this nature.

7 And I think it was -- it was -- I think it
8 was well done in terms of our presentation, that it
9 wasn't all just done away with, but, rather, what
10 could be provided with the quality that should be
11 provided for it was done in this case. And so I think
12 that was also very persuasive in terms of looking at
13 the requirement or -- and/or the diminishing nature of
14 that.

15 Okay. Anything else?

16 (No response.)

17 Very well. If there's nothing further, we
18 do have a motion before us. It has been seconded.
19 I'd ask for all those in favor to signify by saying
20 aye.

21 (Chorus of ayes.)

22 Opposed?

23 (No response.)

24 Abstaining?

25 (No response.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Very well. Ms. Bailey, if you wouldn't
2 mind recording the vote.

3 MS. BAILEY: Yes, Mr. Chairman. The vote
4 is five-zero-zero to approve the application. Mr.
5 Griffis made the motion, Mr. Etherly seconded. Mr.
6 Mann, Mrs. Miller, and Mr. Turnbull supports the
7 application.

8 And, Mr. Chairman, the statements
9 requested by the applicant and articulated by the
10 Board, are we using -- are those to be conditions, or
11 are they to be contained in the order?

12 CHAIRPERSON GRIFFIS: Yes. I think we're
13 going to put them as -- however we want to legally
14 label them. Certainly not conditions.

15 MS. BAILEY: But included as a part of the
16 order.

17 CHAIRPERSON GRIFFIS: That's right.

18 MS. BAILEY: Okay.

19 CHAIRPERSON GRIFFIS: That's right. I
20 mean, we can make note of it as a fact in the case in
21 our limited summary order, I would suggest, if we can
22 do that. I think we can accomplish that. Unless
23 there's any objections to issuing a summary order, why
24 don't we waive our rules and regulations and issue
25 that with that specific note made based on this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 application.

2 Anything else?

3 (No response.)

4 Indeed. Mr. Collins, anything else? All
5 set?

6 MR. COLLINS: No, sir. Thank you.

7 CHAIRPERSON GRIFFIS: Thank you all very
8 much. We appreciate it. Good application.

9 We are going to take just a five-minute --
10 let this applicant leave and let the Board just
11 stretch their legs, and then we're going to call 17356
12 of Bannum, Inc.

13 (Whereupon, the proceedings in the
14 foregoing matter went off the record at
15 3:58 p.m. and went back on the record at
16 4:13 p.m.)

17 CHAIRPERSON GRIFFIS: Let's call the last
18 case of the afternoon.

19 MS. BAILEY: Mr. Chairman, this is
20 Application Number -- this is Appeal Number 17356 of
21 Bannum, Inc., and it's pursuant to 11 DCMR 3100 and
22 3101, from the administrative decision of the Zoning
23 Administrator, Department of Consumer and Regulatory
24 Affairs, for the revocation of Certificate of
25 Occupancy, Permit Number C53679, dated May 2, 2003,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for a temporary correctional institution. Appellant
2 alleges that DCRA erred by revoking the occupancy
3 permit. The property is located at 2210 Adams Place,
4 N.E.

5 Were the parties sworn in previously?

6 CHAIRPERSON GRIFFIS: I don't believe so.
7 Actually, why don't we do that. Anyone that needs to
8 be sworn in, and that will provide testimony today, if
9 you would please stand and give your attention to Ms.
10 Bailey. If you have any witnesses --

11 MS. BAILEY: Please raise your right hand,
12 sir.

13 (Whereupon, an oath was administered to
14 those persons planning to offer
15 testimony.)

16 CHAIRPERSON GRIFFIS: Excellent. And I'm
17 just going to have everyone introduce themselves for
18 the record, name and address.

19 MR. GORDON: Michael Gordon for Bannum,
20 Inc., 17 West Jefferson Street, Suite 202, Rockville,
21 Maryland.

22 CHAIRPERSON GRIFFIS: Thank you.

23 MR. RUSHKOFF: And Bennett Rushkoff for
24 the Department of Consumer and Regulatory Affairs.
25 I'm here in the Office of the Attorney General for the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 District of Columbia.

2 MR. TEMPLE: Donald Temple for ANC
3 Commissioner Virginia James.

4 CHAIRPERSON GRIFFIS: Can you turn your
5 mike on?

6 MR. TEMPLE: I'm sorry. Sure. ANC
7 Commissioner Virginia James and ANC Commissioner Joan
8 Black. Do you need my address? It's 1229 15th
9 Street.

10 CHAIRPERSON GRIFFIS: So, Mr. Temple,
11 you're representing the ANC, who is a party in the
12 case, is that correct?

13 MR. TEMPLE: That's correct. Yes.

14 CHAIRPERSON GRIFFIS: Okay. Thank you all
15 very much.

16 Mr. Gordon, very good afternoon to you.
17 I understand -- was it your father's --

18 MR. GORDON: Yes.

19 CHAIRPERSON GRIFFIS: I'm terribly sorry
20 to hear that. And, actually, it's the first
21 preliminary item I'd like to bring up, and I
22 appreciate the -- everyone's communication and
23 coordination in getting that done in terms, of course,
24 you requested enlargement of time for the submissions
25 and the briefings.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 We would not have had an opportunity to
2 deal with that until today, so I'm glad that you all
3 availed yourself of doing that. And, again, our
4 condolences to you, sir.

5 Secondly, let's go -- move into the motion
6 to consolidate. Mr. Temple, you had brought a motion
7 before the Board to consolidate the original C of O
8 into this case. Do we want to open that up, just for
9 quick comments from Board members, or I will take it
10 up --

11 MR. GORDON: Mr. Griffis?

12 CHAIRPERSON GRIFFIS: Yes.

13 MR. GORDON: We've never received any
14 motion.

15 CHAIRPERSON GRIFFIS: I'm showing it as
16 Exhibit 29, our Exhibit 29. What date do you have on
17 that? It was dated -- submitted November 22nd. Well,
18 let's take quick Board discussion on it. What do you
19 have? Yes, that's it. Why don't we talk about it and
20 see if he has to take a look at it at this point.

21 VICE CHAIRPERSON MILLER: Okay. Then, I
22 would say I'm sorry you haven't seen this yet. We
23 think you might not need to concerning our point of
24 view on this at this point. But it's a motion to
25 consolidate an appeal challenging the issuance of a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 certificate of occupancy for Bannum, and that was
2 filed apparently in 2003.

3 And it was submitted in connection with
4 Order 16998. And in researching this, we determined
5 that the order, which you do have a copy of, Order
6 Number 16998, actually addresses this issue, and I
7 would like to read from that. And that is on page 12
8 of that order, and it said in pertinent part, "If a
9 building permit is found to be invalid because it
10 authorized a non-permitted use, the legal underpinning
11 of a subsequently issued certificate of occupancy for
12 that same use also fails."

13 So I think -- I'm certainly of the view
14 that this issue was addressed in that order, and that
15 it also would be moot at this point, because we're now
16 dealing with the revocation of a certificate of
17 occupancy and not the issuance of one.

18 CHAIRPERSON GRIFFIS: Right. So for
19 clarification, my understanding is what we're asked to
20 do in this motion is to take in the certificate of
21 occupancy, which in fact has been revoked at this
22 point, and that's why we are here. So taking that
23 under -- it's superfluous to be talking about it in
24 that vein as if it exists, so that that motion does
25 become and is rendered moot for the Board's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 consideration.

2 We will provide you, Mr. Gordon, with a
3 copy of that, if you want to see it, to review
4 briefly. Let me hear from -- Mr. Rushkoff, were you
5 indicating you wanted to address the Board on that
6 issue?

7 MR. RUSHKOFF: No. No, I'm sorry. I'm
8 fine with it.

9 CHAIRPERSON GRIFFIS: Okay. Good.

10 Mr. Temple, did you have --

11 MR. TEMPLE: Just to -- thank you. For
12 clarification purposes, I want to make sure what
13 you're saying is that the prior decision on the
14 building permit basically applies as well to the
15 certificate of occupancy, for the reasons that you've
16 stated.

17 CHAIRPERSON GRIFFIS: Go ahead.

18 VICE CHAIRPERSON MILLER: That's not
19 exactly what it's saying. But it's saying that it was
20 -- that issue was addressed in this court order as I
21 read -- not this court order, excuse me, in the Board
22 order as I read it. And Mr. Griffis was also saying
23 it's -- so it's moot for that reason, but it's also
24 moot because there is -- it has already been revoked.

25 CHAIRPERSON GRIFFIS: Anything else?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 (No response.)

2 Okay. Why don't we see if -- well, there
3 is. I think we should move on at this point, then.
4 Those are the two preliminary items that I have
5 attendant to my agenda for today, in which case we
6 would then move to the reasoning.

7 Yes, Ms. Miller?

8 VICE CHAIRPERSON MILLER: Just to be clean
9 on this, so, therefore, I think we would be denying
10 the motion to consolidate the appeals of Bannum, Inc.
11 and ANC Commissioner Joan Black.

12 CHAIRPERSON GRIFFIS: Absolutely. Forgive
13 me. I took it as a consensus of the Board, but I
14 would second that motion and open it up for any
15 deliberation. Any comments, deliberation? Ms.
16 Miller, any last additional items on that?

17 VICE CHAIRPERSON MILLER: No.

18 CHAIRPERSON GRIFFIS: Then, we have a
19 motion before us and a second to deny the motion to
20 consolidate the past ZA vote based on the fact that
21 the Board found it -- the C of O to be moot, and the
22 motion also -- or, rather, the motion to be moot in
23 regards to the disposition of the C of O.

24 Anything further, then?

25 (No response.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 All those in favor signify by saying aye.

2 (Chorus of ayes.)

3 Any opposed?

4 (No response.)

5 Abstaining?

6 (No response.)

7 Very well. Let's move into the heart of
8 the matter, then. What we had indicated last -- and
9 let me just review to make sure that we are all of the
10 same understanding, we were going to -- and we
11 appreciate everyone's filings. I think they're
12 excellent in terms of the detail and specificity that
13 we were looking for.

14 We are giving this opportunity, of course,
15 to allow a shortened period -- we were allowing 15
16 minutes -- to highlight and summarize those
17 submissions that were brought in. I believe my
18 records and notes are correct that we were allowing
19 five minutes for additional -- for witnesses to
20 present testimony, and then we would move on from
21 there.

22 Let me answer any procedural questions
23 that you might have. Mr. Gordon, did you have --

24 MR. GORDON: Only that I'd like to be able
25 to call Mr. Lowry sooner rather than later, because he

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 has a plane to catch.

2 CHAIRPERSON GRIFFIS: I think -- I think
3 we'll start with you. So as soon as you want to call
4 him, why don't we do that. And, obviously, then he
5 can stay for cross examination. We might be able to
6 excuse him.

7 MR. GORDON: Okay.

8 CHAIRPERSON GRIFFIS: Is that of
9 everyone's understanding? Not yours, Ms. Miller?
10 What's your preliminary question?

11 VICE CHAIRPERSON MILLER: Mr. Gordon, I
12 have a preliminary question, and that is it looks like
13 in your December 19th you have a -- you move that this
14 Board dismiss the appeal, and so I'm wondering whether
15 that's a motion. And if it is, since you are the
16 Appellant, why isn't -- why don't you just withdraw
17 it? You are certainly free to do that.

18 MR. GORDON: Well --

19 VICE CHAIRPERSON MILLER: It's kind of
20 unusual to have an Appellant bring something and then
21 ask that it be dismissed.

22 MR. GORDON: Well, we have to preserve the
23 appeal in the event that the court -- the Board
24 decides it has jurisdiction as well. I mean, we could
25 withdraw the appeal, but I think what we're seeing is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that the appeals here -- we don't know what rights --
2 because of the confusion I guess in the different
3 forums that we have, we want to make sure we have one
4 forum that decides it.

5 But if this Board were to decide, which we
6 think is accurate, to not necessarily dismiss it, but
7 at least stay it until the initial decision is issued
8 by the ALJ at the OAH, then the appeal then would come
9 forward. So it's premature.

10 We filed it protectively here. We had to.
11 We had to file an appeal right away from the
12 revocation was issued. But we also filed -- we also
13 had pending, then, a case at the Office of
14 Administrative Hearings. That case was pending then.
15 The way -- and I guess this gets me right into my
16 jurisdictional argument, which is to say, you know,
17 the way things have always -- I mean, at least from
18 all the research I've done at the BZA, and, you know,
19 in the BZA cases, and all the cases I've seen at the
20 Court of Appeals, when a certificate of occupancy is
21 revoked, that revocation automatically creates an
22 infraction or a use violation.

23 The way that has always been treated is as
24 either an infraction proceeding or a contested case
25 proceeding. Okay. And those proceedings have always

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 gone first to an Administrative Law Judge before they
2 came to this Board. The Board has always reviewed
3 those as an appellate kind of court rather than as a
4 trial court.

5 Now, there's one case where the person
6 didn't go to the ALJ and came -- and didn't come here.
7 But the government came here, and the Board found
8 jurisdiction in a different route. But -- and that's
9 the Curry case that I -- that I cited in my first
10 paper.

11 But typically these things are contested
12 cases, and they go to the ALJ first, which we had
13 already done. We were there. We had a pending case.

14 Now, this revocation is issued, and then
15 we had to appeal here to -- to preserve our rights to
16 appeal in case someone were to decide, no, we can
17 handle that as a matter of the first impression here.

18 CHAIRPERSON GRIFFIS: But what was the
19 element? What's the title that you actually brought
20 to the -- to the OAH? I mean, was it the -- was the
21 action rescinding?

22 MR. GORDON: The first time we went to the
23 OA -- I mean, the OAH wasn't in existence at the time
24 when we first --

25 CHAIRPERSON GRIFFIS: Understood.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. GORDON: Okay. But the OAD, the first
2 one was a revocation of our certificate -- the same
3 certificate of occupancy, based upon this Board's
4 decision.

5 CHAIRPERSON GRIFFIS: And is that the
6 appeal that you're here for, that revocation?

7 MR. GORDON: No.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. GORDON: No.

10 CHAIRPERSON GRIFFIS: So we'll --

11 MR. GORDON: But what we're saying is that
12 the subsequent revocation that followed, that we are
13 here for, we're saying that revocation itself is void
14 by a statute that was enacted in October 2004, before
15 this revocation was issued. That statute is very
16 important, because what it says is that all contested
17 cases at DCRA, all -- they call them adjudicated cases
18 in the statute, but adjudicated cases covers contested
19 cases as well.

20 All of those now, right, are -- and
21 there's no limitation on zoning or anything else,
22 those go to an ALJ at the Office of Administrative
23 Hearings. Then, under 1803, the statute that the
24 Board has addressed before in terms of what it covers,
25 then, if it is a zoning regulation that's at issue,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 then the appeal comes to this Board.

2 Okay. So we don't want to lose our right
3 to appeal in case there's decisions made by -- by
4 others that we have to be here, and this is our only
5 recourse for this revocation.

6 CHAIRPERSON GRIFFIS: So, in some
7 respects, you're not asking us to find jurisdictional
8 elements. I mean, perhaps you would say -- maybe you
9 would -- that you're not sure whether we have it or
10 not. But we don't need to decide that.

11 Really, what you're pushing for is -- is
12 also not a dismissal and not a stay. But you're
13 asking for a continuance, a postponement, until some
14 other proceeding is complete, and thereby we would
15 find it more of an administrative chronology to do
16 that, whether there's jurisdiction or not.

17 MR. GORDON: I think -- I think whether
18 you call it a continuance or some courts dismiss as
19 premature. They call it a dismissal as premature.

20 CHAIRPERSON GRIFFIS: Well, you can
21 withdraw also as premature.

22 MR. GORDON: Right. Another Board --
23 another court could say, "We are holding this in
24 abeyance until the OAH decides, and then we will
25 handle it."

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON GRIFFIS: I guess I don't have
2 any -- I don't -- to me there's nothing to hold in
3 abeyance, and there's nothing to stay at this point.
4 I mean, it may just be my misunderstanding of legal
5 nomenclature, but I don't -- I don't -- you know, I
6 think -- there's nothing that has been -- if we got
7 into the substance and there was substance here, I
8 think there's nothing that precludes us from
9 continuing today.

10 However, we do have -- and I think it was
11 interesting to see you brought an appeal, and you're
12 asking the motion to dismiss it for lack of
13 jurisdiction, which -- which begs the question, if you
14 didn't think we had jurisdiction, why did you bring it
15 here?

16 But now you're saying it's more of a
17 complication of dueling processes. But what I'm now
18 getting to, then, are each of these -- are each of
19 these elements of DCRA, are they hearing the same
20 positions and elements that we would be hearing in the
21 appeal?

22 MR. GORDON: Well, actually, there was an
23 original appeal at the Office of Administrative
24 Hearings that was on -- that covered estoppel.
25 Estoppel is one of the grounds we raised there, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 one of the grounds that we're raising here.

2 Additionally, after the first appeal was
3 filed, right -- and that's on the first revocation --
4 we also filed another case at the Office of
5 Administrative Hearings on the second revocation also.
6 Now, again, you know, there's two proceedings going on
7 at the same time effectively. We have a case number
8 for both of them.

9 So I don't want to be out of both forums.
10 I don't want to be -- someone to say to me later, "You
11 should have been -- done that at the Board of Zoning
12 Adjustments," or, you know, some people get in a
13 crossfire. All I'm saying here is that the Board can
14 look at what it should be doing and how the process
15 should be working.

16 And if the Board looks at it and says,
17 "Wait. For revocations of certificates of occupancy,
18 according to the statutes and according to the
19 regulation which I have cited in there, we should not
20 be dealing with that now." If this Board, then, were
21 to say, "There is no jurisdiction here," that would
22 then -- and I'm -- and then, at that point, if some
23 later court would say, "No, you should be back there,"
24 I'd say, "Well, the Board dismissed it for -- for
25 jurisdictional reasons."

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So I'd have a Board finding rather than my
2 own finding.

3 CHAIRPERSON GRIFFIS: That's right.

4 MR. GORDON: Okay. That's why -- that's
5 why I'm keeping the case here also. And I think that
6 when you look at the regulations that we -- that we
7 have here for revocations, you can say, "Where is the
8 statutory ground for it?" Right in the regulation it
9 says 641.09, which is a -- a penalty statute.

10 That's -- and that's because as soon as
11 you have that revocation for a use that's ongoing --

12 CHAIRPERSON GRIFFIS: I understand that,
13 but we seem to be talking in the big picture of
14 process.

15 MR. GORDON: Yes.

16 CHAIRPERSON GRIFFIS: And I don't disagree
17 with -- if you read that section that way, it may well
18 say that, but I think we have specificity here that
19 goes to the actions that we could easily deal with.
20 I'm not -- I mean, I'll let this go. This is where I
21 am.

22 I'm not convinced that -- I'm not
23 convinced that something -- I have never -- I am not
24 aware of anything that we've in the past procedurally
25 had to wait for. Oftentimes we can set things aside,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 whether it be, you know, deciding it at the Court of
2 Appeals, and there are elements that the court above
3 us will illuminate or may take action to.

4 But in terms of the parallel processes at
5 OAH, or at anything -- at the old BAR or any of that
6 nature, there are different elements. I have never
7 seen a situation where we should wait for something to
8 come from them.

9 MR. GORDON: I think the reason that this
10 --

11 CHAIRPERSON GRIFFIS: In fact, you
12 supported my case in point, because if it was that
13 then your appeal would be timely, even if it wasn't
14 here today, because if you had to wait for a certain
15 point, of which there was a decision to be made, well,
16 then, certainly those elements -- the clock would run
17 with that decision of that time and that would be
18 appealable.

19 So I don't -- again, don't see the nexus
20 of where we get the balance of why one should wait or
21 one should have to decide jurisdictional elements over
22 the other.

23 MR. GORDON: I think the reason it has
24 never come to the Board before is because the notices
25 that went out for revocations of certificates of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 occupancy didn't tell people to come to this Board.
2 They told people to go to the ALJ.

3 And that's why it transpired in that way
4 in the past, and I think that's why you've not had
5 this situation arise before. In fact, I think the
6 whole rescission was specifically for that purpose --
7 was let's go reread these things and see if we can get
8 away from the Administrative Law Judge, because we
9 don't like the fact that the Administrative Law Judge
10 has stayed everything --

11 CHAIRPERSON GRIFFIS: Right.

12 MR. GORDON: -- until the Court of Appeals
13 decides the case.

14 CHAIRPERSON GRIFFIS: Then, why did you go
15 there? Why didn't you just come here? Why are we
16 waiting on them?

17 MR. GORDON: On?

18 CHAIRPERSON GRIFFIS: On the OAH or the
19 ALJ.

20 MR. GORDON: Why are we waiting on them?

21 CHAIRPERSON GRIFFIS: Right.

22 MR. GORDON: They haven't acted.

23 CHAIRPERSON GRIFFIS: I know. But why?
24 If you're saying that in some respects they just stay
25 or they wait for the higher courts, and there was --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 there was reasoning in the section, the reading, that
2 people just went there and didn't come here, why not
3 just come here and not go there?

4 MR. GORDON: Why do people not come here?

5 CHAIRPERSON GRIFFIS: No. Why did you?

6 MR. GORDON: Why did I? Because I had a
7 notice in front of me that said, "Your appeal is to
8 the BZA." The DCRA counsel told us, "Your appeal is
9 to the BZA."

10 CHAIRPERSON GRIFFIS: Then, why are we
11 worried about the ALJ or the OAH?

12 MR. GORDON: The only reason is because
13 your statutes and regulations tell you what you have
14 initial and appellate jurisdiction over.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. GORDON: And that's our position on
17 the jurisdictional side of it. On the -- you know,
18 assuming that you -- you find jurisdiction, we're not
19 withdrawing the appeal. Assuming that you're finding
20 jurisdiction, our second argument is that if you're
21 looking at the April 21, 2005, revocation, you have to
22 then decide, is that a legal revocation? Could DCRA
23 legally revoke this, you know, certificate of
24 occupancy?

25 And that's where we come into -- again, to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the Office of Administrative Hearings statute.

2 CHAIRPERSON GRIFFIS: Right.

3 MR. GORDON: I think --

4 CHAIRPERSON GRIFFIS: Do you think we have
5 jurisdiction and overview through the zoning
6 regulations of the administrative statute?

7 MR. GORDON: Of the?

8 CHAIRPERSON GRIFFIS: Of the
9 administrative statute that sets out the protection of
10 the jurisdiction and authority that would preclude one
11 -- what you're saying the error is, that one was taken
12 away and then replicated and put back into -- in
13 force.

14 You're saying that we would have the
15 ability to take on that statute and look at it. It
16 would be jurisdictional here.

17 MR. GORDON: Right. I think in the past
18 the Board has actually taken a look at the Office of
19 Administrative Hearings Act in terms of deciding
20 whether it has jurisdiction. What I'm saying is that
21 assuming you even have jurisdiction, right, which is
22 -- you know, that's our second argument here in our
23 brief -- that you have to decide whether the
24 revocation is valid, whether the revocation is legal,
25 in order to decide whether it's -- you know, whether

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to grant the appeal.

2 And if you look at the second revocation,
3 DCRA concedes that when it was issued there was a
4 pending case before the Office of Administrative
5 Hearings on this revocation and the infractions
6 resulting from the revocation.

7 Now, that -- you know, the DCRA says,
8 "Well, I can split them apart, and just withdraw it."
9 The problem with that is the --

10 CHAIRPERSON GRIFFIS: But how does this --
11 how does the revocation -- that element itself, how
12 does that rise to the level of being a zoning issue?

13 MR. GORDON: What it rises to is that you
14 have to decide -- you can't make a zoning decision on
15 something that was issued illegally. The revocation
16 itself was issued illegally. There's a statute which
17 says --

18 CHAIRPERSON GRIFFIS: I understand that.

19 MR. GORDON: -- I can't do this. I can't
20 -- you can't do anything once we file here. It's a
21 statute. It says that. It's new. It's a brand-new
22 statute.

23 So the question is: if something is a
24 void act, right, it may not be specifically a zoning
25 issue, right, because -- but it still involves

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 statutory interpretation.

2 CHAIRPERSON GRIFFIS: But that's what
3 you're waiting for OAH to figure out. Is that
4 correct?

5 MR. GORDON: Both OAH and the Board.

6 CHAIRPERSON GRIFFIS: But you're saying
7 it's not a zoning issue. And why would we both try
8 and answer the same question?

9 MR. GORDON: Take the Choharis case. The
10 Choharis case you had to make a decision whether it
11 was -- whether it was jurisdictional or not, right?

12 CHAIRPERSON GRIFFIS: Right.

13 MR. GORDON: Whether you had the authority
14 to hear the case.

15 CHAIRPERSON GRIFFIS: Right.

16 MR. GORDON: I think the same issue arises
17 with how -- is this revocation legal? Is it legal?

18 CHAIRPERSON GRIFFIS: I don't follow that
19 at all. I mean, in Choharis, I think it was fairly
20 clear the elements, and I think it's clear here, too.
21 But you're asking us to ask a different question in
22 this case than we did in Choharis.

23 MR. GORDON: The question that comes up in
24 this case is there's a revocation that's been issued,
25 and we have appealed it. Okay? Now, if the Board

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 says, "I cannot decide whether that revocation itself
2 was a void Act, I'm just going to decide the zoning
3 issues as part of that Act, but I'm not going to issue
4 the" -- I mean, it's --

5 CHAIRPERSON GRIFFIS: Well, I think we get
6 into more complications there, because I'm not sure we
7 could get to that level before answering the first.
8 Okay.

9 Ms. Miller?

10 VICE CHAIRPERSON MILLER: It sounds like
11 you're saying there was a violation of -- is it the
12 Civil Infractions Act? The new statute that you're
13 referring to.

14 MR. GORDON: Yes.

15 VICE CHAIRPERSON MILLER: Okay. It's not
16 a violation of the Zoning Act.

17 MR. GORDON: Okay.

18 VICE CHAIRPERSON MILLER: And I think
19 that's what is before the OAH, which is their
20 expertise to determine whether that Act has been
21 violated. Isn't that correct?

22 MR. GORDON: Well, that's one of the
23 things we've argued at the OAH. But we've been told
24 by the DCRA, both here and in Superior Court and in
25 federal courts, that the Board of Zoning Adjustment

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 decides this whole case. Okay.

2 And I don't know how the Board of Zoning
3 Adjustments can decide whether or not an action that
4 they're evaluating is good or bad without also
5 deciding whether or not it's legal or not.

6 VICE CHAIRPERSON MILLER: We decide -- it
7 gets confusing with the Civil Infractions Act.

8 MR. GORDON: I'm sure it is. It's brand
9 new.

10 VICE CHAIRPERSON MILLER: It gets very
11 confusing. But what we try to parse out is,
12 basically, if it's a violation of a zoning regulation,
13 then it's properly before this Board. But it sounds
14 like certainly what's before OAH is a violation of the
15 Civil Infractions Act, which is -- which is not our
16 expertise.

17 MR. GORDON: Right.

18 VICE CHAIRPERSON MILLER: So I'm not sure
19 why we would wait for a decision on that issue before
20 we would act on a case.

21 MR. GORDON: The reason is is because,
22 historically -- historically, this Board has always
23 waited for an ALJ. The only time -- the only case I
24 saw where it didn't happen was where the person had --
25 didn't even appeal to the ALJ and came -- and didn't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 come here, but the government came here -- in that
2 Kuri Brothers case, which I -- which the case is
3 confusing to me a little bit, the Kuri Brothers case.

4 Other than that, I haven't seen where they
5 come here, and the ALJ is the one that is deciding the
6 zoning issues.

7 CHAIRPERSON GRIFFIS: Kuri was a civil
8 infraction case, was it not?

9 MR. GORDON: Yes. It was a revocation
10 case.

11 CHAIRPERSON GRIFFIS: But there were civil
12 infractions involved in it I seem to --

13 MR. GORDON: I --

14 CHAIRPERSON GRIFFIS: I don't know. I sat
15 on a few of them. I'm not sure I sat on all of them.

16 MR. GORDON: I'm sorry. But I -- I guess
17 what I'm trying to get at, really, here is that -- is
18 that this case -- the new statute that came in
19 basically adds something new that I think the BZA has
20 to consider. The ALJs have always evaluated zoning
21 regulation violations and impacts, and the BZA has
22 always had the ability to review those on appeal.
23 That's what 1803.01 says. That's what Choharis said.
24 "Hey, wait, if it's a zoning regulation violation, we
25 get -- we have an appellate review ability over those

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 cases."

2 VICE CHAIRPERSON MILLER: That's right.
3 But let me just stop you right there. Maybe we can
4 parse out the issues a little bit. It is not a zoning
5 regulation violation if they improperly apply the
6 Civil Infractions Act. If that rescission of the
7 first revocation was illegal, improper, whatever,
8 that's a violation of the Civil Infractions Act, and
9 that's what you have under consideration there right
10 now.

11 So I don't believe that issue is before --
12 is within our jurisdiction.

13 MR. GORDON: It was kind of a crazy
14 situation where -- where an agency could violate a law
15 -- could actually issue a revocation that is void ab
16 initio, you know, void from its beginning, because it
17 was -- they should not have done anything while that
18 case was pending, and they did it anyway.

19 It's an illegal act. How then it would
20 have to go through the entire process before the Board
21 of Zoning Adjustments, have a hearing and have a
22 decision on it, when the initial thing you're actually
23 evaluating was illegal. That has to be one of the
24 things you need to consider as part of your
25 evaluation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON MILLER: Mr. Rushkoff, do
2 you want to comment on this?

3 MR. RUSHKOFF: Yes. I just want to make a
4 couple of points. The situation before the creation
5 of the Office of Administrative Hearings is -- I want
6 to briefly describe that situation, and then explain
7 how things changed. Before, if you had a matter
8 before DCRA, some of these matters went to ALJs.

9 For example, if DCRA charged someone with
10 an infraction, and that could involve a revocation,
11 sometimes you'll charge an infraction and the relief
12 you seek is to revoke the certificate of occupancy
13 for, you know, using it incorrectly, that would go to
14 an ALJ.

15 When you are done with the ALJ, that might
16 then go either to the Board of Appeals in review or
17 come up here to the BZA. It depended.

18 If, on the other hand, DCRA, for example,
19 just revoked a building permit as in, for example, the
20 American Tower case, or revoked a certificate of
21 occupancy, that could come straight to the BZA. For
22 example, in the American Tower case, we -- there was
23 no accusation that American Tower had engaged in any
24 infractions. They were obeying the law. There was a
25 change of heart at DCRA. They revoked the building

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 permit, and there was an appeal here.

2 CHAIRPERSON GRIFFIS: And it was the
3 appeal of the revocation --

4 MR. RUSHKOFF: The appeal of the building
5 --

6 CHAIRPERSON GRIFFIS: -- or the permit or
7 the C of O.

8 MR. RUSHKOFF: Of the permit revocation.
9 That's correct.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. RUSHKOFF: Now we have the new Office
12 of Administrative Hearings, and the Office of
13 Administrative Hearings -- if you look at the statute,
14 it doesn't change all that much. It says quite
15 explicitly, for example, that it doesn't create a
16 right to a hearing where it doesn't already exist,
17 with the exception of disciplinary actions for ALJs.
18 That's an exception.

19 It also -- what it does is it -- something
20 that would have gone to an ALJ now goes to the Office
21 of Administrative Hearings. And something that would
22 have gone to the BAR now goes to the Office of
23 Administrative Hearings. It's a little bit confusing,
24 because the BAR is viewed as -- as being a higher
25 level than just a plain old ALJ at DCRA, yet both --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in both situations the matter goes to the -- for
2 example, at American Tower, before it or not, there is
3 still leftover appeals from that.

4 Those -- the appeal that did not come to
5 the BZA, the appeal that didn't have to do with zoning
6 issues, it had to do with the Height Act, that is now
7 pending before the Office of Administrative Hearings.
8 And there was no -- you know, that's where it went
9 because it would have gone to the BAR, so now instead
10 it's at OAH.

11 Now, the problem, to be quite frank, is
12 that in 2004 DCRA issued a notice of revocation that
13 -- that had charges. It listed two -- I believe two
14 charges against Bannum, and the charges were written
15 in a way that tried to work into it the outcome of the
16 case here at the BZA involving Bannum, and tried to
17 articulate the outcome of that case in a way that
18 charged Bannum with violations.

19 Now, that case got, let's say, bogged
20 down, and then eventually there was no further work on
21 that case by the ALJ. I don't know whether you'd call
22 it a stay or a continuance. Whatever you call it,
23 that case stopped, and then got transferred over to
24 OAH. Okay? So that's like kind of dead in the water
25 there.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Now, in that particular case, revocation
2 was sought as a remedy for these violations, these
3 infractions by Bannum. That's how that case was set
4 up.

5 Now, later, in 2005, DCRA issued another
6 notice and said, "We are rescinding that." Now,
7 there's a legitimate issue raised by Bannum as to
8 whether or not that portion of the notice was correct.
9 There's a legitimate issue as to whether or not it
10 could be rescinded or whether or not it needs to be
11 dismissed with the consent of OAH, or some sort of,
12 you know, filing over there.

13 I don't really know what the correct
14 procedure is, but, you know, we're dealing with new
15 agencies. No one knows.

16 But let's say, hypothetically, that Bannum
17 is correct and that partial -- that portion was wrong.
18 Okay? You still have the other portion that -- that
19 provides notice that DCRA has concluded that the
20 certificate of occupancy was issued in error, and is
21 being -- you know, that that certificate of occupancy
22 is being revoked, not because of any violations, not
23 because of any infractions, but it just -- it never
24 should have been issued. Kind of like an annulment,
25 okay?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And so it seems to me that if Bannum is
2 correct, the correct posture of it I think would be a
3 proceeding at -- I should say if Bannum is partly
4 correct, you would have a proceeding at OAH where DCRA
5 would need to still get OAH to consent to the
6 dismissal of the case, based on the provision that Mr.
7 Gordon cites, and simultaneously Bannum would have a
8 right to appeal that portion of the letter that said,
9 "We are now revoking based on it having been issued in
10 error."

11 And under the regs that we cited -- that
12 DCRA cited in its brie, that decision does not go to
13 an ALJ. That basic certificate issued in error
14 provision results in an appeal here to the BZA. So I
15 think that --

16 CHAIRPERSON GRIFFIS: So the act of the
17 revocation of the C of O comes here, but the error in
18 rescinding the 2005 revocation goes somewhere else.

19 MR. RUSHKOFF: 2004 revocation.

20 CHAIRPERSON GRIFFIS: 2004, right.

21 MR. RUSHKOFF: Would remain at OAH, and I
22 won't take any position on that, other than to say
23 that would be decided by them.

24 MR. GORDON: You left out one fact, and
25 that's that after they issued this new revocation,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 they did move to dismiss at the OAH, and that motion
2 has not been acted on. We opposed it. It hasn't been
3 acted on.

4 But this is after they've already taken
5 the act that they -- that they're not permitted to
6 take. You know, he says this in error -- the decision
7 was issued in error. That was in both notices. It
8 wasn't something brand new. He keeps saying there was
9 no infraction in the second one.

10 Well, you know, a few days later, on
11 May 13th, right after the first revocation comes out,
12 then comes a notice saying you're in violation for use
13 violations. So what DCRA did is they split it in two
14 --

15 CHAIRPERSON GRIFFIS: Well, I guess I'm
16 not clear on what you're asking us, then. Are you
17 asking us to look at whether it was an error to
18 rescind in 2004?

19 MR. GORDON: I'm asking you to -- to look
20 at that and say, "Yes, that rescission was -- that
21 rescission and reissuance -- the reissuance is really"
22 --

23 CHAIRPERSON GRIFFIS: Right.

24 MR. GORDON: -- was illegal.

25 CHAIRPERSON GRIFFIS: Then, we're ready to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 go. We can hear that today. However, I heard you
2 also say that that is something that's at OAH, that
3 should be done under the Civil Infraction or the new
4 OAH Act.

5 MR. GORDON: We still have that case
6 pending.

7 CHAIRPERSON GRIFFIS: I just don't -- I
8 don't know how we do it. I don't know how we do both.

9 VICE CHAIRPERSON MILLER: I mean, I know
10 we haven't heard from Mr. Temple yet, but I just want
11 to say that so far, based on what I'm hearing, is I
12 don't think we should hear that -- the rescission
13 issue. But, I mean, we're still discussing this.

14 I sympathize. I think that there's an
15 issue there that -- but there's another body that's
16 looking at it that has the -- I think the jurisdiction
17 to hear that issue. We hear issues related to zoning
18 regulations, and I don't think -- I think that falls
19 in the other category.

20 MR. GORDON: So the Board's position --

21 VICE CHAIRPERSON MILLER: That's my
22 opinion.

23 MR. GORDON: So your opinion would be that
24 --

25 VICE CHAIRPERSON MILLER: My opinion.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. GORDON: -- your opinion would be that
2 the Board cannot look at anything in terms of the
3 infraction, any infraction or any penalty.

4 VICE CHAIRPERSON MILLER: Yes, I think so.
5 I think that's -- we've had this a few times, and we
6 try to parse out, you know, what -- what's the civil
7 infraction issues that should go before OAH, and what
8 are the zoning issues that should come before us.

9 CHAIRPERSON GRIFFIS: Yes. I --

10 VICE CHAIRPERSON MILLER: I think we
11 should do that.

12 CHAIRPERSON GRIFFIS: I tend to agree. I
13 don't think we're taking official action on this, but
14 I don't -- I don't see how that issue has been framed
15 appropriately for us to hear and deliberate on at this
16 point. And I think I'll leave it at that.

17 Let's have Mr. Temple -- we've kind of --
18 I think we're going and being very productive here.
19 But, Mr. Temple, do you want to touch on any of those
20 elements that we've just brought up?

21 MR. TEMPLE: If I may briefly. I just
22 want to say that the contention that we are proceeding
23 on ab initio illegal premise is incorrect. The
24 revocation is based -- consistent with what Ms. Miller
25 stated earlier -- is based on the prior decision.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 The prior decision -- the permit is
2 illegal. The language which is in the opinion is is
3 that if the permit is illegal, then the certificate of
4 occupancy is illegal. The DCRA was required, by
5 virtue of your decision and your assessment of the
6 law, to assert the revocation. That's point number
7 one.

8 Point number two is that the law is clear.
9 You referred to the respective statutes which are
10 being raised here. Both Section 6 -- D.C. Code 641.07
11 juxtaposed with D.C. Code Section 218.3113 --
12 actually, I'm sorry, 13 -- 1831, the authorizing
13 statute for the administrative -- the new
14 administrative process.

15 Essentially, this -- but nothing in that
16 statute takes away the authority of the BZA to hear
17 exactly this type of case. Section 641.07, at
18 subsection G, speaks to this issue. And it is
19 unamended, and there is no -- no repeal of this
20 section. It says that the BZA essentially has the
21 authority to hear and decide appeals where it is
22 alleged by the appellant that there is an error in any
23 order, requirement, decision, determination, or
24 refusal, made by the Inspector of Buildings or the
25 Mayor of the District of Columbia, or any other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 administrative office or body in the carrying out or
2 enforcement of any regulation adopted pursuant to this
3 subchapter.

4 I think that this is a very simple issue.
5 It's properly here. And I want to just close by
6 saying this. Bannum cannot bring, under principles of
7 law -- it waives its argument to say, "We're going to
8 bring a case and then say that you don't have
9 jurisdiction." By bringing the case, it's estopped
10 from challenging your jurisdiction. It's a very
11 simple principle.

12 It is -- we are in a cross-hairs, an
13 illogical catch 22. They're telling you, "We want to
14 challenge this, but you don't have jurisdiction to
15 hear it." That's just not logical, and I think they
16 waived that issue, and I think they are estopped from
17 bringing that issue. And I think that we should
18 proceed.

19 In closing, I just want to say we've been
20 on this case for three years almost, and each time
21 this particular approach -- we get to the substance --
22 when it comes to hearing the merits and substance of
23 the issue, there is some obfuscation of the process.
24 I think this is more of the same.

25 CHAIRPERSON GRIFFIS: Okay. Let me just

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 see if I'm clear on, Mr. Temple, your point is --
2 you're indicating that the action of rescinding the
3 revocation under OAH Act, as you cited in 1831, I
4 think it was .13(c), under that that is not properly
5 here as that's an error that -- however, the
6 revocation itself of the C of O is properly here.

7 MR. TEMPLE: That's correct.

8 CHAIRPERSON GRIFFIS: Okay. Mr. Gordon?

9 MR. GORDON: Mr. Temple brings up a good
10 point. 641.07 is not the statute in the regulation.
11 641.09 is. 641.09 is an infraction -- you know, deals
12 with infractions, injunctions, penalties. And that's
13 with -- all revocations go to that section of the
14 statute, to look for the appeal to the BZA.

15 So I -- you know, I mean, to me I
16 understand what the Board is saying about this not
17 being zoning, but here it is. This is what -- this is
18 the statute that's cited in that regulation. That's
19 12A, 110.6 that says you can appeal to the BZA under
20 641.09, not 07. And I think we've addressed in our
21 brief why we think that is the correct citation,
22 because the revocation automatically brings the use
23 violation.

24 In terms of the idea that we have waived
25 or estopped -- we're estopped from arguing, I think

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that's what a protective -- protective appeals are
2 about.

3 I think, unless the Board has other
4 questions on the jurisdictional issues, I'd like to
5 proceed on the estoppel issue. Is that okay?

6 MR. TEMPLE: Mr. Griffis? Okay.

7 CHAIRPERSON GRIFFIS: Mr. Temple, did you
8 have a procedural question?

9 MR. TEMPLE: Just briefly. The point with
10 regard to the distinction between Section 641.09 and
11 07 is on the jurisdiction question. The question of
12 jurisdiction goes to the power of this particular
13 board to hear a case. And that particular session
14 specifically speaks to this court -- this
15 administrative body's power to hear certain cases.

16 So contrary to what counsel is saying, it
17 is precisely on point.

18 CHAIRPERSON GRIFFIS: Do you have a copy
19 of 641.07?

20 MR. TEMPLE: Yes.

21 CHAIRPERSON GRIFFIS: Can you give it to
22 Ms. Bailey? This is what I propose at this time. I
23 think this is excellent discussion that we've had in
24 terms of clarifying some of the points. What I want
25 to do is now set the clock, so that we all know

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 essentially how we're rolling on this.

2 I don't know that we'll have to use all
3 the time, because I'm sure you practiced and got it so
4 concise, down to 15 minutes, and we've used up some of
5 that time. But we can do that in order to have some
6 equity also in terms of how people are looking at
7 their discussion and highlights.

8 So I'll have Mr. Moy get several here, and
9 then, Mr. Gordon, you wanted to call someone. I'm
10 going to leave it up to you how you proceed, but
11 noting that you mentioned some time constraints.

12 MR. GORDON: Am I really just going to
13 have five minutes in terms of direct examination with
14 Mr. Lowry?

15 CHAIRPERSON GRIFFIS: No. I mean, I think
16 what I was trying to understand was, just giving a
17 capsulization, if we have 15 minutes for the
18 counselors to address the Board, we were going to just
19 set some limits in terms of the testimony of
20 witnesses. You know, I'm a little bit flexible as
21 long as we're not going way off the deep end.

22 Obviously, they -- your witness will be
23 able to be cross examined, as none of the other people
24 on the panel are. So we'd naturally be aware of that,
25 too. So with that, we'll turn it over, and I'll just

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 keep note. But this will give us some idea of where
2 we are.

3 MR. GORDON: I guess what I'm going to try
4 to do is go through the elements of estoppel in terms
5 of Mr. Lowry testifying about them. And then, if the
6 Board has any questions about whether -- you know,
7 about the legal aspects of what he said, I want to --
8 if I have any time left, I want to respond to those.
9 Okay?

10 CHAIRPERSON GRIFFIS: Okay. Actually, let
11 me just interrupt, because this may help a little bit.
12 Did we lose our attorney? No. Good. Ms. Monroe is
13 here.

14 I just want to discuss, as I'm not an
15 attorney, but I want to go through to make sure that
16 you're not assuming that you have to introduce
17 evidentiary elements through our witness, that we
18 can't have that just put in, so you don't utilize
19 time. I'm not sure if that's what you were trying to
20 do in terms of his testimony.

21 MR. GORDON: Well, I think there were some
22 things that were discussed in connection with estoppel
23 in the first BZA hearing. But I think there were some
24 gaps in what Mr. Lowry talked about, and some things
25 that I think the Board filled in by reading some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 documents. And some of the things the Board filled in
2 by -- you know, by things others may have said.

3 And I wanted to make sure that you
4 understood, basically what I'm trying to -- trying to
5 establish here is that Mr. Lowry will testify, which
6 we've said in our declarations and our papers, that he
7 relied on DCRA letters saying that we had proper
8 zoning at this facility, that he relied on those --

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. GORDON: -- that he -- and that -- and
11 that his reliance was reasonable for two reasons. One
12 is that no objections were received, no appeals were
13 made during long stretches of time, and that by the
14 time any objections were learned he was under
15 obligations contractually that he couldn't escape
16 from, and that he had to -- had already expended a lot
17 of money.

18 CHAIRPERSON GRIFFIS: Let me ask you this,
19 Mr. Gordon. How is that now?

20 MR. GORDON: I think what's new is that
21 the BZA, in the first hearing, was focused on estoppel
22 in terms of the ANC. You were saying the ANC can't be
23 estopped, right, because they -- what do they have to
24 do with it? Okay.

25 CHAIRPERSON GRIFFIS: But is this not a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 repackaging of the same issues?

2 MR. GORDON: It's -- well, there are some
3 things that came out in terms of estoppel. When you
4 want to -- when I looked at the Board's decision on
5 estoppel in the footnote, when it said you haven't met
6 the elements of estoppel, I don't think there was a
7 complete -- you know, first of all, the decision is
8 confusing in a way if you say on page 10 that an
9 administrative decision by DCRA, a letter saying you
10 have proper zoning, is something that is an appealable
11 issue. It's something that's a significant event, you
12 know, in the process.

13 How, then, someone cannot rely on that
14 event, you know, for extended periods, how someone
15 cannot rely on that event for extended periods before
16 entering into a contract that will bind them --

17 CHAIRPERSON GRIFFIS: I think we either
18 proceed or not. It seems like we're bringing up
19 elements of reconsideration. I mean, I don't -- I
20 think in terms of the letter -- the Zoning
21 Administrator's interpretive letter, my gosh, the
22 record is entirely full on that, if not diverse in its
23 fullness on that.

24 And I think it was fairly determinative,
25 although it's complex perhaps in what was established.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Ms. Miller, did you have comments?

2 VICE CHAIRPERSON MILLER: Yes. It also
3 goes to that footnote that I read about the
4 certificate of occupancy that was addressed in the
5 previous order, because I guess my question is -- it
6 seems as if revocation of a certificate of occupancy
7 naturally flowed from the Board's Order 16998. And
8 that your case on estoppel is one that could have been
9 made in the previous case.

10 I don't think that -- I don't know that
11 there are things new, and maybe you can address it.
12 I know it wasn't addressed, but that may be because
13 you didn't raise them then, because it sounds as if
14 this is an appeal of our earlier decision.

15 MR. GORDON: Well, I think the elements of
16 estoppel are good faith reliance on decisions. Okay?
17 Whether they're permanent improvements, okay, there
18 has been a challenge as to whether making a warehouse
19 into something where you could live is not a permanent
20 improvement.

21 And then, the last one is whether we had
22 any notice at the time of whether there could be
23 anything -- anything wrong with the zoning. And I
24 think the Board -- I think it was dictum in terms of
25 the Board -- you know, in terms of that footnote that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the Board wrote about estoppel. I don't think it was
2 -- it was actually integral to the decision, because
3 here we're looking at, can estoppel work against the
4 ANC?

5 So in that sense, it's not -- it would not
6 be precluded, since it's dictum. There hasn't been a
7 decision on really a focused approach to this element.

8 VICE CHAIRPERSON MILLER: I understand
9 there hasn't been a decision, and I understand your
10 case about estoppel. But my question goes to:
11 shouldn't it have been raised, then, in the previous
12 case as a motion for reconsideration, or whatever, or
13 an appeal of the Board's decision, as opposed to some
14 new case here related to the revocation?

15 MR. GORDON: Well, in terms of the
16 certificate of occupancy itself, I think that came at
17 a time -- I think one of the things the Board said was
18 that the stop work order -- not issuing the stop work
19 order when it was requested was not an affirmative
20 act.

21 And we have some testimony that was not
22 brought up before, because I don't think -- I think
23 some of the things that came in the Board's decision
24 couldn't have been anticipated at the time that the
25 hearing was going on.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I think that we wouldn't have understood
2 that this would become an issue later in the Board's
3 decision.

4 VICE CHAIRPERSON MILLER: Then, you have
5 a chance to move for reconsideration or appeal.

6 MR. GORDON: We've appealed, and we
7 brought those issues up on appeal.

8 VICE CHAIRPERSON MILLER: So these issues
9 are in the court?

10 MR. GORDON: That's right. And this is --
11 but this is a different case. This is the certificate
12 of occupancy. And as to the certificate of occupancy,
13 the DCRA contacted us, contacted Mr. Lowry at -- you
14 know, at a time prior to the appeal. There's no
15 testimony on that in the record. There was just --
16 there was no testimony brought up in the original
17 record. That's one issue.

18 Second issue would be the idea of whether
19 this was -- whether he had acted in good faith. You
20 know, people have alleged that, other places we
21 haven't, and they say that the lease was a sham, for
22 example, is one of the things that was said in the
23 opinion. But there was no testimony on it at that
24 time -- the Board didn't ask, none of the lawyers
25 asked, no one knew that was coming up, I would say,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and it came out in the opinion.

2 So now it's something that we're dealing
3 with here in our second case, which is the revocation.
4 Now, this is just specifically whether DCRA should be
5 estopped from what they did. I see that as being --
6 as being new and something to be redecided by the
7 Board, because now you're just focusing on what DCRA
8 did. Did they lead us? Did they lead us into this
9 position that we're in?

10 CHAIRPERSON GRIFFIS: Okay. Mr. Temple,
11 you had a comment?

12 MR. TEMPLE: Yes. Thank you. What Bannum
13 is essentially asking this Board to do is to rule
14 that, based upon a theory of estoppel, as a matter of
15 law, it's indisputable that you should kick this case
16 out. You should dismiss it.

17 And I would suggest to you that it's a
18 back doorway of seeking a reconsideration of not only
19 -- of the prior decision in this regard. This Board
20 -- first of all, the issue of estoppel was raised as
21 a preliminary issue in the prior case, the very same
22 issues that are being raised here.

23 They are, therefore, estopped. A decision
24 was made by this Board procedurally on the very same
25 factual questions. The expenses that were incurred,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you may recall, etcetera, and all of the risks that
2 were made by Mr. Lowry in pursuing this. This Board
3 decided against it.

4 Secondly, and most fundamentally, in its
5 decision this Board, after consideration of
6 considerable evidence, decided that Bannum committed
7 a sham on the District of Columbia.

8 CHAIRPERSON GRIFFIS: Poor choice of
9 words. Not yours, ours, but poor choice of words.

10 MR. TEMPLE: Well, the words are written
11 and decided. It's what it is. But the point is is
12 that the issue -- the element upon which -- which they
13 rely to show that there is a basis for equitable
14 estoppel is that of good faith.

15 There is considerable evidence over and
16 beyond that that Bannum has not operated in good faith
17 in its dealings with the District of Columbia. And I
18 think it is a danger zone, more of the same, more
19 delay, more unnecessary delay, in getting to the
20 substance and the core of this hearing.

21 I think that you need not reach that,
22 based upon the decision that you already made, and I
23 think you open up a Pandora's Box in that regard.

24 CHAIRPERSON GRIFFIS: Okay.

25 BOARD MEMBER ETHERLY: Mr. Chair, if I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 could -- if I could follow up on that with Mr. Temple.
2 I tend to agree with you. I'd like to ask you, Mr.
3 Temple, does it -- does it make any difference
4 substantively if the argument for estoppel in the
5 prior proceeding was made against the -- was made with
6 the ANC as the focus as opposed to DCRA? I don't
7 think it does, but I'd like to have some -- some
8 discussion the record.

9 MR. TEMPLE: There are two legal theories
10 which address that particular issue. One is that of
11 res judicata, and the other is collateral estoppel.
12 This is not a res judicata argument that I make. It's
13 a collateral estoppel issue.

14 It is a different party, but it is the
15 same legal issues, i.e. that if they would have known
16 certain things they wouldn't have done certain things,
17 etcetera, etcetera, and that their expenses and
18 losses, the same economic-type issues that are
19 addressed in Mr. Lowry's affidavit, are mirrors of the
20 same issues that were previously addressed.

21 So to answer your question, it doesn't
22 make a difference that it was a different party.

23 BOARD MEMBER ETHERLY: Thank you.

24 Thank you, Mr. Chair.

25 CHAIRPERSON GRIFFIS: Good.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. GORDON: Mr. Etherly, I think I'd have
2 to disagree with Mr. Temple's view of collateral
3 estoppel. First, you have to have the decision being
4 on the same basis. If you're just looking to see
5 whether the ANC can be estopped, and you stop there,
6 things that are added are dictum. They're not part of
7 the decision that was decided.

8 So you're not collaterally estopped if the
9 Board hasn't actually decided, as DCRA, can they be
10 estopped? And I don't think the Board really did
11 that. So the focus is on ANC. I think there's a
12 footnote saying, "We're not sure these other elements
13 would be met," but it was dictum. It was not a
14 finding. That makes it different than a regular
15 collateral estoppel where it's the same issue decided
16 with -- on the same party. So that's -- I think
17 that's my point.

18 CHAIRPERSON GRIFFIS: Let's go, because
19 you're going to -- you're going to address more on
20 that. Is that correct?

21 MR. GORDON: I was just going to -- the
22 only thing I was going to go through with Mr. Lowry
23 was what happened.

24 CHAIRPERSON GRIFFIS: Let's do it.

25 MR. GORDON: Ready?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON GRIFFIS: Yes.

2 MR. GORDON: Okay. All right. Did the
3 Bureau of Prisons require you to have proper zoning?

4 MR. LOWRY: Yes. Before they would issue
5 us a contract, we had to demonstrate proof of zoning.

6 MR. GORDON: Okay. And how did you
7 develop proof of zoning?

8 MR. LOWRY: Once we located a property, we
9 contacted local attorneys -- Holland & Knight -- met
10 with a zoning expert, and they told us their opinion
11 was the property was properly zoned, and they obtained
12 proof of zoning that I submitted to the BoP. And they
13 awarded a contract on that basis.

14 MR. GORDON: All right. When did you
15 first notify anyone that you might be entering into a
16 contact for a community correctional center at 2210
17 Adams Place?

18 MR. LOWRY: In November 2000, I sent
19 certified letters, as required by the BoP, to the
20 Mayor, his Chief of Staff, and the Police Chief,
21 notifying them, and had discussion about what a
22 community correction center was.

23 MR. GORDON: Okay. And after you received
24 the DCRA letter in December 2000 stating that you had
25 proper zoning, did you notify the community officials

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 again?

2 MR. LOWRY: Yes. We -- all told, we
3 notified the Mayor twice by certified mail, the Chief
4 of Police twice by certified mail, Vincent Orange
5 twice by certified mail, and the Mayor's Chief of
6 Staff once by certified mail, and never -- based on
7 those notifications, we never received any objections.

8 MR. GORDON: Okay. And those
9 notifications were sent out to these people, second
10 notifications, in March and April of 2001?

11 MR. LOWRY: Yes.

12 MR. GORDON: Okay. All right. When did
13 you enter the BoP contract with the Bureau of Prisons?

14 MR. LOWRY: The BoP awarded the contract
15 November 16, 2001.

16 MR. GORDON: All right. At the time --
17 and that's seven months after the last time you
18 notified -- or six months -- six, seven months after
19 the last time you notified the community.

20 MR. LOWRY: Yes.

21 MR. GORDON: You had heard no objections
22 or appeals at that point.

23 MR. RUSHKOFF: Objection. Leading.

24 CHAIRPERSON GRIFFIS: I'm sorry. What was
25 the objection? He's leading him?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. RUSHKOFF: Leading.

2 MR. GORDON: Had you heard any objections
3 to the location of the facility from a anyone at that
4 point?

5 MR. LOWRY: No.

6 MR. GORDON: Okay. Would you have entered
7 the contract with the Bureau of Prisons had you had
8 any idea that the zoning was potentially improper?

9 MR. LOWRY: No.

10 MR. GORDON: Okay. Okay. Did you ever
11 notify the ANC that you intended to enter into a
12 contract with the BoP for a community correctional
13 center?

14 MR. LOWRY: Yes. In April 2002, we met
15 with the three ANC leaders. The Bureau of Prisons was
16 also involved in the meeting, as was a Mayor's
17 representative. In fact, at the meeting, the three
18 ANC leaders agreed to be Bannum's initial community
19 relations board. They agreed to begin development of
20 a memorandum of understanding with the community.

21 MR. GORDON: Okay. When did you begin to
22 incur expenses in terms of renovating the facility for
23 a community correctional center?

24 MR. LOWRY: Well, we -- we started
25 incurring expenses in August or September, because we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 had to get contractor bids, we had to travel up to
2 evaluate the bids. We had to get architectural plans,
3 we had to hire an engineer, we had to have an
4 expediter to get our plans through.

5 So there were expenses that weren't really
6 -- that were related to construction that we -- we
7 expended before we were actually issued the building
8 permit.

9 MR. GORDON: Okay. After the building --
10 when was the building permit issued?

11 MR. LOWRY: I believe it was December 12th
12 of 2002.

13 MR. GORDON: Okay. And at that point,
14 heard you heard any objections from anyone at the ANC
15 or anyone in the community?

16 MR. LOWRY: No.

17 MR. GORDON: Okay. So you still believe
18 your zoning was proper at that point?

19 MR. LOWRY: Yes. In fact, right after we
20 had been awarded the contract, we reverified zoning
21 with DCRA. We had another zoning letter.

22 MR. GORDON: Okay. And, okay, when did
23 you first learn that there was any opposition at all
24 to the community correctional center at 2210 Adams
25 Place?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. LOWRY: When the Director of DCRA
2 telephoned me and told me it was -- it was around
3 January 16th or so, and he told me -- 2003, and he
4 said that Vincent Orange, a Councilman, had filed some
5 kind of motion to try to get a stop work order.
6 Because of that, he was going to review our
7 application. And, remember, the building permit had
8 already been issued.

9 He said because of the Councilman being
10 involved in a request for a stop work order, he was
11 going to review the file to make sure that everything
12 was above board. He reviewed the file, and he told me
13 that we needed to revise the language we had put on
14 our application to read something along the lines of
15 a temporary correctional institution, for a period not
16 to exceed three years.

17 We did that, and then we got another --
18 the second building permit. So we had two. And at
19 that point, that was the only objections I had heard.
20 I had met with the ANC. I had notified the Mayor.
21 All of this occurred over a two-year period. Not one
22 objection. They started spending money.

23 MR. GORDON: Okay. After the appeal was
24 filed at the Board of Zoning Adjustments by the ANC,
25 why didn't you stop work on the contract?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. LOWRY: I couldn't. I had -- I had
2 signed the contract. We had started. I had signed
3 with construction people. We had started renovation.
4 We were issued two building permits, and we were -- I
5 didn't have any choice. I had to go or I'd be held in
6 default.

7 MR. GORDON: Okay. All right. And I
8 guess my last question is: did you -- oh, yes, one
9 other question. Were the improvements that you made
10 to the facility permanent?

11 MR. LOWRY: Yes. We -- before we started
12 renovation, we had a warehouse. So we added walls,
13 plumbing, dropped ceiling, electrical, flooring,
14 sprinkler, fire alarm, everything to turn it into a
15 residential unit. It was simply a warehouse.

16 MR. GORDON: Okay. And those are
17 permanent structures?

18 MR. LOWRY: Yes.

19 MR. GORDON: Okay. Did you intend to stay
20 at 2210 Adams Place beyond the three-year period of
21 your zoning?

22 MR. LOWRY: We had hoped we would be able
23 to, but we were prepared to leave, because we were
24 very aware the zoning -- especially after my
25 conversation with David Clark, it was a temporary

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 correctional facility.

2 MR. GORDON: Okay. Did you take any steps
3 in light of the fact that it was only a three-year
4 zoning with respect to your contracts?

5 MR. LOWRY: I'm sorry?

6 MR. GORDON: Did you take any steps to
7 deal with the fact that you only had three-year zoning
8 with any of your contracts or leases with the BoP or
9 the landlord?

10 MR. LOWRY: Yes. We informed the BoP that
11 it was temporary zoning, and we may have to leave
12 after three years. And in our lease with the
13 landlord, we discussed that it was temporary zoning,
14 and we may have to leave after three years.

15 MR. GORDON: Okay. If you -- how did you
16 plan on, if at all, on staying at 2210 Adams Place,
17 N.E., after the three years?

18 MR. LOWRY: Well, after the -- before the
19 three years was up, we intended to either file a
20 variance, have the laws changed, or find another
21 facility.

22 MR. GORDON: Okay. Did you attempt --
23 have you attempted any of those things?

24 MR. LOWRY: Yes. We hired a political
25 consultant who so far has not been able to help in any

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of those areas. We had him focus on those three
2 areas, and he hasn't been successful.

3 MR. GORDON: Okay. So I think I have no
4 further questions.

5 CHAIRPERSON GRIFFIS: Any questions from
6 the Board?

7 (No response.)

8 Mr. Rushkoff, do you have cross? Mr.
9 Temple?

10 MR. RUSHKOFF: I'm going -- Mr. Temple
11 asked if he could go first.

12 CHAIRPERSON GRIFFIS: Sure. Fine by me.

13 MR. TEMPLE: Sir, I'd like to direct your
14 attention to your Exhibit 4 in your submission, your
15 letters to the Zoning Administrators for the District
16 of Columbia, dated -- the first letter -- December 11,
17 2000.

18 MR. GORDON: I guess I have -- I have a
19 clarification. I don't know exactly what -- I think
20 what we're going to be doing here is talking about the
21 letter -- you know, the same kind of testimony that
22 was heard at the first BZA hearing. It will not go to
23 the elements of estoppel. Could you please clarify
24 how it goes to the elements of estoppel, Mr. Temple?

25 MR. TEMPLE: I will not. I'll do what Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Griffis tells me to do.

2 CHAIRPERSON GRIFFIS: I guess I need a
3 clarification of the questioning, too.

4 MR. TEMPLE: Mr. Griffis, I made the
5 argument at the outset --

6 CHAIRPERSON GRIFFIS: Right.

7 MR. TEMPLE: -- that this was redundancy.
8 This gentleman just went over evidence that was
9 presented in the first case.

10 CHAIRPERSON GRIFFIS: Right.

11 MR. TEMPLE: I'm merely cross examining
12 the gentleman on what he has testified to, which does
13 go to fundamentally the good faith. He is suggesting
14 that they told the District of Columbia what they were
15 going to do, and they relied on the District of
16 Columbia's "approval."

17 CHAIRPERSON GRIFFIS: Right.

18 MR. TEMPLE: And I'm going to show the
19 Board that that's not true.

20 CHAIRPERSON GRIFFIS: Okay. Let's move
21 ahead. Ask the question again, please.

22 MR. TEMPLE: Yes. I'm directing the
23 gentleman's attention to his December letter, 2000
24 letter to Mr. Michael Johnson, Zoning Administrator.

25 CHAIRPERSON GRIFFIS: That's in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 filings under an exhibit?

2 MR. TEMPLE: It's under their Exhibit 4 in
3 their submission dated December 7, 2005.

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. TEMPLE: It's one of the two zoning
6 letters. I'd like to juxtapose that, sir, with the
7 letter that was sent to the Mayor of our city that you
8 referred to, which is at Exhibit 7.

9 Mr. Lowry, do you at any point in your
10 letter of December 11, 2000, say to the Zoning
11 Administrator that this is going to be a five-year
12 contract?

13 MR. LOWRY: Well, neither one of these are
14 my letters. One is from our attorney, one is from our
15 Operations Director.

16 MR. TEMPLE: Does it state anywhere in
17 this letter, sir, that this is going to be a five-year
18 contract?

19 MR. LOWRY: In which letter?

20 MR. TEMPLE: The letter dated December 11,
21 2000.

22 MR. LOWRY: I don't know. I'll have to
23 read it. It says temporary detention or correctional
24 institution on leased property for a period not to
25 exceed three years.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. TEMPLE: Question, sir: does this
2 letter state -- isn't it true that this letter does
3 not state that this facility is going to be in use for
4 a five-year period of time?

5 MR. LOWRY: Okay. Yes.

6 MR. TEMPLE: Okay. Let me direct your
7 attention to the letter dated April 10th to the Mayor
8 of the District of Columbia, April 10, 2001. Do you
9 have that letter in front of you?

10 MR. LOWRY: Yes.

11 MR. TEMPLE: Okay. I'd like to direct
12 your attention to the last paragraph on the first
13 page.

14 MR. LOWRY: Yes.

15 MR. TEMPLE: Do you see that, beginning
16 with "the total"?

17 MR. LOWRY: Yes.

18 MR. TEMPLE: Can you read, please, the
19 first sentence in that paragraph?

20 MR. LOWRY: "The total term of the
21 proposed contract is five years."

22 MR. TEMPLE: Can you explain to the panel,
23 please, why in one letter to the Zoning Administrator
24 when you're seeking zoning approval you don't state
25 that it's a five-year contract, but in the letter to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the Mayor and to Vincent Orange you state that it's a
2 five-year contract, and with other much more
3 substantial details about the use of the facility?

4 MR. LOWRY: It's very simple. The
5 April 10, 2001, letter is a letter that the BoP
6 requires that we send certified mail. Most of this
7 language comes right out of the BoP's contract and
8 statement of work. Our attorney sent this letter.

9 MR. TEMPLE: Did you explain to the Zoning
10 Administrator, sir, in your 2000 -- your December 2000
11 letter that you had a one-year option contract with --
12 a one-year contract with four one-year options?

13 MR. LOWRY: I didn't. I don't know what
14 our attorney told me they explained -- discussed the
15 contract.

16 MR. TEMPLE: And did you explain to the
17 landlord when you leased the facility that you
18 intended to lease it for up to a maximum of five to
19 six years, including the option years on the contract?

20 MR. LOWRY: I believe that's in the lease,
21 yes.

22 MR. TEMPLE: And so, in fact, the Zoning
23 Administrator didn't have the benefit of the complete
24 details of your contractual arrangement with the
25 Bureau of Prisons when you submitted the letter to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Zoning Administrator in December 2000. Isn't that
2 correct?

3 MR. LOWRY: It may have been, and I think
4 that's why David Clark wanted to -- me to insert the
5 language "temporary, three-year facility," and then we
6 relied on that language.

7 MR. TEMPLE: And when you did your
8 subsequent letter in November 2001, you still did not
9 state that you had a contract which was a maximum of
10 up to five years, isn't that correct?

11 MR. LOWRY: That's correct.

12 MR. TEMPLE: And in neither of the letters
13 to the Zoning Administrators did you state that these
14 facilities were considered halfway houses, did you?

15 MR. LOWRY: They're called community
16 correction centers. You can call them whatever you
17 want.

18 MR. TEMPLE: Isn't it true, sir, under the
19 Bureau of Prison contract, which is part of the
20 record, the first record, that these facilities are
21 called, in the alternative, halfway houses?

22 CHAIRPERSON GRIFFIS: Is it part of this
23 record?

24 MR. TEMPLE: Part of the record upon which
25 this gets based on the first record.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. LOWRY: I don't know what they're
2 called in the alternative. Primarily, they're called
3 community correction centers.

4 MR. TEMPLE: Indulgence. You mentioned
5 that you met with the Board -- the ANC Commission 5B,
6 okay? Isn't it true that the D.C. Office of Campaign
7 Finance has cited you for making illegal financial
8 contributions to ANC members with whom you met --

9 CHAIRPERSON GRIFFIS: But what's the
10 relevancy in terms of the testimony of --

11 MR. TEMPLE: Because he is talking about
12 good faith. He opened the door, Mr. Griffis, to
13 suggesting that he did what he was supposed to do to
14 secure this particular certificate of occupancy.

15 MR. LOWRY: I'll answer that.

16 MR. TEMPLE: Excuse me, sir. If I may
17 answer the question. What we're saying is that --
18 we're showing is that on the record you could take
19 judicial notice is that another agency -- this
20 government -- has repeatedly, in four different
21 instances, cited Mr. Bannum for violation of D.C.
22 election law, campaign finance laws, for illegal
23 contributions to ANC members related to this
24 particular event.

25 CHAIRPERSON GRIFFIS: Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. LOWRY: I was cited, and I was later
2 exonerated.

3 CHAIRPERSON GRIFFIS: Next question?

4 MR. LOWRY: I'm sorry. I wasn't cited;
5 Bannum was. And Bannum was later exonerated.

6 MR. TEMPLE: No further questions.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. RUSHKOFF: Mr. Lowry, at any point did
9 DCRA lead you to believe that you would have -- or
10 that you had some sort of zoning approval for more
11 than a three-year period?

12 MR. LOWRY: I believe the initial -- or
13 let me see the initial letter. No. No.

14 MR. RUSHKOFF: Okay. At what point did
15 you learn that the issuance of a building permit by
16 DCRA could be appealed, say, to the BZA?

17 MR. LOWRY: I didn't learn of that until
18 much later, until all of this stuff started happening.

19 MR. RUSHKOFF: Until there actually was an
20 appeal, you just didn't know about that.

21 MR. LOWRY: Yes.

22 MR. RUSHKOFF: And at what point -- or
23 have you -- have you learned, or are you aware that
24 the BZA's decision can be appealed to a court?

25 MR. LOWRY: Yes. Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. RUSHKOFF: Okay. And did you learn
2 that during the BZA proceeding?

3 MR. LOWRY: I believe I did.

4 MR. RUSHKOFF: Okay. Has Bannum taken
5 steps to prepare for a possible closing of the
6 facility prior to May of 2006?

7 CHAIRPERSON GRIFFIS: What? I don't
8 understand where we're going with that. Didn't you
9 testify about the closing? Or what's the relevancy?

10 MR. RUSHKOFF: The relevance is that it
11 goes to the issue of harm to Bannum. I mean, Bannum
12 is making an equitable argument that the harm to it is
13 so severe that this Board cannot enforce the
14 District's zoning regulations against it.

15 If, hypothetically -- I have no idea, I
16 don't know what the answer is, but if Bannum has taken
17 steps to deal with the possible loss of the facility,
18 and I'm assuming Bannum has, knowing what those steps
19 are could provide -- shed some light on exactly how
20 dire a situation Bannum is in right now. And that
21 goes to the Board's --

22 CHAIRPERSON GRIFFIS: I don't want to go
23 too far into any sort of --

24 MR. RUSHKOFF: No, I'm not going very far.
25 I'm asking just --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON GRIFFIS: Okay.

2 MR. RUSHKOFF: -- this question.

3 MR. LOWRY: Well, we hired attorneys,
4 spent a fortune on legal fees, and we've hired a
5 political consultant to try to save our contract,
6 either at the existing location, relocation of --
7 through the variance process, whatever we can do. But
8 we haven't been successful as I sit here.

9 MR. RUSHKOFF: But you've described steps
10 you've taken to avoid a closing. And I'm just asking
11 -- my question was whether or not you have done any
12 planning for the possibility that there will be a
13 closing.

14 MR. LOWRY: No. No, I have not.

15 MR. RUSHKOFF: Okay.

16 MR. GORDON: I'd caveat that. The
17 attorney-client privilege would cover any plans we
18 might have to defend against a default determination.
19 So is that what you're asking?

20 MR. RUSHKOFF: No. I was wondering what
21 they're going to do with the prisoners, what your
22 plans are in the event that it's shut down. I mean,
23 did you have any --

24 CHAIRPERSON GRIFFIS: Well, actually,
25 that's interesting. There's two timing milestones

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that I was hearing. One is, what were you planning to
2 do at the end of three years when the term was --

3 MR. RUSHKOFF: No, that's not what I
4 asked.

5 CHAIRPERSON GRIFFIS: Okay. I thought I
6 heard --

7 MR. RUSHKOFF: I asked what they would do.
8 No, that's not what I asked.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. RUSHKOFF: If I did, I misspoke. I
11 was trying to find out what their contingency plan is
12 in the event the facility is closed prior to May of
13 2006.

14 For example, the answer could be, "We have
15 an empty facility in College Park, and they would all
16 be moved there."

17 CHAIRPERSON GRIFFIS: Okay. I'm just --
18 was trying to find out.

19 MR. LOWRY: That's strictly up to the
20 Bureau of Prisons. I don't know what their plan is,
21 if we close. But right now there -- I still have a
22 contract, and I'm still honoring that contract. But
23 all plans as far as where the residents would go is
24 strictly up to the Bureau of Prisons.

25 MR. RUSHKOFF: And you haven't had

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 discussions with them about that.

2 MR. LOWRY: We've had discussions that --
3 no, not specifically what their plans are. They just
4 said they would make some kind of arrangements if we
5 had to shut down.

6 MR. RUSHKOFF: Now, attached to Bannum's
7 submission of December 19th, as Exhibit 2, the first
8 document is a declaration of David A. Lowry. And it's
9 not a dated document, and I'm wondering if you can
10 recall about when this declaration was prepared.

11 MR. LOWRY: The notary is June 14th.
12 That's June 14th, '09. That's the expiration.

13 MR. RUSHKOFF: That's the notary public's
14 commission expiration date.

15 MR. LOWRY: Yes, I see that.

16 MR. RUSHKOFF: Well, can you tell from
17 reading it about when it -- when you --

18 MR. LOWRY: This is my first declaration?

19 MR. RUSHKOFF: I suspect it's your second,
20 because there's an affidavit -- there's an affidavit
21 that appears to be older, but I'm not sure.

22 MR. GORDON: Yes. I can represent this --
23 this declaration was made in connection with a motion
24 for stay at the D.C. Court of Appeals. So it had to
25 be in July.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. RUSHKOFF: Would that be about 2004?
2 Okay. Now, is it true that Bannum invested
3 approximately \$450,000 in this facility before the
4 appeal was filed at the BZA, is that about right?

5 MR. LOWRY: I believe so, yes.

6 MR. RUSHKOFF: And is it true that they
7 expended an additional investment of approximately
8 \$758,000 after the BZA appeal?

9 MR. LOWRY: Yes.

10 MR. RUSHKOFF: So that would bring the
11 total investment to about \$1.2 million?

12 MR. LOWRY: Yes.

13 MR. RUSHKOFF: And then, is it true that
14 Bannum would lose profits of \$12,000 a day if the
15 certificate of occupancy is revoked?

16 MR. LOWRY: That figure was based on the
17 population of 150, with \$80 per inmate per day.
18 That's what our contract says, so that's -- that's
19 where the \$12,000 -- that's \$12,000 of the revenue.

20 MR. RUSHKOFF: Okay. So you didn't mean
21 profits, you meant revenue.

22 MR. LOWRY: Yes, I believe. Yes.

23 MR. RUSHKOFF: And how many -- what is the
24 population of the facility?

25 MR. LOWRY: Right now it's about 80, 85.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 The Bureau of Prisons has only -- only been keeping
2 about half of the people they contacted for.

3 MR. RUSHKOFF: Okay. Now, further along
4 there's an affidavit attached after it, and I'm -- I
5 think -- Exhibit 2 there's an affidavit attached after
6 the declaration. And there's a reference -- I just
7 want to confirm this is -- there's a reference to
8 Bannum having a minimum daily fixed operational cost
9 of \$4,150 at the facility. Is that --

10 MR. LOWRY: Which paragraph?

11 MR. RUSHKOFF: Oh, this is paragraph 12.

12 MR. LOWRY: Yes, that's true.

13 MR. RUSHKOFF: Okay. How high has
14 Bannum's population gotten at this facility? How high
15 has the residential population been?

16 MR. LOWRY: I believe the highest point
17 was about 102, and the lowest point -- the first month
18 we opened I think we only averaged nine or ten people.

19 MR. RUSHKOFF: I assume that the
20 population rose during the first several months.

21 MR. LOWRY: Yes.

22 MR. RUSHKOFF: And did it eventually
23 plateau at a particular level?

24 MR. LOWRY: It has averaged about, best I
25 can recall, about 80 people. And it's 150 mid-

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 contract.

2 MR. RUSHKOFF: And it's been over 100, at
3 least at one time.

4 MR. LOWRY: I think on a couple of
5 occasions it has been over 100, but not much over.

6 MR. RUSHKOFF: And when you were planning
7 this facility, did you have a projected break-even
8 point in terms of number of months or years of
9 operation?

10 MR. LOWRY: No, not in terms of tab, no.

11 MR. RUSHKOFF: And do you know whether
12 Bannum has recovered its investment in the facility?

13 MR. GORDON: I think I've got to object at
14 some point, if this is legally irrelevant to estoppel.
15 You know, I can see talking about equities, but how
16 much -- how much you recovered, how much money you
17 made, really is not the equities that they're talking
18 about.

19 CHAIRPERSON GRIFFIS: I tend to agree
20 somewhat, but I think it actually goes even further,
21 that we're going well beyond what the testimony
22 actually was, although we're talking about questions
23 individually here on the affidavits and evidence that
24 was submitted.

25 However, having kind of an accounting of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the entire system, I haven't seen how we can get into
2 that into cross. It may well be a point that's
3 brought up, which you pretty much made, but I think we
4 should move on from here.

5 MR. RUSHKOFF: Okay. I think that
6 concludes my questions. Thank you.

7 MR. TEMPLE: May I just ask a followup
8 series of questions, Mr. Griffis?

9 CHAIRPERSON GRIFFIS: Series of questions?

10 MR. TEMPLE: Briefly. It's very brief,
11 though.

12 CHAIRPERSON GRIFFIS: On the testimony you
13 just heard?

14 MR. TEMPLE: On the original testimony.
15 It's cross -- still cross, within the line of cross.

16 CHAIRPERSON GRIFFIS: Well, we kind of
17 went through it, didn't we?

18 MR. TEMPLE: Not completely. It would
19 only be about three -- three or four questions.

20 CHAIRPERSON GRIFFIS: Quickly.

21 MR. TEMPLE: Yes. Mr. Lowry, how many --
22 can you tell the panel how many halfway houses or
23 community correctional centers do you operate in the
24 United States?

25 MR. GORDON: I think this is definitely

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 not --

2 CHAIRPERSON GRIFFIS: Yes, that's going
3 well beyond where we're going. I don't understand the
4 relevance.

5 MR. TEMPLE: Well, if I may.

6 CHAIRPERSON GRIFFIS: Quickly.

7 MR. TEMPLE: Okay. To the extent that
8 we're talking about good faith, the gentleman has
9 testified that he thought and believed that he secured
10 zoning approval. The questions are designed to show
11 this panel that the gentleman operates in about 17
12 different cities or states.

13 And the followup questions is that he has
14 sued the community under the city- or the community-
15 based organizations, and many of those states -- in
16 cases that show a level of sophistication that you
17 need to understand, relative to his representation
18 that this one-page letter constitutes a zoning
19 approval.

20 CHAIRPERSON GRIFFIS: Okay. I don't think
21 we'd be able to easily get there. Let's move ahead.

22 Okay. Anything else?

23 MR. GORDON: I guess just one comment upon
24 Mr. Temple's testimony.

25 Do you have to go? Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. LOWRY: May I be excused?

2 CHAIRPERSON GRIFFIS: Yes, I don't think
3 we'll need Mr. Lowry any more. We appreciate your
4 time, and travel safely.

5 MR. LOWRY: All right. Thank you.

6 MR. GORDON: In terms of the DCRA letters
7 that Mr. Temple brings up, I think you have to
8 remember that DCRA continued to support Bannum all the
9 way through this Board. So there is no question that
10 DCRA knew exactly what Bannum had there, what their
11 contract was, and so forth, all the way through to
12 litigation.

13 And I think in terms of the letter of the
14 five-year contract, the lease that goes longer than
15 five years, our -- I think we put in our brief, the
16 proposal says it's three years. It's limited. The
17 lease says, "Yes, we can -- we'll stay longer if we
18 get government approvals. But if we don't, we are
19 out." Those are actions that were taken by a
20 businessman to make sure that they didn't get killed
21 if the zoning was what it was, and it was.

22 So, in terms of -- and I think I made the
23 argument on profits. Profits that -- I made a mistake
24 in one of the declarations. I said profits. He
25 didn't catch it. It's revenues. So that was revenues

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 at full bore. It's different than profit, because it
2 doesn't account for costs.

3 Bannum obviously had spent a lot of money
4 on lawyers and all sorts of other expenses it didn't
5 anticipate, and it's still in a position that if it --
6 if this contract stops short of three years, it can
7 still be sued, and it can be defaulted.

8 And those are big things to -- I don't
9 think there's any harm to anyone -- and I guess this
10 will be my closing -- I don't think there's any harm
11 to anyone --

12 CHAIRPERSON GRIFFIS: Save your closing.
13 You've got 10 minutes left at the end, and we can get
14 through the others, unless there's other elements you
15 want to discuss now.

16 Good. We'll set aside 10 minutes. We had
17 13 minutes left over. I'll take those three minutes
18 of that statement now, 10 minutes for closing. And
19 how do you want to proceed? Mr. Rushkoff? Mr.
20 Temple? Would you like to be next?

21 MR. RUSHKOFF: DCRA isn't putting on any
22 witnesses, so I --

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. RUSHKOFF: -- I would be happy to just
25 proceed to closings, and I would assume that Bannum,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 as the appellant, would close first. And then, DCRA
2 would respond.

3 CHAIRPERSON GRIFFIS: And leave the
4 appellant not -- and closing the last --

5 MR. RUSHKOFF: That's fine.

6 CHAIRPERSON GRIFFIS: Doesn't really
7 matter to me, but as long as we can be expeditious.
8 Ms. Miller had a quick question, however, in the
9 meantime.

10 VICE CHAIRPERSON MILLER: I'm still stuck
11 on the procedural issue, and I just -- one of them,
12 and I just want you perhaps just to keep it in mind in
13 case you can address it and clarify it more for me.
14 But -- and I was a dissenting member on the Board's
15 decision, but we -- we do have a Board decision, and
16 my question is: doesn't revocation of a certificate
17 of occupancy flow from that order?

18 And if the revocation is being challenged,
19 is not our decision being challenged? That decision
20 -- and I guess, again, what is -- I know the theory is
21 new here, but, you know, why shouldn't that have been
22 addressed in the earlier case?

23 MR. GORDON: I think the way I can answer
24 that is that in the first hearing, the only issue that
25 I think -- you know, whether the revocation is good or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 not, whether it flows from the decision, the decision
2 says that the revocation was issued. We have our
3 arguments about whether it was a legal revocation or
4 not.

5 But to get straight to your question, it
6 seems to me that estoppel was not addressed as to the
7 DCRA in the first decision. We put on evidence here
8 of estoppel in the first -- against DCRA only in this
9 appeal. And that is -- that is what we're saying,
10 that DCRA took actions, Bannum relied on them
11 reasonably, and I don't think that was actually a part
12 of the Board's first decision.

13 The Board had some language about, you
14 know, if it were, so forth, that's classic what's
15 called dictum. I consider it dictum. I think the
16 Board -- that may have been how the Board felt, but I
17 don't think that was the focus, because the focus was
18 on -- on the ANC and on laches and on whether the ANC
19 could be estopped. That was the Board's decision.

20 VICE CHAIRPERSON MILLER: I hear that.
21 You know, I don't think that the Board directly
22 addressed estoppel against DCRA at all. But my
23 question is, was Bannum obligated to have raised that
24 theory then? Why couldn't they raise it now?

25 MR. GORDON: It's raised now as to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 revocation of the certificate of occupancy.

2 VICE CHAIRPERSON MILLER: But did not the
3 same facts exist at the time of the previous order,
4 and why shouldn't Bannum have raised it then?

5 MR. GORDON: Well, one -- one issue is
6 that the first case was about a building permit, and
7 the building was done. So in terms of estopping it
8 from taking back the building permit, the building was
9 already done. Now we're talking about a revocation of
10 occupancy, which is ongoing, and which can cause
11 Bannum harm. And I think that's the reason it -- it
12 should be raised now more than as to a building permit
13 when the building has already been constructed.

14 But I don't really feel -- I don't feel
15 like we're constrained from raising it again anyway
16 legally, because, as I said, the Board did not decide
17 the issue.

18 And, therefore, if we want to bring the
19 same facts and additional facts on the certificate of
20 -- I mean, yes, the certificate of occupancy, I think
21 we're permitted to do it, and I think the Board should
22 decide just on the revocation of the certificate of
23 occupancy, did DCRA take actions that, you know, they
24 should not be able to withdraw at this point in time
25 based on what they did and how Bannum relied on them.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRPERSON GRIFFIS: Anything else?
2 Follow up? Mr. Temple?

3 MR. TEMPLE: I'd note that I believe, and
4 I am not 100 percent accurate, but I believe this same
5 issue was raised by Bannum before the D.C. Court of
6 Appeals.

7 CHAIRPERSON GRIFFIS: Why is that relevant
8 to us, though?

9 MR. TEMPLE: Because the question is,
10 again, whether it has been decided.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. TEMPLE: It's been decided. This
13 equitable estoppel issue has not only been decided by
14 you on the facts on the first case. It has also been
15 decided by the Court of Appeals in Bannum's effort to
16 stop the DCRA revocation process.

17 CHAIRPERSON GRIFFIS: And what are you
18 referring to in the Court of Appeals?

19 MR. TEMPLE: I'm just saying that for the
20 record. That's a Bannum -- a BZA adjustment decision,
21 the same case that's now pending before the court.
22 There was a preliminary motion to stop the DCRA
23 revocation.

24 CHAIRPERSON GRIFFIS: Was it a stay, or
25 was it a discussion on estoppel?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. TEMPLE: It was under the -- one of
2 the underlying issues -- arguments raised in support
3 of their motion was an estoppel argument.

4 CHAIRPERSON GRIFFIS: I'm just not clear.
5 Has that been decided, then?

6 MR. TEMPLE: Yes, it has.

7 CHAIRPERSON GRIFFIS: And what was the
8 decision?

9 MR. TEMPLE: It was decided against
10 Bannum. October 22, 2004.

11 CHAIRPERSON GRIFFIS: The element of
12 estoppel was decided by the Court of Appeals?

13 MR. TEMPLE: The argument was raised in a
14 motion, as an issue in their motion, yes.

15 CHAIRPERSON GRIFFIS: And what was the
16 motion?

17 MR. TEMPLE: It was a motion to require
18 D.C. Department of Consumer Affairs -- well, actually,
19 I may be incorrect. They filed -- I don't have the
20 motion that they filed.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. TEMPLE: But there was a motion filed
23 and ruled upon by the Court of Appeals denying, and
24 this Board may note that not only did D.C. Court of
25 Appeals, but the U.S. District Court for the District

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of Columbia as well, ruled on this issue, whether to
2 stop you from -- stop the revocation process.

3 CHAIRPERSON GRIFFIS: I think it was --
4 yes, I think there may have been different elements.
5 You're right. They were motions to stay. We've been
6 briefed fairly well on this, and I wasn't -- didn't
7 have a recollection that this element was decided on
8 at the Court of Appeals level. But we certainly would
9 look to have that submitted if you have it.

10 MR. TEMPLE: And the final point, going to
11 Ms. Miller's point, is is that -- and it's an accurate
12 position. The issue of estoppel was considered.
13 Bannum talks about it in the context of the party, ANC
14 versus DCRA. But the issue was raised in the context
15 of the zoning -- the illegal zoning action and what
16 happened before, whether or not they had relied on the
17 District of Columbia government to secure zoning
18 approval.

19 It doesn't necessarily fall to DCRA or the
20 ANCs. This panel decided that issue relative to
21 whether or not they should be estopped from raising
22 that zoning -- they should be -- they should not be
23 able to be challenged, because they relied on the D.C.
24 government. It's the same exact argument.

25 CHAIRPERSON GRIFFIS: Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRPERSON MILLER: I just have a
2 question, I think for Mr. Gordon. Is this estoppel
3 issue -- again, DCRA -- before the Court of Appeals?

4 MR. GORDON: Yes.

5 VICE CHAIRPERSON MILLER: In connection
6 with our earlier order?

7 MR. GORDON: It was part of the appeal of
8 the earlier order, and as I think all the panel heard,
9 the Judge -- the Judges weren't impressed by the fact
10 that they denied stays. They're still deciding the
11 issues on the merits.

12 VICE CHAIRPERSON MILLER: So, but what's
13 before them is not just an appeal of the estoppel
14 issue, say, as it relates to the ANC but estoppel as
15 it relates to DCRA?

16 MR. GORDON: Both, yes.

17 VICE CHAIRPERSON MILLER: Both. Okay.
18 Thank you.

19 CHAIRPERSON GRIFFIS: Okay. Anything
20 else, Mr. Temple?

21 MR. TEMPLE: No, sir. Thank you.

22 MR. GORDON: On this issue, or are we --

23 CHAIRPERSON GRIFFIS: No. Closing. Are
24 you --

25 MR. TEMPLE: We're doing closing?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON GRIFFIS: Yes.

2 MR. TEMPLE: That was closing, he gave?

3 CHAIRPERSON GRIFFIS: No, no, no. I'm
4 allowing him his 10 minutes at the end. He's going to
5 follow.

6 MR. TEMPLE: So you're asking --

7 CHAIRPERSON GRIFFIS: As if we were going
8 through a full appeal, we'll take that order, and
9 there was an opening. We'll have the presentation of
10 intervenor and the government, and then we'll turn to
11 close.

12 MR. TEMPLE: So clarification --

13 CHAIRPERSON GRIFFIS: Sure.

14 MR. TEMPLE: -- are you saying that Bannum
15 is going to start with the closing for 10 minutes? I
16 --

17 CHAIRPERSON GRIFFIS: They're going to end
18 it. Basically, what we've set aside, of course, is
19 the 15 minutes to highlight and your submissions.
20 Everything is in the written submission. I'm allowing
21 you your 15 minutes now.

22 Mr. Rushkoff labeled it closings. But you
23 can use our first five minutes for opening, and your
24 next five minutes for closing, however you want to do
25 it. Now is your time, if there's additional --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. TEMPLE: I go first?

2 CHAIRPERSON GRIFFIS: It's up to you.

3 MR. TEMPLE: Okay. That's a pleasure.
4 It's not a problem.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. TEMPLE: Yes. Let me try to summarize
7 our position and be as clear and succinct as possible.
8 The issue before you goes to the revocation by DCRA of
9 the Bannum certificate of occupancy.

10 This Board, and Ms. Miller stated it, and
11 I raised that exact point -- this Board stated, in
12 fact even beyond that point, this Board stated -- Mr.
13 Griffis, you stated in that opinion that we would not
14 be able to challenge -- after you ruled, we would not
15 be able to challenge the certificate of occupancy,
16 essentially that the decision of the Board relative to
17 the permit would follow on the certificate of
18 occupancy.

19 Every issue that you can imagine that goes
20 to the legality of the zoning has been ruled on. As
21 simple as that. This is an illegal zoning action, and
22 you can't come back after the fact for any reason
23 whatsoever. It has been decided. All of the
24 witnesses on every substantive question have been
25 presented, and you have ruled that they have violated

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 District of Columbia zoning law.

2 And that based upon the violation of the
3 permit, no legal act relative to a certificate of
4 occupancy could flow if the permit was illegal. That
5 is our position, simple and short and to the point.
6 And that -- based upon that, the District of Columbia
7 DCRA, which also took a protracted period of time
8 because you might recall we went to court to try to
9 get them to enforce your decision in the courts.

10 But the District of Columbia finally did
11 what it was required to do by law in revoking Bannum's
12 charter. There are no exceptions to that. In order
13 for Bannum to be correct, they would have to come back
14 here, and you would have to reconsider your decision
15 and come up with a decision that was totally
16 contradictory to the decision that you've entered into
17 the record.

18 And so our position is that the revocation
19 is correct, the District is right, and that Bannum's
20 certificate of occupancy should be -- the decision
21 should be ratified below and affirmed.

22 Thank you.

23 CHAIRPERSON GRIFFIS: Thank you very much.

24 Questions from the Board? Clarifications?

25 (No response.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Excellent. Mr. Rushkoff?

2 MR. RUSHKOFF: Okay. I think what I'll
3 do, rather than going through our prehearing brief,
4 which I think the Board can just read -- I'm not sure
5 it requires summarizing -- what I thought I would do
6 is go through Bannum's December 19th letter, and there
7 are a number of points that are made that I'd like to
8 just respond to.

9 First, there is a -- sort of a theme here
10 in the letter that a revocation cannot -- somehow the
11 revocation is not -- cannot be issued separately from
12 the resulting "use" violation. The idea here is that
13 the revocation of a certificate of occupancy
14 automatically results in a use violation. So,
15 therefore, there's really no sense in which you can
16 proceed without charging an infraction. That seems to
17 be the argument.

18 And DCRA's response is simply, of course
19 you can revoke a certificate of occupancy without
20 inducing an infraction. That should be the normal
21 course.

22 If DCRA determines, for example, that it
23 has issued a building permit in error, if it has
24 issued a certificate of occupancy in error, the normal
25 procedure in that circumstance should not be to charge

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the recipient of the permit with a violation, but the
2 normal procedure should be to notice a revocation, to
3 give the permittee an opportunity to respond and to
4 point out any error the DCRA may be making, and then
5 after allowing that opportunity to respond, there is
6 a date upon which the certificate of occupancy is
7 revoked.

8 At that point, a normal, usual business
9 will cease the activity, unless it can obtain a stay.
10 I mean, the normal procedure would be to try to get a
11 stay of that revocation from, you know, whatever the
12 next appellate level is, say, from the BZA, to try to
13 get a stay. Or if they can't get a stay from the BZA,
14 then go to the Court of Appeals.

15 But the normal course should not be just
16 to continue operating in defiance of the revocation,
17 you know, and forcing the D.C. government to then
18 bring some type of infraction charges or other
19 violation charges.

20 There is -- in the second paragraph, there
21 is a reference to DCRA having interpreted the statutes
22 in the past as authorizing an initial ALJ hearing of
23 all certificate of occupancy revocations as
24 infractions. You know, we have pointed out there's a
25 -- let me find it here in my -- where did I put it?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Here we go. I mean, the provision that
2 we're relying on is in the D.C. Building Code
3 Supplement 2003. You know, the D.C. Code -- the
4 regular D.C. Code has approved these building codes,
5 and the supplements as being the law in the District
6 of Columbia.

7 And in -- in Title 12A, 110.5.3, it's very
8 specific. Certificate issued in error. And it simply
9 says that -- that if a certificate of occupancy has
10 been previously issued, and it's found to have been
11 issued in error, it can be revoked by the Director
12 after notice.

13 And on the next page, there's a provision
14 for an appeal. So you do get a hearing. The hearing
15 is here at the BZA. Under 110.6, there's an appeal to
16 the Board of Zoning Adjustment, and that would be the,
17 you know, due process hearing that the -- that you
18 would get.

19 Now, it does say, by the way, that it
20 shall be revoked after notice. I would argue that the
21 notice provides two benefits. One would be the
22 opportunity to respond. And while that's not explicit
23 here, I think as a matter of good practice the person
24 who receives a notice should have an opportunity to
25 respond.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And, second, it does give you an
2 opportunity to cease the conduct that you can't engage
3 in without a certificate of occupancy.

4 Now, in the third paragraph of Bannum's
5 letter, there is a reference to passage of the OAH Act
6 as providing for ALJ review of all DCRA administrative
7 decisions in "adjudicated cases." And I want to
8 emphasize that if you look at the -- if you look at
9 the OAH Act, and you look at the definition of
10 "adjudicated cases," an adjudicated case is not
11 something that's created by the OAH Act.

12 The OAH Act defines adjudicated cases as
13 cases that already require hearings. Now, we contend
14 that under the procedures that I've just outlined this
15 doesn't require a hearing by a DCRA ALJ. This is the
16 revocation of a certificate of occupancy for having
17 been -- been issued in error is simply that revocation
18 is done by the Director, and the appeal is to the BZA.

19 This is not a situation where you would
20 have had an ALJ proceeding somewhere in DCRA, which
21 has now been transferred to OAH.

22 In further support of the point that a use
23 violation automatically results from a certificate of
24 occupancy revocation, Bannum points to DCRA's letter
25 of May 13, 2004, where we notified Bannum that they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 were now in violation of the zoning regulations.

2 I would just note that the May 13th letter
3 came eight days after Bannum had lost its certificate
4 of occupancy. So the -- it was not -- if Bannum had
5 ceased using the facility for the improper purpose,
6 they would not have received a letter from DCRA on May
7 13th notifying them that they were in violation of the
8 zoning regulations.

9 And then, finally, the -- Bannum makes the
10 point that -- that the -- that the April 21, 2005,
11 revocation is, to use their words, illegal and void,
12 because of the pending OAH case. And as I argued
13 earlier, at most the rescission would arguably be
14 illegal and void, and that there would still be a
15 pending OAH case, but that that would not make the
16 revocation, based on the certificate having been
17 issued in error, illegal and void.

18 That would be -- basically, there is --
19 we've got two problems with a similar remedy. I mean,
20 it's a little -- you have -- and I really can't defend
21 to this Board the charges made against Bannum in 2004,
22 the alleged violations for operating I guess with a
23 certificate of occupancy that DCRA contended it
24 shouldn't have issued, I -- I have trouble
25 understanding the nature of those charges.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 But what you really have is you have a
2 series -- you basically have an accusation that Bannum
3 is doing something wrong in operating pursuant to the
4 certificate of occupancy, and you -- in 2005, you have
5 something very different. You have DCRA saying, "We
6 shouldn't have issued this, and we're giving you
7 notice, and we're going to revoke it," because we --
8 based on the BZA's decision, you shouldn't have a
9 certificate of occupancy.

10 It's just a completely different type of
11 proceeding. It does have the same result. Either way
12 they end up having their certificate of occupancy
13 revoked.

14 In the first place, it would have been for
15 somehow doing something wrong. In the second place --
16 in the second occasion, it's because DCRA is coming
17 clean and saying we shouldn't have done this.

18 And then, finally, I just want to mention
19 if you -- if you look through, and, you know, we do
20 talk about this in our memo, but the case law is
21 really quite striking. And I think the case that
22 Bannum relies on, which I think was cited by the BZA
23 in its decision in 16998 -- that's the Saah v. BZA.
24 That case in some ways is the least striking of the
25 three. I mean, if you look at the next two, it's --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Bannum really has quite a burden to carry in terms of
2 making out a case of estoppel.

3 And I think the strongest case from DCRA's
4 point of view would be the Murray decision, which we
5 cite. That's Murray v. District of Columbia Board of
6 Zoning Adjustment, 572 A.2d 1055, and that's in our --
7 in our brief.

8 And here they -- the court is very clear.
9 The court says it is the Board, not the Zoning
10 Administrator, which has final administrative
11 responsibility to interpret the zoning regulations,
12 and pretty much rejects the estoppel claim in that
13 case pretty much out of hand.

14 And it's really very -- it -- I'm just
15 going to read two or three sentences, because I think
16 it parallels this case so well. It says, "They,
17 nonetheless, made commitments for architectural plans
18 on receiving the Zoning Administrator's ruling,
19 despite knowledge of the neighborhood opposition to
20 their plans."

21 And then, they go on to say, "That invites
22 application of the self-created hardship rule," and
23 then they also cite to the Interdonato case, where it
24 says a party cannot justifiably rely on non-final BZA
25 action still subject to review.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Now, notice in Interdonato -- in that
2 point they are saying that you can't rely on non-final
3 BZA action, which is much more final than non-final
4 Zoning Administrator action. So the Court of Appeals
5 has basically put people, you know, on notice, and
6 these cases were -- the Murray case was decided in
7 1990, and the Interdonato case was decided in 1981.

8 I mean, people have been on notice a long
9 time that -- that it may be gutsy to go ahead based on
10 the firm conviction that you're right, but, you know,
11 you can take a fall if it turns out you're wrong, and
12 that's just the way -- the way the law is right now.

13
14 And I was a little bit surprised when I
15 was cross-examining Mr. Lowry and asked him when he
16 was first aware that -- you know, that the -- that the
17 decision by the Zoning Administrator to issue a
18 building permit could be appealed to the BZA, and he
19 said once this whole thing started happening.

20 And, obviously, counsel needs to impress
21 -- I'm sure he may have been -- I mean, I'm not -- I
22 shouldn't say I'm sure. It's very possible he was on
23 notice, but just didn't notice it at the time. But,
24 you know, it -- people who come into the District in
25 reliance on letters or decisions by DCRA simply have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to know that the community will have an opportunity to
2 be heard, and the DCRA may fight to defend its permit.

3
4 It may -- you know, DCRA may believe fully
5 that they did the right thing, but the final decision
6 is made by the BZA and ultimately by the Court of
7 Appeals, and that is just -- you just can't -- you
8 just can't go ahead and make plans that are
9 "permanent" until you get a decision that can be
10 treated as final. And that's the way it is.

11 So I'll end my comments there.

12 CHAIRPERSON GRIFFIS: Excellent. Thank
13 you very much.

14 Mr. Gordon?

15 VICE CHAIRPERSON MILLER: Could I ask one
16 --

17 CHAIRPERSON GRIFFIS: Yes. A quick
18 question, Ms. Miller?

19 VICE CHAIRPERSON MILLER: Did you say that
20 a statute referenced the Building Code, Title 12A?
21 Did you say that, or no?

22 MR. RUSHKOFF: The -- what I said was that
23 -- maybe I can find it for you -- the D.C. Code refers
24 to the construction codes. Actually, I think I have
25 it -- I think I actually brought the pocket part with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 me here. It's hiding somewhere. But the -- here it
2 is.

3 The -- see, 6 -- this would be Title 6.
4 Then, it would be Section 1409. And there is -- you
5 know, there is a general reference here in the D.C.
6 Code to the fact that unless something is -- there's
7 a 45-day review period, and these various supplements
8 to the construction code are deemed to be approved by
9 the Council unless they are disapproved.

10 So that would be 6-1409. And that's in
11 the D.C. Code. So the provisions I was citing before
12 from Title 12A of the DCMR, all of those would be
13 deemed approved by the Council or considered -- you
14 know, they are D.C. law.

15 They have, you know, full legitimacy
16 there, and it's not a matter of -- it's not a matter
17 of DCRA simply coming up with its own regulations and
18 then following them. This is a matter of DCRA
19 following these building code type regulations, which
20 have received the imprimatur of the D.C. Council
21 through this 45-day review period.

22 VICE CHAIRPERSON MILLER: But they don't
23 carry any greater significance than other regulations,
24 or do they?

25 MR. RUSHKOFF: What's in the implication

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 -- I think that -- I think they do carry some greater
2 weight, because most regulations -- actually, let me
3 take that back. This isn't a situation I think where
4 -- where we're dealing with a DCRA-created rule where
5 it -- one might question whether or not the rule DCRA
6 has come up with is consistent with the larger code.

7 I think this is a situation where DCRA
8 really didn't have anything to do with it, and there
9 are these just various construction codes, building
10 codes, that are repeatedly presented to the Council
11 and either -- I guess generally they are -- I assume
12 the Council generally takes no action, and they
13 generally just go into effect.

14 But I think that that is -- there is -- I
15 think it's harder to argue that DCRA is somehow trying
16 to evade the intent of the Council when DCRA isn't
17 even -- you know, responsible for the regulations that
18 it's trying to follow.

19 VICE CHAIRPERSON MILLER: And then, my
20 final question is: when there's a revocation of a
21 certificate of occupancy, it can go two ways -- either
22 it's just a revocation or it's a revocation followed
23 by an infraction proceeding?

24 MR. RUSHKOFF: It can go three ways. It
25 can -- you can charge an infraction. You can say,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 "You're not operating this consistently with the
2 certificate of occupancy." You go through the
3 infraction procedure, and the remedy you seek is
4 revocation. That's one way it could go.

5 Another way it could go, and hopefully
6 this would be the way it would usually go, you'd
7 simply notice the revocation and then it's revoked,
8 and there's no infraction, because they stop doing
9 whatever they were doing under the C of O.

10 Another situation is you have a defiant
11 business that keeps doing it, and then, in addition to
12 various appeals of the certificate of occupancy
13 revocation, you would also have enforcement actions,
14 a charging of violations, or, in this case, the
15 Attorney General went to Superior Court to seek
16 injunctive relief. We have all kinds of collateral
17 proceedings.

18 VICE CHAIRPERSON MILLER: Thank you.

19 CHAIRPERSON GRIFFIS: Excellent. Any
20 other questions at this time?

21 (No response.)

22 Very well. Mr. Gordon?

23 MR. GORDON: The first point I have to
24 make is that the Regulation 12A DCMR 110.6 says, for
25 whatever reason a certificate of occupancy is revoked,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you can appeal the action of the Board of Zoning
2 Adjustment pursuant to D.C. Code Official 641.09. .09
3 says that it doesn't really deal with Board appeals of
4 certificates of occupancy. It deals with infractions.
5 It deals with violations.

6 The Board's authority to review the
7 certificate of occupancy then would come through Title
8 2 of Section 18, I think, or Chapter 18. That is
9 where you get the Board's appellate authority to
10 review these matters, after a Hearing Examiner has
11 issued a decision.

12 This follows the prior practice of having
13 Board -- having revocations come out as infractions,
14 or, one thing that was left out of Mr. Rushkoff's
15 recitation of my brief was "or is contested cases."
16 Okay.

17 Now, if you don't do it as a -- you know,
18 in our particular case, that's exactly what DCRA said
19 it was in April of 2004. They said this is a
20 contested case. They didn't say it was -- they
21 charged infraction, but they called it a contested
22 case. Contested cases now go to the ALJ, and this
23 would continue to be a contested case.

24 So when he says it's very clear that if it
25 goes to the Board of Zoning Adjustment directly, it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 doesn't say "directly." It says "pursuant to 641.09."
2 There is no provision for appeals to the Board of
3 Zoning Adjustments directly in that statute. It's
4 only an indirect appeal after you have first gone to
5 an ALJ.

6 Okay. I've tried to lay that out in my
7 brief. There's a lot of statutes to go through, but,
8 really, that's -- the key thing here is it's 641.09,
9 not 641.07, which is the Board's normal manner of
10 hearing appeals. All right?

11 Now, therefore, you know, the appeal is --
12 the appeal here should be -- is premature.

13 The second thing is assuming that the
14 Board has jurisdiction, and we're here, the -- again,
15 I go back to the Office of Administrative Hearings
16 Act. This revocation itself is void. It was a
17 pending case. Counsel admits there was a pending case
18 at the time when this April 21st revocation was
19 issued.

20 Now, he tries to separate the fact that,
21 well, the revocation is new, but the infractions were
22 -- were what was before the OAH, not the revocation.
23 It's not true. The revocation was before the Office
24 of Administrative Hearings, and the statute says the
25 subject matter and issue.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Now, you can't separate the revocation
2 from the use violation, because you don't have a use
3 violation without the revocation. They are obviously
4 intertwined. In fact, he even says in his brief that,
5 by the fact of -- the fact that we dismissed the -- or
6 we pulled out, rescinded the revocation, we
7 effectively dismissed the charges against you. Well,
8 that shows they are totally connected.

9 These two things are one in the same.
10 That's why they've always been treated by an ALJ
11 first. When he says that the DCRA was coming clean
12 and saying they made a mistake, you know, what
13 happens? Five -- nine days later after the
14 revocation, we get a violation notice. Why weren't
15 they put together on the same paper? Did they do an
16 investigation between those two times? No. They just
17 wrote out, "You're in violation, because your
18 certificate of occupancy is revoked."

19 They knew exactly what they were doing.
20 This was a clear attempt to try to get jurisdiction at
21 the Board and get out of the jurisdiction of the ALJ.
22 Why? Not because -- because Bannum had received a
23 ruling from the ALJ that said, "Look, the whole reason
24 that your certificate of occupancy is being revoked is
25 because the Board of Zoning Adjustment has issued a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 decision."

2 It was a case of first impression on a
3 regulation that had never been decided before. It was
4 sitting before the Court of Appeals. And what did the
5 ALJ say? Let's not do anything until such time as the
6 Board -- the Court of Appeals rules. That was -- that
7 was okay, I think, with DCRA.

8 I don't think it was okay with the
9 Intervenor, and I think, according to what we heard,
10 there was pressure put on them. And so they came up
11 with this remedy of now we're going to rescind and
12 immediately reissue the revocation, and nine days
13 later then we'll -- we'll say there are violations.

14 It was a manipulation of the process to
15 get out from under an order that they were statutorily
16 bound to obey, or to get dismissed, which they tried
17 later. Didn't happen, though.

18 All right. Finally, with respect to
19 estoppel, I completely disagree with DCRA's
20 interpretation of the Interdonato case as saying the
21 only time you can have an estoppel issue is if the
22 Board of Zoning Adjustments has issued a final order.
23 That isn't the way it works.

24 It's from actions of a governmental
25 agency, not the Board of Contract Appeals. The reason

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in Interdonato that they mentioned the Board had not
2 made a final decision was because when this person in
3 that case had been making the improvements, he made
4 them knowing that the Board had issued a non-final
5 decision. So he knew there was litigation going on
6 there when he actually incurred the cost.

7 So he couldn't rely on the Board's non-
8 final decision. He had to wait for the Board's final
9 decision.

10 Here we have a situation where how could
11 anyone have predicted -- you know, in November 2000
12 the community is notified, we receive a letter from
13 DCRA saying, "You have zoning," we notify the
14 community. We couldn't have notified every single
15 person living in the community. We notified their
16 local representative, Councilman Orange, twice, the
17 Mayor twice, the District Police twice or three times.
18 Everyone has gotten notice that there is a community
19 correctional center going in at 2210 Adams Place, N.E.

20 There is then a seven-month period. Now,
21 whatever appeals can be brought, you know, I mean, I
22 -- I understand the Board issued a decision that said
23 that would not be something. We're still going to let
24 people appeal later with a building permit. But for
25 a person who is a normal person who is trying to do

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 business in the District, remember, he has counsel
2 that are advising him.

3 He says, "Yes, you can enter the contract.
4 Of course, you can enter it." If there's any appeal
5 rights, they're gone.

6 April 2002, after the contract is entered,
7 he goes to the ANC, the very people that appealed.
8 Those three people are there. They're told, "We have
9 a contract." It's not like we're thinking about
10 entering into a CCC at some day, maybe yes, maybe no.
11 We have a contract with the U.S. Government to start
12 this CCC, and we have approval from DCRA. So everyone
13 knows about this.

14 Now it comes time for -- the building
15 permit is issued. He still doesn't know. He spent
16 money, he spent a lot of money. Now we find out there
17 is an opposition, and DCRA tells him, "Go forward. Go
18 forward. We have reviewed it again. Go forward."

19 Then, they defend the entire appeal, and
20 we get a decision that says, "In the beginning you
21 were wrong. You didn't have zoning." This is exactly
22 the type of case where estoppel should -- should lie.
23 You have to be able to rely on your administrative
24 government. Business would come to a grinding halt if
25 everyone had to wait for the final BZA order or the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Court of Appeals review of the BZA before they could
2 ever start a building or a contract.

3 The Bureau of Prisons says, "Send out the
4 notice to everybody, so we can make sure that we're
5 okay before we let -- we sign the paper." And they
6 did that. Seven months had gone by. So to me I feel
7 like -- like my client tried to do everything right.
8 They hired counsel. They got something from the
9 District of Columbia that said they could go forward.
10 All of the way up until the certificate of occupancy,
11 which is actually issued after the appeal is started.

12 DCRA has said, yes, go forward. That's
13 the -- that's the person we're saying should be
14 estopped now after the Board's decision from coming
15 back and saying, "You're revoked. You're out of
16 here." And they know that -- that we are going to be
17 in default on our contract. So, and that's the
18 biggest -- actually the biggest kind of injury.

19 Even at this point where so much time has
20 gone by, the Bureau of Prisons could very well
21 default/terminate the contract. Even now. We'd fight
22 it, of course we'd fight it. We'd fight a lot of
23 things. But I'm just saying that is something they
24 could do, and that default itself, if it happens, they
25 have already threatened it once -- if that happens,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that's a big harm to Bannum.

2 And what's the harm to the community? I
3 think back in -- when the Board its decision it said,
4 "Wait. This could -- something really bad could
5 happen to the community. It could upset everything."
6 Nothing has happened to the community. It has
7 operated. It has provided a benefit to the community.
8 These people come off the street and go into a -- they
9 don't come out of jail and go right onto the street.
10 They go into a CCC and get a job. So the facility
11 itself is a benefit, and I'm talking about the overall
12 equity here.

13 I think the equities strongly favor
14 Bannum. We've done everything we could to try to
15 comply. We have what we believe are legal decisions
16 that are trying to kick us out. We're fighting those
17 in court. And the Bureau of Prisons hasn't kicked us
18 out yet, because they are saying, "Let's see what
19 happens."

20 So what we ask the Board now, in
21 conclusion, is to, you know, take one of two steps.
22 Either -- either delay things until you have an ALJ
23 decision or find that the decision is illegal, or, in
24 the alternative, find that the DCRA should be estopped
25 from revoking their certificate of occupancy after

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 everything they did that led us into the situation
2 we're in.

3 Thank you.

4 CHAIRPERSON GRIFFIS: Thank you very much.

5 Follow up?

6 VICE CHAIRPERSON MILLER: I have a
7 question for Mr. Rushkoff, actually.

8 So are there no proceedings -- no civil
9 infraction proceedings going on now? They're not
10 being assessed any penalties?

11 MR. RUSHKOFF: There are -- right now,
12 what do we have? And I hope I get this right. I
13 suppose there is still a proceeding before the OAH
14 brought by DCRA. That's the 2004 notice proceeding.
15 I suppose that that is still there, because I -- at
16 least I think someone -- someone told me today that
17 the motion that DCRA made to dismiss that hasn't been
18 acted upon. So that's still a pending matter at the
19 OAH.

20 And then, I know that there's a proceeding
21 brought by the Office of the Attorney General in
22 Superior Court, and I believe that that -- that the
23 relief sought in that proceeding is to enforce the
24 DCRA order to Bannum to get out of the premises, or to
25 discontinue the use of the premises.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I don't think right now that there is a
2 proceeding -- I don't believe there is -- well, I
3 guess the short answer is, yes, there is a proceeding
4 pending, and it's the one on the 2004 notice, the one
5 that DCRA is trying to dismiss.

6 VICE CHAIRPERSON MILLER: And one last --
7 but that's -- that involves --

8 MR. RUSHKOFF: Those are --

9 VICE CHAIRPERSON MILLER: -- the
10 rescission of the revocation, right? I mean, my -- my
11 --

12 MR. RUSHKOFF: No, that involves the
13 revocation. They propose revoking it based on
14 violations -- alleged violations by Bannum. That's
15 what that 2004 proceeding is about. You have
16 committed violations. There are two charges there,
17 and based on those charges it is proposed that the
18 certificate of occupancy be revoked. Okay? That's
19 what that proceeding is about.

20 VICE CHAIRPERSON MILLER: But didn't you
21 rescind that?

22 MR. RUSHKOFF: I'm just telling you
23 what --

24 VICE CHAIRPERSON MILLER: I mean, didn't
25 DCRA rescind that, and that's what the case is about

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 over there?

2 MR. RUSHKOFF: The case isn't about
3 anything. Nothing is happening in the case. DCRA
4 unilaterally rescinded it. Bannum has made the point,
5 well, can you really unilaterally rescind it based on
6 the statute which says that once your -- once you have
7 a case pending before the OAH, you can't take
8 decisional actions.

9 So, yes, there was a rescission there, and
10 then there's also a -- I believe a proper motion
11 pending at the OAH to dismiss that action, which
12 hasn't been ruled on. So that's the status of that
13 matter.

14 Then, you have the Office of the Attorney
15 General in court asking a Superior Court Judge --
16 we're waiting for a ruling for weeks now from a
17 Superior Court Judge on -- basically, it's a petition
18 to enforce DCRA's order to Bannum to stop using the
19 premises without a certificate of occupancy.

20 It's not -- it has nothing to do with
21 revoking. It has been revoked. It's stop using it
22 because you don't have a certificate of occupancy, and
23 the Judge -- you know, that's not self-enforcing when
24 DCRA issues that order, and if -- if Bannum ignores
25 it, then you have to go to court and get a court to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 enforce the order.

2 MR. GORDON: I think what -- the answer to
3 the question is that the only infraction proceeding is
4 the one that was in August or April 27, 2004. That's
5 the only infraction proceeding.

6 The case in Superior Court -- it's very
7 interesting, because they have never ever filed any
8 infraction proceeding against us, because they know
9 that we then made an appeal to the Office of
10 Administrative Hearings, which would be -- would stop
11 them from taking action.

12 So they've tried to avoid any infraction
13 proceeding at all against us now. It's -- but they
14 are trying to get us out of there without an
15 infraction proceeding.

16 MS. MONROE: Can I ask a question? This
17 is solely for clarification.

18 So I realize that the one is stayed by
19 Judge McCoy. That was the 2004 revocation. But
20 didn't you say before that Bannum had appealed the
21 2005 revocation?

22 MR. GORDON: Yes.

23 MS. MONROE: Which was an OAH also --

24 MR. GORDON: that's also --

25 MS. MONROE: That's also pending at the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 moment.

2 MR. GORDON: Right.

3 MS. MONROE: So you have two things
4 pending. One is essentially stayed by McCoy, and then
5 the second one is now pending, which is on the same
6 question that we have here.

7 MR. GORDON: Exactly.

8 MS. MONROE: Okay. So there's two things
9 pending there, and then the Superior Court --

10 MR. GORDON: And the first one is on the
11 2004 revocation. The second one is on the 2005.

12 MS. MONROE: I just wanted to be sure.

13 MR. GORDON: Right.

14 MS. MONROE: So we have -- do have two.
15 And then -- okay.

16 CHAIRPERSON GRIFFIS: Anything else? Any
17 other clarifications?

18 (No response.)

19 Gentlemen, thank you very much. Before
20 you go, we'll set the next time for this. I don't
21 have any notes or recollections that we were keeping
22 the record open for anything additionally, except, Mr.
23 Temple, you had mentioned that there might be a motion
24 in the Court of Appeals. But I think that was not
25 actually what you thought it was.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 So we won't have the record open, and we
2 won't accept anything else. I'd set this for
3 decisionmaking at our regularly-scheduled public
4 meeting on the 7th of February. It will be the first
5 case on the schedule at this point for decisionmaking.

6 It'll open it up for last comments from
7 the Board. If they want additional filings, at this
8 point I think our filings are full. I don't need to
9 -- any other proposed or drafts. At this point, we
10 can get through what we have.

11 Good. Not noting any other comments on
12 that, thank you all very much. Appreciate you all
13 being here. Appreciate it, and thank you all for
14 attending the afternoon session.

15 Ms. Bailey, is there any other business
16 before the Board?

17 MS. BAILEY: Not for the afternoon, Mr.
18 Chairman.

19 CHAIRPERSON GRIFFIS: Very well. Thank
20 you very much. Let's adjourn the afternoon session.

21 (Whereupon, at 6:18 p.m., the proceedings
22 in the foregoing matter were adjourned.)

23
24
25

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701