

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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ZONING COMMISSION

+ + + + +

PUBLIC HEARING

+ + + + +

----- :  
IN THE MATTER OF: :  
: :  
200 K STREET LIMITED :  
PARTNERSHIP :  
: :  
Application No. 01-28TE :  
----- :

Thursday,  
November 17, 2005

Hearing Room 220 South  
441 4<sup>th</sup> Street, N.W.  
Washington, D.C.

The Public Hearing of Case No. 01-28TE by the District of Columbia Zoning Commission convened at 6:30 p.m. in the Office of Zoning Hearing Room 220 South, 441 4<sup>th</sup> Street, N.W., Washington, D.C., 20001, Carol J. Mitten, Chairperson, presiding.

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
ANTHONY HOOD	Vice-Chairperson
GREGORY JEFFRIES	Commissioner
JOHN PARSONS	Commissioner (NPS)
MICHAEL TURNBULL	Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

SHARON S. SCHELLIN      Acting Secretary

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OFFICE OF PLANNING STAFF PRESENT:

STEVE COCHRAN  
JENNIFER STEINGASSER

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

ALAN BERGSTEIN, ESQ.  
JACOB RITTING, ESQ.

This transcript constitutes the minutes  
from the public hearing held on November 17, 2005.

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

6:48 p.m.

CHAIRPERSON MITTEN: Good evening ladies and gentlemen. This is a public hearing of the Zoning Commission of the District of Columbia for Thursday, November 17, 2005. My name is Carol Mitten and joining me this evening are Vice Chairman Anthony Hood and Commissioners Greg Jeffries, John Parsons and tonight we're welcoming for the first time Michael Turnbull who's now representing the Architect of the Capitol.

The subject of this evening's hearing is Zoning Commission Case No. 01-28TE and is a continuation of our October 3, 2005 hearing.

This is a request by 200 K Street Limited Partnership for approval of a modification to a previously approved Planned Unit Development ("PUD") and a two-year time extension for property located at 200 K Street, N.E. and known as square 749, lots 2 through 8, 18, 23 through 26, 31 through 42, 57, 63, 66, 804 through 809, 812 through 815, 818 through 820 and 822.

Notice of today's hearing was published in the D.C. Register on July 1, 2005 and copies of that hearing announcement are on the table near the door.

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1           This hearing will be conducted in  
2 accordance with the provisions of 11 DCMR Section  
3 3022, which are the Rules of Procedure for contested  
4 cases, and the order of procedure will be as follows.

5           We'll take up any preliminary matters,  
6 followed by the presentation of the applicant's case,  
7 report by the Office of Planning, reports of other  
8 government agencies, report by the affected Advisory  
9 Neighborhood Commission, in this case 6C,  
10 organizations and persons in support and  
11 organizations and persons in opposition.

12           The following time constraints will be  
13 maintained in the hearing. The applicant will have  
14 60 minutes for the presentation of their case,  
15 organizations will have five minutes and individuals  
16 will have three minutes. The Commission intends to  
17 adhere to the time limits as strictly as possible in  
18 order to hear the case in a reasonable period of  
19 time.

20           The Commission reserves the right to change  
21 the time limits for presentations if necessary and  
22 notes that no time shall be ceded.

23           All persons appearing before the Commission  
24 are to fill out two witness cards. These cards are  
25 on the table near the door as well. Upon coming

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1 forward to speak to the Commission, please give both  
2 cards to the reporter who's sitting to our right with  
3 the headphones on.

4 Please be advised that this proceeding is  
5 being recorded by the court reporter. Accordingly,  
6 we ask you to refrain from making any disruptive  
7 noises or actions in the hearing room. When  
8 presenting information to the Commission, please turn  
9 on and speak into the microphone, first stating your  
10 name and address. When you are finished speaking,  
11 please turn the microphone off so that it's not  
12 picking up any background noise.

13 The decision of the Commission in this case  
14 must be based exclusively on the public record. To  
15 avoid any appearance to the contrary, the Commission  
16 requests that persons present not engage the members  
17 of the Commission in conversation during a recess or  
18 at any other time.

19 Staff will be available throughout the  
20 hearing to answer any procedural questions and you  
21 can direct those to Ms. Schellin.

22 Please turn off all beepers and cell phones  
23 at this time so as not to disrupt this hearing. At  
24 this time we'll take up any preliminary matters and I  
25 know that we have a large issue which is the issue of

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1 the time extension. Is there anything else, Ms.  
2 Schellin?

3 SECRETARY SCHELLIN: That's it.

4 CHAIRPERSON MITTEN: Okay. Thank you.

5 SECRETARY SCHELLIN: I'm sorry. There was  
6 also one other request for party status that was  
7 filed. It's in the packet this evening from Mrs.  
8 Smallwood.

9 CHAIRPERSON MITTEN: It's in the package  
10 this evening?

11 SECRETARY SCHELLIN: Yes.

12 CHAIRPERSON MITTEN: Mr. Ritting, can you  
13 advise us about an application for party status,  
14 given that we had convened the hearing in October.

15 MR. RITTING: In October and it wasn't  
16 received until today?

17 CHAIRPERSON MITTEN: It wasn't received  
18 until the 6<sup>th</sup> of November.

19 MR. RITTING: Requests for party status are  
20 required to be filed in advance of the original  
21 hearing so it's over.

22 CHAIRPERSON MITTEN: Okay. So it's not  
23 timely?

24 MR. RITTING: Yes.

25 CHAIRPERSON MITTEN: Okay. So I would move

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1 that we deny the request from Margaret Smallwood for  
2 party status as being untimely.

3 COMMISSIONER PARSONS: Second.

4 CHAIRPERSON MITTEN: Any discussion? All  
5 those in favor please say aye.

6 (Ayes.)

7 CHAIRPERSON MITTEN: All those opposed  
8 please say no. Ms. Schellin, would you record the  
9 vote?

10 SECRETARY SCHELLIN: Yes. Staff will  
11 record a vote 5-0-0 to deny party status to Margaret  
12 Smallwood, Commissioner Mitten moving, Commissioner  
13 Parsons seconding, Commissioners Jeffries, Hood and  
14 Turnbull in favor to deny.

15 CHAIRPERSON MITTEN: Thank you.

16 VICE CHAIR HOOD: Madam Chair, can I just  
17 say just in case Ms. Smallwood is listening, she will  
18 have an opportunity to get all of her point across  
19 and maybe submit something for the record if she  
20 hasn't already done so.

21 CHAIRPERSON MITTEN: Absolutely. Thank you  
22 for pointing out.

23 All right. So we had asked and we received  
24 submissions from the applicant and the Office of  
25 Planning regarding the burden of proof for a time

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1 extension, and those criteria are listed in 2408.10  
2 and then further in 2408.11 in the regulations. So  
3 I'd ask if we've had a chance to review the  
4 submissions and are there any comments from the  
5 Commission?

6 COMMISSIONER PARSONS: Madam Chair?

7 CHAIRPERSON MITTEN: Mr. Parsons?

8 COMMISSIONER PARSONS: This is a precedent-  
9 setting decision. The Commission has established  
10 these regulations really based on a PUD that was  
11 approved by the Commission and for reasons of  
12 litigation on the applicant where they couldn't  
13 proceed, or the market wasn't right to build the  
14 project, and these are stated in 2408.11 and 10.

15 But it was always intended that the same  
16 project would move forward, that it was something  
17 beyond the applicant's or the owner's ability to move  
18 it. It was market or litigation or something. And  
19 that's been our practice. That the same project  
20 would move forward.

21 Then we put in a point in 2408.10b that  
22 there's no substantial change in any of the material  
23 facts upon which the Commission based its original  
24 approval and the substance of that, of course, was  
25 the project is the same. And then we put in

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1 something that now I'm sorry we did that would  
2 undermine the Commission's justification, that is  
3 nothing has changed or there's no substantial change  
4 that would undermine our prior approval.

5 So here comes a project that was a split  
6 project with office and residential. They're  
7 changing it. They're changing that to all  
8 residential, which everybody is applauding. Well,  
9 everybody's a broad term, but the mayor's initiative  
10 to enlist more people to come back into the city, I  
11 mean it is doing that. But it is a substantial  
12 change, and I'm concerned about the precedent of  
13 doing that, that even though it's a positive change  
14 in many people's mind, it's a substantial change to  
15 this project from moving from 200 units of  
16 residential to 700 units of residential. That is  
17 not an unsubstantial change.

18 And then we get to the term undermine, and  
19 I know that the applicant has gone with a great deal  
20 of care on their pages 10, 11, 12 of their  
21 submission, to show that there are very few changes  
22 in what they had originally proposed.

23 But it is still substantial and, for that  
24 reason, I would urge us to not grant this extension  
25 and somehow give the applicant the opportunity to

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1 proceed with this case but not to set the precedent  
2 for ourselves that we think this is unsubstantial.  
3 So that's my comment at the moment.

4 CHAIRPERSON MITTEN: Okay. Anyone else?

5 COMMISSIONER JEFFRIES: So Commissioner  
6 Parsons, you're not commenting on the merits of the  
7 present case, the present development that's been put  
8 forward. It's really more procedural things?

9 COMMISSIONER PARSONS: Oh yes.

10 COMMISSIONER JEFFRIES: Okay.

11 CHAIRPERSON MITTEN: Mr. Hood?

12 VICE CHAIR HOOD: Yes Madam Chair. While I  
13 respect what Commissioner Parsons is saying, I want  
14 to make sure and I'm trying to grasp it. I will tell  
15 you that first of all I don't know if there's a  
16 procedure of how we move, and I understand there are  
17 things we need to look at, and I don't mind looking  
18 at the regulations and I'm thinking for the best of  
19 the city and the common good for the city.

20 I do remember, and this may be digressing a  
21 little bit, but I do remember this Commission  
22 considering a minor modification from I think it was  
23 all office space and we had switched it all to  
24 residential, and I think we have reasonable  
25 accommodation. I know it's not in the regulations,

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1 I'm just trying to be rational here and reasonable.

2 We know as far as the merits go it's  
3 obviously a great project; I mean it appears to be.  
4 Some people may disagree and we have to get to that  
5 if we get to that. But to deny it on the surface,  
6 I'm not sure if I want to move in that direction  
7 because there have been times when we have tweaked,  
8 this Commission can do what we choose even though we  
9 look at the regulations, but there have been times  
10 that we've made decisions as far as a minor  
11 modification. And when you're changing the whole  
12 project from office to residential, to me that is not  
13 a minor modification. That has been done in the  
14 past.

15 Now I'm trying to remember if that had a  
16 time extension on it, too because I don't think we've  
17 had this situation where we had to deal with a time  
18 extension first and then a modification second -- and  
19 you notice I used the word "minor" modification from  
20 all office space to residential and to me that still  
21 is not minor. And I know I've argued that case for a  
22 couple of years now. So that's my comments.

23 CHAIRPERSON MITTEN: Thank you Mr. Hood. I  
24 think there's a distinction maybe, and I actually  
25 think that the applicant pointed it out or

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1 highlighted it in their submission, and if I can't  
2 find it then I'll just invoke it in general.

3           There's a distinction here that I think  
4 Commissioner Parsons is trying to make, which is that  
5 what we're being asked to do first is to take up the  
6 time extension and then if we decide to extend the  
7 PUD as it was presented, then we can take up the  
8 issue of the modification. And I think what has  
9 happened is that those two things have been blended  
10 in the approach that both the Office of Planning has  
11 taken and what the applicant has taken, so that the  
12 substantial changes are those in the modifications.  
13 So this has all been blended together where the  
14 changes that come to us through the modification are  
15 being used to rationalize the time extension.

16           And, if I'm understanding Mr. Parsons  
17 correctly, he's saying we have to take the time  
18 extension up first and not justify the time extension  
19 using the modification. Because I think there's  
20 still, you know, it doesn't mean if we deny the time  
21 extension that everything is dead; it's that we have  
22 to start over where we can have a new case. But I  
23 think his point is --

24           COMMISSIONER PARSONS: That's exactly the  
25 point. I mean there's nothing I'm saying here that

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1 would stop the proceedings. It's simply setting the  
2 precedent that we believe that this change is not  
3 substantial.

4 CHAIRPERSON MITTEN: Well and I think  
5 further than that, I think the fact that the  
6 modification, if you look at the time extension  
7 purely on its own merits so ignore the modification  
8 for a moment because we're looking at the time  
9 extension of the PUD as it currently exists, all the  
10 reasons that have been used in this sort of blended  
11 manner to justify why there hasn't been a substantial  
12 change that would undermine our justification for the  
13 PUD really are all the reasons why it has changed.

14 We now have a Metro station, we have a much  
15 more desirable market for housing. We have a  
16 community that wants more housing. We have a  
17 rezoning that moved more in the direction of housing.

18 All of those are reasons that show that there's been  
19 a shift and that shift undermines the justification  
20 for the original PUD. That's a distinction. I think  
21 we need to judge the modification separately.

22 COMMISSIONER PARSONS: Let me give you a  
23 theoretical. Supposing the applicant came in and  
24 said housing doesn't work. I want to modify this PUD  
25 to all office. Community outrage. And we're sitting

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1 here with essentially the same kind of decision. Oh  
2 no, that substantially changes. Why is that  
3 different than converting it to all housing is my  
4 point as a precedent for the Commission?

5 COMMISSIONER JEFFRIES: Madam Chair,  
6 Commissioner Parsons, I mean can someone speak to  
7 Vice Chair Hood's comment about precedent that this  
8 Commission has looked at this issue in the past?

9 VICE CHAIR HOOD: Let me just say this  
10 though. I'm trying to recall if we had a time  
11 extension but I do remember the minor modification.  
12 It was back, I know Mr. Parsons was on the  
13 Commission, I don't know if the Chair was on at the  
14 time, but I do remember the minor modification. And  
15 she may recall it.

16 COMMISSIONER JEFFRIES: So it was a change  
17 in use that characterizes a minor modification?

18 VICE CHAIR HOOD: Exactly. And just  
19 getting on the Commission at the time it didn't seem  
20 to me that that was minor. Maybe it was. And still  
21 today I'm still grappling with that. But I will tell  
22 you, I understand what Mr. Parsons' point is and I  
23 understand that we're taking this as a time extension  
24 first and my mind may be a little cloudy, Madam  
25 Chair, because I've been dealing with all this

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1 information together to get to the second point and I  
2 understand that.

3 But for the common good I'm looking at if  
4 we start all over I'm looking at fees and from what  
5 we've heard since I've been on the Commission from a  
6 lot of testimonies, a lot of times there's a  
7 financial burden -- a hardship -- when people have to  
8 do certain things and if that was to move in that  
9 direction then I wonder if it'd still be feasible to  
10 do all this residential. I don't know. I'm just  
11 putting it out there.

12 CHAIRPERSON MITTEN: Well, I think I can  
13 speak to the case that you're recalling which is, and  
14 this is a little bit different and I don't know if  
15 there was a time extension involved. But you're  
16 making the distinction about minor modification that  
17 we've debated in the past, and this is a  
18 modification. This isn't being brought forward as a  
19 minor modification.

20 But the case that you're thinking of is I  
21 think it's 1001 K Street, or what has become 1001 K  
22 Street, where the shift was from all office to hotel.

23 I think that's what the shift was. And that was  
24 deemed by the Commission at that time a minor  
25 modification, and I wasn't on the Commission at the

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1 time but I was so alarmed by the decision that it  
2 stuck in my mind.

3 VICE CHAIR HOOD: So you agree with me?  
4 I'm just asking. Since I had the opportunity to find  
5 out.

6 CHAIRPERSON MITTEN: I agree with you as to  
7 what--

8 VICE CHAIR HOOD: It shouldn't have been a  
9 minor modification.

10 CHAIRPERSON MITTEN: It should not have  
11 been a minor modification I agree.

12 Well, I guess there's a couple of ways to  
13 proceed. Perhaps it might give some of the  
14 Commissioners some comfort as to how to proceed if we  
15 had a sense of if this case was before us, the  
16 modified case was before us, if I can just like get a  
17 consensus on this, would you be willing, if this were  
18 being presented in the context of a hearing action,  
19 is this a case that you would want to set down,  
20 absent the time extension component of it. If this  
21 was a new PUD, would there be a consensus to set this  
22 case down? Does it have the merit for a hearing?

23 COMMISSIONER JEFFRIES: Absolutely. That's  
24 why I asked the question about the merits of the  
25 present case. I mean as long as there was not any

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1 statement being made about that as it relates to  
2 something that's procedural, yes, but that's fine.

3 CHAIRPERSON MITTEN: Okay, and I agree. So  
4 we have a consensus about that. Okay.

5 So then we have the issue -- we want the  
6 case to go forward in some way so then the question  
7 is can you support the time extension, given that  
8 it's supposed to be not viewed in light of the  
9 modification that's coming but viewed on its own  
10 merits, can you support the time extension given that  
11 in my mind the way that it's been justified in the  
12 submissions that we have, if you look at it as  
13 Commissioner Parsons has encouraged us to which I  
14 actually think is the right way, those actually  
15 provide the argument against the time extension, in  
16 which case the way we could proceed is we can vote  
17 the time extension up or down and then, depending on  
18 how that goes, we could set down this case tonight.

19 And I don't know if we could have proceeded  
20 with the hearing or not, maybe Mr. Ritting could tell  
21 us, would we be able to proceed tonight or would we  
22 have to, given that people have been put on notice as  
23 to the nature of what's been proposed?

24 MR. RITTING: Well, I think as a threshold  
25 issue you have to determine whether, if you went the

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1 route of denying the time extension and then setting  
2 it down for the hearing, the original 01-28 case  
3 would then expire so it would have to be a new case.  
4

5 So then you'd need some affirmation from  
6 the applicant whether they in fact wanted to go ahead  
7 with the new case, and I don't think that you can  
8 determine that for them at this point.

9 CHAIRPERSON MITTEN: Okay. And there would  
10 be fees involved?

11 MR. RITTING: Yes. It would be a new case  
12 so they'd have to pay a new filing fee and then  
13 they'd have to pay a new hearing fee as well.

14 CHAIRPERSON MITTEN: Okay. But we could  
15 set it down and we can set it down that we wouldn't  
16 proceed to schedule hearing until the fees had been  
17 paid?

18 MR. RITTING: Provided that the applicant  
19 elected to do so, yes.

20 COMMISSIONER JEFFRIES: But Madam Chair, I  
21 guess I don't really see the merits of setting it  
22 down tonight. I mean we decide here that there's no  
23 extension, you know, it would seem to me that the  
24 applicant should have a moment to pull himself  
25 together and sort of figure out, I don't know if we

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1 normally would do a set down on condition like that.

2 CHAIRPERSON MITTEN: Which would be fine.  
3 I think the important thing is to have a sense of our  
4 willingness to do it.

5 COMMISSIONER JEFFRIES: Well I think we've  
6 said that at this dais at this point.

7 CHAIRPERSON MITTEN: Okay.

8 COMMISSIONER JEFFRIES: I don't think we  
9 need to go through a set down.

10 CHAIRPERSON MITTEN: Okay.

11 VICE CHAIR HOOD: That's a good point  
12 though if I can just chime in here. I think we send  
13 a message of predictability, not that it's going to  
14 be rubber stamped and we agree because I know that we  
15 have to go through a full blown hearing and maybe  
16 tweak and maybe vote it down or maybe vote it up, I'm  
17 not sure. But I think if this time extension is  
18 denied then I think we send a clear message to the  
19 applicant that we're being predictable, first of all.

20 CHAIRPERSON MITTEN: Yes.

21 VICE CHAIR HOOD: And from what I keep  
22 hearing that's what government -- I know when I call  
23 that's what I like, some predictability. And I'm  
24 not saying I always get it but I think we should be  
25 clear that that's how much we would like to see this

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1           come to us in a different fashion, the beginning, as  
2           Commissioner Parsons has already stated.

3                       So I would be in favor of setting it down  
4           if we were to -- because we haven't finished with  
5           that first part and I'm getting contaminated again  
6           but I'm trying to deal with the time extension.

7                       COMMISSIONER JEFFRIES: And I would add,  
8           based on the definitions that I'm reading as it  
9           relates to what constitutes a material change, this  
10          seems like a clear material change to me. I mean,  
11          you know, you've taken out one full use and making  
12          one use, which is a wonderful use, but that single  
13          use you know really requires the view of a lot of  
14          different variables at a different time and place.

15                      So unless legally if someone can tell me  
16          that that is not quite the case, I just don't see how  
17          we can rest on this, you know, not being a material  
18          change. I don't see it.

19                      CHAIRPERSON MITTEN: Thank you. Before we  
20          vote I did also want to address, because I think  
21          maybe the concern is shared by some of the  
22          commissioners, the applicant had included a series of  
23          cases in the number of time extensions and the period  
24          of time over which those time extensions extended,  
25          and I know since my time on the Commission the

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1 Commission has been criticized, and I think rightly  
2 so, in some cases about basically the low standard  
3 that they had at least applied for time extensions.

4 And I, frankly, am glad that we're being  
5 more predictable, but in being predictable we're  
6 applying the standard the way that the Commission had  
7 intended it when it put this in place, which is as  
8 Mr. Parsons described because he was probably here  
9 when it was put in place, that it's for cases that  
10 haven't changed both what's being proposed and the  
11 underlying circumstances haven't changed and the  
12 market has just been difficult for some reason.

13 But for the most part I think what we've  
14 asked for in the cases since I've been here is bring  
15 us a case when it's ripe, when you're ready to build  
16 something, when the market says it's time, don't try  
17 and just lock in because there's a certain climate in  
18 terms of politically, or there's a certain climate in  
19 terms of the composition of the Commission and you're  
20 going to lock that in for the next ten years. So I'm  
21 in favor of applying the standard as I think it was  
22 written, which I think is a higher standard than may  
23 have been applied in the past.

24 So I'll just put a motion out there and if  
25 anyone has any additional comments we can take them

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1 up.

2 I would move that we deny Case No. 01-28TE  
3 for the time extension and that we deny the time  
4 extension that's been requested for the reasons that  
5 the standard in 2408.10 has not been met.

6 COMMISSIONER PARSONS: Second.

7 CHAIRPERSON MITTEN: Is there any further  
8 discussion? Mr. Hood?

9 VICE CHAIR HOOD: Yes. Madam Chair, I  
10 really hope, I understand the precedent that we're  
11 setting, or that Commissioner Parsons has mentioned,  
12 but I sure hope that in the future that we're  
13 consistent. And I'm not saying we're not, and I'm  
14 just putting it out there because I'm going to be  
15 moving this and I'll make sure we're consistent  
16 across the board; I do, too, not want to set anything  
17 that may come back to haunt us.

18 But also before we vote, can we find out  
19 whether or not the applicant is even interested in  
20 bringing this forward? Or do we have to do --

21 CHAIRPERSON MITTEN: I would rather vote  
22 first and then you can ask the applicant anything  
23 that you would like. And in terms of consistency I  
24 think we do have another case pending at this time  
25 and when we took it up we said, and maybe we need to

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1 be more explicit about this at this set down stage  
2 rather than at the hearing stage, but we had another  
3 applicant that really didn't address, at the  
4 commencement of a hearing they had not addressed  
5 their standard for extending the time, and we sent  
6 them back.

7 VICE CHAIR HOOD: And let me just say this  
8 though, Madam Chair and I won't belabor it, but some  
9 of the people who have criticized, not necessarily  
10 criticized, but who have mentioned how we keep  
11 extending PUDs, also have offered letters of support  
12 for this time extension which came in I guess this  
13 evening. I won't call who they are but they're  
14 members of the council from whom we have letters of  
15 support -- not that that's going to dictate how we  
16 move but I just thought that should be put on the  
17 record in complement to the statement that you made  
18 earlier.

19 CHAIRPERSON MITTEN: Okay. Thank you.  
20 Anyone else before we vote? All right. Then all  
21 those in favor please say aye.

22 (Ayes.)

23 CHAIRPERSON MITTEN: Those opposed please  
24 say no. Ms. Schellin?

25 SECRETARY SCHELLIN: Staff will record a

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1 vote 5-0-0 to deny the time extension request in Case  
2 No. 01-28, Commissioner Mitten moving, Commissioner  
3 Parsons seconding, Commissioners Jeffries, Hood and  
4 Turnbull in favor of denial.

5 Mr. Hood, would you like the applicant to  
6 come forward? Did you want to --

7 VICE CHAIR HOOD: I really would rather  
8 have done it before we took the vote; that might have  
9 changed the way I voted because I hate to see this go  
10 down too, I really do.

11 CHAIRPERSON MITTEN: I guess I was hoping  
12 that you would have more of a pure, you were voting  
13 more purely on the merits than --

14 VICE CHAIR HOOD: Well I've been  
15 contaminated. And I mean from looking at all this,  
16 it's a good project, I think it's viable but  
17 hopefully it'll move forward. I don't know. So,  
18 yes, I would like for applicant to come forward.

19 CHAIRPERSON MITTEN: Okay.

20 COMMISSIONER JEFFRIES: But Vice Chair, I  
21 think we all think that there's definitely merit to  
22 this so I don't want there to be sort of a separation  
23 between you and the rest of the Commission on that  
24 though. I think we all find this to be, you know, a  
25 very worthy application.

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1           But, again, backing up the Vice Chair here,  
2 I really do think that, you know, in this PUD I think  
3 as we go forward, particularly around this mandatory  
4 inclusionary zoning, that this PUD process we're  
5 going to have to tighten it up, you know, and I think  
6 that it's important that we do set standards,  
7 particularly around extensions. I mean that's not a  
8 small feat, and I don't think we should take that  
9 lightly and I don't think the bar should be low for  
10 that. I mean that's just my opinion.

11           VICE CHAIR HOOD: I would agree though  
12 Commissioner Jeffries. I know when I first came to  
13 the Commission we would grant an extension, grant an  
14 extension, and I understand we're raising the bar,  
15 we're stopping the bar from, you know --

16           But anyway my point, let me just say this,  
17 I just think that like the downtown housing, we have  
18 tweaked and done everything down there. This  
19 Commission has been good about making sure downtown  
20 housing help and I think this is one of those cases  
21 when we talk about residential, I've seen us do it,  
22 we've done everything possible to make sure it  
23 happens and I mean that's just the way that I move --

24  
25           I mean we all agree up here, it's just how

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1 we're getting there. I think we're all in the same -  
2 - and I agree with Commissioner Parsons to a point,  
3 but I was just trying to make it easy as possible we  
4 can continue to get the residents which we're trying  
5 to get here in the city. That's all.

6 CHAIRPERSON MITTEN: Did you want the  
7 applicant to come forward or not?

8 VICE CHAIR HOOD: Do we want the applicant  
9 to come forward or just me?

10 CHAIRPERSON MITTEN: I think that we've  
11 communicated what we need to communicate to the  
12 applicant but if you wanted to hear something from  
13 them now.

14 VICE CHAIR HOOD: I do have one question  
15 for them. I don't know if it's appropriate or not.  
16 I was going to ask them whether they're going to move  
17 forward.

18 COMMISSIONER JEFFRIES: You know, I would  
19 back you up on that Vice Chair. I mean if the  
20 applicant is interested in coming forward and making  
21 a statement I won't have a problem with that.

22 CHAIRPERSON MITTEN: Would you like to make  
23 a statement, Mr. Ray or Mr. Cohen? Okay.

24 MR. COHEN: Thank you Madam Chair and  
25 Commissioners. I understand what you've done, I

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1 understand the delicate task of what you are  
2 balancing, and I understand the many cases that come  
3 before you every year.

4 One thing that was mentioned, Madam Chair,  
5 which I am very, very sensitive to, is people trying  
6 to use a PUD as an asset. It's not supposed to be an  
7 asset. But with the volatility of our economy and  
8 the differences of how things happen and where they  
9 happen, sometimes it does take the perception of  
10 being held as an asset.

11 I can assure you, and I think the file and  
12 the record is relatively clear, I've been before this  
13 Commission several times on this same property, but  
14 it was a property that was before its time. And I  
15 kind of smile every time Madam Chair has to read how  
16 many lots are involved, it was a painstaking effort.  
17 It was a dream. Pioneers get shot with arrows  
18 sometimes and they have to come back in to be healed.  
19 Those are time extensions.

20 I think we're at a very critical point with  
21 this project. The community is supporting it not  
22 because they favor me but because they realize the  
23 process that got us from the office mixed use concept  
24 to today, was a real process, developed through the  
25 District of Columbia government through the efforts

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1 of the Office of Planning, and I must say significant  
2 efforts of the Office of Planning, the community with  
3 all the personalities in the community and with the  
4 developer, trying to very, very drastically weigh all  
5 of the point of views to come out with a product.

6 This product that is in front of you today  
7 I'm not going to debate substantial change or change,  
8 I'm going to tell you it's a product of today. And  
9 the problem with products of today, the window  
10 changes beyond the control of the developer, or of  
11 you respective Commissioners.

12 We are in an economy -- we're reading about  
13 it in the newspaper -- where are we? Where is our  
14 housing? Has the bubble burst? Has it not burst?

15 I've tried to come before you in the  
16 written submissions to mandate this project must go  
17 forward within 12 months or I should forever lose my  
18 entree to present this project before you again. The  
19 delay of what you are requesting in normal  
20 circumstances nobody can truly debate one month, two  
21 months. It's not worth debating.

22 But the sensitivity of where are today I  
23 think it is critical. I truly do. This project has  
24 a very well established financial partner, a savvy  
25 financial partner, that we have worked together for

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1 the last five months putting together the team to  
2 make it happen and to let this property once and for  
3 all become the asset to the community that the  
4 community deserves, that the District of Columbia  
5 expects, and that the Office of Planning's efforts  
6 don't just go by the wayside.

7 This is a project that has been balanced  
8 with affordable housing, not asking for any  
9 government money for this affordable housing.  
10 Realizing that there are mandates in front of the  
11 council now to try to develop some formula for  
12 affordable housing, to try to mandate developers to  
13 do it. Working with the Office of Planning we made  
14 it happen. This is housing for people who are  
15 without housing.

16 So one month or two months, this is not  
17 about building an affordable housing building; this  
18 is about having to build a main structure in which to  
19 house the affordable housing. If that structure  
20 because of market-driven finances doesn't go forward,  
21 then the government is going to be asked to provide  
22 housing for these people. It's their inalienable  
23 right to come forward.

24 We are asking you with the unique  
25 circumstances, not an office building becoming a

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1 hotel, but this is the circumstance of us providing a  
2 service to the community. There are 900 people  
3 waiting for daycare. We are providing it.

4 Let's take away the capitalistic view of  
5 this project and let's look at the substantiation of  
6 what it does for the community.

7 CHAIRPERSON MITTEN: Can you wrap up your  
8 statement for us, Mr. Cohen.

9 MR. COHEN: I'm sorry. I've finished.

10 CHAIRPERSON MITTEN: Okay. I didn't mean  
11 to cut you off.

12 MR. COHEN: I'm finished. I think you  
13 understand where I'm coming from.

14 CHAIRPERSON MITTEN: I do.

15 MR. COHEN: Okay.

16 CHAIRPERSON MITTEN: Mr. Ray, did you want  
17 to say something?

18 MR. RAY: Madam Chair I do, and thank you  
19 very much for giving me an opportunity to put a few  
20 words on the record. I respect the Commission. I  
21 respect Mr. Parsons' comments but I disagree.

22 Let me just point out two things. Mr.  
23 Parsons said we adopted the rules, that he was  
24 disappointed that you included in the rules the word  
25 "undermine." But those are the rules. The Zoning

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1 Commission can't adopt rules and regulations and then  
2 say we're going to ignore them.

3           These are the rules of this Commission now,  
4 that there's three tests. There has to be a change  
5 in material facts, it has to be substantial. And we  
6 agree. Office of Planning agrees. But it also must  
7 undermine. Office of Planning agrees it doesn't  
8 undermine; we agree. So Mr. Parsons is saying that  
9 may be the rule, I'm sorry we adopted that. I wish  
10 we had not. And we're just going to ignore that and  
11 just say this is a substantial change.

12           I don't think the Zoning Commission want to  
13 send that out there. I don't think the Zoning  
14 Commission want to say that we're going to adopt  
15 rules and then we're going to say well we're sorry we  
16 included this, so we'll just ignore it. You can't  
17 ignore the rules that you adopted to operate under.  
18 That was there. It's part of the standard. And  
19 unless this Commission concludes that we violated all  
20 three of those, change in material facts, substantial  
21 change and our project now undermines your original  
22 decision, and the fact is it doesn't. It supports  
23 your original decision because this is more  
24 consistent; it's as planned as it was then and it is  
25 today. Number one.

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1           Number two, the argument that this  
2 Commission has traditionally, you know, followed and  
3 approved projects that we substantially the same,  
4 that's not the case.

5           Right in our document we cite three cases  
6 that were extended year after year. One started out  
7 as an office building and ended up as a hotel.

8           CHAIRPERSON MITTEN: Maybe that was the  
9 one.

10          MR. RAY: Substantial change. We cited  
11 another one that started off as a private undertaking  
12 to build commercial leased property. It was later  
13 assumed by George Washington University, turned into  
14 a student dorm. The housing that was supposed to be  
15 market housing was turned into student tax exempt.  
16 Those are substantial changes and the Commission  
17 approved those.

18          I'm at a loss. I'm at a loss to understand  
19 this decision. Mr. Cohen has worked hard with the  
20 community, with the Zoning Commission, he's done  
21 everything they've asked of him. And this project  
22 put in plain sight many of the projects that this  
23 Commission has approved that clearly, using your  
24 standard tonight, clearly undermined the original  
25 decision, has been approved.

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1           But the most compelling thing is that you  
2 are saying here tonight we're going to ignore our own  
3 rules. You put it on the record. I'm sorry we put  
4 this word undermine in there, I wish we hadn't put it  
5 there, so we're going to ignore that. We're just  
6 going to say this is a substantial change and go  
7 forward. I don't think you should do that. I think  
8 that's just a total -- on the policy for the  
9 Commission to say that.

10           And then, finally, let me say I don't know  
11 how, and maybe Madam Chair you can explain to me, but  
12 Section 3029.8, I'm sorry, Section 3029.4 says no  
13 application or petition essentially the same as that  
14 denied following a hearing shall be accepted for  
15 filing with one year after the --

16           I read that as saying that we couldn't even  
17 come back for another year. I don't understand how  
18 the Commission can make this decision based on this.

19           CHAIRPERSON MITTEN: Okay. Is there  
20 anything else you'd like to address?

21           VICE CHAIR HOOD: I don't know whether to  
22 ask -- well the question I really wanted to know was  
23 whether they would move forward or not but this last  
24 statement I think needs clarification because I don't  
25 think that's right.

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1 CHAIRPERSON MITTEN: Well, I think, and I  
2 don't want us to get into a debate so I will say that  
3 we have made I believe in our decision a clear  
4 distinction between the original application, which  
5 is what the extension was requested for because you  
6 can't get to the question of the modification until  
7 you extend the original application, so we've drawn a  
8 very bright line between the original application and  
9 the modification and we've said we believe that for  
10 all the reasons why you believe the modification is a  
11 good thing, those are the very reasons why it has  
12 undermined the basis for the original application. I  
13 believe that is the reason why the Commission voted  
14 against the time extension.

15 So to your issue of can you bring an  
16 application that has been denied to the Commission  
17 again within a year, we're saying we think the  
18 modified proposal is a good proposal, but it stands  
19 on its own. So the modified proposal is  
20 substantially different than the original so there is  
21 no issue about bringing the same application that was  
22 denied back to the Commission.

23 So one final question perhaps because, as I  
24 said, we don't want to engage in debate. This is a  
25 little bit of an unusual circumstance that we have an

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1 applicant come up at this point. But what I will  
2 offer just for your reaction and then I still have to  
3 get -- at one point we had talked about setting the  
4 case down sort of subject to receiving the filing  
5 fees and as an indication of your willingness to go  
6 forward and, frankly, if we did that tonight it would  
7 help things move along if we were to do that.

8           Would you be interested, if the Commission  
9 agrees, for us to set down the case as modified  
10 subject to the receipt of the proper fees in order to  
11 schedule the hearing, which we would do as soon as we  
12 could?

13           MR. COHEN: In order to honestly answer  
14 that I would need to, and I don't know if it's my  
15 position to ask you, when that set down would take  
16 place?

17           CHAIRPERSON MITTEN: We could, if I  
18 convince my colleagues, we could set it down tonight  
19 subject to the receipt of the fees. Upon receipt of  
20 the proper fees we would schedule the hearing as soon  
21 as there was a break in our schedule.

22           MR. COHEN: I'm sorry my terminology is  
23 incorrect. I'm trying to determine when the hearing  
24 would take place because that's --

25           CHAIRPERSON MITTEN: Okay. We also could

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1 even go that far because Ms. Schellin has our  
2 schedule.

3 MR. COHEN: If I could know that then I  
4 could answer the question that Commissioner Hood had  
5 presented as to the willingness, because there's a  
6 lot of things hinging, as I had earlier spoken to.

7 CHAIRPERSON MITTEN: I understand. Let me  
8 just go sit with Ms. Schellin.

9 Okay. During the set down we would waive  
10 the normal notice period and we have a hearing date  
11 on December 15<sup>th</sup>.

12 MR. COHEN: So we would be in front of you  
13 on December 15<sup>th</sup>?

14 CHAIRPERSON MITTEN: Yes, if you pay the  
15 fees.

16 MR. COHEN: I'll pay tonight.

17 CHAIRPERSON MITTEN: Okay.

18 MR. COHEN: I am inclined to go along with  
19 it. What I'm struggling with, quite honestly, is  
20 I've got -- and I don't like to use cliches -- I've  
21 got a teed up project. I've got a lender; I've got  
22 plans going; and I'm reading every day about the  
23 housing bubble.

24 CHAIRPERSON MITTEN: Right.

25 MR. COHEN: What I would like to request is

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1 to come back on the 15<sup>th</sup>, but because of the severity  
2 of what I see as those next two or three weeks to  
3 request if my PUD is granted to give me the two year  
4 window instead of the one year window, because I  
5 might be out looking for financing again. I know  
6 what I have now and if this Commission were to grant  
7 me my application within this calendar year, I have  
8 commitments to move forward. I can't speak for a  
9 financial institution beyond a commitment date and  
10 I'm willing to go forward but I've also made it  
11 pretty clear to be invited back here that it would be  
12 one year and never back here again.

13 CHAIRPERSON MITTEN: Right.

14 MR. COHEN: And I'm trying to not recant on  
15 that. I just needed to be clear.

16 CHAIRPERSON MITTEN: We understand.

17 MR. COHEN: Okay.

18 CHAIRPERSON MITTEN: Okay. And I  
19 appreciate you pointing it out. Okay. Thank you.  
20 I'd ask you guys to return to your seats then.

21 All right. Then I would move, if I could  
22 get some support, I would move that we would set down  
23 the case as modified and it's going to have a new  
24 number, that it doesn't have yet, for a hearing and  
25 the hearing would be scheduled for December 15<sup>th</sup>

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1 subject to the receipt of the proper fees, and that  
2 we would waive our normal notice period as we have  
3 done in another PUD recently that we sort of  
4 negotiated our way through that one. We would  
5 abbreviate our notice period to allow the December  
6 15<sup>th</sup> hearing to proceed.

7 VICE CHAIR HOOD: Second.

8 CHAIRPERSON MITTEN: Is there any  
9 discussion on that? Then all those in favor say aye.

10 (Ayes.)

11 CHAIRPERSON MITTEN: And opposed?

12 (No response.)

13 CHAIRPERSON MITTEN: Ms. Schellin?

14 SECRETARY SCHELLIN: We will assign this  
15 Case No. 05-36. Motion will be recorded as 5-0-0 to  
16 set down Case No. 05-36 along with waiving the notice  
17 period and subject to the receipt of fees for a  
18 hearing on December 15<sup>th</sup> at 6:30 p.m. Commissioner  
19 Mitten moving and Commissioner Hood seconding and  
20 Commissioners Jeffries, Parsons and Turnbull in  
21 favor.

22 CHAIRPERSON MITTEN: Thank you. And if you  
23 wanted to consolidate those lots in the meantime,  
24 that'd be great too.

25 MR. COHEN: All right.

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1                   CHAIRPERSON MITTEN: Thank you all for  
2 coming out tonight and we hope we see you back on  
3 December 15<sup>th</sup>. We're adjourned.

4                   (Whereupon, the above-entitled matter went  
5 off the record at 7:36 p.m.)

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