

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

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TUESDAY, MAY 10, 2005

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:00 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:

KEVIN HILDEBRAND	Commissioner
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Secretary
BEVERLEY BAILEY	Zoning Specialist
JOHN NYARKU	Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

JOEL LAWSON
STEPHEN MORDFIN

D.C. OFFICE OF THE ATTORNEY GENERAL:

LORI MONROE, ESQ.

This transcript constitutes the minutes from the Public Hearing held on May 10, 2005.

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

10:57 a.m.

CHAIRPERSON GRIFFIS: And call to order our Public Hearing. This is, of course, the Board of Zoning Adjustment of the District of Columbia. I'm Geoff Griffis, Chairperson. Joining me today is Ms. Miller, the Vice Chair, and also Mr. Etherly. Representing the National Capital Planning Commission with us is Mr. Mann and representing the Zoning Commission is Mr. Hildebrand.

I'm going to go very quickly, because I want to have some time and first say a very good morning, but also I appreciate everyone's patience with the Board this morning. There was quite a lot of work to be done at our pre-hearing meeting, but we will try and make up the time and absolutely respect your time here today.

Copies of today's hearing agenda are available for you. You will see all, and you've had plenty of time, I'm sure, to pick it up, it's at the wall where you came into the hearing room. We are being broadcast live for those of you that did not hear this in the other previous opening, so we ask that you, please, refrain from making any noises or disturbing actions in the hearing room. I would ask

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1 that you turn off cell phones and beepers, so that we
2 don't disrupt the proceedings and the transmissions.

3 And most and more importantly, there are
4 several things. First of all, the Court Reporter
5 sitting to my right is creating an official
6 transcript. That official transcript is part of the
7 record. Everything that is said on the record goes
8 into the transcript. You will need to speak into a
9 microphone in order to be on the transcript. You will
10 also need to have filled out two witness cards.
11 Witness cards are available for you. They are at the
12 table where you entered into the hearing room and also
13 the table where you will provide testimony right in
14 front of us.

15 Those two cards go to the recorder prior
16 to coming forward. When you come forward to give
17 testimony to the Board, I would ask that you just
18 state your name and address once. That will obviously
19 give you credit on the transcript as we create this
20 whole thing and then move ahead. I will give any
21 other directive or instructions if we need to in terms
22 of the technology and such. But, please, be aware
23 that if you want something to be on the record, it has
24 to be said into a microphone.

25 Let's move ahead and note that for special

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1 exceptions and variances our procedure is going to be
2 this, and always is actually: First, the applicant
3 will present their case, all the very important and
4 particular pieces of it. Second, we will hear
5 Government reports attendant to the application,
6 reports of Office of Planning or the Department of
7 Transportation. They will come in at that point.

8 Third, we will hear from the Advisory
9 Neighborhood Commission, the ANC. Fourth, we will
10 hear from persons or parties in support of a case.
11 Fifth, would be persons or parties in opposition to a
12 case. And sixth, finally, the last word goes to the
13 applicant. They can summarize, give any rebuttal
14 witnesses that they want and give us their
15 conclusions.

16 Cross examination is very important for a
17 lot of the cases this morning. Cross examination is
18 allowed and permitted by parties in a case. There is
19 two ways you can participate in cases before the Board
20 of Zoning Adjustment. Actually, there's probably
21 more, but there's two principal ways. First is as a
22 person and everyone is welcome, this is a Public
23 Hearing, to come forward and provide testimony. You
24 are allotted three minutes to address the Board as a
25 person.

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1 Parties, which we will get into and
2 establish if need be, are allowed to conduct cross
3 examination. They are also required to put on cases,
4 full case presentations just like an applicant. It's
5 a very, very balanced, very equal participation in
6 this. But importantly, in terms of the opening here,
7 cross examination is permitted by the applicant and
8 parties in a case. The ANC within which the property
9 is located is automatically a party in the case and,
10 therefore, will, obviously, be allowed to conduct
11 cross examination.

12 It is important to understand, as I have
13 said, we are creating a record here today. When we
14 close the hearing on this case, the record is closed.
15 So no other information comes into the record, nothing
16 else will be looked at by this Board in making our
17 decisions, except for any material that, of course, we
18 request and we will be very specific on what is to be
19 submitted into the record and when it is to be
20 submitted into the Office of Zoning. And we will get
21 to that detail in every case as we proceed.

22 The Sunshine Act requires that this Board
23 conduct its proceedings in the open and before the
24 public. This Board does enter into Executive Session
25 both during or after a hearing on a case and that is

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1 for purposes of reviewing the record and/or
2 deliberating on a case and this is, of course, in
3 accordance with the Sunshine Act.

4 At this time, I would like to say a very
5 good morning to Ms. Bailey with the Office of Zoning
6 on my very far right and, Mr. Moy, who has just
7 temporarily walked out, also with the Office of Zoning
8 and with the Office of the Attorney General, Ms.
9 Monroe. At this point, I'm going to have everyone
10 that is thinking about testifying before the Board,
11 giving any information, to have you stand and give
12 your attention to Ms. Bailey and she is going to swear
13 you in. If you would not mind, please, standing and
14 giving your attention to Ms. Bailey?

15 MS. BAILEY: Please, raise your right
16 hand.

17 (Whereupon, the witnesses were sworn.)

18 MS. BAILEY: Thank you.

19 CHAIRPERSON GRIFFIS: Excellent. Thank
20 you all very much. At this point, we have our
21 potential persons to give testimony sworn in. Let's
22 take up any preliminary matters. Preliminary matters
23 are those which relate to whether a case will or
24 should be heard today by this Board. Requests for
25 postponements, continuances or whether proper and

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1 adequate notice has been provided in a case are
2 elements are preliminary matters.

3 Let me first say, Ms. Bailey, are you
4 aware of any preliminary matters for the Board's
5 attention?

6 MS. BAILEY: No. Mr. Chairman, there are
7 preliminary matters dealing with specific cases, but
8 not at this point.

9 CHAIRPERSON GRIFFIS: Excellent. Thank
10 you. Does anyone here have a preliminary matter for
11 the Board's attention? You can come forward at this
12 time. A very good morning, sir.

13 MR. DAVIS: Good morning. I'm Kenneth A.
14 Davis the ANC representative for 7B concerning Case
15 17316.

16 CHAIRPERSON GRIFFIS: Indeed, the Randle
17 Highlands special exception and variances to allow the
18 construction of 11 row dwellings.

19 MR. DAVIS: Yes, we have a letter in the
20 file there, I believe, that asks for a delay, because
21 we were unable to hear -- have a public hearing on
22 that, because the applicant had made changes to the
23 basic plans.

24 CHAIRPERSON GRIFFIS: Excellent. Board
25 Members, I think we should take this up, at this time,

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1 as a preliminary matter and that will assess our
2 schedule for this morning. Now, let me just note for
3 the both of you, because I'm going to have the
4 gentleman representing the applicant introduce himself
5 in a second, that if this goes into further substance,
6 then we'll just, in consideration of the other
7 applicants, stop discussion and we'll call the cases.
8 But let's get through this pretty quickly if you don't
9 mind.

10 MR. DAVIS: Okay.

11 CHAIRPERSON GRIFFIS: Yes, sir, if you
12 wouldn't mind introducing yourself for the record?
13 You can just turn on your microphone.

14 MR. MOORE: Good morning, Mr. Chairman,
15 Members of the Board, Jerry Moore Law Firm
16 representing the applicant here. There is no reason
17 to delay this case. The case is in the record. All
18 the statutory and regulatory requirements have been
19 met. There is no need to delay. If the ANC
20 respectfully wishes to present something into the
21 record, the record can be left open after the hearing
22 for any submission.

23 CHAIRPERSON GRIFFIS: Okay. Then let's
24 get down to that directly in the record and the
25 submission by the ANC and address it. Did the plans

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1 change and they were unaware of the plans and the
2 substantive changes?

3 MR. MOORE: The plans did change. We did
4 file one, an application. Subsequent to that filing
5 we did meet and discuss the issue, the case with the
6 D.C. Office of Planning. There were certain changes
7 made after the conversations that we had with the D.C.
8 Office of Planning. We do -- we have had the
9 opportunity to present those new plans to Members of
10 the ANC, so there is no reason regulatory or statutory
11 for this case to be delayed.

12 MR. DAVIS: Our issue was whether or not
13 we had the information in a timely manner, so that we
14 could present it to the public. We were not able to
15 do that, so that we do not have public comment on the
16 major changes that were made to the original
17 application.

18 CHAIRPERSON GRIFFIS: Do you know what the
19 major changes are you are concerned about?

20 MR. DAVIS: The use of moving to the lot
21 line, for instance. The property is -- the townhouses
22 are proposed to be adjacent to a property line. There
23 were lot size issues and that we feel are inconsistent
24 with the neighborhood.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MR. DAVIS: And that the neighbors and
2 that the community should have an opportunity.

3 CHAIRPERSON GRIFFIS: So that's the
4 siting, the massing has changed substantially, in your
5 opinion?

6 MR. DAVIS: I'm sorry?

7 CHAIRPERSON GRIFFIS: The siting of the
8 structure, the placement of the structure on the site
9 and the massing has changed substantially?

10 MR. DAVIS: Yes, have changed
11 substantially.

12 MR. MOORE: Well, that's just not true.
13 It's not true. What we have done is we have
14 eliminated one of the houses and the density of the
15 site has, in fact, been reduced from what it
16 originally was. The number of paragraphs from which
17 this applicant is seeking relief has been reduced from
18 five down to two.

19 CHAIRPERSON GRIFFIS: Indeed.

20 MR. MOORE: So it's a lot less dense than
21 it originally was planned to be.

22 CHAIRPERSON GRIFFIS: When's the ANC's
23 next meeting?

24 MR. DAVIS: The third Thursday of this
25 month, I believe, the 19th. Is that -- I'm not

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1 certain of that date.

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. DAVIS: We meet next week.

4 CHAIRPERSON GRIFFIS: All right.

5 MR. DAVIS: Yes.

6 CHAIRPERSON GRIFFIS: So you haven't had
7 your May meeting yet? Have we met?

8 MR. DAVIS: Correct. We have not had our
9 May meeting yet, yes.

10 CHAIRPERSON GRIFFIS: Okay. Good. You've
11 been joined. Does the gentleman want to address the
12 Board?

13 UNIDENTIFIED SPEAKER: No, I'm for another
14 case.

15 CHAIRPERSON GRIFFIS: Oh, indeed.
16 Excellent. Board Members, comments, questions?

17 VICE CHAIR MILLER: Well, was the original
18 application presented to the ANC?

19 MR. MOORE: Yes.

20 VICE CHAIR MILLER: At a publicly noticed
21 meeting?

22 MR. MOORE: Yes.

23 VICE CHAIR MILLER: And was -- Mr. Davis,
24 was there a vote at that meeting?

25 MR. DAVIS: There was not a vote at that

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1 meeting. They did not give the presentation, because
2 as we state in the letter, the applicant indicated
3 that there were major changes to the application and
4 that, therefore, we concluded in the meeting that
5 there was no reason to take a vote if there's going to
6 be a major change.

7 VICE CHAIR MILLER: So you're saying at
8 the meeting at which the original application was
9 presented, they said, at that point, that they
10 anticipated making changes?

11 MR. DAVIS: Yes, that's true.

12 VICE CHAIR MILLER: And that's why you
13 didn't have a vote?

14 MR. DAVIS: Correct.

15 VICE CHAIR MILLER: Okay. And my next
16 question is to whom did the applicant present the new
17 plans to, individual ANC Commissioners, the Zoning
18 Committee of the ANC?

19 MR. DAVIS: The new applicant -- the new
20 application or revised application was presented in a
21 private meeting with the ANC, not a public meeting.

22 VICE CHAIR MILLER: A private meeting with
23 the full ANC?

24 MR. DAVIS: A private meeting with the
25 full ANC, with a quorum present, yes.

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1 CHAIRPERSON GRIFFIS: Was there action
2 taken in the private meeting?

3 MR. DAVIS: There was action taken in the
4 private meeting.

5 CHAIRPERSON GRIFFIS: So there was a
6 motion and it was to what support the applicant?

7 MR. DAVIS: To support the applicant, yes.

8 VICE CHAIR MILLER: And why was the
9 meeting private?

10 MR. DAVIS: I don't know. We --

11 VICE CHAIR MILLER: I mean, was it just
12 not announced or was the public excluded?

13 MR. DAVIS: It was not announced.

14 VICE CHAIR MILLER: Okay.

15 CHAIRPERSON GRIFFIS: Follow-up?

16 MR. DAVIS: No.

17 CHAIRPERSON GRIFFIS: Any other questions?

18 MR. MOORE: Mr. Chair, we have a
19 representative of the applicant here. If he would
20 just be permitted one brief statement? Identify
21 yourself, sir.

22 MR. WALLACH: Yes, I'm Michael Wallach
23 with the Anacostia Economic Development Corporation.
24 And my statement is that the plan, the revised plan
25 was presented at a public meeting of the ANC. And

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1 subsequent to that public meeting, one of the ANC
2 Commissioners stated that if we could bring in the
3 other documentation, that they would hold a special
4 meeting, because of the time of this presentation.

5 CHAIRPERSON GRIFFIS: Okay. Without
6 getting into -- so you went to a public meeting. Was
7 there an action taken by the ANC, official action?
8 Was there a motion?

9 MR. WALLACH: There was no action taken at
10 the second ANC meeting. We went to two. And then the
11 third meeting, which was called as a special meeting,
12 was where the action was taken. Yes, sir.

13 UNIDENTIFIED SPEAKER: What action?

14 MR. WALLACH: That it was approved 3-2 by
15 the ANC.

16 CHAIRPERSON GRIFFIS: How many people are
17 here today for this case to give testimony, 17316?
18 Okay. All right. Any other questions,
19 clarifications?

20 MR. DAVIS: Could I just comment that that
21 was not a public meeting. The final meeting was, as
22 I described it, a private meeting.

23 CHAIRPERSON GRIFFIS: Sure.

24 MR. DAVIS: The public was not invited to
25 that meeting.

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1 CHAIRPERSON GRIFFIS: Okay.

2 MR. DAVIS: And had no notice of it.

3 CHAIRPERSON GRIFFIS: Good. And I fully
4 understand that and I don't want us to spend a lot of
5 time, because we may have different impressions of
6 what that meeting was or wasn't. And does the ANC
7 represent the public? I don't want to get into that.
8 I want to get into the substance to see if we actually
9 have enough information for us to utilize the limited
10 time that we have today in getting through this and
11 how many people have been here in order to go through
12 this case today.

13 Perhaps we have to set this for or keep
14 the record open for further feedback and I don't have
15 any difficulty with doing that. But let's get quickly
16 on then. Is there any other questions or discussions
17 from Board Members? Is there any concerning moving
18 ahead with this today?

19 BOARD MEMBER MANN: No.

20 CHAIRPERSON GRIFFIS: Ms. Miller?

21 VICE CHAIR MILLER: I think if we move
22 ahead with it today, we should keep the record open
23 for the community's input at the next ANC meeting and
24 they should be allowed to, you know, submit a
25 resolution on that.

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1 CHAIRPERSON GRIFFIS: I would tend to
2 agree that as we get through this, Mr. Davis, you may
3 see that this comes up very clear or maybe not, but I
4 don't have any difficulty in following my Board and
5 keeping the record open or potentially keeping it open
6 as we get into this case for further filing from the
7 ANC, clarifications of positions or anything else that
8 we come up with. Mr. Davis, do you have any
9 difficulty in proceeding in that fashion? A little
10 bit?

11 MR. DAVIS: Yes, I do. I believe the
12 factors here are so important that the -- that they
13 cannot be judged without the public evaluation or
14 comment.

15 CHAIRPERSON GRIFFIS: Indeed.

16 VICE CHAIR MILLER: I think, Mr. Chairman,
17 it would mean to also not have authorization for the
18 ANC Commission to take a certain position in this
19 case, which they normally would have in participating
20 in this type of proceeding.

21 CHAIRPERSON GRIFFIS: Well, certainly not.
22 We're not looking for a new position. And let me be
23 clear, I'm not looking for a new position today from
24 the ANC. But we would have to keep the record open
25 for the ANC to create a position with a public meeting

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1 at their -- on or about the 19th of May.

2 VICE CHAIR MILLER: I guess my concern
3 goes to the ANC actively participating in the case
4 that under the ideal circumstances, there is an ANC
5 report that takes the position and authorizes the ANC
6 Commissioner to represent that position and we don't
7 have that in this case.

8 CHAIRPERSON GRIFFIS: All right. I see.

9 COMMISSIONER HILDEBRAND: Particularly,
10 the issue is whether or not they are here in support
11 or against the application. Do we have an official
12 position of the ANC in that regard?

13 MR. DAVIS: We do not.

14 CHAIRPERSON GRIFFIS: I thought we did.
15 We do have a letter from the ANC.

16 VICE CHAIR MILLER: We do have a letter.
17 I'm sorry.

18 CHAIRPERSON GRIFFIS: It's Exhibit No. 23.
19 No, wait, that's not correct.

20 MR. DAVIS: 25 is what I have.

21 CHAIRPERSON GRIFFIS: I'm sorry.

22 MR. DAVIS: I have Exhibit 25.

23 CHAIRPERSON GRIFFIS: Thank you much.
24 Yes, right. I don't know.

25 MR. MOORE: Mr. Chairman, Mr. Chairman,

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1 Members of the Board, there is some discord among the
2 ANC. I have at my left an ANC -- Member of ANC-7B who
3 is Single Member District Commissioner. She has asked
4 just for the Board's attention just for the moment,
5 please? Identify yourself.

6 MS. MOORE: Good morning, I'm ANC
7 Commissioner L. Yvonne Moore, ANC-7B-03.

8 CHAIRPERSON GRIFFIS: Excellent.

9 MS. MOORE: This is my Single Member
10 District.

11 CHAIRPERSON GRIFFIS: Indeed.

12 MS. MOORE: I don't think there has been
13 as much division in my ANC in the three years that I
14 have been as this issue has brought to the table.

15 CHAIRPERSON GRIFFIS: Okay.

16 MS. MOORE: The community, Randle
17 Highlands Civic Association wants it, but I have
18 spoken to some residents that live near it and the ANC
19 did notify those residents, but they for some reason
20 did not attend the meeting. But there is a lot of
21 opposition, because of the variances. But my ANC did
22 meet and our chair did send out an email.

23 CHAIRPERSON GRIFFIS: Okay.

24 MS. MOORE: I'm not sure how publicized it
25 was. I do know that there was concern that it wasn't

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1 a seven day notice, which is required. But the ANC
2 did take a position in the event that you did not
3 postpone it, we were asking for a postponement of the
4 decision.

5 CHAIRPERSON GRIFFIS: Okay. So but just
6 for clarification, Ms. Moore, you support postponing
7 this?

8 MS. MOORE: Yes.

9 CHAIRPERSON GRIFFIS: You do. And so does
10 Mr. Davis?

11 MS. MOORE: I'm sorry?

12 MR. DAVIS: Yes, yes, Davis, also.

13 MS. MOORE: For postponing this? For the
14 variances.

15 MR. MOORE: He asked you did you support
16 postponing the case today.

17 MS. MOORE: Oh, yes, today.

18 MR. MOORE: You want to hear it today, am
19 I right? You want to hear it or do you not want to
20 hear it today?

21 CHAIRPERSON GRIFFIS: I think for that
22 counsel --

23 MS. MOORE: Because we've taken --

24 CHAIRPERSON GRIFFIS: I can get a clear
25 answer to the question, Mr. Moore.

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1 MS. MOORE: We took the position --

2 CHAIRPERSON GRIFFIS: No, let me,
3 actually, be very clear. You are one of the ANC, as
4 Mr. Davis is, Commissioners that have authorized to
5 present and appear before the Board. So the question
6 asked of you and the letter by the ANC is requesting
7 that this case be postponed, not heard today. We
8 don't hear this.

9 MS. MOORE: That was the ANC's position.

10 CHAIRPERSON GRIFFIS: And you are, as a
11 Single Member Commissioner, in agreement with that?

12 MS. MOORE: I'm in agreement with the
13 majority and that was the majority vote.

14 CHAIRPERSON GRIFFIS: Okay.

15 MS. MOORE: That was the majority vote.

16 CHAIRPERSON GRIFFIS: And Mr. Davis is
17 also?

18 MR. DAVIS: Yes.

19 CHAIRPERSON GRIFFIS: So we're hearing the
20 same --

21 MS. MOORE: Yes, that was the majority
22 vote.

23 CHAIRPERSON GRIFFIS: Okay.

24 MS. MOORE: But in the event that you did
25 not grant the postponement, we sent a letter.

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1 CHAIRPERSON GRIFFIS: I see. But your
2 letter is Exhibit 25. Is that correct?

3 MS. MOORE: I'm not sure. I guess.

4 MS. BAILEY: She has another letter, Mr.
5 Chairman.

6 CHAIRPERSON GRIFFIS: Oh, she does?

7 MS. BAILEY: That is not in the file.

8 CHAIRPERSON GRIFFIS: Is not in the file?
9 Oh, I see.

10 MS. MOORE: Can I give you this?

11 CHAIRPERSON GRIFFIS: Not right yet. Oh,
12 we'll do it.

13 MS. MOORE: This was mailed to your office
14 certified.

15 MR. MOORE: The bottom line, Mr. Chairman
16 and Members of the Board, is all the statutory and
17 regulatory criteria have been met. There is no reason
18 to postpone this case. We have worked with the ANC.
19 We pledge to continue to work with the ANC even after
20 this record, even after this hearing is concluded.

21 The Board will have ample opportunity to
22 consider any points that the ANC would wish to put
23 into the record after the hearing has been conducted.
24 We have been waiting a long time for this hearing and
25 there is just no reason to postpone it.

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1 CHAIRPERSON GRIFFIS: Good. We have been
2 waiting a long time, too, and it's 11:15. We got to
3 move ahead. So we're going to call the case today.
4 I'm not sure we're going to finish it today, so we're
5 going to assess how much we get through. We have, you
6 know, 40 minutes to do three cases, all of which are
7 very complicated. I thank you all very much. Let's
8 move ahead then and call the first case for the
9 morning session.

10 MS. BAILEY: Application No. --

11 MR. ZINSER: Sir, I can I, please --

12 CHAIRPERSON GRIFFIS: Oh, I'm sorry.

13 MR. ZINSER: -- request a postponement?

14 CHAIRPERSON GRIFFIS: Yes, sir.

15 MR. ZINSER: Okay. I'm sorry that we have
16 somehow got too many people here. My name is Volker
17 Zinser. I live on 1735 Riggs Place and I would like
18 to request that the case 17319 by Mr. McKeever would
19 be postponed just purely on procedural grounds.

20 There was an ANC meeting held. However,
21 the letter that came out of the ANC meeting did not
22 represent what the community actually was voting on.
23 And it's interesting to note that the representative
24 of that ANC group, Mr. Halligan, who was designated to
25 be here, has chosen not to be here.

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1 CHAIRPERSON GRIFFIS: Okay.

2 MR. ZINSER: That is number one.

3 CHAIRPERSON GRIFFIS: Let me see if I
4 understand you correctly. So you're saying that you
5 don't feel that the ANC's action or that meeting
6 actually represents the community's position. Is that
7 correct?

8 MR. ZINSER: That's correct.

9 CHAIRPERSON GRIFFIS: Okay. And let's be
10 absolutely clear here that this Board looks at the
11 recommendations of the ANC and the substantive
12 elements of that. We also look at the recommendations
13 of the Office of Planning and the Department of
14 Transportation. Here's a whole new forum.

15 MR. ZINSER: I understand.

16 CHAIRPERSON GRIFFIS: And this is the
17 Public Hearing, so now is absolutely your time to
18 present any other elements that you feel --

19 MR. ZINSER: Yes.

20 CHAIRPERSON GRIFFIS: -- may not have been
21 correctly represented. So that, to be direct,
22 wouldn't be a substantive postponing of this.

23 MR. ZINSER: Okay.

24 CHAIRPERSON GRIFFIS: Next?

25 MR. ZINSER: But there is a second one and

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1 that is the issue. The hearing requires the applicant
2 to display an appropriate signage.

3 CHAIRPERSON GRIFFIS: Good, posting.

4 MR. ZINSER: Posting and, interestingly
5 enough, the sign came and disappeared and disappeared
6 again twice. We have registered that, I believe, with
7 the Board here in some form, in emails or whatever,
8 and we find that not an acceptable form and we would
9 like to request a postponement, so we can all properly
10 prepare for this.

11 CHAIRPERSON GRIFFIS: Okay. Ms. Bailey,
12 I'm correct that we have an affidavit of posting. Is
13 that correct? It's Exhibit No. 20 in this case.

14 MS. BAILEY: Yes, Mr. Chairman.

15 CHAIRPERSON GRIFFIS: Is the applicant
16 present? Is the applicant represented here?

17 MR. MCKEEVER: Yes, sir.

18 CHAIRPERSON GRIFFIS: Oh, yes. If you
19 wouldn't mind just coming forward. And while we're
20 here, I'm sorry, ma'am, do you want to state your name
21 and address?

22 MS. CHAPLAIN: I'm Norma Zane Chaplain.
23 I live at 1721 Riggs Place.

24 CHAIRPERSON GRIFFIS: And you have an
25 additional request for postponement. Is that correct?

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1 MS. CHAPLAIN: I just --

2 CHAIRPERSON GRIFFIS: Do you have another
3 preliminary matter?

4 MS. CHAPLAIN: No, I'm sorry.

5 CHAIRPERSON GRIFFIS: Just the same?

6 MS. CHAPLAIN: I was just prepared to
7 testify a little early.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. ZINSER: Ms. Chaplain was at the
10 particular ANC meeting, but you already --

11 CHAIRPERSON GRIFFIS: Sure, sure, sure.
12 Okay. Let's talk about posting. Do you want to
13 introduce yourself, please?

14 MR. MCKEEVER: My name is William
15 McKeever, 1723 Riggs Place. I am the petitioner.
16 With regard to Mr. Zinser's, I believe that's his
17 name, his statement, it is inaccurate. The sign did
18 fall down for a three day period in mid April due to
19 wind and I re-erected it. It has been up since at
20 least April 21st, today's date being May 10th. I have
21 met the signage requirement as stipulated on the sign.

22 MR. ZINSER: Can I respond to that?

23 CHAIRPERSON GRIFFIS: Yes, go ahead.

24 MR. ZINSER: Well, there is about, I don't
25 know how many is left, eight or so of the residents

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1 here. They all have observed the same thing. It
2 wasn't just once for a three day period. It came up,
3 was hung and it disappeared again. It's not
4 believable to say when something is wired up to the
5 bars of the window that the wind has blown that down.
6 That's just really not credible.

7 MR. MCKEEVER: Excuse me. It was erected
8 with tape.

9 CHAIRPERSON GRIFFIS: Right.

10 MR. MCKEEVER: The tape did not hold due
11 to the wind.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. MCKEEVER: And when I had to put it
14 back up, I put it up in a wired way. If this
15 gentleman says that it fell down twice, he is lying.

16 CHAIRPERSON GRIFFIS: Okay. We don't need
17 to get too far into this.

18 MR. MCKEEVER: I do not like being accused
19 of dishonesty, sir.

20 CHAIRPERSON GRIFFIS: I understand. Thank
21 you very much. It's interesting and we often hear
22 this. First of all, the placard posting is one of the
23 most important things in my opinion, pieces of
24 announcement, because it is clearly what people see.
25 It is the form of which people take notice.

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1 Oftentimes we get letters in the mail and, although
2 interesting, may not pay great attention to it and we
3 move ahead. So those are the two elements of posting
4 that happens for our Public Hearing.

5 There are, of course, other
6 participations. The ANC, of course, does their public
7 participation. In this case, Board Members and I will
8 hear from all of you, I am not persuaded that we have
9 lacked in announcing the hearing today just based on
10 the fact of how many requests for party status, based
11 on, frankly, your own observation of how often it went
12 down and how often it went up, it was pretty vigilant
13 in noticing this, the fact that the ANC has also had
14 a public meeting on this.

15 Really, what we need to get into and I
16 think we need to assess in terms of the proper posting
17 and whether we will postpone this is whether there has
18 not been enough opportunity for the community to be
19 aware of this. And it seems to me that there is an
20 awful lot of awareness here and we should utilize the
21 limited time that we have in hearing this case and
22 hearing from all of the adjoining neighbors.

23 I don't see what would be gained by
24 postponing this further. I don't anticipate that
25 there's any other formal meetings that are required of

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1 our hearing of this case, but let me hear from other
2 Board Members. Any objection to proceeding, Ms.
3 Miller?

4 VICE CHAIR MILLER: I concur fully with
5 what you have just said.

6 COMMISSIONER HILDEBRAND: I do, as well.

7 CHAIRPERSON GRIFFIS: Okay. Anything else
8 then? Any other questions, comments, concerns?

9 MR. ZINSER: We'll come later.

10 CHAIRPERSON GRIFFIS: Okay. Then I think
11 we're ready to roll. Ms. Bailey, if you wouldn't mind
12 calling the first case in the morning.

13 MS. BAILEY: Thank you, Mr. Chairman.
14 Application No. 17319 of William McKeever, pursuant to
15 11 DCMR section 3104.1, for a special exception to
16 allow a rear addition to an existing single-family row
17 dwelling under section 223, not meeting the side yard
18 requirements, that's section 405, the court
19 requirements, which is section 406. The property is
20 located in the Dupont Circle Overlay and it's also
21 zoned R-5-B at 1723 Riggs Place, N.W., Square 153, Lot
22 104.

23 CHAIRPERSON GRIFFIS: Thank you, Ms.
24 Bailey. Is Ms. Yin present?

25 MS. YIN: Yes.

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1 CHAIRPERSON GRIFFIS: If you wouldn't mind
2 getting seated at the table. Ms. Chaplain, Norma
3 Chaplain? Oh, good, thank you. And Mr. Murphy?
4 Excellent. These are the three persons that have
5 requested party status, none of which were timely
6 submitted. So the first question, Board Members, is
7 whether we would accept these in. Oh, gosh, darn.
8 Yes, you're right. I'm sorry. Do we have a current
9 one? Someone did away with all mine. Oh, we have
10 Volker Zinser.

11 MR. ZINSER: Yes.

12 CHAIRPERSON GRIFFIS: And also Mr.
13 Redford. Okay. One, two, three, four, five. Does
14 anyone else think that they requested party status
15 that I haven't named? That's right, the one I got
16 this morning. Hold on two seconds. Okay. Very well.
17 Roggensack. Is that correct?

18 MR. MURPHY: She had to leave due to --

19 CHAIRPERSON GRIFFIS: Do you mind turning
20 your microphone on? She had to leave?

21 MR. MURPHY: She had to leave due to
22 timing, yes.

23 CHAIRPERSON GRIFFIS: Yes. Understood.
24 Okay. Good. I don't know if you caught a lot of what
25 I said in the beginning, but I'm going to say it again

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1 very clearly and concisely. I'm going to take
2 questions from you, because this is what I want you to
3 weigh at this point.

4 There are two possibilities of
5 participation today. One is as a person and one is as
6 a party. Now, I'm not going to be exhaustive in all
7 of the responsibilities that you have or pros and
8 cons. But very simply put, to provide testimony today
9 all of you are welcome. There is nothing that
10 prohibits anybody from providing testimony.

11 We will call you up at the point in the
12 hearing where we have persons in opposition. You will
13 provide your testimony. You will be cross examined by
14 the applicant and the representative. You will be
15 questioned by the Board and then you will sit down and
16 relax.

17 If you proceed to go for party status and
18 are granted party status, party status means you are
19 a full participant in this case, meaning we will call
20 you to present a full case. You will have an
21 opportunity to call witnesses. You will be required
22 to submit to the Board legal reasonings and
23 conclusions, that which we ask for, that which we ask
24 the applicant for. You are in many respects an equal
25 participant in this hearing today. Obviously, you

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1 will also, as a party, be able to conduct cross
2 examination, meaning question the witnesses and cross
3 them.

4 So with that, is everyone clear on that
5 and are there any questions and is anyone wanting to
6 just present testimony today? Yes, sir?

7 MR. MURPHY: The question goes back to our
8 request for postponement in that part of the reason
9 that we tried to request party status was because of
10 the insufficient notice and we have not been able to
11 secure a plan within the neighborhood to address this,
12 because there are so many folks that were unaware of
13 today's hearing and also unaware of the vote at the
14 ANC.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. MURPHY: So that is why we were
17 seeking party status.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. MURPHY: In order to be able to do
20 that.

21 CHAIRPERSON GRIFFIS: But let me see if I
22 understand, and I fully understand that you want the
23 whole community to be polled and kind of understand
24 and gauge what it is. But do you feel that you have
25 a strong enough understanding of what is being

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1 proposed that you could bring substantive fact or
2 opposition to elements of this case?

3 MR. MURPHY: Yes, I do believe, I do.
4 However, I have requested additional information from
5 our ANC Commissioner and he has refused to give it to
6 me.

7 CHAIRPERSON GRIFFIS: What kind of
8 information from the ANC?

9 MR. MURPHY: We requested the information
10 regarding what he had polled the neighbors, so we
11 understood exactly which neighbors --

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. MURPHY: -- supported the application.

14 CHAIRPERSON GRIFFIS: But to be clear,
15 we're not balancing our judgment and our basis of
16 decision won't be based on, you know, how many in the
17 community support or don't support. I mean, we're
18 looking at very direct impacts, you know, the light
19 and the air and character of the neighborhood type
20 thing, which we'll get very specific into.

21 And what we need is just one person to
22 tell us that. If 50 tell us, that's okay, but one
23 person telling us is strong enough. So my concern is
24 what are we actually looking to get if we have, you
25 know, 10 more people in opposition? Yes, Ms. Yin?

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1 You need to be on a microphone though.

2 MS. YIN: We have an architect with us
3 present who will be able to help us develop perhaps a
4 more articulate description of our opposition to the
5 application. And therefore, we need time in order to
6 do that and to request for party status. There is
7 significant opposition from surrounding neighbors
8 based on the impact it would have upon our lives and
9 our homes.

10 CHAIRPERSON GRIFFIS: This is a special
11 exception, 223.

12 MS. CHAPLAIN: And also, before the ANC
13 meeting we were told that Mr. McKeever had withdrawn
14 his request for third floor construction.

15 CHAIRPERSON GRIFFIS: Well, that's the
16 next question. Do you guys actually know what we're
17 going to hear today?

18 MS. CHAPLAIN: Yes.

19 CHAIRPERSON GRIFFIS: You do?

20 MS. CHAPLAIN: Yes.

21 CHAIRPERSON GRIFFIS: Fabulous.

22 MS. CHAPLAIN: I think, but it went back
23 and forth several times, and so people were not
24 mobilized. I am a former ANC Commissioner.

25 CHAIRPERSON GRIFFIS: Right.

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1 MS. CHAPLAIN: And I called lots of people
2 and said no, you better be there.

3 CHAIRPERSON GRIFFIS: Okay. Maybe I'm not
4 clear though. I'm not --

5 MS. CHAPLAIN: And so --

6 CHAIRPERSON GRIFFIS: I'm not really
7 concerned today about mobilization of forces against
8 or for this.

9 MS. CHAPLAIN: Okay. But the reason that
10 some people did not participate is they didn't know
11 what was happening.

12 CHAIRPERSON GRIFFIS: Well, I know that.

13 MR. MURPHY: There's confusion in the
14 neighborhood exactly about what is being proposed.

15 CHAIRPERSON GRIFFIS: Right.

16 MR. MURPHY: There is substantial
17 confusion.

18 CHAIRPERSON GRIFFIS: Same with us, but
19 that's what we're here for.

20 UNIDENTIFIED SPEAKER: With the sign going
21 up and down.

22 CHAIRPERSON GRIFFIS: But that's what
23 we're here for.

24 VICE CHAIR MILLER: Mr. Chairman?

25 CHAIRPERSON GRIFFIS: Yes?

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1 VICE CHAIR MILLER: I wanted to pose a
2 question I guess to Ms. Yin who said that they have an
3 architect here. Is there any reason that the
4 architect can't testify and participate fully in the
5 proceeding today?

6 MR. ZINSER: I certainly will, yes.

7 VICE CHAIR MILLER: He will?

8 MR. ZINSER: Yes.

9 VICE CHAIR MILLER: Okay. So that's fine.

10 CHAIRPERSON GRIFFIS: You're the
11 architect.

12 VICE CHAIR MILLER: Oh, good, fine. So
13 it's not like --

14 CHAIRPERSON GRIFFIS: Also requesting
15 party.

16 VICE CHAIR MILLER: You don't have
17 sufficient -- it's not that you don't have enough
18 information to participate today.

19 MR. ZINSER: Well, we have the information
20 that we have been able to gather to this point, yes,
21 but there may be more to come and that's the reason
22 for the request for postponement, but we are willing
23 to proceed on that basis as well.

24 VICE CHAIR MILLER: Okay. My other
25 question is from what I'm hearing, we have a lot of

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1 individual requests for party status and you all
2 should know that another option is if you're all
3 presenting the same case, you can join as one party.
4 So that's an option you should consider. Do you
5 understand that?

6 MR. MURPHY: Yes, and that is something
7 that we wanted to consider as a group of neighbors,
8 but we were not able to get together to do this
9 because of the confusion in the neighborhood.

10 VICE CHAIR MILLER: I guess my point is
11 for you all who are here requesting individual party
12 status.

13 MR. MURPHY: Okay.

14 VICE CHAIR MILLER: The six of you.

15 MS. CHAPLAIN: We'll try not to repeat
16 each other.

17 VICE CHAIR MILLER: Right. So if you're
18 going to be saying the same things, then --

19 CHAIRPERSON GRIFFIS: Let me be more
20 direct.

21 VICE CHAIR MILLER: Okay.

22 CHAIRPERSON GRIFFIS: We have one, two,
23 three, four, five requests for party status. We
24 haven't even gotten to the substance of how we grant
25 party status and we need to get to that right away.

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1 And the most critical piece of that is the last
2 question on the application, which you all filled out,
3 and that is "How are you uniquely distinctly impacted
4 or affected if this relief was granted?"

5 Ms. Miller is getting right to that point.
6 If you're all making the same case, you all want to
7 make it separately, you have essentially hurt each one
8 of your applications for granting party status by
9 saying that there are five or six of you that have the
10 exact same thing. You will all be dealt with the same
11 way if this is granted.

12 So it comes up, one, not only
13 strengthening the request for party status as joining,
14 but it also in administrative efficiency is very
15 effective and important in getting forward. You know,
16 if there is a person in charge of the party, all of
17 you will be able to testify as witnesses within the
18 party, and then you will just have one person that
19 will cross each of the pieces.

20 Really, I am almost certain when we get
21 into this, this is a very, very simple case in terms
22 of the facts of what we have to look at. So we're
23 probably going to take less time in getting through
24 all the substance of it than we do in this preliminary
25 matter, which is now observed. Go ahead.

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1 MR. ZINSER: Why don't we go with me
2 representing the group as one and if I leave something
3 out, as you say, someone else can testify?

4 CHAIRPERSON GRIFFIS: Absolutely, yes, and
5 I think that's excellent. I think that's the way to
6 proceed if everyone is amenable to that, and there is
7 nothing that precludes each one of you from addressing
8 the Board in a fashion under the -- in the case
9 presentation. Okay. So let's go to -- Ms. Miller, a
10 concern? Let's go to --

11 VICE CHAIR MILLER: What shall we call
12 them?

13 CHAIRPERSON GRIFFIS: I don't know. We'll
14 deal with that in a minute. Right. I think we should
15 define them as a party then and go to the request for
16 party status application as a joined party in all of
17 this and the rising of concerns that are listed and
18 also that which whether they would be uniquely or
19 distinctly impacted. I think it is fairly persuasive
20 as a joint party, first of all just based on the
21 location and standing. I will give the applicant an
22 opportunity to respond to this request for party
23 status. Yes?

24 MR. MCKEEVER: I have no objection to
25 these folks opposing me as individual people or in a

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1 party status.

2 CHAIRPERSON GRIFFIS: Excellent. Thank
3 you very much. Then let's proceed. We have granted
4 then one, a single party in opposition to this case,
5 and we have, as indicated, Mr. Zinser, is that correct
6 pronunciation?

7 MR. ZINSER: Yes.

8 CHAIRPERSON GRIFFIS: Will be head of it
9 and we'll proceed. I would ask you all to have a
10 seat, be comfortable. We're going to proceed in this
11 fashion. I'm going to open this up, the case
12 presentation from the applicant. We will then go into
13 the Government agency reports, the ANC and then we
14 will go to persons in support of the application, and
15 then we will go to the party in opposition, the case
16 presentation, and then we'll go for any sort of
17 conclusions. A very good morning. Yes?

18 Yes, I'm sorry. Mr. Etherly brings up an
19 excellent point. I think it was kind of a consensus,
20 not official actually, that we waived in the
21 exceptions of the applications and have taken them up,
22 obviously, and granted. An excellent point for
23 clarification. Let's move ahead then with the
24 applicant's case.

25 MR. MCKEEVER: All right. Good morning

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1 again, William McKeever, 1723 Riggs Place. I have a
2 very simple petition. I moved into my residence in
3 December and the sole thing that I am asking for today
4 is an expansion of 4.2 feet into the dogleg that
5 separates my home from 1721 Riggs Place.

6 Originally, in April, I had submitted a
7 different petition to the ANC. The petition to the
8 ANC was what I just mentioned plus the addition of a
9 third floor addition to my home. At the ANC I
10 completely withdrew that petition and when the ANC
11 voted, it had one item on the table, namely the 4.2
12 extension into the dogleg.

13 The ANC voted seven in favor, none against
14 and two abstaining. Ms. Zin, I'm sorry, Ms. Yin was
15 there. Ms. Chaplain. The partner or Mr. Murphy were
16 there. The neighborhood was well-represented and they
17 were vocally represented and despite their objections
18 to my plan, the ANC voted for me.

19 In the letter dated 21 April by the Office
20 of Planning, there is some confusion in the section
21 listed as request. The way I read it, it looks as if
22 I am still petitioning for the third floor expansion.
23 I am not. I am petitioning solely for the 4.2
24 expansion into the dogleg and the words of what I
25 really seek are listed in section 223.2(a). That is

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1 the actual verbiage of what I seek. The information
2 on page 1 under the words request is superfluous and
3 really somewhat inaccurate.

4 I would like to introduce my architect,
5 Mr. William Middleton. He can talk to you about some
6 of the technical aspects of my plan.

7 MR. MIDDLETON: Good morning. I have
8 brought some additional drawings at the request of the
9 staff. I'm not sure they are still needed, but they
10 basically were submitted originally, but I'm not sure
11 you got them, and one is a plat showing the exact
12 location of the extended dogleg and then another is an
13 overall site plan of the square showing the location.
14 And the third drawing is just an elevation of the
15 extension.

16 CHAIRPERSON GRIFFIS: Okay. How many
17 copies of all that do you have?

18 MR. MIDDLETON: I have enough for
19 everybody.

20 CHAIRPERSON GRIFFIS: Okay. Do you want
21 to turn around and hand one to the party in opposition
22 first and then you can submit them into the record?

23 MR. MIDDLETON: Okay. Should I just bring
24 them up?

25 CHAIRPERSON GRIFFIS: If you wouldn't

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1 mind, you can bring them to Ms. Bailey.

2 MR. MIDDLETON: In addition, if need be,
3 I have photographs actually along the whole back of
4 the square, which shows quite a variation in what has
5 been going on. In fact, in one of the doglegs someone
6 has actually put a stair and an entrance.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. MIDDLETON: So it's not that we're
9 establishing a precedent of any kind. I also have
10 photographs of other areas where this Board has
11 actually approved extensions.

12 CHAIRPERSON GRIFFIS: That's nice, but
13 that doesn't go to whether this would impact the light
14 and air available to the neighboring properties, does
15 it?

16 MR. MIDDLETON: Right. No, it's just
17 showing that there wasn't -- we're not establishing a
18 precedent.

19 CHAIRPERSON GRIFFIS: Yes. We do a lot of
20 223s.

21 MR. MIDDLETON: Yes.

22 CHAIRPERSON GRIFFIS: And we don't base
23 anything on precedent anyway. We look at every
24 application that is before us. So let's go directly
25 to it. 223.2, the light and air available to

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1 neighboring properties should not be unduly affected.

2 Do you want to add anything else to that
3 other than what you have submitted into the record?

4 MR. MIDDLETON: I don't believe we have
5 to, because --

6 CHAIRPERSON GRIFFIS: Are there
7 fenestration? Is there windows on the adjacent
8 property where this is proposed to be?

9 MR. MIDDLETON: No, it's a solid wall.
10 Both are solid walls.

11 CHAIRPERSON GRIFFIS: And the extension
12 out is 4 feet, 8 inches?

13 MR. MIDDLETON: Right, and it's only on
14 the first floor.

15 CHAIRPERSON GRIFFIS: So it doesn't go to
16 the basement or cellar level?

17 MR. MIDDLETON: No, it's like a bay,
18 actually.

19 CHAIRPERSON GRIFFIS: Interesting.

20 MR. MIDDLETON: It's an extension of the
21 kitchen by 4 feet.

22 CHAIRPERSON GRIFFIS: I see. Okay.
23 Privacy and the use and enjoyment of the neighboring
24 properties, would they be unduly compromised if this
25 is approved and built?

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1 MR. MIDDLETON: No.

2 MR. MCKEEVER: The addition is not even
3 visible from the alley. I have a 6 foot fence around
4 my property and unless you're 6 foot 3 or 6 foot 4 or
5 over, you cannot even possibly see it.

6 CHAIRPERSON GRIFFIS: So your rear yard is
7 totally enclosed?

8 MR. MCKEEVER: Yes, it is.

9 CHAIRPERSON GRIFFIS: I see.

10 MR. MIDDLETON: As many of them are along
11 the block.

12 CHAIRPERSON GRIFFIS: Okay. And, in
13 addition, together with the original building as
14 viewed from the alley, if you're on a step stool and
15 looked over your fence or you took your fence down,
16 would it be in keeping with the character of the
17 architecture of the neighborhood?

18 MR. MIDDLETON: Yes, I have made an effort
19 to keep it in character.

20 CHAIRPERSON GRIFFIS: How so?

21 MR. MIDDLETON: We'll put the same window,
22 type window, that is there now on it, on the facade.

23 CHAIRPERSON GRIFFIS: What type of window?
24 What does that mean?

25 MR. MIDDLETON: It's a casement window

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1 that is now there, if you need to see the photograph.

2 MR. MCKEEVER: Sir, I believe it would be
3 virtually invisible to anyone who was peering over my
4 fence. You're looking at it now and you would see
5 exactly the same site, except it would be extended out
6 4 and a half feet.

7 MR. MIDDLETON: Yes. It's going to be
8 hard to tell that it's actually an extension, but I do
9 have some photographs of the back of it if that would
10 help.

11 CHAIRPERSON GRIFFIS: Of the back of the
12 house?

13 MR. MIDDLETON: House.

14 CHAIRPERSON GRIFFIS: Yes, we have those.

15 MR. MIDDLETON: Yes, I thought maybe you
16 did. Well, you can tell that the window would be
17 smaller, because the bay does another like dogleg 4
18 and a half feet there.

19 CHAIRPERSON GRIFFIS: Okay. I didn't
20 understand your last comment though. Looking at the
21 proposed addition, your elevation that you submitted,
22 you said that you're using the same type of window,
23 but it looks like you have drawn double hung window.

24 MR. MIDDLETON: No. Oh, if it -- are you
25 looking at this drawing?

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1 CHAIRPERSON GRIFFIS: Right. What are the
2 original windows?

3 MR. MIDDLETON: Yes, this is a double hung
4 window here and with a glass roof, shed roof, on it.

5 CHAIRPERSON GRIFFIS: Okay. All right.
6 There it is. Anything else?

7 BOARD MEMBER ETHERLY: Quick question.

8 CHAIRPERSON GRIFFIS: Yes, Mr. Etherly, go
9 ahead.

10 BOARD MEMBER ETHERLY: Thank you, Mr.
11 Chair. A very brief question. With respect to
12 vantage points from the rear of your property as it
13 currently exists into any of the adjacent properties,
14 do you already have vantage points if you're looking
15 out of any of your rear facing windows into adjacent
16 yards or patios, I should say?

17 MR. MCKEEVER: I'm not sure what you mean
18 about vantage points.

19 BOARD MEMBER ETHERLY: If you're at any of
20 the windows that are facing rearward from your
21 property, can you see into adjacent rear yards?

22 MR. MCKEEVER: I can --

23 MR. MIDDLETON: Yes, you can see across
24 the alley.

25 MR. MCKEEVER: I can see across the alley.

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1 BOARD MEMBER ETHERLY: Across the alley.

2 MR. MCKEEVER: Right.

3 BOARD MEMBER ETHERLY: But in terms of
4 anything to your right or left?

5 MR. MCKEEVER: I cannot.

6 MR. MIDDLETON: No.

7 BOARD MEMBER ETHERLY: And that would
8 continue to be the case?

9 MR. MCKEEVER: Oh, absolutely.

10 BOARD MEMBER ETHERLY: Okay.

11 MR. MIDDLETON: It's 14 feet back.

12 BOARD MEMBER ETHERLY: Excellent.

13 MR. MCKEEVER: Right. The dogleg is 18
14 feet long. I'm proposing to fill up around 4 feet of
15 it.

16 BOARD MEMBER ETHERLY: Thank you. Thank
17 you, Mr. Chair.

18 CHAIRPERSON GRIFFIS: Ms. Miller?

19 MR. MCKEEVER: And not even all of it,
20 just one story of the three stories that the dogleg
21 occupies.

22 VICE CHAIR MILLER: I just want to pin
23 this down. Did you say that the addition, when it's
24 built, will be able to be seen from the public alley
25 or that it will be impossible to see it from the

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1 public alley?

2 MR. MCKEEVER: Well, certainly, ma'am. As
3 you can see, this is the rear of my house and this is,
4 essentially, what you see now. You look to the back
5 of my house and you see this. What you will see is
6 exactly the same thing, except it's just going to be
7 projected 4 feet out further into that dogleg.

8 MR. MIDDLETON: And there's a fence. You
9 can see it.

10 VICE CHAIR MILLER: So you're saying it's
11 not going to be higher than 6 feet so, therefore, it
12 won't be able to be seen?

13 MR. MIDDLETON: Oh, no, no, it will be
14 higher than 6 feet.

15 VICE CHAIR MILLER: It will be higher than
16 6 feet, so --

17 CHAIRPERSON GRIFFIS: The point is there
18 is a 6 foot fence around the rear yard. So if you're
19 walking down the alley, his testimony is that you're
20 not going to see it, because how could you look over
21 a 6 foot fence?

22 MR. MCKEEVER: It's not visible. The
23 current window right there is not visible if you are
24 less than 6 foot 3 or 4 inches if you look at the rear
25 of my house.

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1 VICE CHAIR MILLER: And how tall would the
2 addition be?

3 MR. MIDDLETON: It will be a total of
4 about 8 or 9 feet, probably 10.

5 VICE CHAIR MILLER: Okay. Thank you.

6 MR. MIDDLETON: Depending on what we end
7 up with the slope on the roof.

8 CHAIRPERSON GRIFFIS: Anything else? Any
9 other questions from the Board?

10 BOARD MEMBER MANN: Yes.

11 CHAIRPERSON GRIFFIS: Yes, Mr. Mann?

12 BOARD MEMBER MANN: Just briefly. Has
13 this project received approval from HPRB?

14 MR. MIDDLETON: Who?

15 BOARD MEMBER MANN: The Historic
16 Preservation Review Board.

17 MR. MIDDLETON: They requested that I go
18 to here first, but they have said once you approve it,
19 they will approve it, of course, but they had no
20 problem with it, but they wanted us to do a hearing
21 first. And that was when we were doing the --

22 CHAIRPERSON GRIFFIS: Right, but let's be
23 clear. I mean, you don't have an official --

24 MR. MIDDLETON: No, I don't have anything,
25 right.

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1 CHAIRPERSON GRIFFIS: -- approval from
2 HPRB?

3 MR. MIDDLETON: No.

4 MR. MCKEEVER: On page 5 of the letter
5 dated April 21st it says agency comments. The
6 Historic Preservation Office has no concerns regarding
7 the one story building addition.

8 CHAIRPERSON GRIFFIS: Right. That's from
9 the Office of Planning, correct?

10 MR. MCKEEVER: Yes, it --

11 MR. MIDDLETON: Yes.

12 MR. MCKEEVER: But it talks about the
13 Historic Preservation Office.

14 CHAIRPERSON GRIFFIS: Did you meet with
15 the Preservation Office?

16 MR. MIDDLETON: Yes, I did. I submitted
17 it there first.

18 CHAIRPERSON GRIFFIS: Oh, you did?

19 MR. MIDDLETON: And they came back and
20 said file it with BZA. We don't have any problem with
21 it, but we would rather see you go through a hearing.
22 And that was when we were doing the third story.

23 CHAIRPERSON GRIFFIS: Right.

24 MR. MIDDLETON: So of course, they didn't
25 have any problem with this. They didn't come out and

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1 say that directly at the time.

2 CHAIRPERSON GRIFFIS: Good.

3 MR. MIDDLETON: But they were concerned
4 about the third story.

5 CHAIRPERSON GRIFFIS: All right. But just
6 for clarity, I don't think that they have officially
7 ruled on this. Obviously, they need to sign-off on
8 the permit if this was to proceed through zoning and
9 they would look at that.

10 MR. MIDDLETON: Well, I talked to them.

11 CHAIRPERSON GRIFFIS: But that's not our
12 jurisdiction.

13 MR. MIDDLETON: I talked to them two days
14 ago and --

15 CHAIRPERSON GRIFFIS: Who did you speak
16 with?

17 MR. MIDDLETON: I'm sorry. I don't
18 remember his name.

19 CHAIRPERSON GRIFFIS: That's okay.

20 MR. MIDDLETON: He's in charge of the
21 area.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. MIDDLETON: And I said do we file
24 again now with you all and he said no, bring it over.
25 If you got approval from BZA, we'll sign-off on it.

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1 CHAIRPERSON GRIFFIS: Yes. Right. Just
2 for clarity, because the Board is asking. Of course,
3 the drawings that we're showing here show an expanded
4 scope, even the plat that you have just submitted.
5 All we're looking at is the addition off the first
6 floor.

7 MR. MCKEEVER: Right.

8 CHAIRPERSON GRIFFIS: It is somewhat of a
9 glass bay enclosure and it projects out 4 feet 8
10 inches into the areaway and that's it. Is that
11 correct?

12 MR. MCKEEVER: That's it. That is
13 correct.

14 MR. MIDDLETON: Yes. This drawing shows
15 a deck that he is going to do instead of the third
16 story, but that doesn't affect you all.

17 CHAIRPERSON GRIFFIS: Okay. Right. We're
18 not sure why you said that. What are we talking about
19 then? The deck is not before us.

20 MR. MIDDLETON: Right.

21 CHAIRPERSON GRIFFIS: So let's leave it at
22 what I say and agree with it or disagree with it.

23 MR. MIDDLETON: Well, I was trying to ask
24 you. You said --

25 CHAIRPERSON GRIFFIS: Unless I have gone

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1 way off track here. We're looking at this small
2 addition off the first floor, which is a glass
3 enclosure and it's the bay, correct?

4 MR. MIDDLETON: Right.

5 CHAIRPERSON GRIFFIS: Okay. Anything
6 else? Board Members, clarifications? Good. Anything
7 else you would like to present at this point?

8 MR. MIDDLETON: I don't think so.

9 MR. MCKEEVER: No, sir.

10 CHAIRPERSON GRIFFIS: Okay. Let's move
11 ahead then. Let's go to the Office of Planning. Oh,
12 I'm sorry. Yes. Would the party in opposition like
13 to cross the witnesses that you have heard?

14 MR. ZINSER: Not at this time. I will do
15 that later.

16 CHAIRPERSON GRIFFIS: Actually, no. Now
17 is the time to cross. Cross examination, of course,
18 this is your opportunity to ask questions of the
19 applicant. So they have just presented. They said
20 listen, this small bay enclosure, it's glass. We're
21 going to match the windows and it's not going to
22 impact the light or the air. And you're going to say
23 -- I don't know what you're going to say, but you're
24 going to ask very direct, succinct questions and they
25 are going to give you very direct, succinct answers

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1 and then we're going to move on.

2 MR. ZINSER: All right.

3 CHAIRPERSON GRIFFIS: Good.

4 MR. ZINSER: You asked a question. Is the
5 addition done in keeping with the architecture? Even
6 though the existing window right now is a side-by-side
7 sliding window.

8 CHAIRPERSON GRIFFIS: Let me give one
9 further instruction. This is absolutely not your time
10 to make statements.

11 MR. ZINSER: I'm not.

12 CHAIRPERSON GRIFFIS: This is the time to
13 ask questions of them. So you don't need to prepare
14 us. Don't get us up to speed, zing questions, zing
15 answers and we're going home.

16 MR. ZINSER: The zing question here is in
17 this addition, we are installing a window that is
18 drastically different than the general architecture in
19 the area.

20 CHAIRPERSON GRIFFIS: Is that true?

21 MR. MCKEEVER: It would be the same
22 window.

23 CHAIRPERSON GRIFFIS: That's your
24 question, right?

25 MR. ZINSER: The window is there. It

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1 doesn't mean it's in character with the architecture
2 in the area.

3 CHAIRPERSON GRIFFIS: Okay. What is your
4 question?

5 MR. ZINSER: Why do we need this kind of
6 window if we have to make an addition? It should be
7 in keeping with the architecture.

8 CHAIRPERSON GRIFFIS: Good. If I
9 understand your question, the direct question is you
10 made a statement that this window is in character.
11 It's existing. What makes it in character?

12 MR. ZINSER: When you addressed the
13 question of why --

14 CHAIRPERSON GRIFFIS: Right, that's the
15 question. Now, we need an answer.

16 MR. MIDDLETON: What makes it in
17 character?

18 CHAIRPERSON GRIFFIS: Yes.

19 MR. MIDDLETON: Just keeping with the
20 windows that are there.

21 CHAIRPERSON GRIFFIS: With the windows
22 that are there.

23 MR. MIDDLETON: I don't think it matters
24 to him whether it's --

25 CHAIRPERSON GRIFFIS: Okay. The follow-up

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1 question, as I understand the direction regarding the
2 cross examination, is the window that you're proposing
3 to match, is that an existing? Is that an original
4 window of the structure?

5 MR. MIDDLETON: No.

6 CHAIRPERSON GRIFFIS: It is not? Okay.
7 So their follow-up to that then is what makes it in
8 character with the existing structure?

9 MR. MIDDLETON: Other than because the
10 windows are all casement, except for the top floor.

11 MR. MCKEEVER: It would be essentially the
12 same window that exists.

13 MR. MIDDLETON: We were just trying to --

14 MR. MCKEEVER: It's going to have to be
15 smaller.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. MCKEEVER: But the same window.

18 CHAIRPERSON GRIFFIS: I understand that.
19 I understand that. So from the Board's perspective --

20 MR. MCKEEVER: And if this gentleman
21 objects to the new window, he should have objected to
22 my old window. I have never heard any objections to
23 him -- my old window.

24 CHAIRPERSON GRIFFIS: No, no, but that's
25 not what we're here to deal with. Okay. So just to

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1 establish, it's an excellent question. The question
2 was this is not an original window.

3 MR. MIDDLETON: Right.

4 CHAIRPERSON GRIFFIS: It's not an
5 original, double hung wood, single pane window. It
6 was replaced at some point and what they are doing is
7 matching the existing window and they are saying that
8 that keeps in the existing character of the house and
9 the addition. Okay. Next question?

10 MR. ZINSER: This exhibit here is a plat.
11 It does not show the side yard properly inasmuch that
12 the side yard actually goes down to the basement
13 level.

14 CHAIRPERSON GRIFFIS: Is there a question
15 here?

16 MR. ZINSER: Yes. It has to do ultimately
17 with, which I will present later on, how do we count
18 these areas really? It's presented as if it was
19 level. It is not and I would like to have that
20 corrected.

21 CHAIRPERSON GRIFFIS: So you want --

22 MR. MCKEEVER: That's a two dimensional
23 drawing, sir.

24 CHAIRPERSON GRIFFIS: The plat? So the
25 question to them is how come you didn't show

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1 topographic changes on the plat plan?

2 MR. ZINSER: If you look at the side
3 yard --

4 CHAIRPERSON GRIFFIS: No, no, no. Really,
5 this should go very quickly.

6 MR. ZINSER: Yes.

7 CHAIRPERSON GRIFFIS: And you should be
8 firing off questions. So your question to them is why
9 have you not shown topographic variations on your plat
10 plan? Is that your question?

11 MR. ZINSER: That is correct.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. ZINSER: There is --

14 CHAIRPERSON GRIFFIS: Good. Let's get an
15 answer.

16 MR. MIDDLETON: At the time I honestly
17 thought the stairs were underneath the addition and
18 since I have gone back --

19 CHAIRPERSON GRIFFIS: Do plats show
20 topographic changes?

21 MR. MIDDLETON: No.

22 CHAIRPERSON GRIFFIS: Okay. So the
23 submission of the plat and what they are looking at,
24 this document doesn't show that type of information.
25 Okay.

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1 MR. ZINSER: It shows it for the rear
2 steps and I'm sure it should show it for the other
3 steps, as well, just like it does on the rest of it.

4 CHAIRPERSON GRIFFIS: I see. So you're
5 going to the fact of there are steps down that are not
6 shown correctly?

7 MR. ZINSER: Yes. If I may, I will sketch
8 them in here.

9 CHAIRPERSON GRIFFIS: Okay. And your
10 follow-up answer to why they are not shown correctly?

11 MR. MIDDLETON: I at the time thought the
12 stairs were actually under the addition.

13 CHAIRPERSON GRIFFIS: I see.

14 MR. MIDDLETON: So you wouldn't have seen
15 the stairs.

16 CHAIRPERSON GRIFFIS: So somehow we'll get
17 that corrected somewhere along here. Do you have that
18 drawing to show that today?

19 MR. MIDDLETON: Do I have a drawing? No,
20 no, that's not where the stairs are.

21 MR. MCKEEVER: Sure it is. That's the
22 stairs down.

23 MR. MIDDLETON: The stairs are down here.
24 I can submit a drawing if necessary.

25 CHAIRPERSON GRIFFIS: Do the stairs go

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1 under the area where it's proposed the addition is
2 going?

3 MR. MCKEEVER: They do not.

4 CHAIRPERSON GRIFFIS: Where are these
5 stairs?

6 MR. MIDDLETON: They are just beyond.

7 CHAIRPERSON GRIFFIS: Is there any impact
8 on the stairs?

9 MR. ZINSER: May I approach you on this,
10 so you can see?

11 CHAIRPERSON GRIFFIS: No.

12 MR. MCKEEVER: Sir, the stairs are right
13 here.

14 MR. MIDDLETON: No, that's not correct.
15 Sorry.

16 CHAIRPERSON GRIFFIS: So they are in the
17 areaway towards the end. What is the impact of these
18 stairs for the addition? Are these stairs changing at
19 all?

20 MR. MIDDLETON: No.

21 MR. MCKEEVER: No, sir, they are not.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. MIDDLETON: No.

24 CHAIRPERSON GRIFFIS: All right. Next
25 question?

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1 MR. ZINSER: That's enough for the cross
2 examination.

3 CHAIRPERSON GRIFFIS: Are you sure?

4 MR. ZINSER: Yes.

5 CHAIRPERSON GRIFFIS: Okay. Did you have
6 a question, sir?

7 MR. REDFORD: May I make just a comment
8 here?

9 CHAIRPERSON GRIFFIS: No. No, we're going
10 to have a whole case presentation. I turn it all over
11 to you to say whatever --

12 MR. REDFORD: No, this is on the case.

13 CHAIRPERSON GRIFFIS: No, I know. No, no,
14 no. But this is the time for hard hitting cross
15 examination questions, questions. Do you have a
16 question on what you just heard, any of the testimony,
17 a question?

18 MR. REDFORD: No, sir.

19 CHAIRPERSON GRIFFIS: Okay. Good. Let's
20 proceed then. We're going to go to the Office of
21 Planning and have their report. A very good morning
22 to you.

23 MS. THOMAS: Good morning, Mr. Chairman,
24 Members of the Board. I am Karen Thomas with the
25 Office of Planning. I would like to stand on the

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1 record with respect to our recommendation of approval.
2 We do not see any substantial detriment to the public
3 good nor will it impair the intent of the Zone Plan.
4 This was not my case so, unfortunately, I can't
5 comment too much.

6 CHAIRPERSON GRIFFIS: Okay. Well, we
7 appreciate you being here to present the memo and
8 analysis from the Office of Planning. It is Exhibit
9 No. 24. Does the party in opposition have a copy of
10 this memo?

11 MR. ZINSER: This is the April 21 memo?

12 CHAIRPERSON GRIFFIS: That's correct.

13 MR. ZINSER: Yes.

14 CHAIRPERSON GRIFFIS: Excellent. Okay.
15 So you have a copy of it?

16 MR. ZINSER: Yes.

17 CHAIRPERSON GRIFFIS: Very good. Any
18 questions from the Board of the Office of Planning?

19 VICE CHAIR MILLER: Yes, Mr. Chairman.

20 CHAIRPERSON GRIFFIS: Ms. Miller?

21 VICE CHAIR MILLER: First of all, the
22 Office of Planning report, it addresses only the
23 addition that's before us and not the third story
24 addition that was withdrawn. Is that correct?

25 MS. THOMAS: Yes. That's the way I read

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1 it, yes.

2 VICE CHAIR MILLER: Okay. I just want to
3 clarify on page 3 of the Office of Planning report at
4 the bottom with respect to the analysis under
5 223.2(c), Office of Planning says that the proposed
6 building addition will be visible from the public
7 alley at the rear of the subject property and we heard
8 testimony from the applicant that it would not. And
9 I just wanted to make sure that that is Office of
10 Planning's observation and conclusion.

11 MS. THOMAS: I believe to the extent that
12 if you can see above the fence, if the fence is 6 feet
13 high and the addition will go up to like about 8 feet,
14 I guess you would see 2 feet. To that extent, you
15 might be able to see that portion of it.

16 VICE CHAIR MILLER: Right. That was --

17 MS. THOMAS: Yes.

18 VICE CHAIR MILLER: That was what I was
19 concluding.

20 MS. THOMAS: Yes.

21 VICE CHAIR MILLER: Okay. And then my
22 other question is with respect to the Dupont Circle
23 Overlay. Certainly, based on some of the submissions,
24 I'm wondering why this addition doesn't adversely
25 affect the historic character of the structures along

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1 Briggs Place.

2 MS. THOMAS: I believe the staff person
3 did refer this to Historic Preservation and they had
4 no concerns with it, it being a single story addition,
5 and that's all I can say about it. It was presented
6 to Historic Preservation. We don't really speak to --
7 when it's in a Historic District or an Overlay
8 District like that, we would refer it to Historic
9 Preservation and they had no concerns.

10 VICE CHAIR MILLER: But we don't have a
11 final decision from HPRB on that question. Is that
12 right?

13 MS. THOMAS: That's correct.

14 VICE CHAIR MILLER: Okay. Thank you.

15 CHAIRPERSON GRIFFIS: Anything else from
16 the Board? Does the applicant have any cross
17 examination of the Office of Planning? Do you have
18 any questions, any cross?

19 MR. MIDDLETON: You were asking about
20 whether you could see the 2 feet. Remember it's 14
21 feet --

22 CHAIRPERSON GRIFFIS: Actually, no. It's
23 cross for Office of Planning. Do you have any cross?

24 MR. MIDDLETON: Oh, sorry.

25 CHAIRPERSON GRIFFIS: None? Thank you.

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1 Yes, cross?

2 MR. ZINSER: Yes, I do. The statement
3 "shall not substantially visually intrude upon the
4 character, scale and pattern of the houses" is not
5 really correct, that there would be no impact on this.
6 We do really differ on that item, as we will present
7 later on as well.

8 CHAIRPERSON GRIFFIS: Are you asking her
9 if you differ on that or what is your question of the
10 Office of Planning?

11 MR. ZINSER: My question is how it could
12 be said, if you add any additions to this, that it
13 would not substantially intrude upon the visual
14 character?

15 MS. THOMAS: Given the nature of its
16 location, we defer those questions to Historic
17 Preservation and we rely on their expertise in that
18 area.

19 MR. ZINSER: But I thought we have not
20 heard really from the HPRB Board yet, have we?

21 CHAIRPERSON GRIFFIS: That's correct. My
22 understanding of her answer to the question as to 223
23 and when they assess the visual intrusion or
24 character, especially in a Historic District, they
25 would defer specific analysis or specific detailed

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1 analysis to the Historic Preservation Review Board
2 unless something of monumentality of intrusion came
3 up. Is that a correct statement of Office of
4 Planning's analysis?

5 MS. THOMAS: That would be correct.

6 CHAIRPERSON GRIFFIS: Okay. So that is
7 what they are saying, that they would defer to HPRB
8 for more detailed comment on that. Follow-up on that?

9 MR. MURPHY: Just one clarification
10 question. On page 1, which Mr. McKeever brought up,
11 the record seems to be unclear and this was the part
12 of the reason that the neighbors were confused. Your
13 description of the request then as it's in the record
14 is inaccurate. Is that correct?

15 MS. THOMAS: Oh, description. Are you
16 referring to page 1 that says application?

17 MR. MURPHY: Yes, under request.

18 MS. THOMAS: Right. We typically use what
19 has been filed in the record as we receive it, sent to
20 us from the Office of Zoning. What has been actually
21 filed, that is what we reflect there in the
22 application summary statement.

23 MR. MURPHY: So where it indicates to
24 construct a 13 foot, 8 inch by 18 foot 2 inch one
25 story dining room addition onto the rear dwelling,

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1 that is correct for this application?

2 MR. MCKEEVER: The next sentence
3 countermands that sentence, Mr. Murphy. It says "The
4 applicant has informed the Office of Planning that the
5 third floor building addition --

6 CHAIRPERSON GRIFFIS: Hold on, hold on.

7 MR. MCKEEVER: -- off the rear wing is no
8 longer proposed."

9 CHAIRPERSON GRIFFIS: Excuse me, but it's
10 not your opportunity. He is crossing Office of
11 Planning.

12 MR. MCKEEVER: Oh, I'm sorry.

13 CHAIRPERSON GRIFFIS: Okay. Follow-up on
14 Office of Planning then? Was there a change? Are you
15 aware of an updated analysis as the application has
16 changed?

17 MS. THOMAS: I'm not quite certain as to
18 what the staff person who reviewed this had in mind
19 with respect to the request. I don't know if he was
20 repeating the request, but the subsequent analysis
21 just spoke to the 4.2 foot addition and a one story
22 addition, and I believe that that was the conclusion.

23 CHAIRPERSON GRIFFIS: I'm sorry, say that
24 again. Did you say 403.2?

25 MS. THOMAS: No, I didn't mention 403.2.

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1 CHAIRPERSON GRIFFIS: Well, let's mention
2 it then.

3 MS. THOMAS: Oh, okay.

4 CHAIRPERSON GRIFFIS: Is this compliant
5 with the lot occupancy that allows it to come under
6 223?

7 MS. THOMAS: Yes, it is.

8 CHAIRPERSON GRIFFIS: Okay.

9 MS. BAILEY: Mr. Chairman, the OP report
10 indicates at the bottom that the lot occupancy would
11 be increased in excess of the maximum of 60 percent.

12 MS. THOMAS: But it still falls under 223,
13 because it can --

14 MS. BAILEY: Right.

15 MS. THOMAS: -- it can go up to 70
16 percent.

17 MS. BAILEY: Right.

18 CHAIRPERSON GRIFFIS: Right. The lot
19 occupancy was 63.3 percent, but that wouldn't
20 necessarily tip it to a variance. It would keep it
21 under 223. Is that OP's position?

22 MS. THOMAS: That's correct.

23 CHAIRPERSON GRIFFIS: Okay.

24 VICE CHAIR MILLER: I'm sorry. I have a
25 couple follow-up questions. On page 5 of Office of

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1 Planning's report under Comprehensive Plan, it says
2 that the proposal will contribute toward achieving the
3 following objectives of the Ward 2 element and, in
4 particular, I'm interested in No. 2, which says "To
5 preserve the design quality of historic and special
6 streets and places in Ward 2." And I'm wondering how
7 granting this special exception would further that
8 objective.

9 MS. THOMAS: I can't speak for Historic
10 Preservation, but it doesn't mean -- when we preserve
11 the design quality, it means that nothing could be
12 added to a structure in a Historic District. So to
13 the extent that the addition would be in keeping or
14 have no adverse impact on the historic aspect of it,
15 it would preserve the quality of the Historic
16 District.

17 And, again, HPRB saw nothing to impact
18 that design quality of the District, hence no
19 concerns. They expressed no concerns over it. So I
20 guess it's in keeping with the design quality of the
21 District.

22 VICE CHAIR MILLER: Okay. So you're
23 saying it's in keeping with that, because HPRB hasn't
24 said that it detracts from the historic?

25 MS. THOMAS: Exactly.

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1 VICE CHAIR MILLER: But we don't know what
2 HPRB has said yet, right?

3 MS. THOMAS: They expressed no concerns
4 over it. I don't know if they should have taken it
5 up. I mean, that would have been left to them to have
6 a full hearing on it. I can't speak for them.

7 VICE CHAIR MILLER: Okay. I'm confused.
8 Do we have a final decision from HPRB or we don't? I
9 mean, see, I was under the impression that it hasn't
10 reached them yet for final decision, not that they
11 have taken a position that it's not adversely
12 impacting historic preservation.

13 MS. THOMAS: They were consulted on the
14 project and, as we would do with Historic
15 Preservation, we would go to them on it.

16 VICE CHAIR MILLER: Does that mean staff
17 or does that mean the board?

18 MS. THOMAS: The staff.

19 VICE CHAIR MILLER: Staff.

20 MS. THOMAS: Not the board, yes.

21 VICE CHAIR MILLER: Right. Okay.

22 MS. THOMAS: It did not go to the board.
23 If they wished to submit it for a full hearing, I
24 guess they would have. I don't want to speak to that.

25 VICE CHAIR MILLER: But is the process

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1 that it will go to the board?

2 MS. THOMAS: I'm not sure. I'm not the
3 staff person who worked on it.

4 VICE CHAIR MILLER: Okay. Okay. And with
5 respect to page 4, Dupont Circle Overlay District, No.
6 2, "Enhance the residential character of the area by
7 maintaining an existing residential use." It seems to
8 me that either way, grant or deny the special
9 exception, it would fall within No. 2. Would you
10 agree with that conclusion?

11 MS. THOMAS: It would still be a
12 residential use, yes.

13 VICE CHAIR MILLER: Okay. Thank you.

14 MS. THOMAS: It's a kitchen addition, I
15 think.

16 VICE CHAIR MILLER: But I'm saying if we
17 were to deny the special exception, would that not
18 also still enhance the residential character of the
19 area or would it detract from the residential
20 character?

21 MS. THOMAS: It would maintain. Yes, it
22 would maintain the existing character, because if you
23 denied the addition, there is no addition. It stays
24 the same, right?

25 VICE CHAIR MILLER: Right. Okay. Thank

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1 you.

2 CHAIRPERSON GRIFFIS: Any other cross from
3 the party in opposition of the Office of Planning?

4 MR. MURPHY: Not at this time. Thank you.

5 CHAIRPERSON GRIFFIS: Thank you very much.
6 The Board has a question about the lot occupancy. Is
7 that correct?

8 COMMISSIONER HILDEBRAND: Yes, Mr. Chair.
9 I was wondering. My understanding of the Code would
10 be that because the court is noncomplying width-wise
11 that it should be included in the lot occupancy
12 calculation. Therefore, the additional enclosure of
13 a portion of that would not increase the lot occupancy
14 beyond the existing condition.

15 CHAIRPERSON GRIFFIS: So the direct
16 question to the applicant is how did you calculate the
17 lot occupancy? Did you include that areaway in the
18 lot occupancy or not?

19 MR. MIDDLETON: I did for the third story
20 addition.

21 CHAIRPERSON GRIFFIS: How did you
22 calculate lot occupancy for the third story addition?

23 MR. MIDDLETON: I included the 4 and a
24 half feet or 5 feet. It's a little under 5 feet, but
25 I included that in the calculations.

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1 COMMISSIONER HILDEBRAND: Did you include
2 the area of the courtyard space that is not being
3 occupied --

4 MR. MIDDLETON: Yes.

5 COMMISSIONER HILDEBRAND: -- in your lot
6 occupancy calculations?

7 CHAIRPERSON GRIFFIS: So your addition
8 that you're proposing now, the one story addition on
9 the first floor, does that increase, decrease or
10 maintain the same lot occupancy?

11 MR. MIDDLETON: It increases it.

12 CHAIRPERSON GRIFFIS: How could it
13 increase if you calculated the areaway in the lot
14 occupancy?

15 MR. MIDDLETON: I didn't use that
16 calculation in figuring for the one story.

17 CHAIRPERSON GRIFFIS: So you're saying
18 that there's a different lot occupancy for the third
19 floor as opposed to the first floor?

20 MR. MIDDLETON: Yes, you could say that.

21 CHAIRPERSON GRIFFIS: I'm not sure I
22 could, but that's what you said, correct?

23 MR. MIDDLETON: Well, if you include it,
24 then how would you calculate the increase? See what
25 I'm saying?

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1 CHAIRPERSON GRIFFIS: Well, I'll be
2 direct. First of all, there can't be any difference
3 between the lot occupancy of the first floor and the
4 third floor. You have one single lot occupancy for
5 this site.

6 MR. MIDDLETON: Yes.

7 CHAIRPERSON GRIFFIS: Secondly, as Mr.
8 Hildebrand is bringing up, it should have been
9 calculated in, the less than 5 foot areaway, in the
10 lot occupancy. And therefore, the addition on the
11 first floor would not impact the lot occupancy at all,
12 because it's already being calculated in as an
13 occupied lot. So we wouldn't have any increase or
14 decrease. It would stay the same.

15 But you have just stated that, in fact, it
16 would increase with that addition on the first floor,
17 which tends to make me believe that the calculation
18 may not be correctly done. Do you have at your
19 ability the dimensions of the site and the property at
20 this point?

21 MR. MIDDLETON: Do I have the
22 calculations?

23 CHAIRPERSON GRIFFIS: Yes.

24 MR. MIDDLETON: I have the --

25 CHAIRPERSON GRIFFIS: It's 56.2.

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1 MR. MIDDLETON: I have the sheet. I have
2 the proposed one story addition, first floor form.

3 CHAIRPERSON GRIFFIS: Yes.

4 MR. MIDDLETON: And in that I increased
5 the lot occupancy by --

6 CHAIRPERSON GRIFFIS: Did you fill that
7 sheet out?

8 MR. MIDDLETON: Yes.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. MIDDLETON: But I think the staff went
11 back and did it again.

12 CHAIRPERSON GRIFFIS: I wouldn't count on
13 that. What's your dimensions of the property, the
14 structure on the property?

15 MR. MIDDLETON: It's -- let me look at the
16 plat. Now, I'm not sure of the question you're
17 asking.

18 CHAIRPERSON GRIFFIS: What is the
19 footprint that you calculated the lot occupancy from?

20 MR. MIDDLETON: It's the width of the lot.

21 CHAIRPERSON GRIFFIS: Yes, what are the
22 numbers?

23 MR. MIDDLETON: It's a combination of 13.8
24 minus -- plus 5.7 minus 1.5 times the length, 56.2.

25 CHAIRPERSON GRIFFIS: And what was the lot

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1 occupancy you came up with?

2 MR. MIDDLETON: It was just at 60 percent,
3 I think, is what I have.

4 CHAIRPERSON GRIFFIS: Okay. How did you
5 calculate the front bay? Did you take that into the
6 lot occupancy or not?

7 MR. MIDDLETON: I'm sorry. Say that
8 again.

9 CHAIRPERSON GRIFFIS: The front bay, the
10 projection of the front of the house.

11 MR. MIDDLETON: Yes, I did.

12 CHAIRPERSON GRIFFIS: You took that into
13 account?

14 MR. MIDDLETON: Yes.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. MIDDLETON: That's what brought it up
17 to about 60 percent.

18 CHAIRPERSON GRIFFIS: Okay. I think we
19 need to proceed. The calculations, from what you just
20 stated, did not take into account the areaway and,
21 therefore, we would have to add that back in, which
22 would be a dimension of 1.5 minus 5.7 by the whole
23 distance, whatever that is. However, it doesn't move
24 me to think that it goes up 10 percent of the lot
25 occupancy.

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1 MR. MIDDLETON: No.

2 CHAIRPERSON GRIFFIS: It wouldn't get
3 above 70 percent, which would make this a variance,
4 but we still stay within special exception, so let's
5 go and move ahead. Office of Planning, we absolutely
6 appreciate their report. Let's move on then unless,
7 Mr. Hildebrand, you have follow-up on that.
8 Clarification needed? Let's go to the ANC-2B. Is the
9 ANC represented today?

10 MR. MCKEEVER: He is at a speaking
11 engagement in Baltimore, sir.

12 CHAIRPERSON GRIFFIS: Okay. It is Exhibit
13 No. 23. The report was timely filed. The letter did
14 indicate that it would oppose certain parts of the
15 aspects that are not now part of this application, but
16 supports the application concerning the first floor
17 addition. Well, there it is. Okay. Any comments
18 from the Board on the ANC letter? Okay. It's
19 difficult, of course, to cross examine a letter, but
20 I will let you deal with that in your case
21 presentations if need be.

22 So let us move ahead. I don't have any
23 other attendant Government reports in this
24 application, so I think it would be appropriate.
25 Persons present in support of this Application 17319

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1 that would like to provide testimony? Persons? Not
2 noting any persons present, let's move right ahead to
3 the party in opposition to 17319. If you're ready to
4 go, let's hear it.

5 MR. ZINSER: Sure. Again, my name is
6 Volker Zinser and I would like to present several
7 questions or issues here. The special exception
8 addresses the side yard issue, which we have discussed
9 to some extent already. However, I would like to
10 point out this side yard is by 50 percent non-
11 compliant. It's required by the Code that it should
12 be a minimum of 8 foot wide and, yet, the existing --

13 CHAIRPERSON GRIFFIS: Okay. But why are
14 we talking about an existing nonconforming side yard?

15 MR. ZINSER: I'm not talking about
16 nonconforming existing side yard, except that it's
17 being encroached upon again.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. ZINSER: And I think that is somewhat
20 significant. I think it is also significant that if
21 any changes are made to that, it does contribute to
22 the character or a different character of an
23 architecture that the community would like to have
24 preserved.

25 CHAIRPERSON GRIFFIS: Okay. Good. I say

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1 get right to the impact. Don't walk us through that
2 it's existing nonconforming.

3 MR. ZINSER: Okay.

4 CHAIRPERSON GRIFFIS: What is the impact
5 of this?

6 MR. ZINSER: What is the impact of this?

7 CHAIRPERSON GRIFFIS: Right. I mean,
8 that's what you were saying, that there is going to be
9 impact on character and light and all that stuff, but
10 let's hear that stuff. That's what 223 is about.

11 MR. ZINSER: Okay. Can I make sure that
12 we really have eliminated the third floor, whether
13 it's a room or a deck, altogether and I don't have to
14 address that?

15 CHAIRPERSON GRIFFIS: That's correct.

16 MR. ZINSER: Okay. Well, this drawing
17 here still does seem to indicate there is some deck
18 proposed, so I want to make sure that's not the case.

19 CHAIRPERSON GRIFFIS: That's what the
20 Board is looking at. That's the only thing it would
21 approve. Didn't we get a new one submitted in, the
22 elevation? Let's move ahead. That's all we're
23 looking at.

24 MR. ZINSER: Okay.

25 CHAIRPERSON GRIFFIS: So that's all that

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1 would be able to --

2 MR. ZINSER: As to the impact, everybody
3 knows how secure we have to be or how security
4 conscious we have to be these days. Any small little
5 recess, any small little alley, any side yard is the
6 perfect hiding place for anyone who tries to do some
7 mischief. And any time we decrease and make it even
8 smaller, it's an even better hiding place, and that's
9 why we would like to have it completely untouched and
10 leave it in the way it was originally. We would
11 retain the character of it, itself, and maintain the
12 building as it is.

13 I would also like to raise another issue
14 and that is neither the staff report nor anyone else
15 has raised the question for the FAR total here.
16 Typically, it is only calculated by using of course
17 the first, second and third floor and when you add
18 those numbers up, it's all well within coverage. But
19 that assumes, as the Zoning Code states, that the
20 ground floor shall not be used for anything else other
21 than for recreational purposes.

22 Well, in this case, Mr. McKeever has an
23 apartment down there, which he rents out separately,
24 and I think that that is an area that doesn't fall
25 under this and should be counted into it to some

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1 extent at least. And once you do that you will exceed
2 the FAR number fairly quickly. And therefore, an
3 addition of any kind would really be furthermore a
4 problem with the FAR itself.

5 And I might add to that that, you know,
6 with all due respect to Mr. McKeever wanting to take
7 care of his sister, if he needs more room, the
8 basement apartment is available for two people.

9 CHAIRPERSON GRIFFIS: Okay. We're going
10 way beyond the scope of 223.

11 MR. ZINSER: Well --

12 CHAIRPERSON GRIFFIS: And quickly. I
13 don't understand what your testimony on the FAR is.

14 MR. ZINSER: Well, it has not been
15 addressed as an issue. There is a maximum coverage of
16 1.8 and, of course, this was more an issue when there
17 was a third floor room or whatever being proposed.

18 CHAIRPERSON GRIFFIS: Right.

19 MR. ZINSER: So it's less of an issue.

20 CHAIRPERSON GRIFFIS: Do we have the FAR
21 calculations with this addition for this application?

22 MR. MIDDLETON: The existing FAR is I
23 believe about 2,100. Let's see. I'm just trying to
24 see. The existing FAR --

25 CHAIRPERSON GRIFFIS: It's a pretty tall

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1 building if it's a 2,800 FAR.

2 MR. MIDDLETON: Well, I mean, it's Floor
3 Area Ratio. Oh, you mean --

4 CHAIRPERSON GRIFFIS: I know it is.

5 MR. MIDDLETON: Oh, you mean, what is it?
6 Is it 1.7 or --

7 CHAIRPERSON GRIFFIS: Go ahead. Just keep
8 going.

9 MR. MIDDLETON: Yes.

10 CHAIRPERSON GRIFFIS: Don't mind my
11 pathetic jokes.

12 MR. MIDDLETON: It basically falls -- the
13 maximum allowed is 3,000 square feet. That would give
14 you the 1.8.

15 CHAIRPERSON GRIFFIS: 1.8 is 3,000 square
16 feet?

17 MR. MIDDLETON: Yes. And what is being
18 proposed with the addition is 2,092.7, so it's under
19 the allowable FAR.

20 CHAIRPERSON GRIFFIS: Okay. Ms. Miller?

21 VICE CHAIR MILLER: But does that include
22 the rental apartment?

23 MR. MIDDLETON: No, that is not included
24 in the FAR, because it's at grade level. I mean, it's
25 less than 3 feet or something like that. It doesn't--

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1 it's not counted in when it's below the 3 feet.

2 VICE CHAIR MILLER: But we just heard the
3 argument that it should be counted if it's not for
4 recreation purposes.

5 MR. MIDDLETON: Because it's an apartment,
6 yes. But use has nothing to do with the FAR. All it
7 does is figure out the actual floor area in the
8 building. So if it's below a certain level, then it's
9 not counted.

10 COMMISSIONER HILDEBRAND: Is this current
11 level considered a cellar or is it considered a
12 basement?

13 MR. MIDDLETON: I believe -- I can't
14 remember the exact term, but if it's less than 3 feet
15 it's a cellar, isn't it? I think so.

16 CHAIRPERSON GRIFFIS: 4 feet, if the
17 ceiling is 4 feet below or above the adjacent grade.

18 MR. MIDDLETON: Yes.

19 CHAIRPERSON GRIFFIS: Makes it a cellar or
20 a basement. Of course, cellars don't count towards
21 FAR, basements do, which is what the question Mr.
22 Hildebrand was setting up is. What is it? A cellar
23 or a basement?

24 MR. MIDDLETON: Cellar.

25 MR. MCKEEVER: Members of the Board, I am

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1 not an architect, but I know that the basement windows
2 do not come very high above street level. They are
3 quite low. So Mr. Middleton says it's a cellar, I
4 believe that it certainly would fit that definition.

5 CHAIRPERSON GRIFFIS: At the front. Is
6 that correct?

7 MR. MCKEEVER: At the front and the back.

8 CHAIRPERSON GRIFFIS: And the back. So
9 the grade is similar all the way around?

10 MR. MIDDLETON: Yes, it's actually a
11 little bit lower in the back. The grade is a little
12 bit higher, in fact.

13 MR. MCKEEVER: The only place where it's
14 lower in the back is at the dogleg, because there is
15 a rear entrance.

16 MR. MIDDLETON: No, but he's talking about
17 the -- you have three steps going up the back.

18 MR. ZINSER: It's more like eight or nine
19 steps.

20 MR. MIDDLETON: No, it's not eight or nine
21 steps.

22 MR. MCKEEVER: No. It's my property, sir.
23 It's not eight or nine steps.

24 MR. ZINSER: All right. Three steps.

25 CHAIRPERSON GRIFFIS: Okay. Ms. Miller?

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1 VICE CHAIR MILLER: Just for clarity. Mr.
2 Middleton, you're saying it's a basement, correct?

3 MR. MIDDLETON: A cellar.

4 VICE CHAIR MILLER: Cellar. Okay. It's
5 a cellar based on the definition of cellar in the regs
6 or on what basis are you saying it's a cellar?

7 MR. MIDDLETON: On the regs, based on the
8 regs.

9 VICE CHAIR MILLER: Because of which
10 features of the property?

11 CHAIRPERSON GRIFFIS: The height of the
12 ceiling above the adjacent grade is what he indicated.

13 VICE CHAIR MILLER: Okay. And, Mr.
14 Zinser, what regulation are you referring to with
15 respect to your argument that you count that area?

16 CHAIRPERSON GRIFFIS: Sorry. Your mike is
17 off.

18 VICE CHAIR MILLER: I'm sorry. Could you
19 tell me what regulation you're relying on for your
20 conclusion that you count the FAR in that area?

21 MR. ZINSER: It's under the definition of
22 gross floor area. If you read it through there, it
23 very clearly states what should be counted in gross
24 floor area, which then becomes part of the FAR
25 calculation. I think that's not something I need to

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1 tell the Board about, but if you would like to, I'll
2 read it.

3 "The term gross floor area shall include
4 basement, elevator shafts, stairwells, etcetera, floor
5 space used for mechanical equipment, structural head
6 room of 6 feet inches and 6 foot 6 or more,
7 penthouses, attic space, etcetera, providing
8 structural head room of 6 foot 6 inches."

9 CHAIRPERSON GRIFFIS: Okay. I'm sorry to
10 interrupt you. We don't need -- we're not getting
11 engaged in an argument of what counts towards FAR or
12 what doesn't. What we're hearing today is testimony
13 from the party in opposition that actually the rear
14 should be counted towards FAR. The FAR calculation is
15 incorrect.

16 MR. ZINSER: Right.

17 CHAIRPERSON GRIFFIS: And that's where we
18 are.

19 MR. ZINSER: Okay.

20 CHAIRPERSON GRIFFIS: So we're just
21 exploring that.

22 MR. ZINSER: Okay.

23 CHAIRPERSON GRIFFIS: Let's move ahead.

24 MR. ZINSER: Good, and we established
25 that?

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1 CHAIRPERSON GRIFFIS: Yes. Okay.

2 Anything else?

3 MR. ZINSER: No, I think that will cover
4 it.

5 CHAIRPERSON GRIFFIS: Are you sure? Okay.
6 Everyone else engaged, now is the time. This is your
7 case presentation, so now is the opportunity to get --
8 you're going to call all your witnesses and I imagine
9 you're going to call all four people that are with
10 you.

11 MR. MURPHY: We just have one follow-up
12 question if that's allowed. We're confused a little
13 bit on the testimony regarding the windows in the
14 basement apartment, because we do show it at about 3
15 feet above grade in the front.

16 CHAIRPERSON GRIFFIS: Okay. You show?
17 How do you show it first of all? You have
18 documentation?

19 MR. MURPHY: We have a photograph, yes.

20 CHAIRPERSON GRIFFIS: Okay. So you want
21 to submit that into the record?

22 MR. MURPHY: Yes.

23 CHAIRPERSON GRIFFIS: Okay. And you're
24 showing what as 3 feet above the adjacent grade?

25 MR. MURPHY: The windows to the basement

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1 apartment.

2 CHAIRPERSON GRIFFIS: Okay. What about
3 the ceiling?

4 MR. MURPHY: In the front of the building.

5 CHAIRPERSON GRIFFIS: The ceiling is the
6 definitive factor here. It's the ceiling. How high
7 above the adjacent grade is the ceiling?

8 MR. MURPHY: We don't have access to the
9 building. I'm the former owner, but we did qualify
10 for a Certificate of Occupancy in that basement.

11 CHAIRPERSON GRIFFIS: Okay. And that
12 wouldn't go to whether it was FAR or not, just for
13 clarification. You could conceivably get a C of O for
14 some place that isn't potentially --

15 MR. MURPHY: Right.

16 MS. CHAPLAIN: I have a building that was
17 remodeled at the same time by the same architect, Hugh
18 Newell Jacobsen, in 1963 and --

19 CHAIRPERSON GRIFFIS: Actually, let's do
20 this. Why don't you let him finish and then I'll hear
21 from you.

22 MS. CHAPLAIN: I'm so sorry. I thought
23 you were done.

24 CHAIRPERSON GRIFFIS: And then we're going
25 to make you comfortable and actually give you a chair

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1 with a microphone in front of you. So just have a
2 seat. Not to worry.

3 MS. CHAPLAIN: I'm sorry.

4 CHAIRPERSON GRIFFIS: I'm not going to
5 rush through this too fast and miss anybody.

6 MS. CHAPLAIN: I thought you were done.

7 CHAIRPERSON GRIFFIS: We'll just rush
8 through it a little bit. Okay. Go ahead. Anything
9 else?

10 MR. MURPHY: Yes. That was it, a point of
11 clarification for the testimony regarding the windows.

12 CHAIRPERSON GRIFFIS: Okay. But just to
13 be clear, that photograph is not going to give us any
14 indication of how high the ceiling is in that lower
15 level.

16 MR. MURPHY: We don't have any testimony
17 then on the ceiling in the record?

18 CHAIRPERSON GRIFFIS: Well, you have your
19 opposition testimony and you have the testimony of the
20 applicant, and it looks like we may need clarification
21 on that information. Okay. But if there is nothing
22 further, I would rather not take that photograph into
23 the record just because it's not showing what we
24 actually need in terms of the dimension.

25 MR. MURPHY: Certainly.

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1 CHAIRPERSON GRIFFIS: Okay. Follow-up
2 questions?

3 VICE CHAIR MILLER: I have one more
4 question for Mr. Zinser, because I have been looking
5 through the regulations and I'm just wondering where
6 in the regulations or definitions there's a reference
7 to recreation affecting these calculations.

8 MR. ZINSER: I believe it is in the
9 definitions, but I will try to find it. I'm sorry.
10 I don't recall it immediately, but I will be glad to
11 send it in if you need to and I will find it. It's in
12 the regulations. It's not --

13 CHAIRPERSON GRIFFIS: Good. I think we'll
14 have to rely on our huge legal bank to find our own
15 FAR definition.

16 MR. ZINSER: Okay. Sure.

17 CHAIRPERSON GRIFFIS: And proceed with
18 this. Let's go ahead with further testimony from the
19 opposition. Next? Next witness? Can we give her a
20 chair?

21 MS. CHAPLAIN: This is testimony not
22 questions?

23 CHAIRPERSON GRIFFIS: That's exactly
24 right. In fact, your party leader is calling you as
25 a witness to the party in opposition.

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1 MS. CHAPLAIN: I think perhaps the wrong
2 question may be asked here, not why not should this be
3 done. I have an answer to that, too, but why? The
4 why not is -- I live right next door. This will not
5 affect me. However, one of the reasons that you have
6 so many people up in arms about this is a feeling of
7 protectiveness about this row.

8 It may be the last or the only Schneider
9 Row that exists. There have never been any permanent
10 changes to the exterior. This is the first change
11 that is permanent and I can't really testify against
12 a change that might take place. I assume that both
13 the windows on both sides will be left intact.

14 CHAIRPERSON GRIFFIS: Go ahead.

15 MS. CHAPLAIN: Of the bump out. There is
16 a kitchen window and there is, I think in your house,
17 a hallway window.

18 MR. MIDDLETON: Dining room.

19 MS. CHAPLAIN: Dining room? It's a change
20 that I do not recall. But if -- it's right next to
21 the bathroom, is it not?

22 MR. MCKEEVER: There's no bathroom in that
23 area, ma'am.

24 MS. CHAPLAIN: There's a half bath, is
25 there not?

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1 MR. MCKEEVER: No, there's not, not
2 anywhere near there.

3 CHAIRPERSON GRIFFIS: All right. All
4 she's --

5 MS. CHAPLAIN: I'm sorry. I was just
6 looking ahead.

7 CHAIRPERSON GRIFFIS: What is the impact?
8 Are you closing up any other windows? Is there any
9 other impact that's coming on that side area?

10 MS. CHAPLAIN: Exactly, right.

11 CHAIRPERSON GRIFFIS: Just for a quick
12 clarification.

13 MR. MCKEEVER: The bump out, as you can
14 see, it's going out into that notch and in that notch,
15 sir, is a window from this cross hatched area. So
16 that is just all going to be open.

17 CHAIRPERSON GRIFFIS: Is that window --

18 MS. CHAPLAIN: So you'll have two windows
19 in the bump out?

20 MR. MCKEEVER: No, I have one.

21 MS. CHAPLAIN: All right. They will be
22 able to see the plan, I expect. As you notice, we
23 feel enormously protective of this area, of this row.
24 We would all like to have extra space and nobody in
25 110 years has done any change to the basic structure,

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1 not when it was a one family house, not when it became
2 -- when the buildings became group houses, rooming
3 houses and now recently we would all like more space.

4 Nobody has ever considered doing this and
5 we fear that this is an unnecessary change. I think
6 the reasons that best explain this are the regulations
7 cited, one of the regulations cited by the Office of
8 Planning on why this application should be denied.
9 The Comprehensive Plan says it should preserve and
10 protect historic buildings in historic areas. So the
11 question is is this necessary? Why are we making this
12 change?

13 CHAIRPERSON GRIFFIS: Okay.

14 MS. CHAPLAIN: And it seems to be somewhat
15 gratuitous and makes people question the reason for
16 regulations if they are not -- even simple ones aren't
17 going to be adhered to.

18 CHAIRPERSON GRIFFIS: Good. Thank you
19 very much. Other witnesses?

20 MR. MURPHY: Yes. Members of the Board,
21 I am Robert Murphy and my partner Fred Steckler and I
22 are the former owners of 1723 Riggs Place and the
23 current owners of 1731 Riggs Place. We moved just a
24 few houses down. We sold the home to Mr. McKeever.
25 Our letter for opposition to his application for a

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1 special exception is in your file and it contains the
2 basis for our opposition. I ask that you, please,
3 review it if you have not already done so.

4 However, I would like to take just a few
5 moments to further elaborate to you on why we, along
6 with the majority of neighbors, oppose this
7 application. We do believe that it will substantially
8 and visually intrude upon the character, scale and
9 especially the pattern of houses on this very unique
10 place, Riggs Place, Schneider Row. The neighbors who
11 you will hear today speak represent 9 of the 13 houses
12 of the Schneider Row. Two of those not represented in
13 the opposition include Mr. McKeever, the applicant,
14 and Mr. Halligan our ANC representative, as well as
15 two other absentee landlords who are not part of the
16 community living there.

17 We're joined by several other neighbors
18 from Riggs Place on the other side of the street as
19 well as the surrounding neighborhood. They have
20 spoken or will speak to some of the finer points of
21 the Zoning Laws and the reasons against supporting a
22 special exception. I wish to spend these moments
23 putting into context what it means to be a part of
24 Riggs Place and how she is one of the most beautiful
25 and unique places to live and the city needs this

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1 Board's protection.

2 We, as a neighborhood, are united. To put
3 this in context as of yesterday, every neighbor who
4 chose to write to this Board about this request for a
5 special exemption has opposed it. We represent a
6 diverse group of individuals and families, some just
7 a few years as residents and others with more than 30
8 years here, but we are collectively the Riggs Place
9 family.

10 Despite our individual differences, we
11 share two things in common. We love Riggs Place and
12 we respect, appreciate and intend to protect the
13 historical significance of this unique piece of our
14 nation's capital's history. Webster's defines history
15 as a past worthy of record or out of the ordinary.
16 Nothing could describe Riggs Place more accurately.
17 For well over a century, her residents have protected
18 her and have improved her. All the while protecting
19 the historical significance of her lineage.

20 She is a diamond in the architectural
21 crown of the city, and as such, she cries out for
22 protection. Architectural students, architects and
23 others visit the row on Riggs Place to see this unique
24 block and study its historical lineage. Indeed, Mr.
25 McKeever himself complemented on how historic and

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1 beautiful it was, which was part of the reason he
2 wanted to move to the neighborhood.

3 Please, understand we, as a neighborhood,
4 are not against progress, but progress again defined
5 by Webster's is development in a direction considered
6 as beneficial and to a greater degree greater than
7 that yet attained. What is being proposed here today
8 is development, not progress. We need to respect the
9 historical and unique historical significance of
10 Schneider Row. For over a century our Riggs Place
11 family has improved her, but always respected, indeed,
12 admired the vision and significance of her architect,
13 Mr. Schneider.

14 In fact, 1723 itself has undergone at
15 least two major renovations in her history, but they
16 have always been carried out within the bounds of the
17 Zoning Laws and within the original footprint and the
18 design and intent of Mr. Schneider. Aside from
19 ignoring the historical integrity of this row,
20 granting the special exception will create a slippery
21 slope where precedent could be argued that since the
22 integrity of the row has been breached permanently,
23 and it's a permanent addition that we're talking about
24 today, additional exceptions and development will be
25 sought.

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1 We run the significant risk of over
2 development and the loss forever of this architectural
3 gem. Members of the Board, we are more than a
4 community or neighborhood. We are a family and we
5 have always recognized amongst ourselves that property
6 rights are not absolute. And frankly, because these
7 rights are not absolute, we, as citizens, are
8 depending upon the regulations that this Board
9 interprets and enforces each day.

10 We are asking you to enforce the
11 regulations and not grant this special exception. For
12 the reasons discussed -- for the historical reasons I
13 discussed today, the technical reason that Mr. Zinser
14 has made and the future protection of this unique and
15 wonderful row of homes, we are asking you to stand
16 with us, stand up for the historical architecture of
17 this city and save Schneider Row and rescue Riggs
18 Place. Thank you.

19 CHAIRPERSON GRIFFIS: Thank you. Next?

20 MR. REDFORD: I'm Mr. Redford and we've
21 lived there for 30 years.

22 CHAIRPERSON GRIFFIS: Indeed.

23 MR. REDFORD: And I thank our friends here
24 on the right here for bringing the community again
25 together. We have families and they have children and

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1 we have weddings on the street. And they have brought
2 us together on this issue. And I can't -- because
3 I've watched things go on and then changes being made
4 and we made a real historical, all books, everything
5 concerning the architecture, the history, who has
6 lived there.

7 CHAIRPERSON GRIFFIS: Sure.

8 MR. REDFORD: And we just don't want it
9 changed.

10 CHAIRPERSON GRIFFIS: Any thing --

11 MR. REDFORD: I won't be here long and I
12 hope this kind of things stay. My wife is gone, so I
13 won't be long, but it's a wonderful street.

14 CHAIRPERSON GRIFFIS: Indeed.

15 MR. REDFORD: And I ask you not to change
16 it.

17 CHAIRPERSON GRIFFIS: Thank you very much.

18 MR. REDFORD: Thank you.

19 CHAIRPERSON GRIFFIS: Others?

20 MS. YIN: Thank you. My name is Monica
21 Yin and I will make it very brief and simple. I think
22 this proposal is completely incompatible with the
23 current intensity of use. It is my belief that if the
24 subject property finds the total square footage
25 inadequate for his use, he should have purchased a

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1 free-standing property elsewhere in the suburbs where
2 his stated desire for greater space and privacy would
3 not impinge upon the lives of others. Thank you.

4 CHAIRPERSON GRIFFIS: Thank you. Closing
5 remarks? Mr. Zinser, do you want to come up?
6 Questions from the Board of all of that you just
7 heard? Ms. Miller?

8 VICE CHAIR MILLER: I just want to make
9 sure I understand the status of these buildings with
10 respect to their historical status. Are they
11 landmarked or are they in a Historical District or you
12 just think they are historically significant?

13 MR. ZINSER: The historical significance
14 is in the Dupont Circle Overlay District, if that
15 helps you. They are not per se on the Landmark
16 Register, even though some individual houses have been
17 put into the register.

18 VICE CHAIR MILLER: So I understand they
19 are in the overlay, but they are not necessarily in a
20 Historic District? Is that it?

21 MR. ZINSER: Correct.

22 VICE CHAIR MILLER: Okay. Thank you.

23 MR. ZINSER: Okay.

24 UNIDENTIFIED SPEAKER: It is a Historic
25 District.

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1 UNIDENTIFIED SPEAKER: Yes, it is.

2 MR. ZINSER: I mean, the overlay --

3 VICE CHAIR MILLER: It's a Historic
4 District?

5 MR. ZINSER: The overlay at --

6 VICE CHAIR MILLER: Okay.

7 MR. ZINSER: -- Dupont Circle Overlay is
8 a Historic District.

9 VICE CHAIR MILLER: The whole overlay is
10 in a Historic District?

11 MR. ZINSER: Yes, yes.

12 VICE CHAIR MILLER: Thank you.

13 MR. ZINSER: Okay.

14 COMMISSIONER HILDEBRAND: But this
15 particular building does not have landmark status and
16 it hasn't been noted for that. Okay. I had one
17 question just to make I understand. You said that by
18 making this areaway smaller, you said it was actually
19 becoming more of a hazard, because it's a hiding
20 place.

21 MR. ZINSER: It's more of a hiding place.

22 COMMISSIONER HILDEBRAND: But if the
23 hiding place is larger, how -- that doesn't seem to
24 make sense to me.

25 MR. ZINSER: Well, it's -- for one, it's

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1 darker, especially with an overhang. A person can
2 hide under it, under the overhang down in that areaway
3 or whatever you want to call it. And that is
4 something that really shouldn't be allowed to happen.

5 COMMISSIONER HILDEBRAND: Okay. My next
6 question is for Mr. Murphy. You said that there was
7 a historic character here that you wanted to preserve.
8 But wasn't there a significant change done to this
9 house when Hugh Newell Jacobsen changed the
10 fenestration on the front?

11 MR. MURPHY: He did change the front
12 character of the windows in this particular house, but
13 not along the block.

14 COMMISSIONER HILDEBRAND: And the entrance
15 door as well?

16 MR. MURPHY: Yes. Pardon me?

17 COMMISSIONER HILDEBRAND: And the entrance
18 door as well?

19 MR. MURPHY: And the entrance door. It's
20 reversed from the rest of the block.

21 COMMISSIONER HILDEBRAND: So there has
22 already been a breach of the "historic character" of
23 the block by the changes that were implemented
24 earlier. Is that correct?

25 MR. MURPHY: I believe that that is

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1 correct.

2 COMMISSIONER HILDEBRAND: Okay. Thank
3 you.

4 UNIDENTIFIED SPEAKER: May I just respond
5 to that?

6 CHAIRPERSON GRIFFIS: Any other questions?

7 VICE CHAIR MILLER: Well, as a follow-up,
8 how is this case different from that one, if there is
9 a difference you want to highlight?

10 CHAIRPERSON GRIFFIS: What case?

11 VICE CHAIR MILLER: Changing the back in
12 this case as compared to Jacobsens changing of the
13 front. Were you opposed to that?

14 MR. MURPHY: I was not around when Mr.
15 Jacobsen did that. Norma, what year was that?

16 MS. CHAPLAIN: 1963.

17 MR. MURPHY: That was 1963 and I don't
18 think that we had the --

19 CHAIRPERSON GRIFFIS: It wasn't a Historic
20 District at that point.

21 MR. MURPHY: At that point in time. So
22 now, we have got an appreciation for the difference
23 and Mr. Schneider's reputation has grown significantly
24 in the last 40 years as well as an architect and
25 designer of the city.

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1 CHAIRPERSON GRIFFIS: Okay.

2 MR. ZINSER: Also, if I may continue with
3 that, the design by Hugh Jacobsen covered the entire
4 front, not just one window, so it wouldn't stand out.
5 It is very uniform. It does make sense, historically
6 speaking, even though it's a newer design.

7 CHAIRPERSON GRIFFIS: Okay. I think the
8 Office of Planning's position was well said in this in
9 that they would defer to the Historic Preservation
10 Review Board for that type of design impact of it and
11 I think we can still look to that. Yes?

12 MS. CHAPLAIN: It's my understanding that
13 the casement windows that Mr. Jacobsen put in and the
14 door can -- if they are ever replaced, have to be
15 replaced with more traditional windows and doors.

16 CHAIRPERSON GRIFFIS: So what you're
17 saying is --

18 MS. CHAPLAIN: He did not break out any of
19 -- he did not --

20 CHAIRPERSON GRIFFIS: -- the impact is --

21 MS. CHAPLAIN: -- break out any of the
22 brick --

23 CHAIRPERSON GRIFFIS: Understood. Thank
24 you.

25 MS. CHAPLAIN: -- in this. It's still the

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1 original openings.

2 CHAIRPERSON GRIFFIS: The point is in the
3 renovation the windows are reversible. Okay.
4 Anything else, any other questions? Do you have any
5 closing remarks?

6 MR. ZINSER: No.

7 CHAIRPERSON GRIFFIS: Okay. Cross from
8 the applicant? Any cross questions of the witnesses
9 you heard?

10 MR. MIDDLETON: I would like to point out
11 that even --

12 CHAIRPERSON GRIFFIS: No, would you like
13 to question one of the witnesses?

14 MR. MIDDLETON: No.

15 CHAIRPERSON GRIFFIS: Yes?

16 MR. MCKEEVER: I have a question. Ms.
17 Yin, you speak about the beautiful nature of the
18 neighborhood. Can you, please, tell me when the last
19 time your home was painted?

20 CHAIRPERSON GRIFFIS: No, no, no. That
21 goes beyond the scope of this hearing. Are there
22 questions that go to -- I can't see how we would even
23 factor that into assessing the impact of this small
24 addition.

25 MR. MCKEEVER: Well, it's with beauty,

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1 sir.

2 CHAIRPERSON GRIFFIS: I understand. Okay.
3 Any other cross on the substantive issues relating to
4 this case? No? Very well. Are there any other
5 persons here present in 17319 in opposition that would
6 like to provide testimony that have not done so
7 already? No other persons present for this
8 application. I think we can move ahead with the
9 applicant's closing remarks.

10 MR. MIDDLETON: I would say in the
11 question of the FAR, if you include the 977 square
12 feet of basement, even then it's still under, you
13 know, FAR requirements.

14 CHAIRPERSON GRIFFIS: Okay. Without
15 addressing that, what we're going to do is keep the
16 record open just to get ahead of you here. I'm going
17 to need FAR calculations, also lot occupancy
18 calculations. We're also going to require drawings be
19 submitted in that show the exact scope that we're
20 looking at, so the elevation is to remove the deck up
21 above. Those shouldn't take very long to get in, so
22 it won't delay decision of this, but we're not doing
23 a Bench decision.

24 In that frame, I would ask if you just
25 have any closing or summation remarks that you want to

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1 leave us with, otherwise we can move ahead.

2 MR. MIDDLETON: With that, I think it's
3 sort of misleading by the community in their effort to
4 call it historic. I understand that very clearly.
5 But if you go walk down that alley, almost every
6 building has some modification to it. One of them
7 they have built two huge buildings in the back. At
8 the other end, somebody has put, Mr. Redford I think,
9 up a steel gate. Another application -- in another
10 situation, there is actually a door and a walkway in
11 the dogleg. So I don't know that it's so pure as they
12 pretend it to be.

13 CHAIRPERSON GRIFFIS: Anything else?

14 MR. MCKEEVER: My comments. Ladies and
15 gentlemen, this is a photograph of the back of the
16 residences. You can see it is nothing but brick,
17 square and rectangular, in my opinion, of course I'm
18 not an architect like any of these gentlemen who have
19 spoken, it looks to me to be just plain old squared
20 off buildings. Now, the fronts of these buildings are
21 very historical in nature.

22 Mr. Schneider, the esteemed Mr. Schneider,
23 I'm sure he is long deceased, perhaps he might not
24 approve of what's going on here, but Mr. Schneider
25 doesn't make law. You gentlemen and ladies interpret

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1 the law and the regulations and I believe that I'm
2 entitled to petition you for whatever might fall
3 within that purview.

4 I'm not attempting to change the front.
5 I'm attempting to change the back, which once again I
6 think is very nondescript, very non-historical. As my
7 architect just mentioned, one gentleman in my alley
8 has an enormous aluminum gate. It is the most
9 unsightly thing possible. Another person has a
10 garage. One of these testifiers just said that
11 nothing permanent has been erected. There is a huge
12 garage in the back of one of these homes.

13 If there's anything about this alley, the
14 rears of these buildings, is the lack of uniformity.
15 Many of them have decks. The decks are totally
16 nonuniform. The alley is in a heavy state of
17 disrepair. The way I would characterize this alley,
18 which my opponents are saying is historical, is that
19 it is nothing more than a dilapidated alley and a
20 depository for about 50 green garbage cans.

21 There is nothing historical or beautiful
22 about this alley whatsoever. My push-out would be, at
23 worst, neutral and, in my opinion, I think it would
24 improve the neighborhood. It is a sign of someone
25 wanting to improve his home, wanting to make the

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1 neighborhood better by improving his residence. I
2 think that the opponents' position can be
3 characterized by two statements.

4 The lady who lives next to me said this
5 will not affect me and she is absolutely right. It
6 will not affect her and the other gentleman said we
7 just don't want to change. I think that is the
8 attitude of my opponents. And the final thing, Ms.
9 Miller, you talked about the fence. Again, the
10 average American male is 5 foot 8. The average
11 American woman is 5 foot 4. They would have to be on
12 a stepstool peering over the fence to see it.

13 Now, if they went maybe 20 feet away and
14 stood on the property in S Street, they could see on
15 an angular version over the fence and perhaps see the
16 very, very top of my proposed extension. But any
17 person walking along the alley without going very far
18 away with an intent to try to see it, he could not
19 possibly see it, unless he or she were 6 foot 3 or 6
20 foot 4.

21 I thank all of you for this lengthy -- for
22 listening to our lengthy exposition here and I think
23 that what I'm proposing is very minor and to be honest
24 I am absolutely stunned by the opposition. It is not
25 -- it does not in any way to me seem to be rational in

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1 any way. And I thank you for a positive approval of
2 my petition. Thank you.

3 CHAIRPERSON GRIFFIS: Good. Thank you
4 very much and thank you all very much for
5 participating in this case. We're going to set this
6 for a decision and that is at our next decision
7 making. I'll get through the calendar and all that.
8 As I said, we'll keep the record open. We're going to
9 need FAR calculations, lot occupancy calculations,
10 just a quick drawing that shows just the scope of work
11 of which was the substance of the application today,
12 that is that small bay.

13 Just for clarification, of course, we did
14 step lively into, I think, a lot of what is part of
15 the Historic Review Board and staff purview and
16 jurisdiction. I would hope that or actually I don't
17 know if I have any hopes, but that's what it is. I'm
18 not sure that we'll be able to get too far into that.
19 Our level of judgment, the regulations of which this
20 is under is 223, which are very straightforward and I
21 think we have heard a lot of testimony on those.

22 The one thing I did want to address,
23 because we're not going to deliberation today, but at
24 our meeting we'll do this, but the question did come
25 up as shouldn't they have to answer why do they do

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1 this or why are they doing this? And just to be
2 absolutely clear, so that we don't walk out of here
3 with different impressions or understandings, that's
4 actually not a threshold question for an applicant
5 coming for a special exception or relief.

6 It is not the burden of the applicant to
7 prove that they have to do it or why they do it or
8 they have some special need for this to be done, but
9 rather that they have proposed to do this and under
10 special exception of which 223 is written in our
11 regulations, it is for the additions to structures
12 that were rendered nonconforming based on our
13 regulations.

14 Now, that's all I want to say for the
15 clarity. Let's set this for the first meeting that
16 would be the first session in June, which is the 7th
17 I believe. Is that correct, Ms. Bailey?

18 MS. BAILEY: Yes, Mr. Chairman.

19 CHAIRPERSON GRIFFIS: Excellent. We'll
20 set this for decision on the 7th, which means we have-
21 - the FAR and lot occupancy need to be submitted in
22 and also served to the party. Before you leave, I
23 want you folks to establish where you are serving each
24 other. Meaning, all that stuff that's coming into the
25 record has to be served on the party in opposition.

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1 So you need an address and a person to give that to.

2 I'll leave the record open for a response
3 only to the FAR calculations and the lot occupancy
4 calculations. The drawings should stand for
5 themselves. I don't think there is going to be any
6 discrepancy on that. Okay. So, Ms. Bailey, if we
7 have that submissions and then responses to that, what
8 are we looking at for schedule?

9 MS. BAILEY: A week should be sufficient
10 time, I believe, Mr. Chairman, so that would be May
11 17th for the submission and then another week.
12 Actually, I would like to revise that.

13 CHAIRPERSON GRIFFIS: Okay.

14 MS. BAILEY: May 24th for the submissions
15 and then -- am I doing this correctly?

16 CHAIRPERSON GRIFFIS: Right. Because
17 we're missing a meeting on the 31st.

18 MS. BAILEY: Right.

19 CHAIRPERSON GRIFFIS: So you have an
20 additional week there that isn't showing, which is
21 probably throwing you off. So if we had that, the
22 24th for submission, responses are in on the 31st?

23 MS. BAILEY: Yes, sir.

24 CHAIRPERSON GRIFFIS: Okay. Does that
25 make sense to you?

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1 MS. BAILEY: Yes, it does.

2 CHAIRPERSON GRIFFIS: Okay.

3 MS. BAILEY: I'm sorry, it does. So the
4 24th are the submissions, the responses are the 31st
5 and then decision is June 7th.

6 CHAIRPERSON GRIFFIS: Excellent. Okay.
7 Are we clear, the process? We'll decide this on the
8 7th, because the 7th of June is a Public Meeting,
9 there's no additional testimony that is provided,
10 that's the deliberation and decision, that which you
11 sat through all this morning. Exciting stuff. You
12 are welcome to be here, watch us from home, whatever
13 you prefer.

14 Obviously, you have requirements to submit
15 in by the date. The record is open for responses to
16 those calculations. All right. Procedural questions,
17 yes, we need to get this done quickly. Ms. Yin, you
18 need to be up at a microphone. What's your question.

19 MS. YIN: I wonder if it makes any sense
20 to ask the Historic Preservation Review Board to weigh
21 in on this decision?

22 CHAIRPERSON GRIFFIS: Nope, it makes no
23 sense. They have their own jurisdiction. They can
24 call a public hearing. They have a whole entire
25 review process, which is different from ours and it is

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1 independent of ours. So if they invoke that and go
2 through it all, then that is what they will do. But,
3 no, I don't see how it would impact our zoning review
4 of this case. But I appreciate you bringing that to
5 our attention.

6 Any other questions procedurally?
7 Nothing? Very well. We're all clear then.
8 Addresses, business cards are being exchanged as we
9 speak. Thank you all very much. We appreciate it.
10 Let's go to the next case in the morning session.
11 We're going to take a five minute break here. Let me
12 update folks that are now showing up for our 1:00
13 afternoon hearing that you might want to make yourself
14 available to the coffee shop and newspaper stands out
15 front. I do not imagine we're calling our afternoon
16 session before 3:00 today. We'll be back in five
17 minutes.

18 (Whereupon, at 12:52 p.m. a recess until
19 1:06 p.m.)

20 CHAIRPERSON GRIFFIS: We're going to get
21 rolling here any second, but here is the problem I
22 have when I recess for a few minutes on a beautiful
23 day, it's really hard to get people back. I'm happy
24 that you all made it back.

25 UNIDENTIFIED SPEAKER: We didn't leave.

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1 CHAIRPERSON GRIFFIS: Okay. Good. And as
2 soon as Ms. Bailey gets comfortable again in her
3 chair, she is going to call the next case of the
4 morning, which is, of course, your's. And then we're
5 going to have some preliminary questions that we're
6 going to need to get into right away. Ms. Bailey,
7 thank you.

8 MS. BAILEY: Application No. 17315 of Todd
9 Collins, pursuant to 11 DCMR 3103.2, for a variance
10 from the lot width and lot area requirements under
11 section 401, and a variance from the use provisions
12 under subsection 330.5, to allow the construction of
13 three three unit apartment houses and five flats. The
14 property is located in the R-4 District at premises
15 1200 Block of 14th Street, N.W., Square 513, Lots 865,
16 866, 867, 869, 888, 904 and 905.

17 Mr. Chairman, as you know, there are
18 several preliminary matters with this case.

19 CHAIRPERSON GRIFFIS: Indeed. Good.
20 Let's move ahead and just have introductions, if you
21 wouldn't mind. Who is before us?

22 MS. BAYLOR: Good afternoon. Sorry, good
23 afternoon, Mr. Chairman, Members of the Board. My
24 name is Brynee Baylor. I am the attorney on behalf of
25 Collins Development Corporation.

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1 MS. JACKSON: Good afternoon, Dawn Jackson
2 on behalf of Collins Development Corporation.

3 MR. COLLINS: Good afternoon, Todd
4 Collins, principal with Collins Development.

5 MR. SELLERS: Good afternoon, Rod Sellers
6 representing Zahn Design Architects for Collins
7 Development.

8 CHAIRPERSON GRIFFIS: Okay. Ms. Baylor,
9 you represent Collins and how many properties under
10 this application does Collins own and control?

11 MS. BAYLOR: As it stands currently,
12 Collins controls 6 of the 8 properties. And we had
13 anticipated -- one of the properties 1222 is in
14 litigation right now. It's a homestead property. I'm
15 sorry, home again property owned by the District, and
16 the other property is owned by NCRC. And we are in
17 the process of settling all the terms and conditions,
18 so that Collins will be able to control and develop
19 those properties.

20 CHAIRPERSON GRIFFIS: Okay. But has NCRC
21 authorized you to represent them in proceeding with
22 zoning relief for Lot 888?

23 MS. BAYLOR: Not officially and that's --

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. BAYLOR: And I understand.

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1 CHAIRPERSON GRIFFIS: And that's where we
2 are concerned.

3 MS. BAYLOR: I understand.

4 CHAIRPERSON GRIFFIS: And what about DHCD
5 for the 866?

6 MS. BAYLOR: 866 is 1222?

7 UNIDENTIFIED SPEAKER: Yes.

8 MS. BAYLOR: At this point, we've been in
9 correspondence with the Assistant Attorney General for
10 handling the litigation.

11 CHAIRPERSON GRIFFIS: I know. Let me be
12 absolutely clear. Even if you are so persuasive --

13 MS. BAYLOR: Right.

14 CHAIRPERSON GRIFFIS: -- and gosh, I
15 really want you to do it, I have no jurisdiction to do
16 it. It's absolutely impossible for this Board to hear
17 a relief request by somebody that doesn't own the
18 property, and that's about as legal as we get.

19 MS. BAYLOR: Okay.

20 CHAIRPERSON GRIFFIS: They don't even let
21 me fly alone, see I've got this attorney that sits
22 down there and --

23 MS. BAYLOR: Gotcha.

24 CHAIRPERSON GRIFFIS: -- that's what gets
25 us into trouble. But in all direct seriousness, about

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1 888, of course, we wouldn't be able to hear anything
2 on 866 and you're indicating that, in effect, you do
3 control. But what about 903, which is the home again,
4 is that the one you were talking about?

5 MS. BAYLOR: Is that 1222? Hold on. I
6 need to get -- here we go.

7 CHAIRPERSON GRIFFIS: I have 866 and the
8 North Capitol Neighborhood Development, DCD Homestead.

9 MS. BAYLOR: Right. We have actually with
10 us today to testify is Chad Williams, who is the
11 president of North Capitol Neighborhood Development
12 who is going to confirm that Mr. Collins and Collins
13 Development has the permission of NCND to apply for
14 the variances.

15 CHAIRPERSON GRIFFIS: So we have a letter
16 of authorization that you, Ms. Baylor, are
17 representing the North Capitol Neighborhood
18 Development Corporation in pursuing 904 and also 866?
19 Is that correct?

20 MS. BAYLOR: Now, 866, that's correct.

21 CHAIRPERSON GRIFFIS: And that letter is
22 in the record?

23 MS. BAYLOR: Well, you know, we have Mr.
24 Williams here today. This is -- our situation is kind
25 of interesting, because we thought that by this time

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1 we would be -- everything would be settled and we
2 would be ready to go. And I think for purposes of
3 proceeding with the plans and development, we wanted
4 to know if it would be possible or because these are
5 both District of Columbia owned properties, is there
6 any way that we could possibly request that the Board
7 reserve on those until we do officially supplement the
8 record with ownership or authority, alleged authority?

9 So that we could be heard on it, because
10 the development project really technically is a whole
11 project and we have had a lot of support from the
12 District of Columbia and also from the different
13 entities saying that they want to go forward with this
14 project. So just --

15 CHAIRPERSON GRIFFIS: Well, I think one
16 opportunity we have is, yes, let's hear the whole
17 thing and then we'll put it off until you get all your
18 paperwork together, which means we will probably set
19 this for decision in two or three months.

20 MS. BAYLOR: Okay.

21 CHAIRPERSON GRIFFIS: Ms. Monroe, any
22 difficulty with us proceeding in that fashion?

23 MS. MONROE: No, I guess you could do it
24 that way. The best thing to do is get some kind of
25 letter of permission or authorization from those D.C.

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1 Agencies just saying, you know, that's okay. I
2 suppose you could hear it today and then get that
3 letter. I mean, if you're sure you're going to get
4 it.

5 MS. BAYLOR: Okay.

6 MS. MONROE: The problem is if you don't
7 get it, the whole thing falls.

8 MS. BAYLOR: Right, right.

9 MS. MONROE: Because if we're hearing it
10 as a whole and, you know, those two agencies say no,
11 well, then the whole thing is going to do.

12 MS. BAYLOR: All right.

13 MS. MONROE: So you have to be certain you
14 can get permission.

15 CHAIRPERSON GRIFFIS: And the other
16 opportunity is you take the two weeks to get these
17 letters and you come back and do the whole case.

18 MS. MONROE: At the same time.

19 MR. COLLINS: We'll get the letters.
20 Let's move forward.

21 MS. BAYLOR: Okay. I spoke with my
22 client. We would like to go forward and be heard
23 today and we will supplement the record with the
24 letters of approval, if that's sufficient.

25 MS. MONROE: I mean, if you are

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1 comfortable with that, you can do that.

2 CHAIRPERSON GRIFFIS: No, I mean, I don't
3 -- oh, man. I think if we proceed today, we proceed
4 without the properties of which -- or with the
5 properties that you have control of. So we're
6 actually looking at bringing back part of what you are
7 submitting today to look at this individually or
8 independently.

9 MS. BAYLOR: If we are heard today and
10 then we're able to supplement the record, say within
11 two weeks, would that be sufficient in terms of a
12 letter? Yes, if we could do that, would that be
13 sufficient? Because technically, I mean, the
14 properties, the two properties are the two end
15 properties, so provided, you know, certain variances
16 are granted, we could conceivably go on with the
17 project. It's just that we would like to -- you know,
18 the plan is to do it.

19 CHAIRPERSON GRIFFIS: All right. At this
20 point, I don't think it's -- it's not ripe to go
21 forward with, as I see it, Lot 888, which is the
22 NCRC's.

23 MS. BAYLOR: Yes.

24 CHAIRPERSON GRIFFIS: The home again which
25 is 903, the North Capitol Neighborhood Development,

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1 904, the DHCD's Homestead Lot 869.

2 MS. BAYLOR: Yes, with the Homestead and
3 DHCD and with the North Capitol Neighborhood
4 Development, we can go forward.

5 CHAIRPERSON GRIFFIS: Okay. So you're
6 saying you're going to take those in, so we're looking
7 at -- well, we're still looking at three or four lots.

8 MS. BAYLOR: Two lots.

9 CHAIRPERSON GRIFFIS: Two lots you're
10 saying? 888 and 903?

11 MS. BAYLOR: Those are the two lots that
12 would be, I guess, held.

13 CHAIRPERSON GRIFFIS: Yes, which we -- I
14 mean, bottom line, we wouldn't hear anything on it.
15 Ms. Miller is going to read you the regulations on
16 this.

17 MS. BAYLOR: Okay.

18 CHAIRPERSON GRIFFIS: Yes?

19 VICE CHAIR MILLER: I just would like to
20 offer this opinion. I don't think it makes sense to
21 go forward today without all the property owners
22 having authorized representation, because we're
23 supposed to be looking at this application as a whole
24 with respect to the individual properties. And by not
25 looking at some of them, I think that distorts our

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1 review of this case.

2 And I think that we're also saying there
3 is going to be a delay there one way or the other.
4 Either we're going to do this and then the record is
5 going to be supplemented when they get the
6 authorization and that will take a while or else we
7 get the authorization in at the start and then we hear
8 the case as it should be heard. So I would be in
9 favor of, you know, a short delay on this, a short
10 postponement or as long as it takes, I guess, to get
11 the authorization.

12 CHAIRPERSON GRIFFIS: Mr. Hildebrand?

13 COMMISSIONER HILDEBRAND: Would I be
14 correct in understanding that if we were to hear the
15 case today, we would not hear anything relative to
16 those two buildings that aren't under ownership and
17 that we would have to have a subsequent hearing
18 specifically for those two at a later date anyway?

19 CHAIRPERSON GRIFFIS: That's my --

20 COMMISSIONER HILDEBRAND: So we're not
21 actually saving any time?

22 CHAIRPERSON GRIFFIS: That's my opinion,
23 yes.

24 MS. BAYLOR: Right.

25 CHAIRPERSON GRIFFIS: I think you would be

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1 better off doing it all together. Mr. Etherly?

2 BOARD MEMBER ETHERLY: No, well, I'm not
3 quite there yet. I mean, if we're here and we can do
4 it in part, I don't understand why it's so essential
5 that we deal with all of them together. I understand.
6 I understand the totality and the totality of the
7 project. But if there's an opportunity to get some
8 work done today, why not take advantage of that?

9 MS. MONROE: Mr. Etherly, I think I can
10 address that.

11 BOARD MEMBER ETHERLY: Sure.

12 MS. MONROE: I think the original idea was
13 to do, you know, 5 out of 8 lots or whatever and then
14 come back with the rest of them. But the regulation
15 does say the owner of the property makes the
16 application or an authorized agent of the owner. If
17 they can come in in a week or two with a letter saying
18 they are the authorized agent, we can do the whole
19 thing. It appears that we can only do what we can do
20 today, and you're going to have to have a new
21 application and a new hearing on whatever we don't do
22 today.

23 MS. BAYLOR: Right.

24 MS. MONROE: It seems kind of silly.

25 MS. BAYLOR: Right.

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1 MS. MONROE: Right. It would be two --
2 you would be breaking into two separate applications
3 unfortunately.

4 BOARD MEMBER ETHERLY: Why would it be a
5 separate application?

6 MS. MONROE: Because it's a different
7 owner.

8 BOARD MEMBER ETHERLY: Right.

9 MS. MONROE: Unless you get the
10 authorization saying go ahead, we're okay with it and
11 then we can do it all at the same time.

12 BOARD MEMBER ETHERLY: But isn't that what
13 we're hearing that we will get the authorization?

14 MS. MONROE: I think that's -- well, and
15 that's the question. It depends on how you interpret
16 the regulations. Can you wait and get that
17 authorization after or do we need it now? Because
18 only the owner really is supposed to --

19 BOARD MEMBER ETHERLY: Well, no, no, I'm
20 not saying anything with regard to what we can't get
21 authorization on today, but it sounds as though the
22 applicant is indicating that there are a number of
23 lots, what is it three by my count, that we can speak
24 to and resolve the authorization question today.

25 MS. MONROE: But if we can't do them all,

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1 then there's one left that we can't really take
2 evidence on, because we don't have a proper
3 application on it. See that's what I'm concerned
4 about.

5 BOARD MEMBER ETHERLY: No big deal. Well,
6 yes, that's my -- you know.

7 COMMISSIONER HILDEBRAND: Is the
8 representative from the North Capitol Development and
9 the other property that you are discussing, are they
10 authorized to give you that authorization?

11 MS. BAYLOR: They are.

12 COMMISSIONER HILDEBRAND: Within those
13 corporations?

14 MS. BAYLOR: He is, yes. We don't want to
15 waste the Board's time and we would like to be most
16 prudent and, you know, efficient, so I mean, is it
17 possible for us to maybe get the authorization and, I
18 mean, the only question is when is the next possible
19 time we can get on the schedule?

20 CHAIRPERSON GRIFFIS: Now we're talking.
21 Okay. I think we can get this -- how long do you
22 think you need for authorization? I mean, two weeks,
23 two months?

24 MR. SELLERS: One month.

25 CHAIRPERSON GRIFFIS: A month?

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1 MR. SELLERS: Yes, please.

2 CHAIRPERSON GRIFFIS: Okay. I think
3 that's easily accommodated.

4 MS. BAYLOR: Okay.

5 CHAIRPERSON GRIFFIS: We're at the 10th of
6 May. Ms. Bailey, any recommendations? How does, oh,
7 my goodness.

8 MS. BAILEY: Mr. Chairman, I hope Mr.
9 Nyarku is listening and he can help us with this.

10 UNIDENTIFIED SPEAKER: He's not here.

11 MS. BAILEY: He's not here. We need a
12 date. We need a hearing date for continuation. Mr.
13 Chairman, while you're looking for that, I just wanted
14 to remind you that there is a request for party status
15 in this case.

16 CHAIRPERSON GRIFFIS: Right. We'll
17 establish that. All right. Why don't we do that
18 first and then we'll set the date while we're looking
19 at dates here. Is Ms. Martha Michels here? Hi, Ms.
20 Michels. Would you like to come forward for a brief
21 moment? Is there a chair we could pull up and make
22 her comfortable at the table? I wish I could say good
23 morning, but I have to say good afternoon to you, Ms.
24 Michels.

25 Of course, the critical aspects of a party

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1 status application is the last piece and you have
2 indicated that you are obviously a close proximity
3 neighbor and you have a retaining wall. You're
4 concerned about storm water runoff and also open
5 spaces. Is that a good summation of how you are
6 uniquely distinctly impacted?

7 MS. MICHELS: Yes. The retaining wall
8 holds up my backyard and it's meshed with the back --

9 CHAIRPERSON GRIFFIS: Okay. Right. We're
10 not getting into the substance of all the elements.

11 MS. MICHELS: Okay.

12 CHAIRPERSON GRIFFIS: Just to make sure
13 that the Board has all those elements. I think I'm
14 pretty clear on the request for party status. And you
15 are aware, of course, a party is a full participant in
16 the case. You are certainly able to come and testify
17 as a person and give all that, but you want to
18 maintain a party status and actually present a case
19 and conduct cross examination. Is that correct?

20 MS. MICHELS: Do what I submit have -- is
21 that being considered if I don't come and be a party?

22 CHAIRPERSON GRIFFIS: Absolutely not. It
23 will absolutely be considered. In fact, it already
24 has been read by the entire Board and it's part of the
25 official record. So no matter what you do, there is

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1 no need to, one, read this into the record, as we have
2 read it. If you wanted to provide further testimony
3 as a person, that would be certainly possible for you
4 to do when we call this case next.

5 MS. MICHELS: Okay.

6 CHAIRPERSON GRIFFIS: Would you like to
7 participate as a person then?

8 MS. MICHELS: Yes.

9 CHAIRPERSON GRIFFIS: Okay. And just for
10 clarity then, you are withdrawing your party status
11 application?

12 MS. MICHELS: No, I didn't understand. I
13 thought you meant yes, I want to be a party
14 application.

15 CHAIRPERSON GRIFFIS: Okay. So what you
16 want to do is you want to come in and actually present
17 an entire case? You're going to have the ability to
18 call witnesses? You're going to cross examine the
19 witnesses of which you're going to hear? When we
20 request findings of fact, conclusions of law, we'll
21 request that of the application. We will also be
22 requesting that of you to submit into the record.
23 That's the level you would like to participate at as
24 one party or there is person.

25 The person you come in and just give

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1 testimony. You have already submitted written
2 testimony. You could provide more oral testimony
3 during the Public Hearing.

4 MS. MICHELS: Okay. I'll come in as a
5 person then.

6 CHAIRPERSON GRIFFIS: As a person. Okay.
7 So because I'm so redundant, then you are withdrawing
8 your request for party status. Is that correct?

9 MS. MICHELS: Yes, as long as all the
10 information stays in there.

11 CHAIRPERSON GRIFFIS: Absolutely. There's
12 nothing removed from the record. We've already done
13 that in that submission. In fact, just to be clear,
14 it's Exhibit No. 38 in the official record. And we
15 will look forward then to hearing you as a person.
16 That being said, I don't have any other indication or
17 request for party status in this case.

18 Let's look to our schedule.

19 MS. BAYLOR: I do have some photos that
20 clarify it better to submit.

21 CHAIRPERSON GRIFFIS: Excellent. How many
22 copies of that do you have?

23 MS. BAYLOR: Just one.

24 CHAIRPERSON GRIFFIS: Just one?

25 MS. BAYLOR: I have one for me and one for

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1 you.

2 CHAIRPERSON GRIFFIS: Okay. We've got
3 time to get that in the record, but you're going to
4 need to make copies of it. Anything you submit is
5 going to need to be copied. Maybe you can avail
6 yourself today and make copies today in the office.
7 The applicant leaves with those copies, so that they
8 have it, so you don't have to serve them. But
9 actually you wouldn't have to serve them anyway, but
10 make copies and give to them and then you can put it
11 into the record.

12 Okay. What dates do we have?

13 UNIDENTIFIED SPEAKER: Right here. That's
14 my yard. This is 865.

15 UNIDENTIFIED SPEAKER: Right.

16 UNIDENTIFIED SPEAKER: That's my yard and
17 that's what -- that's going to -- the apartment
18 building three stories high.

19 CHAIRPERSON GRIFFIS: All right. Let's
20 set this for the morning of the 14th of June. Does
21 the applicant have any difficulty in doing the 14th of
22 June?

23 UNIDENTIFIED SPEAKER: That's what I'll
24 see out of my backyard.

25 CHAIRPERSON GRIFFIS: Ms. Baylor?

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1 MS. BAYLOR: I'm available.

2 CHAIRPERSON GRIFFIS: Just turn your mike
3 on and say that.

4 MS. BAYLOR: We're available. Sorry about
5 that.

6 CHAIRPERSON GRIFFIS: That's okay. Very
7 well. We're going to put it on in the morning of the
8 14th of June and we will get through the entire thing
9 then.

10 MS. BAYLOR: Great.

11 CHAIRPERSON GRIFFIS: Whew. Okay.

12 MS. BAYLOR: Thank you.

13 CHAIRPERSON GRIFFIS: Yes. Hold on.
14 Before you go, let's go through any other preliminary
15 matters that we may have.

16 MS. BAYLOR: All right.

17 CHAIRPERSON GRIFFIS: You had a question
18 on that. Why don't you bring that up, at this point?

19 VICE CHAIR MILLER: Could the applicant
20 just briefly state what is different about the amended
21 application?

22 MS. BAYLOR: Yes, the amended application
23 is just requesting the variance or the special
24 exception to provide three units. The first
25 application requested just three properties to provide

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1 the three units. But now, we're asking for four of
2 the units, 1220, 1222, 1224 and 1228, to receive the
3 special exception for the three units. And that's
4 just in compliance with Historic Preservation's
5 suggestions. There were modifications made after the
6 report to conform with their requirements.

7 VICE CHAIR MILLER: Thank you.

8 MS. BAYLOR: Thank you.

9 CHAIRPERSON GRIFFIS: Okay. And it's my
10 understanding then that we're not looking at an off-
11 street parking requirement application. So what we're
12 looking at is just the amended application. This is
13 it in entirety as submitted May 9th?

14 MS. BAYLOR: That's correct.

15 CHAIRPERSON GRIFFIS: Okay.

16 MS. BAYLOR: Well, in addition, we're also
17 asking for the lot and width area variance. We're
18 just amending. We're making the modification for the
19 area -- I'm sorry, for the special exception request
20 for the three units. That's the only thing that has
21 been changed. And we're no longer asking for the
22 parking variance. So there's still area variance that
23 we're requesting.

24 CHAIRPERSON GRIFFIS: I'm sure it's very
25 clear after we read this. As we haven't, because it

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1 was handed to us this morning.

2 MS. BAYLOR: We understand.

3 CHAIRPERSON GRIFFIS: Everything else has
4 been read.

5 MS. BAYLOR: Okay.

6 CHAIRPERSON GRIFFIS: Very well.

7 MS. BAYLOR: Thank you.

8 CHAIRPERSON GRIFFIS: We have a time set.
9 We will be the fourth case in the morning on the 14th
10 and we'll move ahead then. Any other questions I can
11 answer procedurally? Very well. Of course, you can
12 update the Office of Zoning if, in fact, you don't
13 have the letters ready to go, at that point, to give
14 us a heads up. We could possibly do a rescheduling at
15 that point. Otherwise, let's move ahead. Thank you
16 all very much.

17 MS. BAYLOR: Thank you.

18 CHAIRPERSON GRIFFIS: I really apologize
19 for keeping you down here all day.

20 MS. BAYLOR: No.

21 CHAIRPERSON GRIFFIS: But let's see what
22 else we can get done this morning then. Let's call
23 the next case of the morning.

24 MS. BAILEY: Application No. 17316 of the
25 Randle Highlands Manor LP, pursuant to 11 DCMR 3103.2,

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1 for a variance from the lot occupancy requirements
2 under section 403, a variance from the rear yard
3 requirements under section 404, and pursuant to 11
4 DCMR 3104.1, for special exceptions under sections 353
5 and 2516, to allow the development of 10 single-family
6 row dwellings on a single subdivided lot in the R-5-A
7 District at 2700 R Street, S.E., Square 5585, Lot 812.

8 Mr. Chairman, the relief may be different
9 from what was read, but, Mr. Moore, I'm sure you will
10 address that.

11 MR. MOORE: Absolutely.

12 CHAIRPERSON GRIFFIS: Good. Thank you,
13 Ms. Bailey. Let's move ahead. Mr. Moore, are you
14 ready?

15 MR. MOORE: Yes, I am. Good afternoon.

16 CHAIRPERSON GRIFFIS: How could you not
17 be? We've given you five hours to prepare, right?
18 Wait a minute, that's a joke.

19 MR. MOORE: Well, we're ready. We're also
20 happy to be here.

21 CHAIRPERSON GRIFFIS: Indeed.

22 MR. MOORE: It's been a long time coming.

23 CHAIRPERSON GRIFFIS: Indeed.

24 MR. MOORE: Good afternoon instead of good
25 morning, Chairman Griffis, Members of the Board, I'm

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1 Jerry Moore with the Law Firm, counsel to Randle
2 Highlands Manor Limited Partnership, the applicant in
3 this case. The District of Columbia in general and
4 the Randle Highlands area in particular are woefully
5 short of affordable housing for single -- people
6 seeking affordable housing, dwelling units for
7 citizens of Randle Heights.

8 There is also a shortage of suitable
9 available sites to in-fill affordable residences, due
10 to the size and number that are necessary to make
11 these projects feasible and to the cost of land. The
12 applicant proposes to effectively address this public
13 need for affordable housing by constructing 10 row
14 dwellings in an R-5-A Zone District on a vacant lot at
15 2700 R Street, S.E., Washington.

16 Since the application was first filed, the
17 applicant has been working with the Office of Planning
18 to arrive upon a development plan that attracts broad
19 support. As a consequence, the new site plan -- a new
20 site plan emerged, one that requires far less relief
21 than that which was originally proposed. Hence,
22 before you today is an application seeking a site plan
23 review special exception under section 353 of the
24 Zoning Regulations and but one variance, area side
25 yard variance under section 405.2 to account for the

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1 lack of an 8 foot side yard on end units numbers 1, 8,
2 9 and 10.

3 This ideal location was acquired in 2000
4 as an abandoned apartment building. The Homestead
5 Program of the District of Columbia Department of
6 Housing and Community Development provided the loan
7 specifically for the development of low and moderate
8 income housing at this location. The preexisting
9 structure has since been razed and the site has been
10 vacant for several years. As a practical matter, the
11 site is of such size and topography that some zoning
12 relief is necessary to make this or any development on
13 it possible.

14 The granting of this relief will not tend
15 to affect adversely the use and enjoyment of
16 neighboring property and is necessary at this
17 location, because the program goals and objectives of
18 the District of Columbia cannot be achieved without
19 zoning relief. And there is no reasonable alternative
20 to meet the program needs of this community. We are
21 pleased that the D.C. Office of Planning has submitted
22 a report agreeing with the applicant and recommending
23 the approval of this application.

24 From a legal perspective, the proposed
25 single-family dwellings are consistent with the

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1 District of Columbia's Comprehensive Plan and its
2 generalized Land Use Maps, which designate and promote
3 this site for moderate density residential uses. The
4 proposed buildings and use are also consistent with
5 the underlying R-5-A Zone District, which is mapped
6 over the entire square and throughout much of the
7 neighborhood.

8 As you know, a single-family residence is
9 permitted in an R-5-A Zone District with the site plan
10 approval of this Board. We are pleased that there has
11 been generated a great deal of support for this,
12 including support of the District of Columbia
13 Department of Housing and Community Development, by
14 letter, which is in the record. Our case consists of
15 five themes which in sum we offer sufficient basis to
16 merit the approval of the zoning relief that is
17 requested.

18 First, the proposed use is in direct
19 response to the dire need for affordable living
20 facilities in the Randle Highlands community. Second,
21 the size and siting of these dwellings is the absolute
22 minimum as to the number and size of buildings that
23 are feasible, affordable housing the project requires.
24 Third, there is a possibility of suitable suits in the
25 Randle Highlands neighborhood to practically develop

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1 an affordable housing project.

2 Fourth, developments of a lesser size are
3 undevelopable economically and end which would result
4 in frustration of the program goals and objectives of
5 the District of Columbia. Fifth, the property is
6 unique by reason of a sloping topographical condition
7 and by reason of that exceptional condition, strict
8 application of the Zoning Regulations will result in
9 a peculiar and exceptional practical difficulty.

10 Yet, the granting of the requested area
11 variance will not cause substantial detriment to the
12 public good and will not impair the intent, purpose
13 and integrity of the Zone Plan as embodied by the
14 Zoning Regulations and Map. We are hopeful that your
15 decision will also be made easier by the detailed land
16 use and planning discussions that have already been
17 submitted. Written analysis will be highlighted by
18 the testimony and exhibits that you receive today.

19 We have endeavored to organize our
20 presenters in a logical and efficient manner. First,
21 Mr. Michael Wallach, a partner of the applicant, will
22 speak to the feasibility and service market of this
23 project. Second, Architect Tim Daniel will present
24 the project elevations, floor plans, parking plans, a
25 description of the project architecture and design and

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1 a commentary on the contextual relationship of the
2 proposed buildings with the existing buildings on
3 neighboring and nearby properties.

4 Third, I believe there may be community
5 representatives who wish to support the need for the
6 homes at this location. We trust that you will find
7 our evidence to be substantial, efficiently presented
8 and persuasive. Now, I would like the Board to
9 consider Mr. -- our architect, Mr. Daniel, as an
10 expert in this case. I have his resume here for the
11 Board to consider. And at the same time, I'll be
12 submitting some colored drawings of a site plan and
13 elevations, small versions of what is already in the
14 record.

15 CHAIRPERSON GRIFFIS: Excellent.

16 MR. MOORE: Mr. Daniel's resume is before
17 you. Would you like to hear him speak to the resume
18 before you make a decision?

19 CHAIRPERSON GRIFFIS: We probably want to
20 look at it first.

21 MR. MOORE: Okay.

22 CHAIRPERSON GRIFFIS: Actually, we'll just
23 use the time very quickly. Well, Ms. Miller, go
24 ahead.

25 VICE CHAIR MILLER: I just have a legal

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1 question with respect to your case regarding the
2 variance test.

3 MR. MOORE: Yes.

4 VICE CHAIR MILLER: What I heard you say
5 is that the unique condition to this property is a
6 sloping topographical condition?

7 MR. MOORE: That's correct.

8 VICE CHAIR MILLER: And that that relates
9 in a practical difficulty. And so my question is what
10 practical difficulty does that relate, yes, to as part
11 of the variance test?

12 MR. MOORE: Ms. Miller, if you would be so
13 kind as to let me have my architect address that
14 during his testimony?

15 VICE CHAIR MILLER: That's fine.

16 MR. MOORE: If that's okay?

17 VICE CHAIR MILLER: That's fine. And
18 actually, I am glad that I just got the question out
19 there, so that he can keep that in mind.

20 MR. MOORE: Thank you. Thank you.

21 CHAIRPERSON GRIFFIS: Has everyone seen
22 the resume? Any questions of Mr. Daniel? Questions,
23 concerns? Mr. Daniel has been offered as an expert
24 witness in architecture and architectural design. Is
25 that correct?

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1 MR. MOORE: Yes.

2 CHAIRPERSON GRIFFIS: Indeed. Concerns?

3 BOARD MEMBER ETHERLY: No objection, Mr.
4 Chair.

5 CHAIRPERSON GRIFFIS: The question is are
6 you licensed in the District of Columbia?

7 MR. DANIEL: I am not. I am not, sir.

8 CHAIRPERSON GRIFFIS: You're not.

9 COMMISSIONER HILDEBRAND: Are you licensed
10 in any other local jurisdictions?

11 MR. DANIEL: I am one exam short of
12 licensure, which I expect to be complete at the end of
13 next month.

14 CHAIRPERSON GRIFFIS: Any other questions?

15 MR. DANIEL: Might I add to that that
16 despite having not licensure, I have had residential
17 experience in architectural design as well as
18 construction.

19 CHAIRPERSON GRIFFIS: Right. No need to
20 go further. There is terms for exception in terms of
21 senior project manager job and certainly all the
22 projects that you're listing below show evidence of
23 experience, if not some authority to be granted expert
24 status, unless there's any opposition from the Board,
25 at this time? Does the ANC have any comment on Mr.

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1 Daniel being an expert witness in this case?

2 MR. DAVIS: I find it odd that we would
3 certify a witness that's not registered in the
4 District of Columbia or anywhere else.

5 CHAIRPERSON GRIFFIS: Okay. Any other
6 comments? I'm sorry. Oh, no, we're going to have one
7 ANC Member represent the ANC, right? I mean, we did
8 have Ms. Moore and Mr. Davis available, so we could
9 hear from them. But anyway, we don't need to spend a
10 lot of time on this particular preliminary matter.
11 First of all, it is not a requirement to be registered
12 to be an expert witness, but rather we would look at
13 the standing of expertise that one can bring to the
14 testimony that they are and I think that the resume
15 shows that there is an expertise available for
16 granting that standard. So let's proceed.

17 MR. MOORE: Thank you very much. I would
18 like to just call the Board's attention to a gentleman
19 sitting on my far right. Would you introduce
20 yourself, please, and your position?

21 MR. HOPKINS: Good afternoon, I'm Albert
22 Butch Hopkins, President and CEO of the Anacostia
23 Economic Development Corporation.

24 MR. MOORE: And are you here in support of
25 the application, sir?

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1 MR. HOPKINS: Absolutely.

2 MR. MOORE: All right. I have called Mr.
3 Michael Wallach. Sir, would you give your name and
4 home address, please?

5 MR. WALLACH: Yes, I'm Michael Wallach.
6 My address is 232 M Street, S.W., Washington, D.C.

7 MR. MOORE: And you are familiar with this
8 application?

9 MR. WALLACH: Yes, I am.

10 MR. MOORE: And you've prepared testimony?

11 MR. WALLACH: Yes, I have.

12 MR. MOORE: Would you give that testimony,
13 sir?

14 MR. WALLACH: Yes, I will. Thank you.
15 Thank you for the opportunity to present on behalf of
16 the Randle Highlands Limited Partnership and the
17 Anacostia Economic Development Corporation. From a
18 historic basis, in around 1998, we received this
19 property from the Homestead Act and attempted to
20 convert what was an eyesore in the community, a 39
21 unit apartment building, into a viable assisted living
22 facility.

23 We did that by meeting the community's
24 demands and needs to tear the building down which was
25 an eyesore, which we did. We demolished the building

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1 and then prepared plans and representations for an
2 assisted living facility. The community was not in
3 favor of the assisted living community or building and
4 ultimately the request for variances and what have you
5 through BZA were turned down and we went back to the
6 community and said all right, what is it that you
7 would like to have here?

8 And it was unanimous that the community
9 supported townhouses on that site. We then endeavored
10 to develop a plan that would be both efficient and
11 economically feasible to provide affordable townhouses
12 on the site to be sold primarily to first time D.C.
13 home buyers, which is in the restriction. It must be
14 first time D.C. home buyers. In order to further
15 this, we, at our first meeting, met with, in February,
16 the Pennsylvania Avenue Task Force, presented our
17 proposal and received favorable response and a letter
18 of support from them.

19 CHAIRPERSON GRIFFIS: I'm sorry, I'm going
20 to interrupt you very, very quickly. Can I ask you
21 directly, you indicated that getting this property out
22 of the Homestead Program, there are actual development
23 agreements that means you have to develop this one at
24 affordable level and for first time home buyers. So
25 is that correct?

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1 MR. WALLACH: Yes.

2 CHAIRPERSON GRIFFIS: So you actually have
3 a land development agreement or kind of an LDA of
4 sorts?

5 MR. WALLACH: Not specific. We have a
6 contract of sale.

7 CHAIRPERSON GRIFFIS: But it's the same
8 sort of deal, correct?

9 MR. WALLACH: Yes.

10 CHAIRPERSON GRIFFIS: You got this through
11 the program and they said yes, but in order for you to
12 get this, you need to build this according to our
13 requirements?

14 MR. WALLACH: Exactly. To meet certain
15 needs, that's correct.

16 CHAIRPERSON GRIFFIS: So they put
17 requirements on the property on how it might be
18 developed?

19 MR. WALLACH: Correct.

20 CHAIRPERSON GRIFFIS: One of which basis
21 is on the affordability?

22 MR. WALLACH: Correct.

23 MR. MOORE: Mr. Griffis?

24 CHAIRPERSON GRIFFIS: So even if you were
25 -- okay. Yes?

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1 MR. MOORE: You are absolutely right.

2 CHAIRPERSON GRIFFIS: Thank you.

3 MR. MOORE: We have placed correspondence
4 in -- and testimony from a previous case into the
5 record, which evidences that very point.

6 CHAIRPERSON GRIFFIS: Right. And for
7 clarity, I don't think -- I know I sat on that
8 previous case.

9 MR. MOORE: Yes, you did.

10 CHAIRPERSON GRIFFIS: But this one is
11 going to have to rest on its own. I think it was
12 clear in the elements of what you're trying to bring
13 and that's where I'm going with this. Is that the
14 agreement hasn't changed. There is a certain
15 requirement from the City Homestead Program that said
16 you have to build according to this. It wasn't just
17 you got a great deal on that, now go about what you're
18 going to do. There are specific requirements that
19 make it unique. Is there a unique factor of this
20 property?

21 MR. WALLACH: Well, it's a restriction.

22 MR. MOORE: Oh, it's unique, that's --

23 MR. WALLACH: It's unique.

24 MR. MOORE: It's unique.

25 CHAIRPERSON GRIFFIS: So the restrictions

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1 on this property are unique?

2 MR. WALLACH: Yes.

3 MR. MOORE: Yes. And it's just not a
4 vacant piece of property. We can go do what we want.

5 CHAIRPERSON GRIFFIS: Yes.

6 MR. MOORE: Even if it were a matter-of-
7 right project. We have an obligation to the District
8 of Columbia Government to build as the District of
9 Columbia Government sold the property to us.

10 CHAIRPERSON GRIFFIS: I understand.

11 COMMISSIONER HILDEBRAND: What are the
12 specific restrictions?

13 MR. MOORE: That the property be sold to
14 first time home buyers, used by first time -- occupied
15 by first time home buyers at an affordable rate.

16 COMMISSIONER HILDEBRAND: Is that the only
17 restriction?

18 MR. MOORE: Yes.

19 MR. WALLACH: Yes, it is.

20 MR. MOORE: As we have evidenced in the
21 record, the price of the property to us reflected that
22 restriction.

23 CHAIRPERSON GRIFFIS: Right.

24 MR. MOORE: And we offer that as another
25 unique factor in the development of this property.

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1 CHAIRPERSON GRIFFIS: Okay. Sorry to
2 interrupt.

3 MR. WALLACH: Okay. Thank you.

4 CHAIRPERSON GRIFFIS: Go ahead.

5 MR. WALLACH: On March 17th we presented
6 to the ANC at a public meeting our first proposal.
7 That proposal included 11 townhouses with a
8 configuration that was slightly different than the one
9 that you see here. After that we had a meeting with
10 the Office of Planning and the meeting produced their
11 recommendations for changes, which they felt were
12 necessary on the plan.

13 One, they wanted to eliminate what they
14 felt were non-direct street access townhouses. They
15 did not want to have what we call --

16 UNIDENTIFIED SPEAKER: Theoretical lots.

17 MR. WALLACH: -- theoretical lots. Thank
18 you. They did not want the theoretical lots nor was
19 the --

20 CHAIRPERSON GRIFFIS: That was a great
21 moment there, that whole anticipation, theoretical
22 lots.

23 MR. WALLACH: I know.

24 CHAIRPERSON GRIFFIS: Okay. So we had one
25 design that didn't fly.

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1 MR. WALLACH: Yes, but that was the one
2 that was, in fact, presented to the community.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. WALLACH: After the Office of
5 Planning's meetings --

6 CHAIRPERSON GRIFFIS: Right.

7 MR. WALLACH: -- we redesigned the plan
8 and we went back to the Office of Planning that looked
9 at the plans, reviewed the plans, went to the
10 Department of Transportation.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. WALLACH: Went back to the ANC on
13 April 21st and presented what was the new plan.

14 CHAIRPERSON GRIFFIS: This has been
15 vetted. We got you there. Okay.

16 MR. WALLACH: Okay.

17 CHAIRPERSON GRIFFIS: What else?

18 MR. WALLACH: It went again to a special
19 meeting on May 2nd of the board of the ANC. The
20 community, the Randle Highlands community, has also
21 seen the project. It has been presented at community
22 meetings and we request that the Board consider this
23 favorably, so we may begin to meet the needs of the
24 residents of the District of Columbia. Thank you.

25 CHAIRPERSON GRIFFIS: Good. Thank you

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1 very much. Mr. Moore, next?

2 MR. MOORE: Do you want to wait to hear
3 them all?

4 CHAIRPERSON GRIFFIS: Let's do it.

5 MR. MOORE: All right. Yes, Mr. Daniel.
6 Would you identify yourself first, please?

7 MR. DANIEL: Tim Daniel, Zavos
8 Architecture and Design. The address is 730 North
9 Market Street, Frederick, Maryland. The drawings you
10 see before you reflect the plan that those of us
11 within the development team agree is the best plan for
12 this site. And to my knowledge, we have also received
13 favorable comments from city staff members as well.

14 I would like to touch on three basic
15 points about the project, the subdivision of the lots,
16 the buildings themselves and also the proposed
17 landscaping. First off, the subdivision, as you have
18 heard, we have gone from 11 proposed lots down to 10
19 to try to maximize our compliance with the Zoning
20 Requirements leaving only one, being the side yard
21 setbacks, that we are requesting a variance, as you
22 know.

23 CHAIRPERSON GRIFFIS: Good. And which
24 ones are requesting the side yard setback?

25 MR. DANIEL: Lots 1, 8, 9 and 10.

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1 CHAIRPERSON GRIFFIS: 1, 8, 9 and 10.
2 Okay. Good. Thank you.

3 MR. DANIEL: Regarding the sizes of the
4 lots, they are of a typical width, 16 feet, which is
5 commonly found throughout the city and in the
6 vicinity. And another thing that we have also met in
7 addition to all the other requirements is the parking,
8 which the parking is an issue that speaks to the
9 complexity of the site and the difficulties that have
10 been presented by the grade.

11 As you can see on the elevation at the far
12 left corner up on the boards, there is a significant
13 slope from the alley to the remainder of the lot and
14 that --

15 CHAIRPERSON GRIFFIS: Do you know offhand
16 what the slope is? I mean, is it at 10 percent, 80
17 percent, 2 percent?

18 MR. DANIEL: It's at 15 percent.

19 CHAIRPERSON GRIFFIS: 15 slope across the
20 site?

21 MR. DANIEL: Yes.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. DANIEL: Part of that also precludes
24 it from providing alley access to the parking.
25 Regarding the parking, we have adopted the District of

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1 Columbia Department of Transportation standards
2 regarding the aisle width and also the parking units
3 even though I understand, being a private drive, it
4 might not be necessary, but we wanted to maximize the
5 safety and the quality of the development.

6 Another quality of the subdivision is that
7 this has afforded all the units to face 27th Street
8 and R Street to maximize the gesture to the
9 neighborhood and fitting in in general. Regarding the
10 buildings themselves, the massing and orientation of
11 them compliments and is consistent with the
12 surrounding neighborhood. As I mentioned before, they
13 are all front facing.

14 We have articulated the masses, so that
15 every other unit facing 27th Street pulls forward and
16 backward to try to break down the scale of it and make
17 it more consistent with the residential neighborhood,
18 and also to try to maximize the sense of individuality
19 within each residence, to give them a heightened sense
20 of home ownership, which is one of the underlying
21 goals of this whole project.

22 In addition to that, we have also added
23 entry features such as bay windows, porches and other
24 articulations of the mass to try to break up the
25 buildings, and also contributing to the kind of

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1 dressing the streets. There's also the configuration
2 of the roof, instead of just kind of a symmetrical
3 kind of configuration we have oriented that toward the
4 street trying to make every effort to be more frontal
5 as opposed to not.

6 And thirdly, regarding the landscaping, we
7 tried to maximize. While we had to satisfy parking
8 requirements, which has necessitated on a drive aisle,
9 we tried to maximize the planting as much as possible
10 and also proposing planting beds at the fronts of the
11 buildings where there is significant -- where we have
12 steps, but there is also a sloped ground, so we
13 propose planting beds for people to be able to
14 personalize their units and it also lessens the
15 chances that it becomes just a patch of grass that
16 falls into disuse, so trying to create an incentive
17 for the residents to kind of take ownership of their
18 lots.

19 MR. MOORE: Okay. That's the extent of
20 his testimony. We will offer our witnesses to the
21 Board for any questions that you might have, please.

22 CHAIRPERSON GRIFFIS: Excellent. Let's
23 start with the architect then. Good diagrams and I
24 think we can walk through sections if we need to, but
25 I think the slope, which is the uniqueness aspect of

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1 the variance test which we're looking at for the
2 relief from the side yards, is well-shown.

3 So what is the practical difficulty, for
4 my understanding, of providing a side yard based on
5 the site slope?

6 MR. DANIEL: I think one thing that speaks
7 to the difficulty of the site is that with a lot of
8 affordable housing projects, it's often necessary to
9 maximize the use of the site. And also, in order to
10 do that and also to have a front on R Street, we would
11 not be able to put units on R Street.

12 CHAIRPERSON GRIFFIS: So you're saying, if
13 I follow you, because you stepped into -- one of the
14 unique aspects of this is the program requirements of
15 which the developer acquired the site, which requires
16 affordability.

17 MR. DANIEL: Yes.

18 CHAIRPERSON GRIFFIS: And you're saying
19 one of the practical difficulties of providing
20 affordable housing leads you to not be able to provide
21 the side yard?

22 MR. MOORE: With the number of units that
23 are necessary to provide this development on an
24 affordable basis.

25 CHAIRPERSON GRIFFIS: Exactly.

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1 MR. MOORE: Consistent with the document
2 that gave the document --

3 CHAIRPERSON GRIFFIS: Because you're
4 saying part of the practical difficulty is you have to
5 have units to sell.

6 MR. MOORE: That's correct.

7 CHAIRPERSON GRIFFIS: In order to pay for
8 the construction to keep this all at an affordability
9 level.

10 MR. MOORE: That's correct.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. MOORE: That's correct. And when we
13 had that, were faced with that slope, it was difficult
14 to put a side yard there as well.

15 COMMISSIONER HILDEBRAND: So at what point
16 does that break even point come into effect?

17 MR. MOORE: It's right at 10. As we have
18 testimony in the record, we started out with 11.

19 COMMISSIONER HILDEBRAND: Right.

20 MR. MOORE: We tried to maximize the site
21 as best we could, so as to bring down or bring up --
22 bring down the level of affordability there. But
23 after conversations with the Office of Planning, we
24 decided to make the site have the least amount of
25 zoning relief that is necessary and then this is the

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1 design that we came up with. We're at baseline here.

2 COMMISSIONER HILDEBRAND: So you would not
3 be able to economically perform this project if you
4 were to do 8 units instead of 10?

5 MR. MOORE: That's a question for you.

6 MR. WALLACH: No. Unfortunately, one unit
7 will go for about 50 percent of the AMI. Another unit
8 will go for about 80 percent of the AMI, and the other
9 units can go at AMI or perhaps above. The units will
10 all be the same. There is not going to be a
11 difference in the amenities for the one unit or the
12 two units or the three units that go for the lower
13 price than the others.

14 And in order to make it feasible we will
15 lose money on those three units, which has to be made
16 up with the balance of the other units in order for it
17 to remain affordable and for us to give that to a
18 first time homeowner who has, we'll say, around 50
19 percent of the AMI.

20 COMMISSIONER HILDEBRAND: So you have
21 looked at the numbers and you could submit some
22 information as to why this would not work at eight
23 units?

24 MR. WALLACH: Excuse me?

25 COMMISSIONER HILDEBRAND: You could submit

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1 some information as to why this would not work at
2 eight units?

3 MR. WALLACH: Sure.

4 CHAIRPERSON GRIFFIS: What kind of
5 information are you looking for? I mean, like a
6 financial statement?

7 COMMISSIONER HILDEBRAND: I think there
8 just needs to be some substantive evidence as to why
9 it doesn't work at eight units.

10 MR. WALLACH: The organization that is
11 actually doing the development, the Anacostia Economic
12 Development Corporation, is a nonprofit corporation.
13 I just wanted to make that clear in there.

14 CHAIRPERSON GRIFFIS: Good.

15 MR. DANIEL: Might I also add that it
16 would actually necessitate a reduction to seven units,
17 because we would need to have side yard allowance
18 along the units at 27th, so it would be reduction from
19 10 to 7.

20 COMMISSIONER HILDEBRAND: I just want to
21 follow that up. My understanding is that you would
22 not need a side yard for the corner lot. So if you
23 were to reduce the twin townhouses to a single, you
24 would have a built-in side yard on either side and if
25 you were to eliminate one and enlarge the other

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1 townhouses, you could still maximize the site but keep
2 an 8 foot side yard on one side.

3 MR. MOORE: That would be the case, Mr.
4 Hildebrand, if we didn't have deed restrictions there,
5 if we could build anything we wanted, but we can't.
6 We have a restriction on the deed. It has to be
7 affordable. It has to be first time home buyers.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. MOORE: And to reduce it any further
10 would frustrate that program goal of the city and the
11 basis upon which we bought the property.

12 COMMISSIONER HILDEBRAND: All right. I
13 understand.

14 CHAIRPERSON GRIFFIS: Okay. Any other
15 questions from the Board?

16 MR. MOORE: I would like to ask Ms.
17 Miller. Have we satisfactorily addressed the question
18 that you asked at the beginning? I want to make sure
19 that all of our Is are dotted and Ts crossed here.

20 VICE CHAIR MILLER: Well, I think you
21 have, but I can say this. In listening to the
22 discussion, it sounds like much of the uniqueness and
23 practical difficulty is tied to the contract, which is
24 with a nonprofit, to serve your affordable housing
25 requirements.

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1 And I had asked also about whether some --
2 it seems like there is some topographical uniqueness
3 with respect to the slope, but it doesn't sound like
4 the connection is there to the practical difficulty of
5 providing these houses without variances in accordance
6 with the side yard requirements. Is that correct?

7 MR. MOORE: I think the testimony is that
8 these 10 houses are the least number of houses that
9 can be built. We're trying not to frustrate the
10 program goals of the city.

11 VICE CHAIR MILLER: Right. I hear that
12 clearly.

13 MR. MOORE: Okay.

14 VICE CHAIR MILLER: I hear that clearly.
15 And I just was inquiring whether this topographical
16 uniqueness led to any specific practical difficulty
17 here that could be obviated, it doesn't sound like it
18 can, in order to fulfill the requirements of the
19 contract.

20 MR. DANIEL: I can speak to that. One
21 thing that the topography adds to the difficulty with
22 the program is increased site development costs, which
23 has to be distributed amongst the units. And given
24 the topography and the fact that we have to introduce
25 some retaining walls to provide parking access, that

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1 does increase the development costs significantly.

2 So I would maybe not in a pragmatic way
3 of, say, providing parking to the units for 27th -- I
4 mean, I'm sorry, along 27th and also the other units,
5 8 and 10. Although, I take that back. 8 and 10, we
6 do require a retaining wall to level off the ground.
7 So in short I do think the topography does add to the
8 difficulty.

9 VICE CHAIR MILLER: Okay. Just then to be
10 clear, does the topography result in the inability to
11 provide the side yards in accordance with the Zoning
12 Regulations?

13 MR. DANIEL: No, I don't think so.

14 VICE CHAIR MILLER: Okay. Thank you.
15 Would you say that the topography is one of the
16 confluence of factors in this case requiring the
17 variance?

18 MR. DANIEL: Yes.

19 VICE CHAIR MILLER: Okay. Thank you.

20 CHAIRPERSON GRIFFIS: Anything else from
21 the Board?

22 COMMISSIONER HILDEBRAND: Looking at the
23 cross section along -- is that 27th Street? Even
24 though the site is sloped, it doesn't seem to be a
25 radical slope. What is the uniqueness of the slope in

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1 this particular area that's causing this hardship?
2 I'm thinking of many streets on Capitol Hill that have
3 a similar slope or greater.

4 CHAIRPERSON GRIFFIS: But that's not the
5 test level of a uniqueness test that it can't occur
6 anywhere else in the entire District, right?

7 MR. DANIEL: I would state that viewed as
8 a project as a whole, the increased site development
9 costs created by the topography combined with some of
10 the limitations presented by that and also with the
11 side yard requirements, meaning fewer units, I think
12 just compounded those things present difficulties not
13 necessarily that one causes the other.

14 CHAIRPERSON GRIFFIS: Okay. Going
15 directly to Mr. Hildebrand's question, because it's a
16 viable one, although you don't need to say there is no
17 other 15 percent slope anywhere in the District of
18 Columbia, but why are you different? I mean, so let's
19 go up four blocks and there is a row dwelling and it
20 has a 15 percent slope across it for 16 or 18 feet.

21 As I understand your statements and
22 analysis of this, there is also a size uniqueness in
23 this. This is a large piece of property. That large
24 piece of property with a slope as it goes across it
25 obviously increases the impact of what that does.

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1 And what I understand you saying also in
2 the case presentation is based on the program
3 requirements of what has to be developed, and you put
4 all that in and how you mass this out, you have to
5 take in the size of the property, the access into it
6 and the slope. All those create the confluence of
7 uniqueness and practical difficulty. Is that correct?

8 MR. DANIEL: Yes.

9 CHAIRPERSON GRIFFIS: Mr. Hildebrand, do
10 you want to follow-up?

11 COMMISSIONER HILDEBRAND: Yes. I'm just
12 not sure that I'm seeing it yet, but perhaps as I hear
13 more about this, I might understand that a bit more
14 completely.

15 MR. MOORE: Just let me add, Mr.
16 Hildebrand, as you may know, this isn't the first time
17 this site has been before the Board of Zoning
18 Adjustment.

19 COMMISSIONER HILDEBRAND: And actually I
20 have not sat on this site before.

21 MR. MOORE: Understand.

22 COMMISSIONER HILDEBRAND: So that is news
23 to me.

24 MR. MOORE: Right. The Anacostia Economic
25 Development Corporation are nonprofit, which does

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1 development exclusively in the Anacostia area of
2 Washington, has tried very hard to make this site work
3 according to the restrictions that have been given to
4 it, affordable housing, first time home buyers at this
5 location.

6 If you go into the neighborhood, and I'm
7 trying not to testify here, but you will see there are
8 vacant properties. There are a number of apartment
9 buildings, some of which are vacant. There's
10 apartment buildings across the street. There are
11 single-family units across the street. This is the
12 best effort of the Anacostia Economic Development
13 Project to make this project at 27th and R Streets go
14 according to the hand that it has been dealt by the
15 District Government.

16 COMMISSIONER HILDEBRAND: Thank you.

17 MR. MOORE: That's all we have for these
18 witnesses. I will offer them, if the Board doesn't
19 have any more questions, for cross examination from a
20 party.

21 BOARD MEMBER ETHERLY: If I could, Mr.
22 Chair.

23 CHAIRPERSON GRIFFIS: Yes.

24 BOARD MEMBER ETHERLY: Let me just follow-
25 up very quickly on Mr. Moore's last point and perhaps

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1 it will offer an opportunity for Mr. Hopkins just to
2 add a little bit of his expertise. Mr. Moore, you
3 spoke to, and it's referenced in the written
4 submittals, some of the challenges that have been
5 faced in terms of trying to bring development to this
6 particular site. And I think if I understand
7 correctly, it has been vacant for the past five years
8 or so.

9 Mr. Hopkins, would you offer or would you
10 be in a position to offer, based on your experience as
11 a developer or as a nonprofit development entity, what
12 you would see as having been exposed to development,
13 market type development, at this property?

14 MR. HOPKINS: Well, the problem is because
15 of those program restrictions that DHCD placed upon us
16 when we acquired their site, we haven't been able to
17 produce market housing at the site that would,
18 therefore, justify the cost and the return. So we
19 have got to look at this site as one that we should
20 try to produce as many affordable units as we can.

21 In our minds, we might have wanted to do
22 50 percent of them as affordable, but then because of
23 the cost we could not do that. And as Mr. Wallach has
24 testified, we have come across with the program that
25 would enable us to sell one at one level of

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1 affordability and the others at a little higher level,
2 you know, at the 80 percent level.

3 So given, you know, the restrictions --
4 and I'm not upset about the restrictions, because when
5 we acquired the property we understood that. And when
6 we tried to do the assisted living piece, it was also
7 about affordability. And then we came back and we
8 listened to the community and they said we prefer to
9 have townhomes and this is what we're offering them.

10 Given, you know, all of those conditions
11 placed upon us at this juncture, this is really the
12 best that we can offer and to reduce them by one or
13 two is just totally impossible, and the site would
14 stay vacant or we would come back and talk about
15 developing an apartment building. And the community
16 doesn't want to see another apartment building go up,
17 but that's what was there before.

18 BOARD MEMBER ETHERLY: Okay. Thank you.
19 Thank you, Mr. Chair.

20 CHAIRPERSON GRIFFIS: Ms. Miller?

21 VICE CHAIR MILLER: Just a follow-up on
22 that. Are you saying it could resort to an apartment
23 building and that's because that would be matter-of-
24 right?

25 MR. HOPKINS: I would think so.

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1 VICE CHAIR MILLER: But it's impossible
2 for you to deliver the affordable housing without the
3 variances?

4 MR. HOPKINS: That is correct.

5 MR. MOORE: Actually, an apartment
6 building would probably require site plan review.
7 This is R-5-A.

8 CHAIRPERSON GRIFFIS: You're saying it
9 would take a special exception to get an apartment
10 building.

11 MR. MOORE: Yes.

12 CHAIRPERSON GRIFFIS: So it is not matter-
13 of-right.

14 MR. MOORE: Matter-of-right, that's
15 correct.

16 CHAIRPERSON GRIFFIS: So everything coming
17 through would be --

18 MR. MOORE: That's correct. And I would
19 also like to direct the Board's attention to part of
20 a transcript that I included in the record from the
21 last hearing, which representatives from DHCD
22 testified as to the number of attempts that the
23 Government has made to market this property to
24 developers and those attempts were unsuccessful,
25 because the numbers just would not work.

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1 COMMISSIONER HILDEBRAND: Just to make
2 sure I understand the proposal, three units are
3 affordable and the others are at market rate?

4 MR. WALLACH: No, they are all affordable.

5 COMMISSIONER HILDEBRAND: They are all
6 affordable.

7 MR. WALLACH: They are all affordable, but
8 they are affordable at different levels.

9 COMMISSIONER HILDEBRAND: At different
10 levels.

11 MR. WALLACH: Correct.

12 CHAIRPERSON GRIFFIS: Anything else for
13 the applicant? Does the ANC have any cross
14 examination of the witnesses? Any cross?

15 MR. DAVIS: Just a clarification on Lots
16 9 and 10. Where is the parking space on those? Your
17 drawing that's in the package and in the submittal
18 seems to show parking on the back, but I don't see it
19 on the drawing here.

20 CHAIRPERSON GRIFFIS: At the rear of the
21 property off the alley access. Is that correct?

22 MR. DANIEL: Yes, that's correct.

23 MR. DAVIS: What's the slope of that
24 driveway?

25 MR. DANIEL: That is just minimal to be

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1 able to drain back to the alley. We have created a
2 retaining wall between Lot 9 and the remainder of the
3 lots along 27th.

4 MR. DAVIS: What is the elevation, the
5 height of that wall?

6 MR. DANIEL: That wall, at the R Street it
7 will be about -- the elevation, excuse me, is at 91.5,
8 the whole length. I'm sorry.

9 MR. DAVIS: No, the height of the wall,
10 the retaining wall.

11 MR. DANIEL: The height of the wall. It
12 changes according to the grade.

13 MR. DAVIS: Well, but --

14 MR. DANIEL: At the highest point it will
15 be, excuse me math quick, 9 and a half feet.

16 MR. DAVIS: All right. So it is a very
17 high retaining wall.

18 MR. DANIEL: At one point. Excuse me.

19 MR. DAVIS: Now, if we look at --

20 MR. MOORE: That's not what you said.

21 MR. DANIEL: I'm sorry?

22 MR. MOORE: You said it would be 9 and a
23 half feet.

24 MR. DANIEL: Correct.

25 MR. DAVIS: 9 and a half feet.

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1 MR. MOORE: Very high.

2 MR. DANIEL: 9 and a half feet at one
3 location from which it will get progressively smaller.

4 MR. DAVIS: You referred to it as an
5 existing alley. Is there an existing alley there?
6 That is a paper alley and don't you need the -- well,
7 how do you arrive at the elevation if it hasn't been
8 established yet?

9 MR. DANIEL: To my knowledge it's an
10 existing alley. That's just based upon the knowledge
11 that I have of the site.

12 MR. DAVIS: But it's an unpaved alley.

13 MR. DANIEL: Okay.

14 MR. DAVIS: And where I'm headed is that
15 if you don't know where the eventual -- the height of
16 the eventually paved alley, you don't know how to
17 design the driveway.

18 CHAIRPERSON GRIFFIS: So the question is?

19 MR. DAVIS: Well, the question is what's
20 the slope of the driveway?

21 CHAIRPERSON GRIFFIS: You mean what is the
22 slope of the alley or what's the slope of the point of
23 access?

24 MR. DAVIS: Well, but you can't determine
25 the slope of the driveway until you know the slope of

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1 the alley, the elevation of the alley.

2 CHAIRPERSON GRIFFIS: All right.

3 MR. DAVIS: And then because it is not a
4 paved or finished alley --

5 CHAIRPERSON GRIFFIS: Understood.

6 MR. DAVIS: -- you don't know where that
7 is. That's all.

8 CHAIRPERSON GRIFFIS: Understood. Do you
9 want an answer to your question or no?

10 MR. DAVIS: Well, I would like one.

11 CHAIRPERSON GRIFFIS: Yes. How did you
12 establish the project elevation in that back side in
13 order to establish the height of the Lots 9 and 10?

14 MR. DANIEL: It would be based on
15 topographical information that was provided by a
16 surveyor.

17 CHAIRPERSON GRIFFIS: So you have an
18 alternate survey or do you have a civil survey of the
19 property?

20 MR. DANIEL: Yes. I don't know if these
21 have become, but part of the city's submission
22 includes the existing topography denoted by the dotted
23 lines.

24 MR. DAVIS: Yes. That's where I drew my
25 information from. That elevation is quite high and if

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1 the final alley is going to be substantially
2 different, then you have a problem in determining the
3 height there.

4 MR. DANIEL: Actually, in determining that
5 height, I have erred on the conservative side and made
6 it higher than -- that spot elevation where that wall
7 starts is relatively low, but I have assumed a height
8 of, approximately, the elevation of 96 where in
9 actuality, those topos go down quite a bit. But I
10 have presumed that they will be bringing that up to
11 level it. So if anything, I believe that I have erred
12 on the conservative side in establishing that height.

13 CHAIRPERSON GRIFFIS: Okay. Next
14 question? Anything else, Mr. Davis?

15 MR. DAVIS: Nothing on the elevation.

16 CHAIRPERSON GRIFFIS: Okay. I'm sure Mr.
17 Moore --

18 MR. DAVIS: Well, yes, I would like to.
19 I would like to comment in general about the concept
20 of affordability.

21 CHAIRPERSON GRIFFIS: Do you have a
22 question?

23 MR. DAVIS: Oh, no? Oh, questions?

24 CHAIRPERSON GRIFFIS: Yes.

25 MR. DAVIS: I'm sorry.

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1 CHAIRPERSON GRIFFIS: That's okay.

2 MR. DAVIS: No questions.

3 CHAIRPERSON GRIFFIS: We'll keep it on
4 track here.

5 MR. DAVIS: Okay.

6 CHAIRPERSON GRIFFIS: Did you have any
7 cross questions? No? Okay. Good. Thank you very
8 much. Let's move ahead then to the Office of
9 Planning's report. Mr. Lawson is with us. A very
10 good afternoon to you.

11 MR. LAWSON: Thank you, Mr. Chair and
12 Members of the Board. My name is Joel Lawson. I'm
13 with the D.C. Office of Planning. As noted by the
14 applicant, this case is for the subdivision of a one
15 third acre vacant site into 10 lots for development as
16 row house and semi-detached dwelling units.

17 The site has frontage on R Street and 27th
18 Street, S.E., and slopes up towards an alley to the
19 east of the site and R Street, S.E. Most of that
20 slope exists adjacent to the alley and adjacent to the
21 street. It was previously developed with an apartment
22 building now demolished, and the subject property and
23 surrounding area are zoned R-5-A, which permits low
24 rise apartment, garden apartment and row dwellings.

25 The original application was for the

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1 creation of 11 lots, 7 standard lots facing 17th
2 Street, S.E., and 4 theoretical lots located between
3 a new substandard private drive in the existing alley.
4 This would have required a number of different forms
5 of relief in addition to BZA approval of the
6 theoretical lot subdivision itself.

7 OP was concerned that the proposal would
8 not meet the many various tests that would be required
9 and DDOT also indicated opposition to the then
10 proposed vehicular access. Staff discussions with the
11 applicant resulted in the submission of a revised
12 proposal, which eliminates the need for the
13 theoretical lot subdivision and reduces the number of
14 lots to 10, all of which have frontage on a public
15 street.

16 The revised lots are larger, eliminating
17 relief for Floor Area Ratio and lot occupancy. The
18 proposal retains the size and design of individual
19 units that was previously proposed and provides rear
20 access to parking on each lot via driveway access
21 easements.

22 The Zoning Regulations require BZA review
23 of all new row house development in the R-5-A Zone.
24 The revised proposal generally conforms to the review
25 requirements of the relevant sections of the Zoning

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1 Regulations, as noted in the OP report. Row house
2 development is permitted in the zone. The lot and
3 unit size would not be out of character with the
4 neighborhood norms and it would not be inconsistent
5 with the Comprehensive Plan and Generalized Land Use
6 Map.

7 The applicant has submitted additional
8 information related to the retaining wall through the
9 center of the site, which would vary from a height of
10 about 0 feet at R Street to about 10 feet at the north
11 end of the wall, 9 and a half, 10 feet at the north
12 end of the wall. Details regarding the design and
13 materials of this wall have not yet been provided. OP
14 is also not certain whether the trees shown on the
15 site plan on the remaining natural slope area in the
16 northeast corner are existing, retained trees or if
17 they are new trees.

18 In addition with section 401.3, lot area
19 and lot width also require BZA review. The proposed
20 lots average just over 1,500 square feet in area and
21 almost 17, well, 16.8 feet in width, both within
22 neighborhood norms. The proposed density is
23 consistent with the moderate density residential
24 designation on the Comprehensive Generalized Land Use
25 Map and development of the vacant site with row house

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1 as opposed to the otherwise outright permitted
2 apartment form or, sorry, the otherwise permitted
3 apartment form of development has been seen as being
4 preferable.

5 Finally, in terms of relief required, Lots
6 1, 9 and 10 require special exception relief from side
7 yard requirements. Lot 8 being at the intersection of
8 two streets is not required to provide a side yard.
9 Site terrain conditions, as noted by the applicant,
10 site terrain conditions in the provision of rear yard
11 parking access result in some practical difficulty
12 while the land use patterns aren't adjacent to the
13 site and the lower permitted height of the row house
14 units help to ensure that there would be minimal
15 impacts on privacy, light or air on adjacent lots.

16 As such, OP believes that the proposal
17 meets the necessary tests of the Zoning Regulations
18 and recommends that the application be approved. This
19 recommendation, again, is consistent with the
20 Comprehensive Plan and the generalized Land Use Map
21 and would not undermine the integrity of the Zoning
22 Regulations. This concludes my testimony and I'm
23 available for questions. Thank you.

24 CHAIRPERSON GRIFFIS: Excellent. Thank
25 you very much, Mr. Lawson. Any questions from the

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1 Board? Ms. Miller?

2 VICE CHAIR MILLER: Good afternoon. How
3 does or how do you see the uniqueness in this case
4 with respect to the variance test?

5 MR. LAWSON: I think the applicant was
6 starting to get to this. It is a confluence of
7 factors related to the site, as well as some design
8 parameters. I think one of the issues that wasn't
9 made entirely clear as part of that discussion related
10 to slope. We didn't receive detailed slope analysis,
11 so some of this is kind of my conjecture from visiting
12 the site.

13 But actually, a fair amount of the site is
14 actually relatively flat. There may be a 15 percent
15 slope overall, but a good deal of that slope is very
16 concentrated adjacent to the alley and adjacent to R
17 Street, meaning the slopes in those locations are much
18 steeper. My guess would be that they would be closer
19 to 45 percent, quite steep in some locations.

20 What that means is it's very difficult to
21 provide access from the alley to these lots
22 necessitating the need for access from R Street, which
23 then limits how development would be able to happen.
24 The addition of a third unit, for example, facing R
25 Street is made not possible by the requirement that

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1 access to the rear parking be from this easement,
2 which is from R Street.

3 And I just want to point out that OP very
4 much supports the applicant's intent to provide the
5 parking from the rear rather than an otherwise
6 permitted form of parking access that would be to
7 garages directly from the street to each individual
8 unit. We feel this is a much preferable solution,
9 although we -- you know, you have probably noticed as
10 well, we look at the site plan and we see a lot of
11 pavement on the property because of that.

12 So the confluence of some of those design
13 constrains, as well as the slope, as well as the
14 location of the slope on the property starts to create
15 some difficulties and some uniqueness associated with
16 the site and that's how we viewed it.

17 COMMISSIONER HILDEBRAND: Mr. Lawson,
18 could you speak just a little bit about how the
19 elimination of the side yards does not affect the
20 integrity of the Zoning Plan?

21 MR. LAWSON: There are a number of kind of
22 ways to answer that question. I think, first of all,
23 a lot of this is based on the assumption that 10 units
24 is an appropriate number of units on this property,
25 and we feel that's a reasonable solution to make than

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1 Comprehensive Plan designation for the site in terms
2 of it being moderate density residential and in terms
3 of the Zoning Regulations themselves, which allow the
4 BZA to establish appropriate lot areas and lot widths.

5 These lot areas and lot widths are not out
6 of character with the norm. There is a wide variety
7 of lot widths and lot areas within the kind of broader
8 neighborhood and there are some that are certainly
9 much smaller than this and there are some that are
10 considerably larger than this, as well, that are
11 developed as or are available for row house
12 development.

13 But if we assume that 10 units is a
14 reasonable number of units for this property, given
15 the other factors that we were just talking about, it
16 becomes very difficult to provide that level of
17 development and to also provide the side yards that
18 are required.

19 Again, given the form of development,
20 there is a significant separation between the semi-
21 detached units and the other units, which face 27th
22 Street, so it meets the intent of providing air, light
23 and privacy to the new units. There is an alley on
24 one side, streets on two sides, which also adds to
25 air, light and privacy minimizing those impacts. And

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1 to the north of the site is a fairly large area of
2 parking, which is required for the apartment unit
3 which is further north of this site.

4 Again, I think another, you know, factor
5 here is, again, the form of development they have
6 chosen to do. They are doing relatively low row house
7 development to a height of 19 feet, whereas the zoning
8 would allow 40 feet. That, again, helps to minimize
9 privacy, light, air impacts, potential impacts on any
10 of the surrounding neighborhoods.

11 COMMISSIONER HILDEBRAND: So am I correct
12 in understanding that, in your opinion, having the
13 adjacency of the alleys next to the units that still
14 need relief is basically the equivalent of having the
15 light and air of having a side yard?

16 MR. LAWSON: It helps to mitigate those
17 concerns. Is it the equivalent? I would say no, but
18 it helps to mitigate those concerns.

19 COMMISSIONER HILDEBRAND: Thank you.

20 CHAIRPERSON GRIFFIS: Any other questions
21 from the Board? Thank you, Mr. Lawson. Does the
22 applicant have any cross examination of the Office of
23 Planning?

24 MR. MOORE: No.

25 CHAIRPERSON GRIFFIS: No cross for the

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1 applicant. Does the ANC have any cross of the Office
2 of Planning?

3 MR. DAVIS: Yes. Your section, section 8,
4 page 3, I'm sorry, section 8-3, page 6, and I'm
5 looking at Exhibit 26, I believe. There you make a
6 statement at the end of -- let me pull this a little
7 closer. You make a statement at the end of the
8 paragraph there that if BZA accepts the units as an
9 appropriate number for this site, the provision for
10 fully complying with side yards would represent a
11 practical difficulty and would result in provisions of
12 housing, which are unnecessarily narrow and a loss --
13 narrow and less in character with the housing in the
14 area.

15 That's my assumption, too, and I just --
16 it doesn't seem to be consistent with your other
17 recommendations that the side yard is okay, the side
18 yard elimination is okay. So I guess my question is
19 is that statement inconsistent with your other
20 recommendations?

21 MR. LAWSON: I don't believe so. I
22 believe this statement is addressing what may be
23 possible if the project at 10 units was required to
24 provide a full side yard requirement for each of the
25 lots. I'm not quite sure, quite frankly, how it would

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1 be done, but one of the ways that it could be done,
2 particularly for the units that face 27th Street,
3 would be to reduce the width of the units by,
4 approximately, a foot for each one.

5 That would result in units that are 15 or
6 less feet in width, which is not impossible to do, but
7 we felt was less in character with the general area
8 and was a reduction in width that wouldn't serve a
9 particular purpose. That's what we were getting to
10 with this.

11 MR. DAVIS: But that assumes that you
12 accept the 10 as your premise.

13 MR. LAWSON: That's why the statement
14 started out with that statement.

15 MR. DAVIS: Let's see. You have a
16 statement concerning the retaining wall and that you
17 would rather see it on the -- adjacent to Lot 9
18 instead of at the property line. Would you explain
19 that logic? I don't understand that.

20 MR. LAWSON: Sure. We always encourage --
21 first of all, I should preface this by saying that we
22 always encourage applicants to work with a slope, to
23 deal with a slope in ways that are -- in ways other
24 than through extensive retaining wall work, and I
25 don't think even the applicant would say that this is

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1 not fairly extensive retaining wall work.

2 Given the nature of the development and
3 the nature of the site, retaining wall work seems to
4 be necessary. We felt that it was more appropriate
5 that that retaining wall work be internal to the site
6 than to be located along the edge of the property,
7 along what will be the alley, simply because then the
8 effects are all internalized as well.

9 The development as a whole would be able
10 to address that retaining wall and how they want to
11 deal with it over the long term in terms of
12 maintenance of the wall, in terms of landscaping, all
13 that kind of stuff, and it just takes it further
14 inland, I guess, from the public realm.

15 MR. DAVIS: Are you aware that the
16 community has not commented on this development?

17 MR. LAWSON: Yes. And just to be really
18 clear, of course, the OP report is dealing with the
19 application as it addresses Zoning Regulations tests
20 as it relates to these kind of Office of Planning type
21 issues. It is, of course, up to you in the ANC and
22 the community to comment on how you feel it might
23 impact you as area residents. OP can't. We can't
24 really do that at least not nearly as well as you
25 possibly could.

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1 CHAIRPERSON GRIFFIS: Ms. Miller?

2 VICE CHAIR MILLER: Just as a follow-up,
3 Mr. Lawson. Does the Office of Planning believe that
4 10 units is the appropriate number?

5 MR. LAWSON: We don't think that 10 units
6 is out of character with the area. We think that, you
7 know, given the wording that's in the Zoning in
8 section 401.3, it certainly allows the leeway for a
9 broader variety of unit size that may be allowed in
10 some other zones, for example, and we think that it's
11 certainly not out of character with what's going on
12 and it's not out of character with other land use
13 regulations that are in place, such as the
14 Comprehensive Plan. So we don't think it's
15 inappropriate.

16 VICE CHAIR MILLER: So your statement is,
17 basically, with respect to the character and the Zone
18 Plan. You didn't go so far as to make an assessment
19 as to whether a lower number was feasible?

20 MR. LAWSON: We certainly did not. A
21 lower number is always feasible. You know, units
22 could always be removed and it would affect the
23 development in a number of ways. In terms of Zoning
24 Regulation ways --

25 VICE CHAIR MILLER: Right.

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1 MR. LAWSON: -- which is what we assess,
2 as opposed to economic impact, that kind of stuff,
3 it's possible it would conform more. The lot sizes
4 may be bigger. They may not. They may be able to
5 provide -- to remove the relief required for side yard
6 setback. They may not. We didn't assess that fully.
7 You know, again, I'm sure that -- well, I'll just
8 leave it at that.

9 VICE CHAIR MILLER: Okay. Thank you very
10 much.

11 CHAIRPERSON GRIFFIS: Anything else for
12 the Office of Planning? Very well. Mr. Lawson, thank
13 you very much. At this point we need to take a five
14 minute break just so that we can change out
15 technically some of our sound equipment and keep the
16 morning session going. So we'll be back very quickly.
17 I won't let anyone leave and go outside to enjoy this
18 day. So let's do that and we'll be back.

19 (Whereupon, at 2:27 p.m. a recess until
20 2:57 p.m.)

21 VICE CHAIR MILLER: We're going to
22 reconvene the proceedings. The Chairman is
23 temporarily detained and Board Member Etherly will
24 also be out here shortly, but we're going to continue.
25 They can read the transcript. I think at this stage,

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1 are we at the time for the ANC to make its case? Is
2 that where we're at?

3 MR. MOORE: Well, Madam Chair, Mrs.
4 Miller, I am fully appreciative of the volunteer time
5 that each ANC Commissioner puts into his work and the
6 deference the Board accords to the Advisory
7 Neighborhood Commissioners when they come here. I am
8 unsure, at this point in the proceeding, if you have
9 an ANC presentation that is consistent with the rules.
10 I have not seen any letter in the record, which
11 authorizes anybody to speak on behalf of the ANC
12 itself.

13 And with that in mind, I want to raise
14 that, because you're asking the ANC to give a report
15 when I think, and I'm just thinking here, the reality
16 is you have individual ANC members who are making a
17 report, who wish to make a report, but the ANC itself
18 has not voted on any particular person to represent it
19 or any particular point of view in the record.

20 MS. MARLIN: Excuse me, ma'am? Can I say
21 something?

22 VICE CHAIR MILLER: Yes. Could you come
23 to the microphone, please?

24 MS. MARLIN: Excuse me. Would you get up,
25 please?

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1 MR. MOORE: Yes, sure.

2 MS. MARLIN: Thank you.

3 VICE CHAIR MILLER: Are you Ms. Marlin?

4 MS. MARLIN: No. My name is Robin Marlin.

5 I'm a Commissioner in 7B, 7B-05, and the reason why I
6 wanted to speak is because the gentleman sat here and
7 heard me say exactly what he is reciting to you and I
8 resent that.

9 He is correct that there is -- to my
10 knowledge, there is no ANC representative to speak to
11 the specific project, but we are here because someone
12 among these gentlemen called a Commissioner, asked for
13 a meeting that didn't include residents, and they met
14 and decided that they were going to try to represent
15 the ANC before he heard me say that and I resent that.
16 It's an embarrassment to my Commission and I'm not
17 going to have that happen to us.

18 VICE CHAIR MILLER: Okay. Everyone who
19 wants to speak will have a chance to speak. Okay?

20 MS. MARLIN: Okay.

21 VICE CHAIR MILLER: That's not at issue.

22 MS. MARLIN: But I wanted to clear up what
23 he was trying to tell you.

24 VICE CHAIR MILLER: Okay. Okay. What I'm
25 trying to determine right now is if there is someone

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1 who is authorized to speak on behalf of the ANC. We
2 have in our records what has been given, Exhibit No.
3 27, a letter from the ANC, which states on page 2 that
4 Commissioner Yvonne Moore is authorized by ANC-7B to
5 present the report. Is that you?

6 MS. MOORE: That's me.

7 VICE CHAIR MILLER: Okay. Now, Mr. Moore,
8 you seemed to indicate that you didn't think anyone
9 was authorized. It appears to me that this letter
10 authorizes Ms. Moore.

11 MR. MOORE: What I said is I have not seen
12 a letter in the record, which gives that authority.

13 VICE CHAIR MILLER: Okay. Thank you.

14 MR. MOORE: If there is a letter in the
15 record, then so be it, but I have not seen it. That's
16 all.

17 VICE CHAIR MILLER: Well, that should be
18 shared with you. Do you have an extra copy?

19 MS. MOORE: I just have my copy.

20 VICE CHAIR MILLER: Okay. Does anybody
21 else have a problem with Ms. Moore representing the
22 ANC? Okay. Then you can proceed.

23 MS. MOORE: Thank you. On last Wednesday,
24 May the 4th, the ANC had an emergency meeting to
25 discuss the BZA resolution and the vote was three

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1 Commissioners for the project, for the variance that
2 is, two Commissioners opposed it and one Commissioner
3 abstained.

4 VICE CHAIR MILLER: Excuse me. Is there
5 a written report you're presenting?

6 MS. MOORE: Yes, you have it in the
7 letter. It's in the letter.

8 VICE CHAIR MILLER: Which? Oh, that
9 letter that you --

10 MS. MOORE: Yes. We asked for a
11 postponement.

12 VICE CHAIR MILLER: Okay.

13 MS. MOORE: But in the event that the
14 postponement was not granted, we decided to vote to
15 support the variances for the homes at Randle
16 Highlands.

17 VICE CHAIR MILLER: Okay. Thank you. Do
18 the Board Members have any questions for the ANC
19 Commissioner?

20 BOARD MEMBER ETHERLY: Thank you very
21 much, Madam Chair.

22 VICE CHAIR MILLER: Ms. Moore, could you
23 stay here for a minute just in case there are
24 questions for you.

25 BOARD MEMBER ETHERLY: Excellent. Thank

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1 you, Madam Chair. Very quickly for you, Mrs. Moore.
2 First of all, good afternoon to you.

3 MS. MOORE: Good afternoon.

4 BOARD MEMBER ETHERLY: And thank you for
5 your time. Let me just be sure I'm clear in terms of
6 the circumstances around the ANC's vote just so we
7 don't get too sidetracked into competing, shall we
8 say, characterizations of what happened.

9 Now, from the standpoint of -- it is your
10 understanding, therefore, that the ANC has taken a
11 position on this application and that position was to
12 support the requested relief, correct?

13 MS. MOORE: That was the vote in the
14 emergency meeting.

15 BOARD MEMBER ETHERLY: Okay.

16 MS. MOORE: Last Wednesday night.

17 BOARD MEMBER ETHERLY: Now, with respect
18 to the emergency meeting, and I'm not disputing that,
19 my question will more or less get at kind of the issue
20 of great weight and how the Board will address or
21 treat the ANC's action. From a standpoint of notice
22 and, shall we say, accessibility of the general public
23 to that meeting, this was a special meeting that just
24 involved ANC Commissioners, correct?

25 MS. MOORE: Yes.

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1 BOARD MEMBER ETHERLY: Okay. So --

2 MS. MOORE: Well --

3 BOARD MEMBER ETHERLY: I'm sorry.

4 MS. MOORE: It was supposed to have been
5 just for ANC Commissioners, but because of the
6 variances, AEDC representatives --

7 BOARD MEMBER ETHERLY: Correct.

8 MS. MOORE: -- were there.

9 BOARD MEMBER ETHERLY: Okay.

10 MS. MOORE: To share with us and they did
11 have their copy of this report.

12 BOARD MEMBER ETHERLY: Okay.

13 MS. MOORE: Which the ANC had not
14 received. I just picked this up today for the ANC.

15 BOARD MEMBER ETHERLY: Okay. No problem.

16 VICE CHAIR MILLER: Excuse me. Could you
17 just identify what report that is that you're
18 referring to?

19 MS. MOORE: It's the report explaining the
20 variances and the new application with the variances.

21 BOARD MEMBER ETHERLY: Is that dated April
22 27, 2005?

23 MS. MOORE: Yes.

24 BOARD MEMBER ETHERLY: It appears to be
25 Exhibit No. 23, Madam Chair, which was the submittal

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1 of the applicant.

2 VICE CHAIR MILLER: Thank you.

3 MS. MOORE: And the ANC is not in receipt
4 of a copy, but I do have it today.

5 BOARD MEMBER ETHERLY: Okay.

6 MS. MOORE: I picked it up.

7 BOARD MEMBER ETHERLY: Okay. And once
8 again, I'm not disputing what happened or its
9 validity, but just from the standpoint of how the
10 Board treats or weights the ANC's action, typically if
11 certain procedures are followed, the ANC of course is
12 accorded great weight and those procedures typically
13 involve notice to the public, you have a quorum on
14 hand, all of those different types of things.

15 But I wanted to be sure that we're clear.
16 It sounds as though this was not, and I'm not saying
17 this negatively, but just to clarify what happened,
18 this was not a regularly noticed or advertised meeting
19 of the ANC. It was a special meeting or an emergency
20 meeting, as you characterized it. You had ANC
21 Commissioners present and you did take an action on
22 it.

23 MS. MOORE: Yes.

24 BOARD MEMBER ETHERLY: But it wasn't a
25 regularly scheduled or advertised meeting.

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1 MS. MOORE: Right.

2 BOARD MEMBER ETHERLY: Okay. Okay. Thank
3 you. Thank you, Madam Chair.

4 VICE CHAIR MILLER: I just want to ask you
5 a little more about that also. We just got a copy of
6 this letter this morning, as well, but from glancing
7 at it, it looks like you did provide some notice to
8 the community about this meeting. You mailed notice
9 to residents of the impacted area. Is that correct?

10 MS. MOORE: That was at the first.

11 VICE CHAIR MILLER: Oh, that was the first
12 meeting?

13 MS. MOORE: The second hearing, yes, the
14 second. See, they have been before the ANC a couple
15 of times.

16 VICE CHAIR MILLER: Okay.

17 MS. MOORE: I think the real issue is that
18 they didn't come to present the variances and when --
19 I think they did that at the April meeting. Due to a
20 family illness, I was not at that meeting.

21 VICE CHAIR MILLER: Okay.

22 MS. MOORE: And because it was changes and
23 they didn't have the report here, we decided that we
24 would have a special meeting to discuss and to take
25 that action.

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1 VICE CHAIR MILLER: Okay.

2 MS. MOORE: And that was the meeting that
3 we had.

4 VICE CHAIR MILLER: So this special
5 meeting, was there notice provided to the community or
6 not?

7 MS. MOORE: I don't think so.

8 VICE CHAIR MILLER: Okay.

9 MS. MOORE: I got an email but, like I
10 said, I have been somewhat secluded because of family
11 illness.

12 VICE CHAIR MILLER: Okay. All right.
13 Thank you. Is there any cross from the applicant?

14 MR. MOORE: No.

15 VICE CHAIR MILLER: Okay. You're back.
16 Are there any other parties who -- I don't believe
17 there are. Okay. You can come forward to testify
18 after we're finished. I want to make sure there is no
19 cross. Okay. Then thank you very much.

20 MS. MOORE: Thank you.

21 CHAIRPERSON GRIFFIS: Very well. Thank
22 you very much, Ms. Miller. The ANC-7B is now finished
23 with their case presentation. Let's move ahead then
24 for persons in support of the application, persons in
25 support to give testimony. Is anyone present in Case

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1 No. 17316? Persons in opposition to the application,
2 persons present to give testimony?

3 MS. MARLIN: Opposition?

4 CHAIRPERSON GRIFFIS: Opposition, yes.
5 Come on forward, everyone that's going to provide
6 testimony at this time.

7 MS. MARLIN: Good afternoon. My name is
8 Commissioner Robin Marlin. I'm a Commissioner with
9 7B-05. Sir, I really didn't have opposition in terms
10 of the project itself. I'm sure that the project will
11 be fine if some of the conditions are met. But my
12 concern is how this is being conducted in terms of the
13 residents.

14 When I was elected Commissioner, I took an
15 oath that I would serve the residents. Now, this
16 special meeting that has been identified, it was not
17 open to the residents nor were the Commissioners,
18 including myself, apprised that the applicants were
19 going to be there to present anything. At the
20 scheduled ANC meeting, we told the applicants that
21 they would have to come back the next month to the
22 next meeting to share with us the variance that they
23 were requesting.

24 That was the understanding I had and,
25 again, that was reiterated to me on April 26th at

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1 another meeting by the chair that we were not having
2 a special meeting with the applicants. They would
3 have to come back before the full ANC to present any
4 documents that they had.

5 CHAIRPERSON GRIFFIS: Okay.

6 MS. MARLIN: Because at our regular
7 meeting they didn't have the information they needed.
8 So subsequent to that, one of the applicants, I
9 believe Mr. Hopkins, made a phone call to a
10 Commissioner and coaxed the special meeting and I
11 really resent that as a Commission.

12 CHAIRPERSON GRIFFIS: Okay.

13 MS. MARLIN: Now, my point in terms of the
14 application itself is I listened to the gentleman from
15 the Office of Planning, had a small discussion with
16 him in terms of, well, the new Comp Plan that is being
17 presented. I attended some of those meetings. Now,
18 he did point out to me that this project is falling
19 under the existing Comp Plan.

20 However, when you talk about affordable
21 housing and land use and that type of thing, right now
22 Ward 7 is being heavily inundated with these types of
23 projects. I differ to say that Randle Highlands would
24 be one of the targeted, so to speak, areas in the new
25 Comprehensive Plan. I don't think that anybody should

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1 come here and tell us that we need affordable housing
2 and where we need it.

3 The applicants represent Anacostia. This
4 is not Anacostia. This is Randle Highland area. It's
5 nowhere near Anacostia. And as a Commissioner, I
6 think that these things need to be taken into
7 consideration and I definitely think that they need to
8 come back before the community and present the
9 differences that they want to change in this project.

10 And I don't see why if the topography, as
11 Ms. Miller was questioning them in detail about that,
12 if it doesn't support 10, 12 or whatever you're trying
13 to do, they need to decrease that. This is money for
14 them, but this is a quality of life for us and I'm
15 looking out for the residents. I'm not looking out
16 for them. I don't have anything against them, but I
17 don't like misrepresentation and I don't like things
18 being done underhandedly.

19 And I think for anyone to call a
20 Commissioner and try to set up a meeting and show up
21 uninvited to present issues is just unethical and I'm
22 embarrassed as a 7B Commissioner that that has
23 happened and it won't happen again, I assure you.

24 CHAIRPERSON GRIFFIS: Okay. Thank you
25 very much and, of course, we don't have much to do

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1 with the workings of the ANC, but don't go too far,
2 because there's probably going to be questions of you.
3 Ms. Miller?

4 VICE CHAIR MILLER: I do have a couple.

5 CHAIRPERSON GRIFFIS: If you wouldn't mind
6 coming back.

7 VICE CHAIR MILLER: This might have been
8 stated before, but when is your next ANC meeting?

9 MS. MARLIN: It should be --

10 CHAIRPERSON GRIFFIS: 19th of May.

11 MS. MARLIN: It's every third Thursday, so
12 it's next Thursday, not this Thursday, next Thursday.

13 CHAIRPERSON GRIFFIS: 19th of May.

14 VICE CHAIR MILLER: Okay.

15 MS. MARLIN: Thank you. The 19th of May.

16 VICE CHAIR MILLER: And did you tell the
17 applicant that that was the date?

18 MS. MARLIN: We told them, yes, at our
19 April meeting that was the date, correct.

20 VICE CHAIR MILLER: Okay. And I assume
21 that they said well, our hearing is set for before
22 then, can you accommodate us or did that discussion
23 not take place?

24 MS. MARLIN: That discussion did and we
25 denied it. We denied it as a group there at our

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1 annual meeting, at our monthly meeting.

2 VICE CHAIR MILLER: And did you consider
3 having a public special meeting prior to this hearing?

4 MS. MARLIN: No. When speaking with the
5 chair, he expressed the fact that he was not
6 comfortable. He agreed with Mr. Davis' assessment of
7 what the applicant was requesting, that we didn't have
8 enough information, that the residents were not fully
9 aware of what the changes were and at our meeting,
10 they didn't have the documentation they needed to
11 support the necessity of the variances, to my
12 understanding. So we were all baffled by what was
13 going on. I had never seen the project, so we told
14 them they had to come back, period.

15 CHAIRPERSON GRIFFIS: Anything else? Let
16 me make one quick statement. Of course, you know the
17 requirements for our hearings are on one track and
18 then ANC are the others and, oftentimes, it may not be
19 within the presenters' or the applicants' ability to
20 postpone.

21 In fact, if they told you that they would
22 postpone this hearing, they wouldn't have been
23 truthful with you, because we can only postpone the
24 hearing. They would have had to show up today and
25 asked for a postponement and, actually, that is what

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1 has happened because of the advertising, because of
2 the notice because, you know, this is published in the
3 D.C. Register. So it's not as easy as it is just to
4 say don't show up for the Public Hearing before the
5 Board of Zoning Adjustment, put it off for months and
6 months.

7 Now, we do obviously hear requests for
8 postponements and continuances, but that's the
9 statement. Right. Anything else? Does the applicant
10 have any cross examination of the presenter?

11 MS. MARLIN: I have a question. So are
12 you saying in terms of them asking for a postponement
13 or us? Who are you --

14 CHAIRPERSON GRIFFIS: I'm saying someone
15 would have had to. I mean, obviously, the ANC asked.
16 But you were saying, you know, the applicant said they
17 -- you wanted them to come back to you to present
18 before they came to us.

19 MS. MARLIN: Right.

20 CHAIRPERSON GRIFFIS: And what I'm saying
21 is just for clarity in the future, it's not up to
22 them, essentially, to postpone this hearing.

23 MS. MARLIN: It's up to us?

24 CHAIRPERSON GRIFFIS: No, it's up to us.

25 MS. MARLIN: Oh, it's up to you. Okay.

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1 CHAIRPERSON GRIFFIS: And this is
2 published. This is published in the Register. It's
3 published on our calendar. It's posted on the
4 property. I mean, and look, if we had to postpone
5 this, we postpone probably three or four months down
6 the line, because our schedule is announced three
7 months ahead of time.

8 MS. MARLIN: Okay. Just a point of
9 clarification for me and in future then. So if we
10 wanted to postpone it as an ANC, we needed to get a
11 letter to you in a timely manner to postpone it. Is
12 that correct?

13 CHAIRPERSON GRIFFIS: Yes.

14 MS. MARLIN: That is correct?

15 CHAIRPERSON GRIFFIS: Right.

16 MS. MARLIN: Okay. But if you're -- okay.
17 Well, I'm clear on that. But like I said, there are
18 some unethical things happening here.

19 CHAIRPERSON GRIFFIS: Right.

20 MS. MARLIN: And maybe that's why you
21 didn't get the letter in time.

22 CHAIRPERSON GRIFFIS: Okay. All right.
23 Thank you.

24 VICE CHAIR MILLER: Ms. Marlin, I just
25 want to make a comment, because I was an ANC

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1 Commissioner and an ANC Chair, so I have been there
2 and I'm here and it's much more complicated to
3 postpone a hearing than it is at the ANC level, and
4 that's why I was asking you.

5 In some instances, the ANC schedule
6 doesn't coincide with the BZA's schedule and in which
7 case it's preferable for the ANC to try to have a
8 special meeting sometimes and get out the notice and
9 get the community input. That's a lot easier than for
10 the BZA to change its schedule. We have all these
11 notice requirements and a very busy, busy calendar.
12 So there is not even always a space to move people to.

13 MS. MARLIN: Community input is very
14 important.

15 VICE CHAIR MILLER: Community is very
16 important, yes. We'll still try to accommodate that.

17 CHAIRPERSON GRIFFIS: Good. Thank you
18 very much. Yes, ma'am?

19 MS. PARKMAN: Good afternoon. My name is
20 Margaret Parkman. I live at 1615 27th Street, the
21 corridor that you're discussing. I was at the meeting
22 on April the 21st. Everything that the ANC person has
23 just addressed to you, I was there. I was under the
24 impression, along with the neighbors in that corridor
25 and we are homeowners, we wanted to see the proposed

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1 changes from 11 to 10.

2 We had asked the ANC not to vote until
3 that was addressed with the residents. The other
4 issue was not every -- in fact, I was the only one
5 that received a notice. None of the other neighbors
6 received any notification that there would be a
7 meeting. And this emergency meeting, I asked Raymond
8 Keith who called the emergency meeting why did he call
9 the emergency meeting, and he couldn't basically tell
10 me why he called it that made any sense to me.

11 In our neighborhood, we have been impacted
12 with a lot of problems. This so-called low income,
13 affordable housing that they're talking about, we want
14 to see. We have no problem with townhouses being
15 placed across the street, and I'm right across the
16 street from the area. I guess the issue is that
17 property has been vacant for five years, over five
18 years. The applicants have never maintained that
19 area. We had to get in -- I personally had to get an
20 inspector. The grass grows so high that it's taller
21 than almost everyone in this room and there's trash.

22 So the question is we have integrity about
23 what they are trying to -- we want to know. We want
24 to see it, because we just can't take their word on
25 what they are telling us they want to do. And after

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1 seeing what they -- when they called this emergency
2 meeting on May the 4th, we are definitely suspicious
3 of their motives. Thank you.

4 CHAIRPERSON GRIFFIS: Good. Thank you
5 very much. Questions from the Board? Is there any
6 cross from the applicant? Does the ANC have any
7 cross? Thank you very much.

8 MS. PARKMAN: Thank you.

9 CHAIRPERSON GRIFFIS: Are there any other
10 persons here present to give testimony?

11 MR. DAVIS: I would like to give
12 testimony.

13 CHAIRPERSON GRIFFIS: Oh, I'm sorry. I
14 thought you did with the ANC, but, please, go ahead.

15 MR. DAVIS: Kenneth A. Davis, 3000 W
16 Street, S.E., Washington, D.C. I happen to be an ANC
17 Commissioner and I ran the last meeting on the 21st
18 and which it was delayed. We had fully planned to
19 have a special meeting on that, a true special
20 meeting. The applicant first told us that the revised
21 plans would be available on the next day, Friday.
22 They were not. I then went down on Tuesday. The
23 applications were not available. I got a call from
24 them Tuesday night saying sorry about that.

25 I went down Wednesday, too. They were not

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1 there at which time I decided hey, this is not going
2 to work. We don't have time to call a special
3 meeting. So that is when I wrote the letter, your
4 item, Exhibit 25, or caused it to be written. So that
5 is a tiny bit of the background as to what had
6 happened. And if you read carefully what, in fact,
7 the letter -- I think you mentioned article or Exhibit
8 27, you will see that there were no -- there was not
9 notice given for that meeting. Okay. In listening --
10 okay. I understand.

11 CHAIRPERSON GRIFFIS: Exhibit 27 does say
12 in the second paragraph notice of the 21st, 25, but go
13 ahead.

14 MR. DAVIS: That's the 21st.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. DAVIS: The meeting was on May --

17 CHAIRPERSON GRIFFIS: So the May 4th.

18 MR. DAVIS: May 4th meeting.

19 CHAIRPERSON GRIFFIS: Okay.

20 MR. DAVIS: With respect to the issues in
21 front of us today and is this proper to talk about
22 those now?

23 CHAIRPERSON GRIFFIS: Yes, very.

24 MR. DAVIS: Okay. The assumption that 10
25 units are the optimum number I believe needs

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1 justification. We should really see a trade study or
2 an analysis. The whole discussion, my view of the
3 discussion today, was that, in fact, it's 10 and let's
4 figure out a way to show it, the burden of proof. I
5 didn't see the applicant justifying any of these. I
6 didn't even see the applicant saying hey, the side
7 yards are small and the blocked breezeway is not an
8 issue for the lady that was just sitting here. I
9 mean, I didn't see that.

10 So we need -- I believe if you're going to
11 accept 10 as the unit, as the criteria, then in fact
12 you need to see some analysis. And if, in fact,
13 you're going to accept the affordability restriction
14 being in the deed, then we ought to see that and that
15 ought to be part of the analysis and then that whole
16 analysis ought to go into the community for their
17 comment.

18 Our friends in the Office of Planning do
19 nice analyses, but the real work is out in the field
20 and until we get the comment of the public, I don't
21 see how we can really make a decision on that. The
22 Comprehensive Plan requires the public input also or
23 suggests that it's needed there.

24 So I believe we ought to go back into the
25 -- that you ought to have an analysis and you ought to

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1 have a justification for the term affordability or
2 first time buyer restrictions that is claimed to be in
3 the sales agreement, and we need input, comment, from
4 the community.

5 CHAIRPERSON GRIFFIS: All right. Anything
6 else?

7 MR. DAVIS: That's all.

8 CHAIRPERSON GRIFFIS: Good. Thank you
9 very much. First of all, when you say from the
10 community, you mean the ANC. Is that correct?

11 MR. DAVIS: The ANC by way of the
12 community, yes.

13 CHAIRPERSON GRIFFIS: Okay. And I didn't
14 understand your reference to the Comprehensive Plan
15 and how that would be or pertain to the special
16 exception or variances that we're looking at.

17 MR. DAVIS: Well, I think one of the
18 requirements is that it be in compliance with the
19 Comprehensive Plan and if you look on page --

20 CHAIRPERSON GRIFFIS: It wouldn't be
21 inconsistent with the Comprehensive Plan. The Comp
22 Plan would lay out the large directives, strategies
23 of --

24 MR. DAVIS: Quite true.

25 CHAIRPERSON GRIFFIS: -- this should not

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1 be the new, what, international airport landing site
2 of, you know, whatever it is.

3 MR. DAVIS: Right.

4 CHAIRPERSON GRIFFIS: So I think the
5 Office of Planning, we can rely fairly strongly on the
6 analysis of whether it's not inconsistent or
7 consistent with the Comprehensive Plan. But in terms
8 of the --

9 MR. DAVIS: 101 F in the Comprehensive
10 Plan on your page 2 simply says "preserving and
11 ensuring community input." That was --

12 CHAIRPERSON GRIFFIS: I see.

13 MR. DAVIS: Okay.

14 CHAIRPERSON GRIFFIS: Okay. Okay. And
15 doesn't having a public hearing preserve community
16 input? Okay. Outside of that --

17 MR. DAVIS: But of course, we had -- we
18 were making a decision without that input.

19 CHAIRPERSON GRIFFIS: We could spend all
20 afternoon arguing that. However, moving ahead, you
21 were suggesting that the ANC should review the
22 development agreement basic from the Homestead? I
23 mean, there were comments of look, how can we rely on
24 what the applicant is saying, because they haven't
25 been able to take care of the property currently? And

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1 boy, let me tell you, I live around areas that have
2 had vacant lots for years, all 15 and I have lived
3 next to them, and it often infuriates me that people
4 don't take care of them.

5 But my understanding of this application
6 is it may well be, and I don't want to get into a lot
7 of argument here, but it may well be that this is city
8 owned and not totally controlled. I don't know if
9 that's the case or not, but what you're suggesting is
10 that you want the ANC to start to comment on the
11 development agreement that the city offered this
12 property for under the Homestead Program. Is that my
13 understanding?

14 MR. DAVIS: No, we're not in a position to
15 do that. I was suggesting that before you made your
16 decision that, in fact, you look at the trade
17 analysis. As I understood the testimony here earlier,
18 there is some analysis that says you need 10 units and
19 then it's just dropped. And then the rest of the
20 discussion was let's have, you know, 10 units, 10
21 units. You know, you can't get -- you eliminate the
22 side yards, because you need the affordability of the
23 10 units. So without a basis or an analysis, I don't
24 see how you can arrive at those conclusions. That's
25 all.

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1 CHAIRPERSON GRIFFIS: Okay. That's more
2 understandable. All right. Anything else? Any other
3 questions from the Board? Cross, Mr. Moore?

4 MR. MOORE: No.

5 CHAIRPERSON GRIFFIS: Wow, you're all
6 ready for your closings then. Excellent. Thank you
7 very much. Let's go to it.

8 MR. MOORE: Okay. Thank you.

9 CHAIRPERSON GRIFFIS: Pardon me?

10 VICE CHAIR MILLER: Sorry. I have a
11 question for you, a couple of just legal questions and
12 you can answer them now.

13 MR. MOORE: I'll try my best.

14 VICE CHAIR MILLER: Or put them in your
15 closing.

16 MR. MOORE: Okay.

17 VICE CHAIR MILLER: I want to ask you how
18 we should factor into our variance analysis if we
19 should -- the fact that you're a nonprofit
20 organization and the fact that this concerns
21 affordable housing.

22 MR. MOORE: Well, affordable housing is
23 clearly an objective of the city not only expressed in
24 its Comprehensive Plan, but also there is a move being
25 undertaken by the D.C. Council. There is a resolution

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1 in the D.C. Council, which it passed, looking to
2 establish affordable housing as a priority of the
3 city.

4 The Office of Planning is undertaking a
5 study that it will soon present to the Zoning
6 Commission of the District of Columbia to bolster
7 affordable housing here in the city. So I don't think
8 anyone can say honestly that affordable housing is not
9 only a political objective, it's a planning objective
10 of the city as well.

11 Insofar as the nonprofit status, we of
12 AEDC, we proffered that only from the perspective to
13 say that we are not making money on this. This isn't
14 a profit making venture. This is an effort on our
15 part to respond to the requirements that have been put
16 upon us by the Department of Housing and Economic
17 Development. No, not Housing and Economic
18 Development, the Department of Housing and Community
19 Development.

20 In the record, in the record in our April
21 the 27th submission, there is a letter dated September
22 8, 1998 that says pretty clearly why we're getting
23 this property and the restraints that this property
24 has on it and it has on us. And I don't think there
25 is any question but that we have tried to fulfill that

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1 letter of the law.

2 And so the fact that we're a nonprofit
3 organization only adds substance to our proffer here
4 to this Board that we're not making money off this.
5 We are trying to produce, to develop, the best project
6 that we possibly can for the site that is available to
7 us with the restrictions on that site.

8 VICE CHAIR MILLER: Let me just say this.
9 I appreciate everything you just said and I'm sure my
10 Board Members do as well. And I only want to ask you
11 that when we're doing our variance analysis and we're
12 looking to uniqueness and practical difficulty and no
13 adverse impact, I mean, it seems like some of these
14 could fall in a few categories. I mean, certainly
15 affordable housing would be no -- perhaps you would
16 say it's no adverse impact. Perhaps somebody else
17 would say it is. But I was just also wondering, you
18 know, where you see them fitting in the analysis.

19 MR. MOORE: We rely on the cases that we
20 had submitted on April the 27th and our analysis that
21 a confluence of factors, the sloping, the restrictions
22 that were placed on this site, the affordable housing
23 component, the fact that we're a nonprofit
24 organization here in the city not looking to make
25 money off of this, but to serve the citizens not only

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1 of the Randle Highlands area, but the city as a whole,
2 and the city's emphasis, as expressed by the recent
3 City Council resolution and efforts of the Office of
4 Planning to bring a case before the Zoning Commission,
5 Mr. Hildebrand, promoting affordable housing, all
6 those.

7 COMMISSIONER HILDEBRAND: And I'm very
8 happy to tell you that we set down the inclusionary
9 zoning last night.

10 MR. MOORE: Excellent, excellent. And
11 that confluence of factors, we submit, will meet the
12 uniqueness test for practical difficulty and an area
13 variance in the Zoning Regulations.

14 VICE CHAIR MILLER: Thank you very much.

15 MR. MOORE: Sure. And also, my client
16 tells me some people are talking about low income
17 housing. This is not low income housing. It is
18 affordable housing and there is a difference. That
19 wasn't my statement, Mr. Chairman. I was responding
20 to Mrs. Miller.

21 CHAIRPERSON GRIFFIS: Go ahead then.

22 MR. MOORE: Thank you. Mr. Chairperson
23 and Members of the Board, the development of this
24 property has been a long process, as you know. We
25 thank you for your time and close attention not only

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1 to this case, but the case that we had in 2003.

2 The applicant has tried very hard to put
3 a strong case into the record and to earn each of your
4 votes to approve this application and to facilitate
5 the development of this wonderful, affordable
6 residential housing project in the Randle Highlands
7 neighborhood of the District of Columbia.

8 We're pleased, fortunate and gratified
9 that those who have been persuaded on the merits of
10 this project, including the Office of Planning, the
11 one Government entity that directly represents all of
12 the adjacent and nearby property owners, has voiced
13 its opinion into the record. Mr. Lawson's words of
14 support on behalf of the Office of Planning are
15 appreciated and echoed by this organization.

16 We're also pleased in the record there is
17 a letter dated May the 3rd from James Thackaberry of
18 the D.C. Department of Housing and Community
19 Development indicating its support on the basis that
20 this project, if it were allowed to go forward, it
21 would eliminate a blighted, vacant lot. It will
22 provide badly needed affordable housing in Ward 7 of
23 the city.

24 The fact that there is some discord among
25 the ANC, we regret that, because the ANC is a very

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1 vital part of any administrative process here in the
2 city. But in doing that, we also would point out that
3 there have been at least four community meetings on
4 this project, so we have done our part. We have been
5 to the ANC. We have presented it to the ANC and we're
6 prepared to continue to work with the ANC.

7 The board staff has provided notice to
8 property owners within 200 feet. The site has been
9 posted. This hearing has been advertised in the D.C.
10 Register. It's at the D.C. Public Library. No one
11 who is interested in this project should not know
12 about it. We have tried to do our best. I think the
13 Office of Zoning's staff has done its best in making
14 this project known to the public.

15 What fair minded people have come to
16 understand about this project is that this affordable
17 housing project is planned on an unimproved lot in a
18 multi-family, moderate density Zone District, that the
19 site replaces an eyesore, abandoned apartment building
20 with new structures and that it will be the first of
21 its kind to serve those in need of affordable housing
22 in the Randle Highlands neighborhood, and that there
23 is an extreme shortage of developable sites in the
24 Randle Highlands neighborhood for projects of this
25 nature.

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1 The record also makes it clear that it is
2 beyond practical difficulty and it is practically
3 impossible to develop a side yard on the end units and
4 still have enough units to make this project
5 developable, that consistent with the District of
6 Columbia's Court of Appeals ruling in Tyler vs. the
7 Board of Zoning Adjustment, which is in your record,
8 this applicant is not merely seeking the most
9 profitable use of the land, but found difficulty
10 financing any involvement of the property without
11 variance relief, and that not building these
12 affordable units as they are proposed will frustrate
13 the goals and objectives of the District of Columbia
14 and that there is no reasonable alternative to meet
15 the needs of that area of the District of Columbia.

16 No one has contested the need for this
17 facility in Randle Highlands. No one has said that
18 fewer housing units can be built on this property. No
19 one has suggested or presented a reasonable
20 alternative than the one that is presented to you
21 today.

22 For its part, the applicant has presented
23 expert testimony and written evidence in the record
24 demonstrating why affordable dwellings were designed
25 the way they are on this site. In other words, there

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1 are professional and functional reasons why the
2 project requires 10 units to develop and that some of
3 those units do not provide side yards, and that is
4 expert testimony in the record.

5 There is an equally compelling
6 demonstration that the proposed dwellings will not be
7 out of context with the existing buildings in the
8 neighborhood. It is significant that the Office of
9 Planning agrees with the applicant as to need, impact
10 and design issues. It is significant that the D.C.
11 Department of Housing and Community Development agrees
12 with the applicant as to the need to develop this site
13 for affordable housing.

14 The applicant has designed the proposed
15 structures to make them pleasing and functional. Most
16 importantly, the applicant has established that the
17 proposed project is the smallest functional project
18 that the site will accommodate. These are the facts.
19 These are the reasons. And these are the public
20 policies on which the applicant submits that it has
21 met its burden of proof and that it is entitled to the
22 special exception and area variance relief that are
23 requested. Thank you for your time and close
24 attention to our presentation.

25 CHAIRPERSON GRIFFIS: Good. Thank you

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1 very much. We're going to follow-up on a couple of
2 legal cases that you cited in your closing and also in
3 your written submission. You cited Tyler, Tyler in
4 terms of not profiting, I believe, is what your
5 closing statement said or not doing the highest and
6 best profit in this. But was it not testified to the
7 fact that this could be developed as a market rate,
8 but that the restrictions on the land itself define
9 the program and the practical difficulties of what is
10 able to be developed. Is that correct?

11 MR. MOORE: One answer gives the other.
12 It cannot be developed for affordable housing simply
13 because the deed -- of the deed restrictions there.
14 We can't do it legally.

15 CHAIRPERSON GRIFFIS: Right.

16 MR. MOORE: I think we can do it, but we
17 can't do it legally.

18 CHAIRPERSON GRIFFIS: I understand. You
19 met the same market.

20 MR. MOORE: Right, market. I'm sorry,
21 market.

22 CHAIRPERSON GRIFFIS: It can't be
23 developed. Okay.

24 MR. MOORE: Right.

25 CHAIRPERSON GRIFFIS: So I understand. So

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1 Tyler comes in under the auspice of this is what is
2 dictated in the applicant's control of development?

3 MR. MOORE: This is the hand that we've
4 been dealt.

5 CHAIRPERSON GRIFFIS: Okay. Follow-up
6 then, Ms. Miller?

7 VICE CHAIR MILLER: You also cite Monaco
8 in your application as being in support of your
9 request for variance relief and I'm just wondering if
10 you could elaborate on how that applies to your case?

11 MR. MOORE: Well, Monaco, just a minute,
12 I've got to find it first.

13 CHAIRPERSON GRIFFIS: It's the last case
14 in the booklet.

15 MR. MOORE: Okay.

16 CHAIRPERSON GRIFFIS: 407, page 23.

17 MR. MOORE: Mrs. Miller, I won't take up
18 the time of the Board in looking for that case. I
19 would be happy to submit a very short statement into
20 the record. I presume the Board is going to keep the
21 record open for a few days, and I would be glad to
22 submit a statement on how that ties into the case, if
23 that is suitable to you.

24 VICE CHAIR MILLER: It's fine with me, if
25 it's fine with the Chairman.

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1 CHAIRPERSON GRIFFIS: Indeed. I think
2 that's good. Okay. Any other questions,
3 clarifications? Excellent. Thank you all very much.
4 We appreciate the case presentation.

5 MR. MOORE: Thank you.

6 CHAIRPERSON GRIFFIS: We're going to go
7 through some procedural? Yes, Mr. Hildebrand?

8 COMMISSIONER HILDEBRAND: And I believe
9 that during the course of the initial statements from
10 the applicant, they agreed that they would provide a
11 development pro forma that lays out why the 10 units
12 are the cutoff point for your affordable housing units
13 to make this a doable project.

14 MR. MOORE: Yes, we did.

15 COMMISSIONER HILDEBRAND: Yes, thank you.

16 CHAIRPERSON GRIFFIS: Right. Yes, I think
17 and that's what I was going to in terms of procedure
18 of what needs to be submitted. I would like something
19 more than just a pro forma, but not as detailed as a
20 pro forma, Mr. Hildebrand, if it's appropriate with
21 you for the Board's edification. We need a narrative
22 indicating and this is also going directly to the ANC
23 which is in time for them to take it up in their 19th
24 and then respond to is what sets the 10 unit as
25 critical? What's the threshold of when this is, you

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1 know, make or break of a project? And then we will be
2 able to assess that once we get it.

3 MR. MOORE: Absolutely.

4 CHAIRPERSON GRIFFIS: Okay. Anything
5 else? Let's set this then for decision on the 7th of
6 June. Ms. Bailey, why don't you walk us through the
7 rest of the calendar then. That would put us at --
8 oh, I don't know. Do we have enough time?

9 MS. BAILEY: Mr. Chairman?

10 CHAIRPERSON GRIFFIS: Yes?

11 MS. BAILEY: The discussion points to the
12 fact that the ANC meeting on May 19th, so is it
13 possible for the information to come in and be filed
14 on the ANC by May 16th? Mr. Moore, is that possible?

15 MR. MOORE: Yes, yes.

16 MS. BAILEY: And then the ANC would be
17 able to respond and file that response by May 31st.
18 May 31st, and then, of course, a decision June 7th. Do
19 you want me to repeat those dates?

20 CHAIRPERSON GRIFFIS: Yes, yes, if you
21 would, please.

22 MS. BAILEY: The applicant is to file
23 their submission and serve it on the ANC by May 17th.
24 The ANC would have --

25 MR. MOORE: Didn't you say 16?

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1 MS. BAILEY: 16th, 16th. The ANC is going
2 to be meeting on May 19th and should have sufficient
3 time to file a letter or response by May 31st and then
4 the decision will be made on June 7th.

5 MR. MOORE: Thank you, Ms. Bailey.

6 MS. BAILEY: You're welcome.

7 CHAIRPERSON GRIFFIS: Hold on. We're just
8 having a brief discussion on addition items that might
9 come in. Mr. Moore, I think we'll also keep the
10 record open for your submission for the -- in light of
11 the testimony and case presentation and also in light
12 of the opposition, just a restating of the variance
13 test and special exception, so that you can just
14 restate the test, the uniqueness, the practical
15 difficulty as it falls into some of what we've heard
16 today, and we'll take that into the record.

17 If that is done before the ANC meeting,
18 that would probably be expeditious as it would define,
19 obviously, what we're going to need from the ANC in
20 terms of their feedback or the public comment as it
21 were. Okay. Anything else?

22 MR. MOORE: Mr. Chairman, I just ask for
23 the opportunity, just so the record will show, for us
24 to respond to the ANC report if we choose to do so,
25 prior to the June 7th decision date.

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1 CHAIRPERSON GRIFFIS: How do you feel
2 about that, Ms. Bailey? It's all up to her. Oh,
3 okay, we'll absolutely let you do that. But in all
4 seriousness, time is of the essence, obviously.

5 MR. MOORE: I understand.

6 CHAIRPERSON GRIFFIS: You're going to need
7 to be there on the 19th. The ANC is going to need a
8 couple of days to turn it around I'm certain. And so
9 let's just get it in as soon as possible. Obviously,
10 the most critical piece for us is to understand the
11 facts, the positions and the facts. So as clear,
12 concise as everyone can be in their communications
13 that would, obviously, benefit us all. Anything else
14 then, Mr. Moore?

15 MR. MOORE: That's all.

16 CHAIRPERSON GRIFFIS: Excellent. Thank
17 you all very much.

18 MR. MOORE: Thank you.

19 CHAIRPERSON GRIFFIS: We do appreciate it.
20 It has been a wonderful and splendid morning. And
21 with that, let's adjourn the morning session of the
22 10th of May 2005. We do have another case in hearing
23 for today in the afternoon session. I'm going to take
24 a 15 minute lunch break. Then I'm going to corral my
25 Board Members to come back out with me and we will

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1 have a quorum in which case we'll get started right
2 away. Why don't we get set up and I don't know pick
3 a comfortable chair, switch them out, move them around
4 a little bit, add some excitement and we'll be back.

5 (Whereupon, the Public Hearing was
6 recessed at 3:39 p.m. to reconvene at 4:11 p.m. this
7 same day.)

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

4:11 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen, let me call to order the 10th of May 2005 afternoon Public Hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today is Ms. Miller, the Vice Chair, also our mayoral appointee Mr. Etherly, representing the National Capital Planning Commission with us is Mr. Mann and representing the Zoning Commission with us on this continuing case is Mr. Hildebrand.

Copies of today's hearing agenda have been available for your purview all afternoon. Let me skip through very quickly as this is a continuation of a case, of course, I have done the opening before, you are all familiar with, but there are several things of great importance. I will remind you, of course, we are being broadcast live on the Office of Zoning's website and also the transcript is being created as official part of the record.

Therefore, there are several things that you will need to be mindful of. Of course, if you have not previously filled out witness cards and plan to give testimony today, you will need to do so and

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1 give it to the Court Reporter sitting to my right.
2 We're going to pick this up and I'll go through the
3 order of procedure, so I will not need to go through
4 what our normal full order is.

5 With that, I think we're going to rely on
6 the past opening, so we can pick up at least five
7 minutes in our afternoon here and let me ask is anyone
8 here, just a show of hands, that was not sworn in
9 previously that plans to give testimony today? Has
10 everyone been sworn in then? Very good. Then let's
11 move ahead. Ms. Bailey, if you don't mind, why don't
12 we call the case for the afternoon?

13 MS. BAILEY: Thank you, Mr. Chairman, and
14 to everyone good afternoon. And that is Appeal No.
15 17285 of Patrick J. Carome, pursuant to 11 DCMR 3100
16 and 3101, from the administrative decision of the
17 Zoning Administrator of the Department of Consumer and
18 Regulatory Affairs. The appellant alleges that the
19 Zoning Administrator erred by issuing a Building
20 Permit No. B460927, dated April 23, 2004, allowing the
21 construction of a masonry retaining wall serving a
22 single-family detached dwelling.

23 Appellant contends that the retaining wall
24 violates the Zoning Regulations, including the side
25 yard requirements, that's section 405, rear yard

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1 requirements, section 404, and structures in open
2 space requirements, section 2503. The property is
3 located at 4825 Dexter Terrace, N.W. It is Zoned R-1-
4 A and it is located in Square 1381 on Lot 806.

5 CHAIRPERSON GRIFFIS: Thank you very much.
6 Ready?

7 MR. AGUGLIA: Richard Aguglia.

8 CHAIRPERSON GRIFFIS: Go ahead.

9 MR. AGUGLIA: With the Law Firm of Hunton
10 and Williams representing the property owners.
11 Because I have to also discuss and oppose the Park
12 Service intervention, I would ask for 45 minutes. We
13 have gone through this very carefully with numerous
14 dry runs. I will be as crisp and brief as possible.

15 CHAIRPERSON GRIFFIS: Okay. And I'm
16 sorry, you want to set up 45 minutes for your case
17 presentation because you are also including in your
18 opposition to the Park Service intervention? Is that
19 correct?

20 MR. AGUGLIA: That is correct.

21 CHAIRPERSON GRIFFIS: Okay. And actually
22 my great consternation there for a moment was we do
23 have a request from Mr. Carome to amend this appeal.
24 Shouldn't we take that up, at this time? Okay. And
25 I would assume that physically, you are in receipt of

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1 this. Is that correct?

2 MR. AGUGLIA: Correct. And I filed on --
3 yesterday, I filed an objection with the Postcard
4 Permit and I have a more readable copy of that for the
5 Board.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. AGUGLIA: I would also advise the
8 Board that because Mr. Carome objected to the fence
9 being put up, that the owner has stopped construction
10 of the fence and is going through the normal building
11 permit process, even though he is not required to,
12 because it is allowed under the Postcard Permit
13 process. And I will --

14 CHAIRPERSON GRIFFIS: But you seem to be
15 arguing the merits of amending the scope to hear the
16 appeal and it's encompassed with that fence. Is that
17 correct or do you object to actually us amending that?

18 MR. AGUGLIA: I object to it. We have a
19 voluminous -- based upon the retaining wall. If he
20 wants to file another appeal, let him file another
21 appeal.

22 CHAIRPERSON GRIFFIS: Okay. I mean, the
23 limited address that the request for amending and
24 expanding the scope, my position, at this point,
25 reading the submissions to date or the submission of

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1 request is not to accept it. First of all, it does
2 seem to go beyond that which is the narrow scope of
3 what we have already established and are well into in
4 terms of this appeal.

5 This, essentially, would start it over for
6 us. I cannot see how we wouldn't have case
7 presentation, obviously, cross and then rebuttal case
8 presentations, etcetera. This goes not to change the
9 legal argument or the legal tact of proving an error
10 or not in the original substantive appeal, but rather
11 takes on an additional factual basis of which that
12 whole appeal would need to be based. So let me turn
13 it over. Yes, sir, you need to speak to -- oh, I'm
14 sorry. Go ahead.

15 MR. CAROME: Good afternoon. May I be
16 heard on the question of the appeal?

17 CHAIRPERSON GRIFFIS: It's your
18 submission.

19 MR. CAROME: Thank you.

20 CHAIRPERSON GRIFFIS: I thought you had
21 brought a representative. Forgive me, I can't keep
22 all the faces straight. Okay. Go ahead.

23 MR. CAROME: I would simply note that the
24 original appeal fully anticipated this issue. It
25 noted that a fence would need to be put there and that

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1 the erection of a fence in the location where they
2 are, in fact, putting it would be a compoundment of
3 the very same zoning issues that are at issue here.
4 I would further note that the fence is an integral
5 part of the overall wall platform structure that is at
6 issue here and that that was fully anticipated.

7 And then I think it would be very
8 counterproductive. I think the issues are fully
9 subsumed here. I mean, if this is really just a
10 question of adding 6 feet of insult to 32 feet of
11 existing injury, and --

12 CHAIRPERSON GRIFFIS: Well, then we're
13 even on both sides. We could just say throw it out,
14 because you don't really need it, because the
15 substance is in the case that you are making.

16 MR. CAROME: No.

17 CHAIRPERSON GRIFFIS: But you're saying,
18 but just take it in, because look it just all falls
19 into the same thing and we're talking about the same
20 thing.

21 MR. CAROME: Well, I think it would be
22 extremely efficient for this Board to hear it now as
23 part of this. I don't think that there are any
24 significant new issues. If there was presentation, I
25 would be happy to have it limited to, you know, three

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1 minutes per side. I don't think that there is
2 anything particularly complicated about this.

3 CHAIRPERSON GRIFFIS: Let me see how well
4 time limits take.

5 MR. CAROME: It seems to me it would add
6 to this Board's burden and the parties' burden to have
7 to really have the tail wagging, the dog be treated as
8 a completely separate proceeding. That's all I --
9 that's my position.

10 CHAIRPERSON GRIFFIS: Because you think
11 there's substance enough to appeal this permit on its
12 own?

13 MR. CAROME: Oh, there certainly is. It
14 violates the -- it's now a fence that is up to 37 or
15 38 feet high in violation of the height limitations.

16 CHAIRPERSON GRIFFIS: Ms. Miller?

17 VICE CHAIR MILLER: I was going to say
18 earlier, you just said something that made me think a
19 little further, but if you prevail on your underlying
20 appeal, then this would go away anyway. There
21 wouldn't be another appeal on the fence, would there?
22 There couldn't be a retaining wall there. It wouldn't
23 be a fence on top of it, right?

24 MR. CAROME: I think that's right.

25 VICE CHAIR MILLER: But are you saying now

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1 that because there is going to be a fence on top of
2 it, that that somehow strengthens the merits of your
3 underlying appeal?

4 MR. CAROME: It adds, you know, 25 or 30
5 percent to the violation of the height limitation that
6 is already severely violated here. The provision
7 requires that there be no more than a 7 foot fence or
8 fence wall. There was already a 32 foot fence wall,
9 if indeed it's a retaining wall at all. And it -- so
10 for the fence on top of that, compounds the violation.
11 It was most -- the current retaining wall permit
12 that's on the website of DCRA asks, you know, is there
13 going to be a fence on top of this?

14 Ordinarily, it would have -- it all should
15 have been done by this owner in one step. And the
16 fact that they have done it in two steps shouldn't put
17 the burden on me of having to --

18 VICE CHAIR MILLER: Let me ask you this
19 just to get to the point though. You don't need to
20 appeal that permit in order to bring in the facts
21 about the fence, do you, into the appeal that's before
22 us?

23 MR. CAROME: I'm not sure. I don't know
24 the answer to that. Out of an abundance of caution,
25 since I know the issue is about late appeals can

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1 really be a concern, I didn't want to -- I wanted to,
2 you know, following the Board's own suggestion on
3 this, bring it forward, bring all your concerns
4 forward. I wanted to appeal it at the earliest
5 juncture and I thought it should be done.

6 Clearly, it's so interrelated and
7 integrated with this appeal, that it would seem to be
8 a waste of everyone's time and effort to do it
9 separately. And I really don't think it will add to
10 the time involved here.

11 VICE CHAIR MILLER: Okay.

12 CHAIRPERSON GRIFFIS: Well, certainly
13 that's not one of the criteria of taking in or not
14 whether it would add time or not. We have proven that
15 it did, it has already added time. Any follow-up
16 questions on the substance? I just don't see how we
17 take on an additional permit, just under the auspices
18 of look this is in the same general area. It's
19 attached to that which we're discussing. I don't see
20 how it is connected at all. Any other comments,
21 questions, at this point?

22 VICE CHAIR MILLER: No.

23 CHAIRPERSON GRIFFIS: Follow-up? Who is
24 speaking? Oh, we've got to get a chair.

25 MS. BELL: Well, I just wanted -- oh,

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1 thank you.

2 VICE CHAIR MILLER: You're welcome.

3 CHAIRPERSON GRIFFIS: All right. The
4 sympathy of the Board is granted.

5 MS. BELL: I just wanted to add one
6 thing. The Postcard Permits are not reviewed by the
7 Zoning Administration at all, so that is one reason
8 why it shouldn't be a part of this appeal. We,
9 obviously, object to it. The way that it is processed
10 is a self attestation sort of process, so it's not
11 reviewed by the Permit Office. You know, a qualified
12 applicant comes in, fills out a form and signs it.
13 It's not reviewed by Zoning or anyone else and then it
14 is sent to be inspected.

15 CHAIRPERSON GRIFFIS: To get to your
16 point, so what you're saying is, in fact, there is no
17 Zoning Administrator's decision of which we are
18 talking in terms of granting the Postcard Permit?

19 MS. BELL: That's exactly correct.

20 CHAIRPERSON GRIFFIS: Okay.

21 MS. BELL: And I can give you the cites of
22 the Building Code.

23 CHAIRPERSON GRIFFIS: Right. Let's just
24 see how far we get into all of the discussion of how
25 it is a nexus of a Base Building Permit or perhaps not

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1 or I think that is well said and it's an excellent
2 point.

3 MR. CAROME: May I respond to that, sir?

4 CHAIRPERSON GRIFFIS: Yes.

5 MR. CAROME: I think one of the problems
6 here is that a Postcard Permit is not permitted to be
7 used to construct a fence in the rear yard, much less
8 one of 37 or 38 feet high.

9 CHAIRPERSON GRIFFIS: But isn't it the
10 merits of an appeal at DCRA and not that before the
11 Board of Zoning Adjustment?

12 MR. CAROME: Well, it's a zoning issue
13 that the DCRA has decided. I have asked them to
14 revoke the permit. They haven't taken any such
15 action.

16 CHAIRPERSON GRIFFIS: But you haven't
17 indicated a zoning issue. You just said that the
18 problem is that this is not allowed to be built with
19 a Postcard Permit.

20 MR. CAROME: DCRA's decision apparently to
21 treat that permit as a sufficient basis for this is --
22 for the erection of this fence --

23 CHAIRPERSON GRIFFIS: Is the error.

24 MR. CAROME: I think is an error and it's
25 a zoning error.

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1 CHAIRPERSON GRIFFIS: What's the zoning
2 error?

3 MR. CAROME: It is the permission of the
4 erection of a fence that is in the rear yard and it is
5 not in accordance with -- it's not constructed in
6 accordance with the Building Code, because it violates
7 the Building Code's 7 foot height limitation. And
8 that is a zoning issue, as I've pointed out before.
9 I recognize that that's an issue that the Board will
10 have to decide, but that is --

11 CHAIRPERSON GRIFFIS: Right. This is case
12 presentation on the original appeal. Okay. Follow-
13 up?

14 MR. BERNSTEIN: Yes.

15 CHAIRPERSON GRIFFIS: I'm sorry. Can you
16 introduce yourself?

17 MR. BERNSTEIN: I'm sorry. I'm Jeff
18 Bernstein. I'm representing the National Park
19 Service. I would like to address --

20 CHAIRPERSON GRIFFIS: I knew you were
21 familiar. Go ahead.

22 MR. BERNSTEIN: An additional matter, but
23 I'll wait until this one is concluded.

24 CHAIRPERSON GRIFFIS: Okay. But you are
25 speaking on this? Am I correct?

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1 MR. BERNSTEIN: Not on this. I wanted to
2 speak on Mr. Aguglia's initial request for the 15
3 minutes time.

4 CHAIRPERSON GRIFFIS: Very well. Let's
5 put one thing to rest first. Yes, Mr. Aguglia?

6 MR. AGUGLIA: To briefly conclude, the
7 property owners have been very concerned about the
8 safety of having the high retaining wall without a
9 fence, which is a very crucial issue. Even Mr. Carome
10 said --

11 CHAIRPERSON GRIFFIS: Okay. But we're
12 talking about the basis of whether this is --

13 MR. AGUGLIA: Okay. All right.

14 CHAIRPERSON GRIFFIS: -- ripe to be
15 included in the appeal or it.

16 MR. AGUGLIA: It is not. It is not. It's
17 clear not and I support --

18 CHAIRPERSON GRIFFIS: So you're standing
19 on your submission?

20 MR. AGUGLIA: -- the legal counsel to the
21 DCRA.

22 CHAIRPERSON GRIFFIS: Okay. Anything
23 else?

24 MR. AGUGLIA: No.

25 CHAIRPERSON GRIFFIS: Comments then, Board

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1 Members? Which way should we proceed?

2 BOARD MEMBER ETHERLY: Mr. Chair, I'm in
3 agreement with your initial observation or statement
4 with regard to motion. I would not seek to expand the
5 appeal. Thank you.

6 CHAIRPERSON GRIFFIS: Thank you very much,
7 Mr. Etherly. Others?

8 VICE CHAIR MILLER: I would concur that
9 this is a new appeal that raises different issues and
10 that it should be considered separately and I would
11 also say that I believe that the question of the fence
12 as related to the retaining wall will be before us and
13 can be before us in connection with the underlying
14 appeal.

15 BOARD MEMBER MANN: I think I'm going to
16 go along with the prevailing opinion, although I did
17 hear some things that had the arguments been made more
18 strongly, could have persuaded me to think just the
19 opposite.

20 CHAIRPERSON GRIFFIS: Good insurance, Mr.
21 Mann. I like that. Okay.

22 COMMISSIONER HILDEBRAND: And actually, I
23 concur with Ms. Miller's position.

24 CHAIRPERSON GRIFFIS: Okay. I take it as
25 a consensus then and not amend the appeal that is

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1 before us. And let's move ahead. Let's move ahead to
2 our next contentious issue and that is the additional
3 15 minutes.

4 MR. BERNSTEIN: Thank you. I understood
5 Mr. Aguglia to say that he needed 15 additional
6 minutes to challenge the National Park Service's
7 participation in this proceeding.

8 MR. AGUGLIA: No, no, no.

9 MR. BERNSTEIN: Is that your position?

10 MR. AGUGLIA: I'm not challenging your
11 intervention.

12 MR. BERNSTEIN: Okay.

13 MR. AGUGLIA: I'm challenging your
14 position and I need additional time, because I have to
15 oppose Mr. Carome as well as you.

16 MR. BERNSTEIN: Okay. I understand what
17 you're saying then. Okay.

18 CHAIRPERSON GRIFFIS: Excellent. That's
19 good clarification.

20 MR. BERNSTEIN: I'll withdraw that.

21 CHAIRPERSON GRIFFIS: Because I thought
22 you needed additional time also to address your
23 intervention, not your position in the intervention.

24 MR. AGUGLIA: Right.

25 CHAIRPERSON GRIFFIS: Okay. There it is.

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1 Anything else then? Do you object to him having a few
2 extra minutes to address your issues?

3 MR. BERNSTEIN: I will not object if -- as
4 long as if we're running over a little bit, he is not
5 going to object to us.

6 CHAIRPERSON GRIFFIS: We'll have to switch
7 something around here. Okay. Any comment on time?

8 MR. CAROME: I don't object.

9 CHAIRPERSON GRIFFIS: Thank you very much.
10 Okay. Then are we ready?

11 MR. AGUGLIA: We're going to pass out my
12 summary.

13 CHAIRPERSON GRIFFIS: Excellent.

14 MR. AGUGLIA: For everyone, including the
15 parties.

16 CHAIRPERSON GRIFFIS: Good.

17 MR. AGUGLIA: This is, obviously, a
18 voluminous case and I want to fine tune it.

19 CHAIRPERSON GRIFFIS: Okay. Wow.

20 MR. AGUGLIA: Maybe you heard.

21 CHAIRPERSON GRIFFIS: On? You're not
22 going to complain on the amount of paper he about to
23 submit are you?

24 MR. CAROME: No, I'm just --

25 CHAIRPERSON GRIFFIS: I'll take care of

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1 that. You don't have to worry about it. We have run
2 out of shelf space. I don't know if you guys know how
3 little -- whew, all right. Go ahead. Did you have a
4 comment? I'm sorry.

5 MR. CAROME: I'll withhold the comment
6 until I see what's being handed out.

7 CHAIRPERSON GRIFFIS: Good. Let me just
8 check while we have a quick second whether the
9 recorder has all the names that is needed? Mr.
10 Carome?

11 MR. CAROME: I apologize. I'm Patrick
12 Carome, the appellant. May I be heard on the
13 supplemental submission that Mr. Aguglia is making?

14 CHAIRPERSON GRIFFIS: Sure. Please, do.

15 MR. CAROME: I'll simply note two things
16 about it. One, that Exhibit 10 to it is a brand new
17 affidavit of a Robert Callastas who with a chart
18 attached to it looks like it's a survey of many
19 different retaining walls in the Wesley Heights area.
20 I object to the submission of this at this late time.
21 There was a date that the Board had set in advance of
22 the last hearing, which was to be the deadline for Mr.
23 Aguglia's submission of any additional fact evidence
24 in support of the appeal. And on that basis, I object
25 to this.

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1 Obviously, I haven't had opportunity to
2 respond to it or to deal with it. I'll also note --

3 CHAIRPERSON GRIFFIS: Okay. So you're
4 going to object to anything that wasn't filed
5 previously in factual evidence? So what you're saying
6 is that they are actually precluded from offering new
7 evidence today? I understand we set up parameters and
8 I did request that everyone get everything in ahead of
9 time to make up some time as we need to today. But
10 your objection is that the factual evidence was not
11 previously submitted?

12 MR. CAROME: That's right. There's no
13 reason. They've been submitting months ago.

14 CHAIRPERSON GRIFFIS: And what's the
15 regulation that would require that?

16 MR. CAROME: I was simply relying on the
17 Board's previous instruction. If the record is still
18 open for these sorts of submissions, then that's fine.

19 CHAIRPERSON GRIFFIS: And perhaps it needs
20 to be taken up in future from the Zoning Commission in
21 terms of writing the text in their requirements and
22 such, but, yes, I mean, conceivably, the way that our
23 regulations are set out, we supposedly have one
24 afternoon for a hearing and we're all here at one
25 place, one time and then we move on. In

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1 continuations, I think we're a little bit more
2 flexible in terms of the evolution of things and then
3 the information that comes in.

4 But let's move straight ahead with
5 administrative efficiency and get to this case.
6 Obviously, you are not precluded from cross examining
7 any of this information or responding to it.

8 MR. CAROME: Also, I have one other
9 objection.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. CAROME: Which goes to Exhibit 9,
12 which is a letter that refers to -- from Specialized
13 Engineering which refers to enclosed inspection
14 reports. Very early on, months ago in this appeal, I
15 asked Mr. Aguglia to provide me with copies of the
16 enclosures to this document that it referred to in
17 this document. He has refused to do so. I just
18 object that we shouldn't be looking at a partial
19 document and that that's not appropriate.

20 MR. AGUGLIA: I provided examples that are
21 in the record. Virtually everything here is in the
22 record, except for this Exhibit 10. So he can make
23 his cross examination when it's his turn. It's my
24 turn to go.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. AGUGLIA: And I would like to go.

2 CHAIRPERSON GRIFFIS: I tend to agree.
3 All right. Let's move ahead.

4 MR. AGUGLIA: Okay. Thank you. On behalf
5 of the property owners, we oppose the --

6 CHAIRPERSON GRIFFIS: Okay. One other
7 thing. Mr. Carome, we're going to give him the table
8 if you don't mind. You can have a seat. We'll get to
9 their appeal also on more technicality. If you want
10 the entire Board to see any images up there, we're
11 going to need to move that Board, because we're --

12 MR. AGUGLIA: Yes.

13 CHAIRPERSON GRIFFIS: Some of the Board
14 Members can't see it. I don't think we need them at
15 this point.

16 MR. AGUGLIA: Can you hear me?

17 CHAIRPERSON GRIFFIS: Excellent. We're
18 ready.

19 MR. AGUGLIA: All right. Thank you. I
20 have three basic points. I'm going right along with
21 my summary. The structure is the retaining wall.
22 Retaining walls are exempt from yard restrictions
23 under section 2503.3. The retaining wall is not in
24 violation of the Wesley Heights Overlay District.
25 Those are the three issues that the Board keyed on in

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1 one of the earlier hearings in this and that is our
2 basic position.

3 Switching now to the next page, the
4 structure is a retaining wall. The burden of proof as
5 we know is on the appellant to prove otherwise. The
6 appellant has failed to meet this burden. Appellant
7 produced no sworn testimony from any expert showing
8 otherwise. Appellant's written evidence from his own
9 expert engineers indicated that structure was a
10 retaining wall.

11 Mr. Neubauer, his expert, rear yard
12 retaining wall, that's our Exhibit 1, this is just for
13 your convenience, it was Carome's Exhibit 29. Mr.
14 Neubauer described it as a rear yard retaining wall,
15 which it is. His other expert, Mr. Kilsheimer,
16 described it as a large geostructure type wall relying
17 on earth characteristics and gravity for support in an
18 acceptable bootstrap approach. That is Exhibit 2
19 attached for your convenience. This is Carome Exhibit
20 88.

21 Appellant also submitted written evidence
22 from our own engineer which indicated that the
23 structure was a mesa site retaining wall. That's
24 Exhibit 3, just the cover page of the design plans
25 attached for your convenience. That was Carome

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1 Exhibit No. 24.

2 We have submitted an affidavit in the
3 record from our engineer, Bill Ryan, same engineer,
4 that the property is a true retaining wall and that
5 all properly constructed retaining walls must have an
6 anchor. And that the anchor for all mesa block
7 retaining walls are the geogrids and clean fill dirt
8 properly compacted. Therefore, because the structure
9 retains dirt with a geogrid anchor does not make it a
10 walled platform structure, a warehouse or a terrace.
11 It is, in fact, a retaining wall and the appellant has
12 failed to produce any evidence to the contrary other
13 than his own inexperienced testimony.

14 My next point is that retaining walls are
15 exempt from the yard restrictions under section
16 2503.3. That provision reads as follows: "A fence or
17 retaining wall constructed in accordance with the D.C.
18 Building Code may occupy any yard required under the
19 provisions of this title."

20 As Ms. Bell said in representing the
21 Zoning Administrator, this is an unambiguous
22 exception. No need to review the legislative text
23 history of it. Nevertheless, in reviewing the
24 history, which is all in the record, that the
25 retaining walls are permitted as a matter-of-right in

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1 any part of a yard. There are numerous references
2 that this was an exception to the basic rule that the
3 yard shall be open and unobstructed to the sky.

4 And the exception is stated in numerous
5 occasions in the text amendments, the legislative
6 history, as I call it, to allow fences and retaining
7 walls as a matter-of-right in any part of the yard.
8 So all that information supports the clear reading of
9 2503.3. Now, I have also submitted case law that
10 supports the Zoning Administrator's position on this
11 issue that retaining walls are considered part of the
12 landscaping. That is Exhibit No. 5.

13 That was the Court of Appeals in
14 Wisconsin. There is the court case. And that case
15 basically said that retaining walls are considered
16 part of landscaping and therefore were not subject to
17 any zoning requirements with either height or setback
18 in that particular case. This is in contradistinction
19 to Mr. Carome's West Virginia case where the property
20 owner simply put up a fence without a permit, which
21 allegedly was for the -- to keep the kids in and then
22 it was to keep the dogs in.

23 And then upon advice of an engineer, they
24 pushed some dirt up against the wall to call it a
25 retaining wall and then filed their application, and,

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1 of course, they lost that case. That has nothing to
2 do with our case. The Wisconsin case is right in
3 point. We could not find any D.C. case in point
4 whatsoever.

5 All right. Going on to my next page, the
6 subject retaining wall was built in accordance with
7 the D.C. Building Code as evidenced by the initials of
8 Robert Chen, DCRA engineer, on the application form
9 under structural approval, that's Exhibit No. 6. You
10 will see where in No. 16 on the back of the
11 application for a building permit, it was signed off
12 by Mr. Chen on April 23, '04. It was also signed off
13 on the retaining wall design cover sheet, that's
14 Exhibit No. 7.

15 You will see his initials in the far right
16 corner, that's Mr. Chen. The actual seal did not come
17 out. This was the field book that they used and you
18 see the stamp of the engineer on the cover. The
19 engineer has submitted as part of his affidavit that
20 this was his true stamp. Mr. Carome alluded to the
21 fact that he believed nothing in this case and that
22 the stamp might have been a fraud and that has been
23 disproved by our expert affidavit.

24 All right. There is no height restriction
25 in the D.C. Building Code for retaining walls. The

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1 only requirement for retaining walls in the D.C.
2 Building Code is that they be designed to ensure
3 stability, that's our Exhibit No. 8. Specialized
4 Engineering monitored the compaction of the clean soil
5 daily to assure that it met the engineering design
6 standards and verified the foundation design bearing
7 capacity and geogrid lengths were in substantial
8 compliance with those plans and specs, that's also in
9 the record as Exhibit 9 here just for your
10 convenience.

11 And I also submitted a couple of sample
12 pages where they took a daily report to make sure that
13 the soil was 95 percent or more compacted, so it met
14 all of the design plans, so that the construction was,
15 in fact, safe.

16 Moving on to the retaining wall is not in
17 violation of the Wesley Heights Overlay District.
18 Many homes in the Wesley Heights Overlay District have
19 retaining walls of varying heights. The survey that
20 we have attached is Exhibit No. 10 and indicates
21 roughly 367 homes in the Wesley Heights Overlay of
22 which 109 have retaining walls and at least 27 were
23 found to have a retaining wall in the front yard and
24 in the back yard where it could be seen from the
25 street without walking on the property.

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1 They were instructed not to walk on the
2 property in any way, shape or form. So basically,
3 this is mostly front yard retaining walls. 27 were
4 found to be in excess of 4 feet in height. And the
5 reason is that this particular neighborhood many of
6 the streets are sloped and backed down onto the park
7 and therefore retaining walls are, in fact, a part of
8 the Wesley Heights life.

9 The Zoning Regulations for the Wesley
10 Heights Overlay refer to residences and liveable
11 structures not retaining walls. In reviewing the
12 legislative history, all of which is in the record,
13 they had three main objectives: FAR, lot occupancy,
14 front yard setback. FAR, lot occupancy and front yard
15 setback all related to residences and liveable
16 structures.

17 There were no tree and slope restrictions
18 about cutting down trees or removing or changing the
19 terrain, so they were not subject to the TSP
20 restrictions. The legislative history clearly
21 indicates that there was a compromise between the two
22 factions, the petitions who wanted the overlay and the
23 neighbors who objected it. Therefore, there was no
24 proscription tree cutting and, in fact, the creation
25 of impermeable surfaces was allowed. This is all in

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1 the legislative history of the Wesley Heights Overlay.

2 And then finally, the retaining walls are
3 allowed in the underlying R-1-A Zoning as a matter-of-
4 right, because it does not conflict with the WHOD.
5 All right. So with that, I would like to go to the --
6 to our PowerPoint presentation and introduce Mr. Hugo
7 Ardon, our witness. Mr. Ardon, would you, please,
8 state your name and profession for the record?

9 MR. ARDON: Yes, my name is Hugo Ardon.
10 I was the supervisor for the retaining wall.

11 CHAIRPERSON GRIFFIS: Excellent. Let me
12 ask you this quick clarification. You mentioned an
13 Exhibit 9. We have the Specialized Engineering and
14 you said also attached were examples of the compacting
15 soil that were put in?

16 MR. AGUGLIA: In other parts of the
17 record.

18 CHAIRPERSON GRIFFIS: Okay. So not in
19 that exhibit?

20 MR. AGUGLIA: But I can make that.

21 CHAIRPERSON GRIFFIS: No, that's fine.
22 They're just in there.

23 MR. AGUGLIA: I just did two samples.

24 CHAIRPERSON GRIFFIS: That's fine.

25 MR. AGUGLIA: On two different days. They

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1 were there every day.

2 CHAIRPERSON GRIFFIS: Okay. I just wanted
3 to make sure we weren't missing something.

4 MR. AGUGLIA: Right.

5 CHAIRPERSON GRIFFIS: Okay. Good. Let's
6 go.

7 MR. AGUGLIA: And I'll make a note to give
8 you that reference in any follow-up. All right. Mr.
9 Ardon, would you, please, describe the first -- do you
10 want to sit on that side so you can see? You can see
11 it?

12 MR. ARDON: Yes.

13 MR. AGUGLIA: Okay. All right. Would
14 you, please, describe the first picture for the Board?

15 MR. ARDON: Yes. That's a picture showing
16 the Economides house at the end looking at Dexter
17 Terrace. You can see the house sitting kind of low
18 from the street.

19 MR. AGUGLIA: Next picture.

20 MR. ARDON: That's a close-up picture of
21 the house of the Economides on the left -- on the
22 right, sorry and the neighbors up on the left. This
23 is the front of the house.

24 MR. AGUGLIA: Now, is it correct that in
25 order to get -- to go into the Economides house, the

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1 property owners' house that you have to go down a
2 couple flights of stairs?

3 MR. ARDON: Yes, you do.

4 MR. AGUGLIA: All right. What does this
5 picture show?

6 MR. ARDON: That shows the permits being
7 posted on the front window.

8 MR. AGUGLIA: All right. Is this the
9 permit for the retaining wall?

10 MR. ARDON: Yes, it is.

11 MR. AGUGLIA: All right. Why -- did you
12 inspect to see if they had a proper permit before you
13 started the job?

14 MR. ARDON: Yes, we did. That's part of
15 our job to start with.

16 MR. AGUGLIA: All right. Why do you -- is
17 there any special reason why you remember this permit
18 at this particular point?

19 MR. ARDON: Well, the reason was the
20 broken window.

21 MR. AGUGLIA: Okay. All right. So before
22 you started the job, it's your testimony that you
23 checked to make sure that they had a proper permit for
24 the retaining wall?

25 MR. ARDON: Yes, we had an approved set of

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1 plans and a valid permit before we actually started.

2 MR. AGUGLIA: All right. Next picture.

3 All right. Would you, please, tell the Board what
4 this is?

5 MR. ARDON: That's the wall in progress.
6 That shows the -- half the way of the wall, pretty
7 much down in the bottom and as a matter of fact it
8 shows the clean dirt that was used for backfill of the
9 wall that had to be brought in from a different site.
10 And at the closed end, you see, all the dirt had to be
11 hauled away, because it was not useable for compaction
12 for the wall.

13 MR. AGUGLIA: Why was the old dirt in the
14 foreground the lighter colored dirt, why was that not
15 -- was that the existing dirt at the house?

16 MR. ARDON: That was the existing dirt
17 that got dug out of the house when the house was
18 raised, I believe.

19 MR. AGUGLIA: All right. And they
20 intended to use that dirt for the retaining wall?

21 MR. ARDON: Yes.

22 MR. AGUGLIA: All right.

23 MR. ARDON: And the engineers instructed
24 us it was not suitable for compaction.

25 MR. AGUGLIA: And why was that? Did it

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1 have stumps, stones, what was it?

2 MR. ARDON: It had debris in it and the
3 moisture content in it.

4 MR. AGUGLIA: So in order to build this
5 according to code you had to bring in the clean dirt.
6 Is that correct?

7 MR. ARDON: Yes.

8 MR. AGUGLIA: Okay. Now, can you just
9 tell the Board, show the Board where the geogrids are?

10 MR. ARDON: Yes, that's -- the grid is the
11 block it looks like cloth that is sticking out of the
12 wall coming from the right and then some coil up up in
13 the upper side of the picture.

14 MR. AGUGLIA: All right. Now, was
15 Specialized Engineering on the site every day?

16 MR. ARDON: Every single day. We will not
17 -- they will not let us work unless they were on site
18 every single day to solidify the wall.

19 MR. AGUGLIA: And they checked to make
20 sure that the compaction was correct?

21 MR. ARDON: Yes.

22 MR. AGUGLIA: And what was their process?
23 Was it every foot or every 2 feet?

24 MR. ARDON: Every 8 inches.

25 MR. AGUGLIA: Every 8 inches they checked

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1 to make sure it was properly compacted?

2 MR. ARDON: Yes, yes.

3 MR. AGUGLIA: In order to meet the design
4 Building Codes, correct?

5 MR. ARDON: Exactly.

6 MR. AGUGLIA: All right. Next. Now, what
7 time of year is this? Please, give us the date.

8 MR. ARDON: That was mid summer, more like
9 September.

10 MR. AGUGLIA: Of what year?

11 MR. ARDON: 2004.

12 MR. AGUGLIA: Now, is that dense foliage
13 around the retaining wall?

14 MR. ARDON: Yes.

15 MR. AGUGLIA: All right.

16 MR. ARDON: You can't see any houses down
17 from where the job is at.

18 MR. AGUGLIA: All right. Do you know
19 where the Tate house is, approximately, in that
20 picture?

21 MR. ARDON: Down on the left side in the
22 bottom. You can't really see it from there.

23 MR. AGUGLIA: Well, we will explain more
24 where -- about the Tate house in a minute.

25 MR. ARDON: Can you see houses across the

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1 street on Fulton Street?

2 MR. ARDON: No.

3 MR. AGUGLIA: Okay. Next picture. All
4 right. Would you explain this picture?

5 MR. ARDON: Yes, that's looking from the
6 back yard towards the front. Actually, that's the
7 neighbors on the left side of the Economides
8 residence.

9 MR. AGUGLIA: And in the foreground that's
10 the rear yard?

11 MR. ARDON: Yes.

12 MR. AGUGLIA: That's under discussion
13 here?

14 MR. ARDON: Yes, that's the new side that
15 was put in through the containment with -- because it
16 was not completed.

17 MR. AGUGLIA: Okay. The next picture.

18 MR. ARDON: That's looking from the back
19 yard towards the end of the wall.

20 MR. AGUGLIA: Okay. This is roughly what
21 time frame?

22 MR. ARDON: That's mid winter.

23 MR. AGUGLIA: '05 or '05?

24 MR. ARDON: '05, it had to be more like
25 January, because there's no vegetation.

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1 MR. AGUGLIA: All right. So this is a
2 picture of the rear yard with the retaining wall in
3 progress?

4 MR. ARDON: Yes.

5 MR. AGUGLIA: All right. Next picture.

6 MR. ARDON: That's the left side of the
7 wall. That's the Tate's residence on the left side of
8 the picture.

9 MR. AGUGLIA: Okay. Next picture.

10 MR. ARDON: That's the face of the wall
11 looking from the park. It's a close-up picture.

12 MR. AGUGLIA: Okay. All right. Now, you
13 want to sit over there? Sit over there so I can --

14 MR. ARDON: Yes.

15 MR. AGUGLIA: Okay. Now, I direct your
16 attention to the stakes in the ground on the right
17 side of the picture. It's sort of the middle right
18 side of the picture. There are two stakes roughly
19 across from each other. Do you see the stakes?

20 MR. ARDON: Yes.

21 MR. AGUGLIA: All right. The stake on the
22 far right side by the fence in the background, do you
23 know what stake that --

24 MR. ARDON: That was the surveyor's stake.

25 MR. AGUGLIA: All right.

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1 MR. ARDON: Right down by the homeowners.

2 MR. AGUGLIA: Okay.

3 MR. CAROME: I'm sorry to interrupt. Are
4 these pictures in what you handed out?

5 MR. AGUGLIA: They're already in the
6 record from things I have already passed out in the --

7 MR. CAROME: Can you point us to where
8 that is, please?

9 MR. AGUGLIA: Well, I will after I finish
10 the presentation.

11 MR. CAROME: I don't think they are in the
12 record.

13 MR. AGUGLIA: Well, then we will submit
14 these for the record.

15 MR. CAROME: But --

16 MR. AGUGLIA: All right?

17 MR. CAROME: -- we won't be able to --

18 MR. AGUGLIA: I did not --

19 MR. CAROME: Will I be able to cross on
20 these afterwards?

21 MR. AGUGLIA: Yes, yes, absolutely.

22 MR. CAROME: You'll put this back up for
23 us if we need it?

24 MR. AGUGLIA: Absolutely.

25 MR. CAROME: All right.

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1 MR. AGUGLIA: All right. Do you know how
2 many surveys, private surveys the property owners had
3 done?

4 MR. ARDON: There were one before the wall
5 got started, that I know. New stakes were just put in
6 and one half the way of the wall and as far as I know,
7 they just did another one not too long ago, maybe a
8 few weeks ago.

9 MR. AGUGLIA: Okay. Now, the stake in the
10 far right, is that the private -- the stake done by
11 the private surveyor for the owners?

12 MR. ARDON: Yes.

13 MR. AGUGLIA: All right. And that shows
14 that the wall is approximately how far?

15 MR. ARDON: 4 feet or so, yes.

16 MR. AGUGLIA: 4 feet or so?

17 MR. ARDON: Yes.

18 MR. AGUGLIA: All right. Now, the stake
19 that is directly across from there, whose stake is
20 that?

21 MR. ARDON: That's the boundary line from
22 the Park Service.

23 MR. AGUGLIA: The Park Service?

24 MR. ARDON: Yes.

25 MR. AGUGLIA: Now, was that stake there

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1 originally?

2 MR. ARDON: No, it wasn't.

3 MR. CAROME: I would just like to state an
4 objection that -- to the foundation of these questions
5 as to what possible knowledge this witness has as to
6 survey expertise. That has not been established and
7 I object to this testimony on that basis.

8 CHAIRPERSON GRIFFIS: Well, isn't that
9 proper for cross?

10 MR. CAROME: I think it's a basis for
11 rejecting the testimony outright.

12 CHAIRPERSON GRIFFIS: Rejecting the
13 testimony of his observation? I think it's much more
14 appropriate for cross in terms of determining whether
15 we should rely on the witness' testimony of who staked
16 what and what they represent. Let's move ahead.

17 MR. AGUGLIA: These are obviously facts
18 observing. Thank you. All right. So was the stake
19 that you identified as being posted by the Park
20 Service, was that stake there originally?

21 MR. ARDON: No, it wasn't.

22 MR. AGUGLIA: Where was it?

23 MR. ARDON: On the corner of the wall on
24 the closed end was the picture, which was the lower
25 part of the wall.

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1 MR. AGUGLIA: Farther from the wall?

2 MR. ARDON: Yes, was.

3 MR. AGUGLIA: So after the wall was built,
4 the -- is it correct that the Park Service placed its
5 stake closer to the wall?

6 MR. ARDON: Yes, they have.

7 MR. AGUGLIA: Okay. Next picture.
8 Describe the picture.

9 MR. ARDON: That's a picture looking for
10 the -- it looks like 49th Street looking up the
11 retaining wall across the park.

12 MR. AGUGLIA: Okay. The retaining wall is
13 to the left?

14 MR. ARDON: Yes.

15 MR. AGUGLIA: The Economides house is
16 behind it?

17 MR. ARDON: Yes, up in the upper end.

18 MR. AGUGLIA: The Tate house is to the
19 right?

20 MR. ARDON: Yes.

21 MR. AGUGLIA: And then the neighbors, the
22 Colemans is behind that?

23 MR. ARDON: The Colemans would be the one
24 on the right on the upper end.

25 MR. AGUGLIA: Right. Okay. Next picture.

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1 Again, is that the Tate house?

2 MR. ARDON: Yes.

3 MR. AGUGLIA: With the -- is that the
4 Coleman house looming in the background?

5 MR. ARDON: Yes.

6 MR. AGUGLIA: Okay. Next picture.

7 MR. ARDON: That's just those are for the
8 back yard looking towards the park.

9 MR. AGUGLIA: Okay. Next picture.

10 MR. ARDON: That's looking from the park
11 trail by the wall.

12 MR. AGUGLIA: All right. Now, is that
13 tree -- was that -- describe the tree. Why is the
14 tree fallen?

15 MR. ARDON: There is numerous trees around
16 and on the park, they just -- they had fallen trees in
17 the park.

18 MR. AGUGLIA: Okay. Next picture.

19 MR. ARDON: That's another picture looking
20 from Fulton Street towards the retaining wall.

21 MR. AGUGLIA: All right. And this is,
22 give us a time frame?

23 MR. ARDON: Mid winter.

24 MR. AGUGLIA: Okay.

25 MR. ARDON: Yes.

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1 MR. AGUGLIA: '04 or '05?

2 MR. ARDON: It's '05.

3 MR. AGUGLIA: Okay. Next picture. You
4 went the wrong way. Okay. Would you describe this?
5 This is a computer simulated picture.

6 MR. ARDON: Yes, that's Virginia Creeper.
7 That's a plant that the Park Service actually
8 mentioned when they --

9 UNIDENTIFIED SPEAKER: Could you speak on
10 the microphone, please?

11 MR. ARDON: I'm sorry. That's a plant
12 that the Park Service actually recommended using as a
13 camouflage for the wall when they made up the wall.
14 I was present when they met, because we were doing the
15 landscaping. I was part of camouflaging the wall.

16 MR. AGUGLIA: Okay. All right. This
17 again is a computer simulation. Thank you. Next
18 picture.

19 MR. ARDON: That's just their driveway
20 looking at the Japanese Embassy house on the upper
21 side.

22 MR. AGUGLIA: All right. Does that
23 picture reflect an existing retaining wall on the
24 subject property?

25 MR. ARDON: Yes.

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1 MR. AGUGLIA: All right. How high is that
2 retaining wall?

3 MR. ARDON: 10 or 12 feet.

4 MR. AGUGLIA: All right. So let's give
5 the Board some direction here. If you are coming down
6 the steps into the subject property from the street.

7 MR. ARDON: Yes.

8 MR. AGUGLIA: Is this on the right, left
9 side, which side is this on?

10 MR. ARDON: Dexter Terrace, which is where
11 the driveway is at, is -- be on the right side.

12 MR. AGUGLIA: Right side?

13 MR. ARDON: Yes.

14 MR. AGUGLIA: So do you have any idea how
15 old this retaining wall is?

16 MR. ARDON: No, it's -- I can't say
17 exactly, but, I mean, it looks like 10 to 15 years
18 old. I mean, it's fairly old.

19 MR. AGUGLIA: All right. So this was an
20 existing retaining wall on the subject property?

21 MR. ARDON: Yes.

22 MR. AGUGLIA: For some years?

23 MR. ARDON: Yes.

24 MR. AGUGLIA: Okay. Because it was deeply
25 sloped?

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1 MR. ARDON: Yes.

2 MR. AGUGLIA: Okay. Next picture. All
3 right. Can you -- the Park Service has raised some
4 objections about the precedent of the retaining wall.
5 Did you have an occasion to drive around the
6 neighborhood and look at other retaining walls?

7 MR. ARDON: Yes, I did.

8 MR. AGUGLIA: All right. Can you describe
9 this retaining wall?

10 MR. ARDON: That's a retaining wall down
11 on New Mexico Avenue.

12 MR. AGUGLIA: This is -- to refresh your
13 memory, this is a swimming pool on Cathedral Avenue?

14 MR. ARDON: Yes, I mean, there are various
15 walls along the area.

16 MR. AGUGLIA: Okay. All right. So how
17 high was this retaining wall?

18 MR. ARDON: It's hard to say without
19 actually walking in to their property to measure, but,
20 I mean, it's more than the same size of the Economides
21 pretty much.

22 MR. AGUGLIA: All right. Now, there is a
23 white object that looks like a pipe that's coming out
24 into the property. Do you know what that is?

25 MR. ARDON: It looks like a drain pipe

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1 coming out of the inside of the retaining wall.

2 MR. AGUGLIA: All right.

3 MR. ARDON: Into the park.

4 MR. AGUGLIA: Is it on park property,
5 draining onto park property?

6 MR. ARDON: Yes, it is.

7 MR. AGUGLIA: Okay. And it's roughly the
8 same height as the Economides retaining wall?

9 MR. ARDON: Yes, it is.

10 MR. AGUGLIA: All right. Next picture.
11 All right. Is this another example of retaining wall?

12 MR. ARDON: Yes, it is.

13 MR. AGUGLIA: Okay. Would you give the
14 Board an idea where this is? Do you recall where this
15 is?

16 MR. ARDON: It's hard to remember. I
17 mean, there are so many in the neighborhood.

18 MR. AGUGLIA: Okay.

19 MR. ARDON: I mean, pretty much every
20 house has a retaining wall.

21 MR. AGUGLIA: All right. Now, what was
22 the height of this particular wall?

23 MR. ARDON: About 30 feet or so.

24 MR. AGUGLIA: All right. Are these
25 retaining walls supporting houses or apartment

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1 complexes?

2 MR. ARDON: They are buildings,
3 apartments, yes.

4 MR. AGUGLIA: They are buildings,
5 apartments?

6 MR. ARDON: Yes.

7 MR. AGUGLIA: All right. Next picture.
8 Is this the same portion of the retaining wall?

9 MR. ARDON: Yes, it is.

10 MR. AGUGLIA: All right. Would you
11 identify to the Board where the park boundary line is?

12 MR. ARDON: That's the one on the right.
13 You can barely see it right behind the tree.

14 MR. AGUGLIA: All right. Is it next to
15 the --

16 MR. CAROME: I object again. I'm not sure
17 I'm going to be able to cross on this without having
18 this picture in my hand, so that I can write notes on
19 it. How am I going to know what this is and how am I
20 going to ask this witness about it if you don't give
21 me a copy of it? Are you going to --

22 CHAIRPERSON GRIFFIS: Your objection is to
23 the --

24 MR. CAROME: Could you just make a note
25 that somehow to come back to this particular picture?

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1 It's not in what you handed out and it's not in your
2 prior submission.

3 CHAIRPERSON GRIFFIS: That's what we're
4 doing. Your objection is based on your --

5 MR. CAROME: I just don't know how I'm
6 going to even refer to this. It will be one of those
7 pictures we saw, do you remember which one it was? It
8 will just be difficult. It will take some time, but--

9 MR. AGUGLIA: Many of these pictures are
10 already in the record.

11 MR. CAROME: This one is not.

12 CHAIRPERSON GRIFFIS: Okay. What we're
13 going to do is after the case presentation, we're
14 going to go through the pictures for the retaining
15 walls and you're going to give a number and an
16 address.

17 MR. AGUGLIA: Yes.

18 CHAIRPERSON GRIFFIS: And that's all. And
19 that way we will identify it for our edification, for
20 cross.

21 MR. AGUGLIA: Yes.

22 CHAIRPERSON GRIFFIS: And for the case.
23 And, of course, we will have the hard copy in the
24 record.

25 MR. AGUGLIA: This is the -- okay.

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1 CHAIRPERSON GRIFFIS: And what we're going
2 to do is require that this come in all in one package.
3 But for today's purposes, we'll absolutely go back
4 very quickly and number them.

5 MR. AGUGLIA: Yes.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. AGUGLIA: 2801 New Mexico Avenue. The
8 prior one was 4101 Cathedral Avenue. All right. So
9 you are pointing out to the Board where the federal
10 park boundary stake is?

11 MR. ARDON: Yes.

12 MR. AGUGLIA: Is it just to the right of
13 a small white sort of tubular object?

14 MR. ARDON: Yes, it is.

15 MR. AGUGLIA: All right. Did this appear
16 to be on the line or over the Park Service line?

17 MR. ARDON: It appears like the steps are
18 over the line, but, I mean, it's hard to tell without
19 actually knowing where the land is.

20 MR. AGUGLIA: Okay. But this is an
21 example of a large retaining wall supporting an
22 apartment right off -- right on the edge of a federal
23 park land, correct?

24 MR. ARDON: Yes.

25 MR. AGUGLIA: All right. Next picture.

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1 All right. Do you know what this picture is?

2 MR. ARDON: Yes, that's a house on the
3 corner of Dexter Terrace and Dexter Street.

4 CHAIRPERSON GRIFFIS: Dexter Terrace,
5 Dexter Street?

6 MR. ARDON: Yes.

7 MR. AGUGLIA: I believe it's 4815 Dexter
8 Street.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. ARDON: It's on the corner.

11 MR. AGUGLIA: All right. I believe it is
12 4815 Dexter Street. And I'll confirm that. It's at
13 the corner. It's on Dexter Street at the corner of
14 Dexter Terrace.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. AGUGLIA: And Dexter Street.

17 CHAIRPERSON GRIFFIS: This is Dexter
18 Street.

19 MR. AGUGLIA: Okay. All right. Would you
20 describe the retaining wall in this picture?

21 MR. ARDON: Yes, it shows the new
22 retaining wall that was just barely built. I mean, a
23 year or two old. It's about 7 or 8 feet tall.

24 MR. AGUGLIA: All right. Describe for the
25 Board exactly what is the retaining wall? Which

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1 object is the retaining wall?

2 MR. ARDON: It's the terrace above it.

3 MR. AGUGLIA: Is that the circular wall in
4 the left?

5 MR. ARDON: Yes.

6 MR. AGUGLIA: Sort of middle left, the
7 circular retaining wall? Okay. Next picture. All
8 right. This is a property at 3005 45th Street, N.W.
9 All right. All right. Is there a retaining wall in
10 the front?

11 MR. ARDON: Yes, it is.

12 MR. AGUGLIA: All right. Next picture.
13 You've viewed this property, correct?

14 MR. ARDON: Yes, I did.

15 MR. AGUGLIA: All right. Is this the
16 retaining wall that continues on the right side of the
17 property?

18 MR. ARDON: Yes.

19 MR. AGUGLIA: All right. Next picture.
20 All right. Is this the retaining wall that continues
21 around the side of the property?

22 MR. ARDON: Yes, it is.

23 MR. AGUGLIA: All right. How high would
24 you say that retaining wall is?

25 MR. ARDON: It's 20 feet or more.

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1 MR. AGUGLIA: Okay.

2 MR. ARDON: Yes.

3 MR. AGUGLIA: Does it have a railing or a
4 fence at the top?

5 MR. ARDON: It has a railing that goes
6 around the top, yes.

7 MR. AGUGLIA: Around the top. All right.
8 Is there a house? Does the next picture show a house?
9 Is there a house immediately to the right?

10 MR. ARDON: Yes, it is. You can't see it
11 on the picture, but I mean, there is a house right
12 next to the wall being on the right side.

13 MR. AGUGLIA: Okay. Next picture.

14 CHAIRPERSON GRIFFIS: Can we go back to
15 that one very briefly?

16 MR. AGUGLIA: Yes.

17 CHAIRPERSON GRIFFIS: Just for
18 clarification. Where is the retaining wall here?
19 Behind those trees. Is that correct?

20 MR. ARDON: Behind the little bushes in
21 the front. That's the retaining wall.

22 CHAIRPERSON GRIFFIS: How about behind
23 those bushes and behind the trees?

24 MR. ARDON: Behind the tall tree in the
25 corner?

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1 CHAIRPERSON GRIFFIS: Yes.

2 MR. ARDON: Yes, that's the retaining
3 wall.

4 CHAIRPERSON GRIFFIS: Okay. It looks like
5 in the image it looks like --

6 MR. ARDON: It looks like there are dead
7 trees in the front, yes, yes.

8 CHAIRPERSON GRIFFIS: Right. So it's
9 running almost perpendicular to the bush line.

10 MR. ARDON: Yes.

11 UNIDENTIFIED SPEAKER: Give the address
12 again, please.

13 CHAIRPERSON GRIFFIS: Do what?

14 UNIDENTIFIED SPEAKER: The address again?

15 CHAIRPERSON GRIFFIS: Oh, this is number
16 3 of 45th Street, right, 4005 45th Street, Slide 1, 2
17 and 3.

18 MR. AGUGLIA: I think it was 3005.

19 CHAIRPERSON GRIFFIS: Oh, I'm sorry.

20 MR. AGUGLIA: 3005, 3005 45th Street.

21 CHAIRPERSON GRIFFIS: I just wrote down
22 45th Street 1, 2 and 3. All right. 3000?

23 MR. AGUGLIA: So the retaining wall goes
24 the entire, almost the entire background of the
25 picture, correct?

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1 MR. ARDON: Yes.

2 MR. AGUGLIA: All right. And it has got
3 the ivy on it, so it's --

4 MR. ARDON: So it's camouflaged. You can
5 barely see it.

6 MR. AGUGLIA: Okay. And there is a house
7 immediately to the right?

8 MR. ARDON: Yes.

9 MR. AGUGLIA: A different residence. All
10 right. Next picture. All right. What does this
11 show?

12 MR. ARDON: That's Dunbarton Oaks, right,
13 next to the park, yes.

14 MR. AGUGLIA: Okay. Next picture.

15 MR. ARDON: That was a park trail.

16 MR. AGUGLIA: Okay. Is the retaining wall
17 from the abutting private property?

18 MR. ARDON: Yes.

19 MR. AGUGLIA: All right. Do you know
20 roughly how long or high that retaining wall is?

21 MR. ARDON: It went all the length of the
22 property.

23 MR. AGUGLIA: The length of the entire
24 property?

25 MR. ARDON: Yes.

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1 MR. AGUGLIA: The private property is
2 owned by Harvard University's Dunbarton Oaks and it
3 has a large retaining wall and the park circles the
4 retaining wall.

5 CHAIRPERSON GRIFFIS: So this is taken
6 from within Dunbarton Oaks looking over to the private
7 property that abuts it?

8 MR. AGUGLIA: Correct.

9 MR. CAROME: I'm just going to object both
10 on grounds of relevance to this entire line. There is
11 no evidence here whatsoever as to what zoning
12 application -- what Zoning Regulations were in place
13 when these were built, whether these -- whether there
14 were special variances or exceptions, whether they
15 were predated, the Zoning Code altogether. This one
16 looks in particular like it may have. I also object
17 to Mr. Aguglia who is testifying on his own behalf
18 here as to what these things are and Harvard
19 University owns it, etcetera.

20 CHAIRPERSON GRIFFIS: Is that testimony or
21 is that just fact of what is being put in for
22 evidence?

23 MR. CAROME: I'm objecting to this line of
24 questioning and I think it should be excluded.

25 CHAIRPERSON GRIFFIS: I see. Okay.

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1 Discussion?

2 VICE CHAIR MILLER: I don't think it
3 should be excluded. I think it can go to the weight
4 that's given to the testimony.

5 MR. AGUGLIA: Thank you.

6 VICE CHAIR MILLER: I think we're a little
7 bit broader here with respect to relevance than in the
8 courts.

9 MR. AGUGLIA: I would recall that not once
10 did I interrupt Mr. Carome during his presentation.

11 CHAIRPERSON GRIFFIS: I know, I know. But
12 gosh, we don't need to start that discussion, who
13 interrupted who.

14 BOARD MEMBER ETHERLY: I would also agree
15 with Mrs. Miller, Mr. Chair, but I would hazard a
16 guess that we're probably kind of coming towards the
17 limit of having sufficiently exercised this particular
18 point out.

19 MR. AGUGLIA: Okay.

20 CHAIRPERSON GRIFFIS: Right.

21 MR. AGUGLIA: Understood.

22 CHAIRPERSON GRIFFIS: And I absolutely
23 agree and I think we'll just continue with it. I
24 think we have gotten, hopefully, close to the end of
25 the exhibits, because it is well-said that we won't

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1 know how deep we can go in terms of looking at the
2 substantive portion of when this was built, especially
3 now we're in Dunbarton Oaks. I mean, that's
4 wonderful, I mean, but we may be centuries if not
5 decades away. So the point is how far we go with
6 that.

7 But in terms of setting up the universe of
8 what we're looking at and part of the case
9 presentation and an appeal has been, you know, this --
10 well, trying to define what it is. I think this may
11 help us in looking at the general parameters.

12 MR. AGUGLIA: Right.

13 CHAIRPERSON GRIFFIS: And we don't know
14 actually what you're going to conclude on with this
15 exhibit and your other witnesses.

16 MR. AGUGLIA: Well, let me just --

17 CHAIRPERSON GRIFFIS: So let's move ahead.

18 MR. AGUGLIA: Let me just bring it to a
19 head, because I'm at a disadvantage in the sense that
20 I have to make the Park Service's argument and then
21 rebut it in my time period.

22 CHAIRPERSON GRIFFIS: Right.

23 MR. AGUGLIA: Essentially, they have said
24 that this is highly precedential. What I'm showing is
25 this is not highly precedential whatsoever.

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1 CHAIRPERSON GRIFFIS: Exactly.

2 MR. AGUGLIA: Okay?

3 CHAIRPERSON GRIFFIS: Exactly.

4 MR. AGUGLIA: So I will go through this
5 very quickly. I understand your concerns. What does
6 this depict?

7 MR. ARDON: Just the walkway out of --
8 just the path out of blue stone.

9 MR. AGUGLIA: Okay. And is that the same
10 blue stone that you used as a gravel leveling pad, as
11 a leveling pad on the subject property?

12 MR. ARDON: Yes.

13 MR. AGUGLIA: It's the same exact --

14 MR. ARDON: Yes.

15 MR. AGUGLIA: -- stuff that they used in
16 their paths?

17 MR. ARDON: That's the same blue stone
18 material.

19 MR. AGUGLIA: Okay. Next picture. Same?

20 MR. ARDON: Same.

21 MR. AGUGLIA: Okay.

22 MR. ARDON: Same picture.

23 MR. AGUGLIA: Same picture.

24 MR. ARDON: Yes. That's just a close-up
25 of the blue stone.

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1 MR. AGUGLIA: Okay. Next picture. All
2 right. I will dwell on this briefly. Please,
3 describe to the Board what this is. We can't see it.

4 MR. ARDON: That picture, it's hard to
5 tell anything of it.

6 MR. AGUGLIA: All right. All right. Next
7 picture.

8 MR. ARDON: That's a retaining wall down
9 on the Kellier Parkway.

10 MR. AGUGLIA: Okay. On Kellier Parkway?

11 MR. ARDON: Yes.

12 MR. AGUGLIA: Okay. Next picture.

13 MR. ARDON: Just the drain coming out of
14 it, yes.

15 MR. AGUGLIA: Drain coming --

16 MR. ARDON: It's the same retaining wall,
17 yes.

18 MR. AGUGLIA: Retaining wall. Next
19 picture. Just describe it quickly.

20 MR. ARDON: That's just a big drain coming
21 out of the retaining wall discharging into park, yes.

22 MR. AGUGLIA: Discharging into the park?
23 How high would you say the wall is roughly?

24 MR. ARDON: About 20, 25 feet.

25 MR. AGUGLIA: All right. Next picture.

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1 Does that show the wall on the edge of the creek,
2 federal park land?

3 MR. ARDON: Yes.

4 MR. AGUGLIA: Okay. Next picture. This
5 is for the Board's review. It simply shows all the
6 various locations of these retaining walls. Okay?
7 All right. Now, would you describe this, please, for
8 the Board?

9 MR. ARDON: Yes. That's our plat that was
10 submitted with the plans for a permit for the
11 retaining wall, which it shows where the placement of
12 the wall is within a foot plus or minus off the
13 property line.

14 MR. AGUGLIA: And your understanding was
15 from the survey, the private survey as well as the
16 original park survey, that you were probably 2 feet or
17 more away from park land?

18 MR. ARDON: Yes.

19 MR. AGUGLIA: All right. I would point
20 out to the Board now as a legal matter that it was
21 signed off for zoning in the corner, so the plans were
22 reviewed on 4/22/04. May I have the handheld, so I
23 can go to my board, the handheld microphone?

24 CHAIRPERSON GRIFFIS: Do we have the
25 cordless around?

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1 MR. AGUGLIA: Could you stop the time,
2 please? This will just be a minute. I think I'm
3 going to finish. Thank you. Can you hear me? All
4 right.

5 So I wanted to put this in perspective.
6 These were the plans that were submitted to DCRA.
7 Here is the zoning sign-off. It conforms to the same
8 date and signature as the zoning sign-off on the back
9 of the approval for 2204, the same initials. It
10 shows, as I have already indicated, that it was signed
11 off for structural engineering by Mr. Chen on 4/23/04.
12 It matches the same initials here on the design plans.
13 So he read the design plans, initialed it. This is,
14 unfortunately, a very hard to see seal of the District
15 along with the engineer's seal and then Mr. Chen's
16 sign-off, the same date.

17 And then this was the sediment control and
18 watershed protection sign-off, so environmental signed
19 off for erosion control on 4/20/04. It matches the
20 same initials and date on the back of the application
21 form, as well as the sediment control over here, the
22 same date and initials were signed. So it was
23 thoroughly reviewed by DCRA for zoning, for
24 structural, for environmental. All this was done
25 before the permit was issued for the retaining wall.

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1 All right. Can you hear me now? Is this
2 going to interfere? No. All right. All right. Now,
3 I'm on to my second summary and this is our opposition
4 to the National Park Service. So to the extent that
5 the Park Service has adopted Mr. Carome's arguments,
6 I have already made my points and I adopt the same
7 points. It's a retaining wall. It doesn't violate
8 the WHOD and it is an exception under -- a clear and
9 unequivocal exception under the Zoning Regulations.

10 The Park Service has asked that the Board
11 incorporate the 4 foot height restriction in 2503.2
12 into 2503.3, and that has no basis in law or fact
13 whatsoever. They would like you to rewrite the
14 regulations, but we are here to interpret the
15 regulations as they exist.

16 My position is also that if the Park
17 Service has issues with alleged water or soil damage
18 to the park land from the retaining wall, relief to
19 this Board is inappropriate. It is our position that
20 the retaining wall does not encroach onto federal
21 property and, assuming it does, the Park Service's
22 relief lies in an action for trespass in another forum
23 not before this Board.

24 As I have already indicated, there is
25 significant precedent that other retaining walls

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1 border federal park land in the District of Columbia.
2 I am not making the argument that these retaining
3 walls are in the Wesley Heights Overlay. They are
4 simply very tall retaining walls that border right on
5 the edge of federal park land and, in fact, their weep
6 holes or pipes leak, release the water pressure right
7 into the stream and if they didn't, the retaining
8 walls would have too much pressure and, obviously,
9 fall. So those are the four that we have already gone
10 through very quickly.

11 Now, Mr. Ardon, during the construction of
12 the wall, was there a Park Service representative
13 monitoring the situation?

14 MR. ARDON: Yes.

15 MR. AGUGLIA: Do you remember who that
16 was?

17 MR. ARDON: Joe Kish.

18 MR. AGUGLIA: Mr. Kish?

19 MR. ARDON: Yes.

20 MR. AGUGLIA: And he was a member of the
21 Park Service?

22 MR. ARDON: Yes.

23 MR. AGUGLIA: Was he there from roughly
24 the beginning until the end?

25 MR. ARDON: Yes, he was.

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1 MR. AGUGLIA: Roughly how many times?

2 MR. ARDON: I didn't count, but he was
3 there sometimes every week or every other week, but he
4 was there all the time.

5 MR. AGUGLIA: All right. Did he indicate
6 to you that the wall was on federal property?

7 MR. ARDON: He never did.

8 BOARD MEMBER ETHERLY: Mr. Aguglia, my
9 apologies for the interruption, but I want to be sure
10 I'm clear. When you say monitoring the situation,
11 could you be a little more specific and more detailed
12 as to what you mean?

13 MR. ARDON: Yes. He used to come in and
14 check the progress, how high the wall was, how long it
15 was going to take and check the steel fences for
16 erosion around the park.

17 BOARD MEMBER ETHERLY: Okay.

18 MR. ARDON: And, as a matter of fact, he
19 made us clean the park once, because it ran, you know,
20 some of the steel fence fell, so he made us clean the
21 park. So he was there all the time monitoring, making
22 sure we had everything with him.

23 BOARD MEMBER ETHERLY: Okay. And by all
24 the time do you mean every day?

25 MR. ARDON: Every week. You know, maybe

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1 he missed a week here and there, but he was there
2 pretty much every week, sometimes every three or four
3 days.

4 BOARD MEMBER ETHERLY: Okay. Thank you.
5 Thank you, Mr. Chair.

6 MR. AGUGLIA: All right. So my position
7 is that since the Park Service monitored the situation
8 on a regular basis that it's really unfair for them to
9 come in at the tail end of the process after the wall
10 was built and then suddenly object. And in fact, you
11 will probably find that Mr. Kish will not be brought
12 forward as a witness by the Park Service in their
13 presentation.

14 So with that, I have made my basic points.
15 Just to return to my basic points, there is no
16 evidence that the wall is not a retaining wall. The
17 burden of proof is on the appellant. All the proof he
18 has submitted supports my position that it is a true
19 retaining wall. Since it is a true retaining wall, it
20 is exempt from the yard restrictions under section
21 2503.3 and I have submitted case law that supports
22 that, and a review of the legislative history
23 indicates that they were -- retaining walls were
24 permitted as a matter-of-right in any part of the
25 yard. Again, all that information was submitted by

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1 Mr. Carome in one of his volumes, three volumes, and
2 it supports our position.

3 And lastly, the retaining wall does not
4 violate the Wesley Heights Overlay. Again, it was
5 meant to go to FAR, lot occupancy and front yard
6 setback to liveable residences, residences and
7 liveable structures, and that's throughout the
8 legislative history. I thank you for your time and
9 consideration.

10 CHAIRPERSON GRIFFIS: Thank you very much.
11 Let's go right into Board questions. Mr. Hildebrand?

12 COMMISSIONER HILDEBRAND: Yes. Am I to
13 understand that if I were -- for example, if I owned
14 a piece of property like this and I wanted to have a
15 phenomenal view, that I could build a retaining wall
16 that matched my property description to an unlimited
17 height, create a new ground plane and then build a
18 structure on it and that would be compliant?

19 MR. AGUGLIA: The retaining wall is below
20 the grade of the property. So therefore, in your
21 example, that would not work.

22 COMMISSIONER HILDEBRAND: Okay.

23 MR. AGUGLIA: So when you -- Mr. Ardon,
24 when you exit the basement of the Economides' house,
25 what do you come upon?

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1 MR. ARDON: Flat ground over the top of
2 the retaining wall.

3 MR. AGUGLIA: All right. And you
4 virtually can't even see the retaining wall from --

5 MR. ARDON: The retaining wall is down
6 lower than the basement part of the house.

7 COMMISSIONER HILDEBRAND: Okay. But
8 you're saying that there is no restriction on the
9 height of a retaining wall?

10 MR. AGUGLIA: There is no restriction on
11 the height of a retaining wall, but I would say that
12 has to be taken into consideration of it being below
13 grade.

14 COMMISSIONER HILDEBRAND: So the retaining
15 walls that are on the front street, those are
16 restricted to height?

17 MR. AGUGLIA: Are they restricted to
18 height? No.

19 COMMISSIONER HILDEBRAND: So there is no
20 height restriction on retaining walls?

21 MR. AGUGLIA: In the Building Code there
22 is no height on the restriction -- there is no height
23 restriction on retaining walls, only that it ensures
24 stability.

25 COMMISSIONER HILDEBRAND: Okay. Thank

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1 you.

2 CHAIRPERSON GRIFFIS: Ms. Miller?

3 VICE CHAIR MILLER: I just want to make
4 sure I understand you correctly. Is it your view that
5 retaining walls are not subject to zoning in the
6 District of Columbia?

7 MR. AGUGLIA: Not subject to zoning. I'm
8 saying that there is an exception in the Zoning
9 Regulations for retaining walls. They can be placed
10 in any part of the yard, and that the only restriction
11 is that they meet the Building Code and the Building
12 Code requires that they be -- that they can carry the
13 load.

14 VICE CHAIR MILLER: They are subject to
15 the Building Code?

16 MR. AGUGLIA: Subject to the Building Code
17 and the Building Code that I have attached as an
18 exhibit simply says that the retaining wall must
19 ensure stability.

20 VICE CHAIR MILLER: So how are they
21 subject to zoning review? For instance, you said that
22 it was signed off on for zoning, that the retaining
23 wall was signed off, and I'm wondering what kind of
24 zoning review would that have entailed?

25 MR. AGUGLIA: Well, in that sense, none,

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1 because the Zoning Administrator has said that he
2 could not read the Building Code and that is why it
3 was signed off by structural, by Mr. Chen. So Mr.
4 Chen reviewed the design plans, as evidenced by his
5 initials and the stamp that's hard to see on the cover
6 on the design plans, and then signed off for
7 structural.

8 So it must be taken as a whole. So once
9 the three approvals were met, then the permit was
10 issued. So the permit could not have been issued
11 until the zoning, the environmental and the structural
12 were signed off. So you will see in my Exhibit No. 6,
13 zoning signed off on April 22nd, erosion April 20th,
14 storm water April 5th, structural April 23rd and then
15 the actual permit was not issued until April 23rd. So
16 it's a comprehensive process, but you are right.
17 Zoning cannot say it meets the Building Code. That's
18 why they have a structural engineer.

19 VICE CHAIR MILLER: I'm not saying I'm
20 saying anything, making a judgment on that, but I just
21 want to understand what you're saying, and from what
22 I hear is that zoning sign-off wasn't a sign-off on
23 the retaining wall for zoning reasons in particular.
24 It was sign-off on all the other things together. Is
25 that correct?

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1 MR. AGUGLIA: Well, I think the zoning
2 sign-off was on 2503.3. They basically said is this
3 a retaining wall? They said yes. Therefore, a
4 retaining wall can be --

5 VICE CHAIR MILLER: Who said yes?

6 MR. AGUGLIA: Well, zoning must have.
7 Otherwise, they couldn't have signed off on it. So
8 first things first. Is this a retaining wall? Yes.
9 Therefore, it falls under the exception of 2503.3 that
10 retaining walls can be placed in any section of the
11 yard.

12 VICE CHAIR MILLER: Okay.

13 MR. AGUGLIA: Structural says it meets the
14 Building Code. All right.

15 VICE CHAIR MILLER: Then my other question
16 is you made a statement that there is no evidence,
17 that this isn't a true retaining wall. What kind of
18 wall wouldn't be a true retaining wall? Do you have
19 any idea? Is there any such thing? As long as it
20 holds up with respect to stability, is there any other
21 criteria?

22 MR. AGUGLIA: Well, let's say it has to
23 have an anchor. If it doesn't have an anchor, then --
24 an anchor pulls it. In our case, the geogrids pull it
25 towards the Economides' property. Some have dead men,

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1 they call them, but it's something that, in addition
2 to the wall, pulls back so it's just not the wall
3 holding up the dirt.

4 So a retaining wall, in order to be
5 properly constructed and pass a Building Code, has to
6 have this geogrid or this anchor and that is why I
7 respectfully submit that Mr. Carome's discussion about
8 the dirt and the geogrids making it a walled platform
9 or a terrace or whatever you want to say is obviously
10 wrong and that is why no expert would testify on his
11 behalf. His expert submitted statements that says it
12 is a retaining wall.

13 So if the dirt is not part of the
14 retaining wall and it's more than 30 percent or 50
15 percent of the lot occupancy, virtually every house in
16 Wesley Heights would flunk the test, because the back
17 yard is filled with dirt. So you just don't say it's
18 not a retaining wall because it has got dirt and an
19 anchor. Every retaining wall has dirt and an anchor
20 with the wall in order to be properly constructed.
21 His expert said it. My experts have said it. That's
22 what it is.

23 BOARD MEMBER ETHERLY: But you would -- I
24 think, to an extent, your discussion kind of invites
25 the circularity of it seemingly. I mean, perhaps the

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1 question kind of begs is there a point at which a
2 retaining wall could ever be a structure? But let me
3 hold that off, because I think that's perhaps the big
4 question that you kind of struggle with. When does a
5 retaining wall stop being a retaining wall and become
6 something else?

7 You referenced the West Virginia case and,
8 if I'm not mistaken, you're coming back to the
9 reference, to the Ranson vs. City of Charleston case,
10 that was cited in the appellant's brief, which is
11 Exhibit 21-A at page 47. I haven't taken an
12 opportunity to look at the facts of that particular
13 case, but I wanted to nevertheless kind of just walk
14 through a little bit of what you kind of alluded to
15 where, in that particular case, it sounded as, based
16 on your exploration of it, that essentially you had
17 dirt that was pushed up to the edge of a structure
18 just to get the benefit of calling it a retaining
19 wall.

20 MR. AGUGLIA: Exactly.

21 BOARD MEMBER ETHERLY: To an extent,
22 before you start --

23 MR. AGUGLIA: Yes.

24 BOARD MEMBER ETHERLY: Because I want you
25 to kind of hear where I'm going. To an extent, part

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1 of the argument here that I kind of am parsing out of
2 the appellant's case is there is a whole bunch of dirt
3 here under or behind the retaining wall that came from
4 somewhere, but perhaps didn't necessarily start as a
5 natural condition there on the subject property.

6 The dirt is now there. You now have a
7 wall behind it. So to an extent, it's almost like
8 what came first, the chicken or the egg? If you
9 hadn't put the dirt there, you wouldn't need a wall,
10 but because you put the dirt there, you now need a
11 wall to hold it all up.

12 So perhaps I'm still struggling with why
13 isn't this necessarily the Ranson case? I mean, help
14 me kind of distinguish that a little more, because if
15 you put that together with where Mr. Hildebrand's
16 question was going, is there any possible end to the
17 madness, if you will? So conceivably, a retaining
18 wall, you know, could rise to the sky with no end. I
19 mean, help me kind of work through that a little bit.

20 MR. AGUGLIA: Well, in my particular case,
21 as we have said, the retaining wall is below grade, so
22 it's not an issue here. I realize that you have a
23 hypothetical problem about how high can you go.
24 Remember in the West Virginia case, they never filed
25 an application for a retaining wall.

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1 They just put up -- my recollection is,
2 because I read it this morning, they put up a fence.
3 It was beyond the height restrictions and their first
4 statement was oh, we need it for maybe the kids and
5 then maybe the dog or vice versa. And then an
6 engineer said just throw some dirt up next to it, call
7 it a retaining wall, then we'll file an application
8 for a retaining wall.

9 Here there was no such deception. From
10 the start, the application for a building permit with
11 the plat showed it right on the boundary line. It
12 showed it within the 25 yard rear yard setback. It
13 showed it within the 8 yard -- the 8 foot, I'm sorry,
14 the 8 foot side yard and the 25 foot rear yard
15 setback. So everyone knew exactly where this was and
16 they submitted a design plan showing it to be a
17 retaining wall.

18 BOARD MEMBER ETHERLY: But perhaps just
19 because you, shall we say, kind of gave notice that
20 you were putting this there, does it still necessarily
21 take on a different nature because there wasn't
22 necessarily this mountain of dirt that you had to hold
23 back originally or initially?

24 I understand the point that you're making,
25 but a little bit of what I'm struggling with, and part

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1 of it is hypothetical and kind of just trying to parse
2 out what the limit is of this, but part of it is I
3 think the practical question of because this isn't
4 necessarily a condition that originally occurred on
5 the property in terms of this mountain of dirt or
6 material that you have to hold back, where is -- maybe
7 a better question is so you would not envision any
8 kind of circumstance where this becomes something
9 other than a retaining wall?

10 MR. AGUGLIA: Well, let me answer the
11 question this way. I mean, going back to the model,
12 you see how the property is steeply sloped and you
13 have to come into the property, down a certain slope,
14 I would say is a practical matter. No one is going to
15 build a large retaining wall in the back of their
16 house so they can't see out. So there are a lot of
17 practical considerations meaning it's above their
18 windows. No one is going to want to look out a window
19 and see or, basically, block their entire view.

20 BOARD MEMBER ETHERLY: I mean, I guess
21 what I beg is if I'm a property owner, a prospective
22 property owner or a property owner, and I'm confronted
23 with the possibility of having this chasm or this
24 ravine right at the rear of my property, to an extent,
25 you know, whatever the Latin phrase is, you know,

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1 buyer beware, it's there and that's what you're kind
2 of stuck with.

3 If we are to accept your argument, does
4 that then allow anybody to purchase a property that
5 happens to have a ravine in the back, something that's
6 naturally occurring, but I'm going to truck in red
7 Vermont dirt. I love red Vermont dirt. I'm not
8 trying to speak pejoratively about Vermont dirt, but
9 I love it. I'm going to bring truckloads in of it and
10 create a backyard and put a retaining wall at the end
11 of it to hold it all up and together.

12 That would be an acceptable outcome under
13 the Zoning Regulations according to your
14 interpretation, correct?

15 MR. AGUGLIA: That is exactly correct.

16 BOARD MEMBER ETHERLY: Okay.

17 MR. AGUGLIA: Yes.

18 BOARD MEMBER ETHERLY: Okay.

19 MR. AGUGLIA: In fact, why do we get here?
20 This is a family. This is their house. They want to
21 live in it. If you recall the prior -- you know, he
22 has got the old house and the steeply sloped terrain.
23 Everyone can see it was unusable and steeply sloped.
24 That was conceded early on. No one has made any
25 objection to that. So this is a family that wants to

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1 live in it. This is not a spec house. They have
2 three children. They wanted to have a useable
3 backyard.

4 The reason that they could not use the
5 existing dirt there was because, as Mr. Ardon
6 testified, it didn't meet the proper Building Code for
7 compactable soil. It had to be clean soil that was
8 readily water absorbent, so there is not a build-up of
9 water underground, which would cause the wall to
10 falter.

11 BOARD MEMBER ETHERLY: Okay. Okay. Thank
12 you. Thank you, Mr. Chair.

13 BOARD MEMBER MANN: What was the --

14 CHAIRPERSON GRIFFIS: Oh, Mr. Mann?

15 BOARD MEMBER MANN: You showed us several
16 examples of retaining walls presumably in northwest,
17 the northwest quadrant of the District, I guess?

18 MR. AGUGLIA: That is correct.

19 BOARD MEMBER MANN: I'm not entirely
20 certain what the purpose of showing us those examples
21 were.

22 MR. AGUGLIA: The Park Service has said
23 that this wall is setting a precedent, which must be
24 stopped, because they are building retaining walls
25 along the edge of park land and they cast shadows or

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1 encroachments and my point is that there are many. We
2 have shown at least four. I think with some other
3 time, although the Board would probably not want to
4 view it, this is just one of many throughout the
5 entire city. These were just done in the northwest
6 quadrant.

7 BOARD MEMBER MANN: But was every
8 retaining wall that you showed us adjacent to National
9 Park Service property?

10 MR. AGUGLIA: Yes, Glover Archibald Park.

11 BOARD MEMBER MANN: There were retaining
12 walls on the front of homes in some of the examples.
13 Were those adjacent to National Park Service property?

14 MR. AGUGLIA: The one that was in the
15 front, the park land is behind it. That's very close
16 to the Economides' property, but it's not fronting on
17 park land.

18 BOARD MEMBER MANN: So the only value in
19 seeing those for us was to show that there are
20 retaining walls adjacent to National Park Service
21 property?

22 MR. AGUGLIA: Correct. They are on the
23 edge as ours is. They are on the edge of federal park
24 land and they have spouts that cast water into the
25 park land creeks. Glover Archibald Park is on the one

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1 involving Cathedral and New Mexico.

2 BOARD MEMBER MANN: Okay. So it wasn't
3 meant to say that zoning had allowed these in the
4 past?

5 MR. AGUGLIA: One would think that zoning
6 had allowed them in the past. Otherwise, they
7 couldn't have been built.

8 BOARD MEMBER MANN: So there was more than
9 one purpose in your showing us those then. I mean,
10 you wanted to show us --

11 MR. AGUGLIA: Yes.

12 BOARD MEMBER MANN: -- examples along the
13 Park Service.

14 MR. AGUGLIA: Yes. Please, yes.

15 BOARD MEMBER MANN: You wanted to show us
16 that zoning allowed those in the past?

17 MR. AGUGLIA: Correct. Yes, you are
18 correct. So these are examples of where retaining
19 walls for many years have been considered by the
20 District as part of landscaping and they fall under
21 the exception and, as long as they meet the Building
22 Code for ensuring stability, they are allowed. So
23 yes, there is a dual purpose, on the edge of the
24 federal park land as well as an indication that this
25 has been signed off many times in the past as meeting

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1 the Zoning Regulations.

2 BOARD MEMBER MANN: Okay. Thank you.

3 MR. AGUGLIA: Thank you.

4 BOARD MEMBER MANN: But just to continue
5 on that for just a second, didn't you also testify
6 though that you weren't aware of when many of these
7 retaining walls were built, and that some of them
8 probably predated the Zoning Code?

9 CHAIRPERSON GRIFFIS: That was somewhat
10 the objection that was being brought up.

11 BOARD MEMBER MANN: Right.

12 CHAIRPERSON GRIFFIS: About the
13 youthfulness of these images, but go ahead.

14 MR. AGUGLIA: I have not checked the
15 dates, except the one on Dale Carlia Parkway, which is
16 on the edge of park property with the large weep holes
17 that was built in the last two years.

18 COMMISSIONER HILDEBRAND: I see. I have
19 two questions for you. At 1541.3 where it outlays or
20 the purposes of the Wesley Heights Overlay District
21 are, and particularly Item C, to preserve existing
22 trees, access to air and light and a harmonious design
23 and attractive appearance of the neighborhood.

24 How do you respond to that relative to the
25 proposed retaining wall?

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1 MR. AGUGLIA: Right, right. In that
2 language there is no prescription or proscription,
3 whatever the word is, no proscription from cutting
4 down trees. In fact, the legislative history says
5 that trees can be cut down. Aesthetics, it's
6 impossible to get into aesthetics. That means I don't
7 like the way your house is designed versus anybody
8 else's house. I found that that provision was,
9 basically, meaningless.

10 COMMISSIONER HILDEBRAND: Okay. In your
11 Exhibit 10 --

12 MR. AGUGLIA: Again, to reiterate on that,
13 the three tests of all the legislative history behind
14 it was FAR, lot occupancy and front yard setback.

15 COMMISSIONER HILDEBRAND: Right.

16 MR. AGUGLIA: That was the purpose.

17 COMMISSIONER HILDEBRAND: In your Exhibit
18 10, as you surveyed these walls, how many walls did
19 you find that were in excess of 10 feet in height?

20 MR. AGUGLIA: In excess of 10? Well, the
21 directions I gave the paralegal were, essentially, in
22 excess of 4, because Mr. Carome's position was
23 anything higher than 4 feet above grade, in his
24 position, was illegal.

25 And in fact, we have shown in one of our

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1 exhibit's Mr. Carome's house and the rear yard
2 retaining wall and under the Zoning Regulations, it is
3 legal. It's roughly between 6 and 8 feet. Do you
4 have a picture of that? This is Mr. Carome's
5 property. This is his backyard. There is his
6 retaining wall. Mr. Ardon, how high was that
7 retaining wall roughly?

8 MR. ARDON: 7 to 8 feet from the top of
9 the street.

10 MR. AGUGLIA: Now, there is his garage in
11 the -- his garage door seems to be open. It's below
12 grade and, therefore, perfectly consistent with the
13 Zoning Regulations, in my opinion, but it flunks his
14 own test that it cannot be more than 4 feet high
15 measured from the lowest grade of the property.

16 COMMISSIONER HILDEBRAND: Would you say,
17 based on your survey, that the typical height of
18 retaining walls in Wesley Heights is between 0 and 10
19 feet?

20 MR. AGUGLIA: Well, here is part of the
21 problem. I gave strict instructions that they could
22 not go into the backyard of any property at any time.
23 Basically, the survey shows there are 367 homes, 109
24 had retaining walls. Of 109 that had retaining walls,
25 27 were in excess of 4 feet in height. And again, I

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1 was going with the Carome test. Okay?

2 COMMISSIONER HILDEBRAND: But looking at
3 your survey, how many of those were over 10 feet in
4 height?

5 MR. AGUGLIA: It appears to be a handful
6 at most.

7 COMMISSIONER HILDEBRAND: Okay. Thank
8 you.

9 BOARD MEMBER ETHERLY: Let me, if I could,
10 Mr. Chair, and perhaps with the picture in mind there.
11 As I have taken a look at the Ranson case that was
12 cited in the appellant's materials, I perhaps don't
13 want to invite discussion, but just so you have a
14 sense of kind of what I'm struggling with. The
15 factual discussion of the court doesn't go into as
16 much detail as I would like to, but what's interesting
17 about that case and once again, of course, I forget my
18 law school term for it, it's of course not binding on
19 this body or anybody here in the District of Columbia.

20 But what's interesting about that case is
21 the court does attempt to get at this issue of simply
22 bringing in fill dirt to deal with a depression in the
23 landscape, so to speak. And in that particular case,
24 that was found to be something a little different from
25 what is otherwise understood in that particular

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1 setting as a typical, and this was the language of the
2 court, a typical retaining wall, which in that
3 particular case was looking at the BOCA Codes as they
4 existed in 1993, "A wall designed to resist a lateral
5 displacement of soils and other materials."

6 And I'm not suggesting that for our
7 definition here, but just in terms of the definition
8 that was employed in that particular case. I'm
9 wondering that as you look at something like this here
10 that's pictured and the piece that is the subject of
11 the instant appeal before us, is there a distinction
12 in that this is something of a more naturally
13 occurring condition?

14 And I want to be careful here, because I
15 don't want to necessarily try to, you know, work
16 through a test that adds some sense of, you know,
17 naturalness to some organic requirement. But I think
18 part of the discussion is much of the retaining wall
19 that is at issue here is artificial in some sense, and
20 so what you're essentially talking about is not a wall
21 to ensure against the lateral displacement of soils
22 and other materials, but it's essentially a perimeter
23 wall that is meant to simply, you know, provide a
24 boundary for the subject property that seems to be a
25 little bit of the message in that Ranson case.

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1 Once again, West Virginia, you know, far
2 away, great place to go for a weekend to a cabin, but
3 beyond that perhaps, you know, not binding on this.
4 But that's a little bit of what I'm struggling with.
5 And as I look at that picture and contemplate the --
6 not structure, the thing that's at issue here, that's
7 a little bit of what I'm struggling with.

8 MR. AGUGLIA: Well, two quick points. One
9 is, again, as I read the Ranson case, it was a
10 complete ruse. They built a fence higher than I
11 believe the height restrictions had allowed and they
12 said it was for their kids and for their dog and then
13 they said no, this doesn't comply. They never filed
14 an application for a building permit. And then they
15 just threw some dirt up, pretended it was a retaining
16 wall. It had no anchors, no application.

17 BOARD MEMBER ETHERLY: Okay.

18 MR. AGUGLIA: It was just a joke.
19 Remember, in our case he intended to use the same soil
20 that was there, except it didn't meet Building Codes,
21 because it was not fine enough. It had to be -- the
22 soil had to be --

23 BOARD MEMBER ETHERLY: So you did some
24 additional thing to it?

25 MR. AGUGLIA: Yes, it had to be tested

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1 before it was even brought in, period. And then it
2 had to be tested as it was compacted. But under your
3 scenario then, if I want to landscape my backyard and
4 anything over 4 feet under Mr. Carome's theory is
5 going to be illegal under the Zoning Regs even though
6 the Zoning Regs say there is an exception for --

7 BOARD MEMBER ETHERLY: For retaining
8 walls. Okay.

9 MR. AGUGLIA: Right. So maybe what you're
10 fighting with is the language. I feel you're fighting
11 with the existing language that's there and if you or
12 Mr. Carome or the Wesley Heights Overlay or the ANC
13 feels that it's too broad, then the direction is to go
14 to the Zoning Commission and get a text amendment.

15 BOARD MEMBER ETHERLY: Okay. And I think
16 that's an important point. If I'm struggling with
17 where is the limit here, where is the outer boundary
18 of this thing, it's not necessarily -- your position
19 would be it's not necessarily the place or the forum
20 to try to sort that out here and impose or shoehorn a
21 limit in. It needs to be worked out with Mr.
22 Hildebrand and his colleagues rather than torturously
23 worked out in this particular process.

24 MR. AGUGLIA: Thank you.

25 BOARD MEMBER ETHERLY: Okay. Thank you.

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1 Thank you, Mr. Chair.

2 CHAIRPERSON GRIFFIS: Ms. Miller?

3 VICE CHAIR MILLER: I just have one
4 question, Mr. Aguglia.

5 MR. AGUGLIA: Yes, ma'am.

6 VICE CHAIR MILLER: You have a few times
7 made reference to the legislative history of the
8 Wesley Heights Overlay District.

9 MR. AGUGLIA: Yes.

10 VICE CHAIR MILLER: You know, basically
11 going to the FAR, the lot occupancy and the front yard
12 setback.

13 MR. AGUGLIA: Correct.

14 VICE CHAIR MILLER: And I can see in the
15 regulations that that's the most specific parts of the
16 overlay. But I'm wondering just for my knowledge, did
17 you put anything in the record with respect to the
18 legislative history?

19 MR. AGUGLIA: Mr. Carome submitted the
20 entire legislative history, all the petitions leading
21 up to it, the Zoning Commission's report. And of
22 course, the most important thing is what the Zoning
23 Commission said when it amended the regs and they
24 talked about residences and liveable structures as
25 they related to the three items we just discussed, and

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1 then said there had to be a compromise and that tree
2 cutting was not going to be prohibited and they could
3 have impermeable surfaces, such as tennis courts and
4 swimming pools and it's all there.

5 VICE CHAIR MILLER: Thank you.

6 MR. AGUGLIA: All right. The legislative
7 history of section 2503 was submitted by Mr. Carome on
8 March 14, 2005 and the Wesley Heights Overlay on March
9 30, 2005, you know, virtually every document in that
10 particular Case 90-5.

11 VICE CHAIR MILLER: Thank you.

12 CHAIRPERSON GRIFFIS: She read it sometime
13 ago in the initial submission, but we'll re-review it.
14 Good. Follow-up questions? Anything else? Let's go
15 to cross.

16 MR. CAROME: Good afternoon, Mr. Ardon.

17 MR. ARDON: Good afternoon.

18 MR. CAROME: Since we have it up on the
19 board, did you view that area behind my house
20 yourself?

21 MR. ARDON: Yes, I did.

22 MR. CAROME: Do you know whether the wall
23 is holding up dirt that was there before the wall was
24 built or not?

25 MR. ARDON: I didn't walk in your

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1 property. I looked from the street. I mean, I can't
2 see what's behind the wall. It's all camouflaged with
3 all the vegetations in front of it.

4 CHAIRPERSON GRIFFIS: You don't know when
5 the dirt was placed behind that wall?

6 MR. ARDON: No.

7 MR. CAROME: For example, you don't know
8 whether the driveway was carved into the hill there
9 and so in order to carve the driveway in, you had to
10 put walls on either side of the drive in order to hold
11 the dirt that was there up? You don't know that,
12 right?

13 MR. ARDON: No.

14 MR. CAROME: Mr. Aguglia, you said that
15 the Economides' intended to use, wanted to use, the
16 dirt that was there and they only brought in different
17 dirt because they needed to use a different kind of
18 dirt. Is that right?

19 MR. AGUGLIA: I'm the lawyer. You're
20 cross examining the witness.

21 MR. CAROME: But did someone testify about
22 that? All right. Mr. Ardon, I'll ask you, because I
23 didn't hear you testify about that. I only heard Mr.
24 Aguglia talk about that. How much additional dirt was
25 brought in?

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1 MR. ARDON: A few hundred trucks.

2 MR. CAROME: A few hundred trucks?

3 MR. ARDON: Yes.

4 MR. CAROME: How many trucks of dirt were
5 removed?

6 MR. ARDON: It's hard to tell, 150, 100.
7 It's hard to tell. I mean, they were all hourly rate
8 trucks. I mean, they were not pay by load, so -- but
9 it was less than what was brought in if that's what
10 your question was.

11 MR. CAROME: Yes. There was a lot more
12 dirt brought in than was taken away. Is that right?

13 MR. ARDON: Yes.

14 MR. CAROME: Was it 10 times more dirt
15 brought in than taken away?

16 MR. ARDON: No.

17 MR. CAROME: Mr. Ardon, of the walls you
18 observed, the retaining walls you observed in the
19 neighborhood, how many of them were in the required
20 rear yard of a property? Do you have any idea?

21 MR. ARDON: No, they were all next to
22 parks out of the ones I looked at.

23 MR. CAROME: You only looked at walls that
24 were next to parks?

25 MR. ARDON: Yes.

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1 MR. CAROME: What about the -- there were
2 pictures of walls that were on the front streets. Did
3 you look at -- was that you who looked?

4 MR. ARDON: There was one, yes.

5 MR. CAROME: You looked at how many of
6 those?

7 MR. ARDON: One.

8 MR. CAROME: You looked at just one of
9 those?

10 MR. ARDON: Yes.

11 MR. CAROME: All right. Did you find out?
12 As to all the walls you looked at, do you have any
13 idea whether a permit was issued for the building of
14 that wall?

15 MR. ARDON: No, I don't.

16 MR. CAROME: As to all the walls you
17 looked at, do you have any idea whether a variance was
18 issued for the building of that wall?

19 MR. ARDON: No, I don't.

20 MR. CAROME: Were some of those walls
21 outside the R-1-A area?

22 MR. ARDON: I wouldn't know.

23 MR. CAROME: Some of those walls were
24 adjacent to high rise apartment buildings. Is that
25 right?

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1 MR. ARDON: Yes.

2 MR. CAROME: Do you know why the
3 Economides' put up this structure?

4 CHAIRPERSON GRIFFIS: What's the relevancy
5 of that?

6 MR. ARDON: I don't know. I can
7 speculate, but I don't know exactly what it was.

8 CHAIRPERSON GRIFFIS: I wouldn't. It
9 would probably waste all our time. Okay.

10 MR. CAROME: Was the purpose of this
11 structure to create a level area outside of the house
12 that they could use?

13 MR. ARDON: I believe so, yes.

14 MR. CAROME: Was a wall needed to hold up
15 any dirt or other substance that was already on the
16 property?

17 MR. ARDON: I think so, yes.

18 MR. CAROME: Let me restate that. Is the
19 wall here that has been built, the structure that's
20 been built, is that holding up any dirt or other
21 material that was on the site before the wall was
22 built?

23 MR. ARDON: Yes, it is holding -- other
24 material?

25 MR. CAROME: Yes.

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1 MR. ARDON: Yes.

2 MR. CAROME: What is it holding up?

3 MR. ARDON: Gravel.

4 MR. CAROME: And where is the gravel?

5 MR. ARDON: It's the drainage that goes at
6 the wall.

7 MR. CAROME: Alongside the wall?

8 MR. ARDON: Yes.

9 MR. CAROME: Right. So but it is -- I'm
10 asking a different question. Is there anything that
11 the wall is holding up that was already on the
12 property before the wall was built?

13 MR. ARDON: Dirt.

14 MR. CAROME: What dirt?

15 MR. ARDON: The dirt, some of the dirt was
16 used that they had in the property.

17 MR. CAROME: All right. Just looking at
18 the model, is it right that the grade level of the
19 property before the wall was put up at the rear of the
20 property was, approximately, at the bottom of -- where
21 the bottom of the wall -- where the visible bottom of
22 the wall now is?

23 CHAIRPERSON GRIFFIS: I think we ought to
24 tread lightly in using your model. He didn't testify
25 to your model. Do you want to use some of the

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1 testimony and evidence that he referred to or what are
2 we trying to establish here, where the base original
3 grade was before the construction started?

4 MR. CAROME: Yes. I mean, for example,
5 the suggestion that -- he has suggested that this is
6 holding up dirt that was already there, it would have
7 been dirt that was already there, except they would
8 have exchanged it. I'm making the point that that was
9 -- the area that is surrounded by the wall was an
10 entirely empty cavity beforehand.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. CAROME: And it's inconsistent with
13 the evidence, the testimony he was trying to give
14 here.

15 CHAIRPERSON GRIFFIS: I fully understand
16 your point. I'm just not sure you're going to make it
17 with that. I'm not sure that everyone on the Board is
18 going to understand it plus your model is a cutaway,
19 is it not? Where is the adjacent grade? You get my
20 point. I don't want actually answers to any of these,
21 because I think we're just stepping all too far. I
22 would think it would be better off if you use some of
23 the evidence that he spoke of of what or somehow
24 pointed to his testimony to establish what was there
25 and what was not there.

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1 MR. CAROME: All right.

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. CAROME: Thank you. There was
4 testimony either from Mr. Aguglia or Mr. Ardon, I
5 can't remember who, as to the Economides' wanting to,
6 you know, have a liveable land for their family and
7 children.

8 Is it correct, Mr. Ardon, that the
9 Aguglias lived at that property for upwards of 10 or
10 12 years beforehand, had their children and some of
11 their children are grown up?

12 MR. ARDON: I don't know about that.

13 MR. CAROME: I'm just asking a question.
14 Do you know whether that's correct or not.

15 MR. AGUGLIA: The Economides, please.

16 MR. CAROME: I'm sorry, did I --

17 MR. AGUGLIA: You said Aguglias.

18 MR. CAROME: I strongly apologize. Let me
19 restate the question.

20 CHAIRPERSON GRIFFIS: That's all right.
21 We understand the question.

22 MR. CAROME: Well, but just so the record
23 is clear if that's all right. Is it correct, Mr.
24 Ardon, if you know, that the Economides lived in that
25 house for, approximately, a decade beforehand doing

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1 this work and that some of their children are already
2 either in college or out of college?

3 MR. ARDON: I wouldn't know. I got there
4 back in June.

5 MR. CAROME: Mr. Ardon, you mentioned the
6 geogrids. Do the geogrids that were put into this
7 structure, do they go back as far as the Ryan plan
8 said they should go back?

9 MR. ARDON: Yes, they do.

10 MR. CAROME: When you took notes on the
11 heights of walls, did you make any notes of them?

12 MR. ARDON: Not particularly, no.

13 MR. CAROME: How did you remember the
14 heights of the walls?

15 MR. ARDON: Because I only looked at a
16 few.

17 MR. CAROME: You talked about a house at
18 4815 Dexter Terrace, I'm sorry, Dexter Street. Can we
19 put that back up? Do you know, Mr. Ardon, sitting
20 here today whether the wall in the center of that
21 structure, I'm sorry, the wall in the center of that
22 picture, how close that is to the lot line?

23 MR. ARDON: I don't know. I never went
24 inside the property. I seen it from the street.

25 MR. CAROME: So you don't have any idea

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1 how close that is to the lot line?

2 MR. ARDON: I don't know exactly where the
3 property line is.

4 MR. CAROME: All right. So you don't
5 know, for example, whether that's within 10 feet of
6 the lot line or not. Is that right?

7 MR. ARDON: I don't know.

8 MR. CAROME: Your answer was you don't
9 know?

10 MR. ARDON: I don't know, yes.

11 MR. CAROME: And do you know how high the
12 preexisting grade was behind that wall before that
13 wall was built?

14 MR. ARDON: No, I don't.

15 MR. CAROME: Do you know whether a permit
16 was issued for that wall?

17 MR. ARDON: No, I don't know.

18 MR. CAROME: Can we go back a couple of
19 pictures, please, forward a couple, this one. Do you
20 know where this picture is that we're looking at, what
21 that is, what the address for that is?

22 MR. ARDON: I don't know what the address
23 is.

24 MR. CAROME: And, Mr. Aguglia, do you?

25 MR. AGUGLIA: Yes, that's New Mexico

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1 Avenue, 2801 New Mexico. I believe it's attached to
2 our exhibits that I handed out. It's one of the
3 attachments.

4 CHAIRPERSON GRIFFIS: 2801 New Mexico
5 Avenue, Colonnade Apartments, borders Glover Archibald
6 Park.

7 MR. CAROME: Could we go to the picture of
8 the wall that is the old wall that's near the front of
9 the Economides' residence? Mr. Ardon, do you recall
10 testifying about this wall?

11 MR. ARDON: Yes.

12 MR. CAROME: Now, do you know behind that
13 wall -- do you know how high the wall is from the
14 ground above that wall or behind that wall?

15 MR. ARDON: I never been on the other side
16 of the wall.

17 MR. CAROME: Let me ask you. Just a
18 second. I'm going to -- just for the record, I'm
19 going to ask Mr. Ardon. I'm going to present to him
20 a picture of this wall from the other side. It is
21 Exhibit F. I'm sorry, it's part of Exhibit G to my
22 third affidavit filed shortly before the last hearing.
23 It's the same. It's the very same wall here just from
24 a different side.

25 CHAIRPERSON GRIFFIS: For what purpose?

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1 MR. CAROME: To make the point that this
2 wall, although shown from this side, looks like it was
3 up to 10 or 12 feet above grade and that, in fact,
4 it's very clear from the other side that it's no more
5 than 5 or 6 feet above grade and that, basically, this
6 was a driveway that was carved out to --

7 CHAIRPERSON GRIFFIS: I understand.

8 MR. CAROME: And the point is that the
9 Building Code height restriction says that the height
10 of a fence wall is to be measured from a grade on the
11 higher side. And so here, the preexisting grade
12 obviously was higher. I would just like to -- it's
13 already in the record at my Exhibit F if the witness
14 has no knowledge. It's just this is not a 10 foot
15 high retaining wall.

16 It's a 4 or 5 foot height retaining wall,
17 because they dug down and that's a big difference than
18 here where you have, obviously, created a big elevated
19 platform from something that wasn't there, so a lot
20 like my driveway where we took -- where there was a
21 hill carved out. You put a wall on either side.
22 That's a below grade retaining wall. This is not a
23 below grade retaining wall. That's my point.

24 CHAIRPERSON GRIFFIS: Okay. I don't think
25 we need to go any further.

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1 MR. CAROME: Okay. Thank you.

2 CHAIRPERSON GRIFFIS: And that was
3 probably worth more than him looking at the picture,
4 wasn't it?

5 MR. AGUGLIA: I would also point out that
6 the retaining wall is lower. The retaining wall at
7 issue is lower than this retaining wall.

8 MR. CAROME: Mr. Ardon, have you had any
9 training at all in survey work?

10 MR. ARDON: No, I don't.

11 MR. CAROME: Are you a surveyor?

12 MR. ARDON: No, I'm not.

13 MR. CAROME: The Tate residence that you
14 referred to, is it correct that the top of the
15 retaining wall here and the platform structure, the
16 so-called retaining wall, is it correct that the top
17 of that is higher than the roof of the Tate's house?

18 MR. ARDON: It looks to be about the same
19 plane as you look from the top.

20 MR. CAROME: Yes. So from their kitchen
21 window, for example, the Tates look out at this great
22 big wall. Is that right?

23 MR. ARDON: I would say so, yes.

24 MR. CAROME: Who is the person who was
25 present from Specialized Engineering every single day

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1 when testing was done, as you testified?

2 MR. ARDON: They had different persons.
3 It was not the same person every time.

4 MR. CAROME: Who were they? What were
5 their names?

6 MR. ARDON: One was Joe. I can't remember
7 the name of everybody and there were different guys
8 coming like one week at a time.

9 MR. CAROME: Okay.

10 MR. ARDON: They would just keep switching
11 all the time.

12 MR. CAROME: How many?

13 MR. ARDON: A handful.

14 MR. CAROME: More than five?

15 MR. ARDON: About five.

16 MR. CAROME: Can you remember the last
17 name of a single one of them?

18 MR. ARDON: No, I don't. I never asked
19 them their last name.

20 MR. CAROME: Can you remember the first
21 name of anyone other than Joe?

22 MR. ARDON: No.

23 CHAIRPERSON GRIFFIS: What's the point?

24 MR. ARDON: Joe was the one that was there
25 most of the time.

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1 CHAIRPERSON GRIFFIS: Do you want to know
2 their names? Okay.

3 MR. AGUGLIA: The salient point is that
4 they gave a seal.

5 CHAIRPERSON GRIFFIS: Yes, that's okay.
6 Let's keep going with the questions.

7 MR. CAROME: Thank you. Does the
8 structure here cover an area of the yard that is more
9 than just the area that is directly below them, the
10 mesa blocks?

11 MR. ARDON: I --

12 MR. CAROME: Let me ask it another way.
13 Geogrids, they extend out into the yard, right?

14 MR. ARDON: Yes.

15 MR. CAROME: And are they part of the
16 structure?

17 MR. ARDON: Yes, they are.

18 MR. CAROME: But part of the retaining
19 wall?

20 MR. ARDON: Yes, they are.

21 MR. CAROME: As you call it, you call it
22 a retaining wall, right?

23 MR. ARDON: It's retaining.

24 MR. CAROME: Do you know whether the DCRA
25 in permitting this structure considered the geogrid

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1 layers as part of the structure or not?

2 MR. ARDON: I don't know.

3 MR. CAROME: Should they have?

4 MR. AGUGLIA: Objection. That's an unfair
5 question. He is asking him if he knows what DCRA
6 thought during the regulatory process before he even
7 came onto the scene to build the wall.

8 CHAIRPERSON GRIFFIS: Understood. I would
9 agree. Move on.

10 MR. CAROME: Exhibit 9. Could we put that
11 before the witness, Mr. Aguglia? This is Exhibit 9 to
12 your submission today. Have you ever seen that
13 before, Mr. Ardon?

14 MR. ARDON: Yes, I have.

15 MR. CAROME: And have you ever seen that
16 together with attachments?

17 MR. ARDON: No. I never actually paid
18 that much attention to it more than my job is I'm
19 working construction. My job is to actually supervise
20 the wall as it's built and make sure we got permits
21 for it. I don't get into reading any of these. I
22 mean, it's not --

23 MR. CAROME: Did you ever, as you were
24 putting up this wall, look at reports that Specialized
25 Engineering prepared from their daily visits?

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1 MR. ARDON: Yes, I did.

2 MR. CAROME: And where are those reports?

3 MR. ARDON: They took them back to the
4 office to generate a data track for the certification
5 of the wall at the end.

6 MR. CAROME: So do you have them anymore?

7 MR. ARDON: No. They were given to the
8 owners and not to me.

9 MR. CAROME: So the owners have them now.
10 Is that right?

11 MR. ARDON: I assume they do.

12 MR. CAROME: I will just reiterate the
13 request I have made to you, Mr. Aguglia, several times
14 to, please, provide us with those attachments.

15 MR. AGUGLIA: As I have said, I put two
16 samples in the record.

17 MR. CAROME: That's all for now.

18 MR. AGUGLIA: As a point of order, I would
19 ask that the Park Service choose one person to cross
20 examine. Two is not really fair, either their
21 attorney or Mr. Murphy.

22 CHAIRPERSON GRIFFIS: Agreed. The Park
23 Service is represented, correct?

24 MR. BERNSTEIN: Yes.

25 CHAIRPERSON GRIFFIS: Okay. Is the ANC

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1 going to cross also? Good. Okay.

2 MR. BERNSTEIN: You can fill me in along
3 the way. Mr. Ardon, can we talk a little bit about
4 Mr. Kish?

5 MR. ARDON: Yes.

6 MR. BERNSTEIN: Do you know what Mr.
7 Kish's title is?

8 MR. ARDON: No, I don't.

9 MR. BERNSTEIN: Do you know what his job
10 is?

11 MR. ARDON: I don't know exactly what his
12 title is, no.

13 MR. BERNSTEIN: Okay. You don't know what
14 he does for the Park Service?

15 MR. ARDON: No, I don't.

16 MR. BERNSTEIN: Okay. Mr. Kish is a
17 boundary specialist.

18 CHAIRPERSON GRIFFIS: Okay. What's the
19 question?

20 MR. BERNSTEIN: Were you present while the
21 leveling pad was installed?

22 MR. ARDON: Yes.

23 MR. BERNSTEIN: Was Mr. Kish present while
24 the leveling pad was installed?

25 MR. ARDON: A few of the times, yes. The

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1 leveling pad was done in sections at a time.

2 MR. BERNSTEIN: So he was --

3 MR. ARDON: He seen maybe one or two. I
4 don't know how many he seen.

5 MR. BERNSTEIN: How big were the sections
6 and where were they?

7 MR. ARDON: How big?

8 MR. BERNSTEIN: Yes.

9 MR. ARDON: I mean, it would go from 5
10 feet to 30 feet. It would vary on -- depending on the
11 grade or the elevation.

12 MR. BERNSTEIN: So he inspected this with
13 you and you showed him where the leveling pad was?

14 MR. ARDON: He did not inspect it. He
15 seen it. I'm saying he seen it. He came and seen the
16 leveling pad, but he never actually came in and
17 inspected it himself.

18 MR. BERNSTEIN: So he didn't know exactly
19 what the span of the pad was that he saw? He didn't
20 see the entire leveling pad?

21 MR. ARDON: I don't know. I can't testify
22 to that, because I don't know.

23 MR. BERNSTEIN: Well, you just said that
24 he was with you and he only saw sections.

25 MR. ARDON: He would come in and he would

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1 see sections of the wall being built every time he
2 came in.

3 MR. BERNSTEIN: Okay.

4 MR. ARDON: He was not --

5 MR. BERNSTEIN: All right. I didn't ask
6 about the wall. I was just asking about the below
7 ground portion.

8 MR. ARDON: Yes.

9 MR. BERNSTEIN: The leveling pad. How
10 much of that did he see built with you there?

11 MR. ARDON: I don't remember.

12 MR. BERNSTEIN: Okay. Okay. Did Mr. Kish
13 ever --

14 MR. AGUGLIA: Mr. Bernstein, just a point
15 of clarification.

16 MR. BERNSTEIN: Yes.

17 MR. AGUGLIA: Mr. Kish is a boundary line
18 specialist?

19 MR. BERNSTEIN: He is the boundary line --
20 he is a boundary line specialist.

21 MR. AGUGLIA: Specialist.

22 MR. BERNSTEIN: For the Park Service, but
23 we have other people that actually establish the
24 boundaries for the Park Service. He monitors the
25 boundaries.

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1 Did Mr. Kish ever talk to you about the
2 above ground portion of the wall?

3 MR. ARDON: No.

4 MR. BERNSTEIN: So he then, therefore,
5 never approved it?

6 MR. ARDON: He never said. He came and
7 looked at the progress. He never said anything about
8 approving or disapproving anything. I don't think
9 that was in his job or anything.

10 MR. BERNSTEIN: Right. Okay. Was Mr.
11 Kish monitoring or looking at the boundary while the
12 construction was going on?

13 MR. ARDON: Yes.

14 MR. BERNSTEIN: Okay. Let's talk a little
15 bit about the leveling pad itself. So you have said
16 that you were present while the leveling pad was
17 constructed. How deep was the bottom of the leveling
18 pad below the original ground surface?

19 MR. ARDON: It will vary depending on the
20 elevation of the wall.

21 MR. BERNSTEIN: What is the deepest point
22 and what's the range of the variance?

23 MR. ARDON: Maybe it will go from 24
24 inches to 32 inches.

25 MR. BERNSTEIN: So it was never deeper

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1 than 32 inches, right?

2 MR. ARDON: Not that I can remember, no.

3 MR. BERNSTEIN: Okay. And the design
4 specifications for the leveling pad, you're familiar
5 with those, I would assume.

6 MR. ARDON: Yes, yes.

7 MR. BERNSTEIN: What was the assumptions
8 with regard to the density of soil underneath the
9 leveling pad? How dense should it have been in order
10 to support the wall at, say, 36 inches below the
11 surface and then again at 24? You said there was a
12 range.

13 MR. ARDON: Yes. What it is, it varies
14 depending on the type of soil we encounter after it
15 was being dug.

16 MR. BERNSTEIN: And what did you encounter
17 in terms of soil density?

18 CHAIRPERSON GRIFFIS: Why do we need to
19 know this?

20 MR. BERNSTEIN: It goes to the width of
21 the leveling pad and the encroachment onto park
22 property and whether or not the Zoning Administrator
23 should have known from the documents before him that
24 there was going to be an encroachment prior to permit
25 issuance.

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1 CHAIRPERSON GRIFFIS: And what would that
2 have been not in accordance with in terms of the
3 Zoning Regulations?

4 MR. BERNSTEIN: The Zoning Administrator
5 had an obligation not to permit something that
6 encroached on park property or anybody's property, for
7 that matter, and that was stated by Ms. Bell at the
8 last hearing. There was no authority to issue a
9 permit that would cause an encroachment. There was
10 information that indicated there would be an
11 encroachment.

12 MR. AGUGLIA: I have to object. This is
13 way beyond this witness' ability to testify. I mean,
14 the main point here is if Kish thought it was over the
15 line, why didn't he say stop?

16 CHAIRPERSON GRIFFIS: All right.

17 MR. AGUGLIA: He is the boundary line
18 specialist.

19 CHAIRPERSON GRIFFIS: Now, we're getting
20 into your rebuttal testimony there.

21 MR. AGUGLIA: Yes.

22 CHAIRPERSON GRIFFIS: But I still don't
23 understand what the Zoning Administrator's
24 jurisdiction was in terms of looking at the below
25 grade construction.

1 MR. BERNSTEIN: The below grade
2 construction is part and parcel of the wall itself.
3 He wasn't permitting one section, which is the below
4 grade, and then permitting the above grade.

5 CHAIRPERSON GRIFFIS: But he also wasn't
6 permitting the fire and life safety of the building
7 application, if there was any in this application. I
8 mean, he was looking only at the zoning issues that
9 were involved within the permit.

10 MR. BERNSTEIN: And the zoning issues go
11 to the location of the structure and the location of
12 the structure in this case, a portion of it, was on
13 park property and that was predictable.

14 CHAIRPERSON GRIFFIS: That portion that
15 was below grade?

16 MR. BERNSTEIN: The portion that was below
17 grade, but it was predicable from the documents before
18 the Zoning Administrator.

19 CHAIRPERSON GRIFFIS: Yes?

20 VICE CHAIR MILLER: This case has been
21 continued a few times and the record is pretty big, so
22 I apologize if this is in the record, but is there an
23 allegation that the Zoning Administrator erred in
24 approving a permit, which allowed an encroachment onto
25 park property?

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1 MR. BERNSTEIN: That's correct.

2 VICE CHAIR MILLER: Okay. And the Park
3 Service is supporting that allegation that is being
4 brought by the appellant. Is that it?

5 MR. CAROME: Yes. I mean, I'm sure that
6 there are multiple zoning violations associated with
7 the construction of the wall on park property. One of
8 them would be that that made it a party wall, which
9 brought in a whole additional overlay of restrictions
10 of the Building Code would have to be complied with in
11 advance of construction in order for this to be a
12 retaining wall, if that's what it is, constructed in
13 accordance with the Building Code.

14 VICE CHAIR MILLER: I'm just --

15 MR. CAROME: That's alleged in the
16 complaint, so that's just one. I'm sure that there
17 are other problems associated with this that are, in
18 fact, zoning problems.

19 VICE CHAIR MILLER: I'm just trying to get
20 to the relevance here of the question and just to
21 understand that there is that allegation of that
22 error. But do we have information in the record yet
23 that there actually has been an encroachment or is
24 that within your case?

25 MR. BERNSTEIN: We will be providing that

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1 information through our expert witnesses during our
2 case presentation.

3 VICE CHAIR MILLER: Okay.

4 CHAIRPERSON GRIFFIS: Well, that seems to
5 be more expeditious to do it that way, doesn't it?

6 MR. BERNSTEIN: I think it does, but I was
7 trying to respond to your question.

8 CHAIRPERSON GRIFFIS: No, you were
9 crossing on that issue.

10 MR. BERNSTEIN: But the question with
11 regard to the soil densities has to -- it goes to how
12 big that footer is and either way, I will withdraw
13 that question and let's move on. Okay.

14 MR. AGUGLIA: But for the record, my
15 continuing objection is if, in fact, which we deny,
16 it's a minuscule inch over the line, under the line,
17 it's a trespass issue not for this Board.

18 CHAIRPERSON GRIFFIS: Okay. Let's move
19 ahead.

20 MR. BERNSTEIN: What, if anything, was
21 done to the sub-grade prior to constructing the
22 leveling pad? What was done to the sub-grade?

23 MR. ARDON: Yes.

24 MR. BERNSTEIN: The soil underneath the
25 leveling pad prior to constructing the leveling pad?

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1 MR. ARDON: What was done to it?

2 MR. BERNSTEIN: Correct.

3 MR. ARDON: I don't, I mean --

4 MR. BERNSTEIN: Was it replaced with other
5 soil? Was it compacted?

6 MR. ARDON: It was compacted.

7 MR. BERNSTEIN: Or was it stable the way
8 it was?

9 MR. ARDON: The leveling pad of the wall?

10 MR. BERNSTEIN: Underneath, the soil
11 underneath the pad.

12 MR. ARDON: Okay.

13 MR. BERNSTEIN: Did you do anything to the
14 soil underneath the pad or did you just put the pad
15 down?

16 MR. ARDON: We put the pad down and we
17 compacted with gravel.

18 MR. BERNSTEIN: So you compacted the pad,
19 but you didn't compact the soil underneath it?

20 MR. ARDON: No.

21 MR. BERNSTEIN: Okay.

22 MR. ARDON: Not if it met the
23 requirements.

24 MR. BERNSTEIN: And did it meet the
25 requirements in every case?

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1 MR. ARDON: Yes.

2 MR. BERNSTEIN: And what were the
3 requirements for soil density at the levels that you--

4 MR. ARDON: I think it started at 5,000.
5 I can't remember exactly. It went up to 2,000 psi as
6 the wall got smaller.

7 MR. BERNSTEIN: So you found 5,000 psi?

8 MR. ARDON: At the bottom of the wall.

9 MR. BERNSTEIN: Okay. How wide is the
10 leveling pad?

11 MR. ARDON: I can't remember off the top
12 of my head.

13 MR. BERNSTEIN: That was a big project.

14 MR. ARDON: I know. I mean, it has been
15 awhile, I mean.

16 MR. BERNSTEIN: So --

17 MR. ARDON: It has been a few months. Let
18 me try to think. I think it was like 2 feet wide.

19 MR. BERNSTEIN: So 2 feet wide?

20 MR. ARDON: 2 feet wide or 30 inches wide.
21 I can't exactly remember how wide it was.

22 MR. BERNSTEIN: Okay. And was that the
23 portion that extended out the front of the wall or was
24 that --

25 MR. ARDON: That was the overall.

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1 MR. BERNSTEIN: The overall.

2 MR. ARDON: Overall leveling pad.

3 MR. BERNSTEIN: 24 inches?

4 MR. ARDON: 30 inches, 24 inches I think
5 it was.

6 MR. BERNSTEIN: 24.

7 MR. ARDON: Depending on what the density
8 was, yes.

9 MR. BERNSTEIN: Okay. And at 2,000 psi,
10 how wide should that have been?

11 MR. ARDON: That was up on the shorter
12 part of the wall, so it was smaller at the lower part
13 of the wall.

14 MR. BERNSTEIN: Okay. Pounds per square
15 foot, rather?

16 MR. ARDON: Yes.

17 MR. BERNSTEIN: How wide should it have
18 been if it was 2,000 pounds per square foot soil at
19 the base?

20 MR. ARDON: The footer requirement was
21 always the same width.

22 MR. BERNSTEIN: The footer was always the
23 same width?

24 MR. ARDON: Yes.

25 MR. BERNSTEIN: It didn't adjust?

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1 MR. ARDON: It didn't adjust, because the
2 wall was getting smaller, so it was less weight.

3 MR. BERNSTEIN: Okay. So at the largest
4 part, at 32 foot --

5 MR. ARDON: At the lowest point of the
6 wall.

7 MR. BERNSTEIN: And where it's 32 feet
8 tall and you had the most weight --

9 MR. ARDON: Yes.

10 MR. BERNSTEIN: -- what was the pounds per
11 square foot?

12 MR. ARDON: 5,000.

13 MR. BERNSTEIN: 5,000?

14 MR. ARDON: Yes.

15 MR. BERNSTEIN: Okay. Did you use any
16 geogrid in the leveling pad?

17 MR. ARDON: No, I did not.

18 MR. BERNSTEIN: Did the design call for
19 it?

20 MR. ARDON: It was an option.

21 MR. BERNSTEIN: It was an option? How did
22 you decide not to exercise the option?

23 MR. ARDON: I didn't decide. It was
24 instructed by the engineers supervising the job not
25 to.

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1 MR. BERNSTEIN: Okay. How did you know it
2 was an option?

3 MR. ARDON: It was part of the plans.

4 MR. BERNSTEIN: Did it say optional?

5 MR. ARDON: Yes, we had two options.

6 MR. BERNSTEIN: What was the option based
7 on?

8 MR. ARDON: Depending on the density of
9 the soil.

10 MR. BERNSTEIN: So --

11 MR. ARDON: And instead of going thicker
12 with your leveling pad, you could have gone smaller
13 and add grid inside of it, add a layer of leveling
14 pad, add a grid and then more leveling pad on top of
15 it.

16 MR. BERNSTEIN: So how deep was the
17 leveling pad? How deep was the leveling pad that you
18 poured, how many inches?

19 MR. ARDON: It was varied size. I mean,
20 it was -- it varied depending on what we encountered
21 as we were doing the footing.

22 MR. BERNSTEIN: Right. Okay. So give me
23 a range.

24 MR. ARDON: It went from 6 inches to 18
25 inches.

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1 MR. BERNSTEIN: To 18 inches.

2 MR. ARDON: I think it was 18 inches.

3 MR. BERNSTEIN: Okay. At what point on
4 the wall was it 6 inches and at what point was it 18?

5 MR. ARDON: It varies along the wall. It
6 was not just one particular section. It was like one
7 section was softer than the other, so we had to
8 increase the leveling pad to add more support to it.

9 MR. BERNSTEIN: Is that documented
10 somewhere?

11 MR. ARDON: It's documented by Specialized
12 Engineering.

13 MR. BERNSTEIN: So they know exactly?

14 MR. ARDON: They were supervising every
15 section of it.

16 MR. BERNSTEIN: They know exactly how deep
17 the leveling pad is?

18 MR. ARDON: Yes, sir.

19 MR. BERNSTEIN: All the way along the
20 wall?

21 MR. ARDON: Yes, they do.

22 MR. BERNSTEIN: And how wide?

23 MR. ARDON: Yes.

24 MR. BERNSTEIN: Okay. Was the first
25 course of mesa blocks centered on the leveling pad?

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1 MR. ARDON: No, it was not.

2 MR. BERNSTEIN: It was not centered? That
3 was the answer?

4 MR. ARDON: It was not centered.

5 MR. BERNSTEIN: Where was it?

6 MR. ARDON: More towards the front of the
7 wall.

8 MR. BERNSTEIN: Okay. Did a third party
9 come out and test the soils?

10 MR. ARDON: Yes.

11 MR. BERNSTEIN: Who was the third party?

12 MR. ARDON: Specialized Engineering.

13 MR. BERNSTEIN: And did they provide daily
14 reports on the soil tests?

15 MR. ARDON: Yes, they did.

16 MR. BERNSTEIN: And you received those
17 reports?

18 MR. ARDON: Not me.

19 CHAIRPERSON GRIFFIS: Haven't we been
20 through this and now who has them and where are they
21 and why don't you have them? Let's move on.

22 MR. BERNSTEIN: Okay. How many structures
23 of this type have you built?

24 MR. ARDON: A handful, five, five or six
25 maybe.

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1 MR. BERNSTEIN: And have they all been 30
2 feet tall?

3 MR. ARDON: No, they're not.

4 MR. BERNSTEIN: Have they had anywhere
5 near 6,150 tons of soil behind them?

6 CHAIRPERSON GRIFFIS: Where are we going
7 with this?

8 MR. BERNSTEIN: I'm just trying to
9 establish his expertise on the wall, whether it was
10 constructed properly.

11 MR. AGUGLIA: But again, this is beyond
12 the Board's jurisdiction. This is a zoning case.

13 CHAIRPERSON GRIFFIS: Right, right.

14 MR. AGUGLIA: If they signed off on it,
15 does it violate the Zoning Regs? If there is a
16 construction problem, again, he has got another forum.

17 CHAIRPERSON GRIFFIS: Agreed. Still
18 waiting to get back to the zoning issues.

19 MR. BERNSTEIN: Okay. How many different
20 design sections were there in the structure, design
21 sections?

22 MR. ARDON: Design sections of?

23 MR. BERNSTEIN: Of the structure. How
24 many sections were of a different design?

25 MR. ARDON: I don't --

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1 MR. BERNSTEIN: Okay. Yes, different
2 height, different layers of geogrid, different soil
3 densities. How many sections were there?

4 MR. ARDON: Well, the soil density of the
5 compaction will never change. It was always the same.
6 It was just the section of the wall. The wall got
7 smaller. The grade got smaller, too. So it went from
8 whatever, 27 to 14 or whatever, if that's what you're
9 asking.

10 MR. BERNSTEIN: Okay. Did you use the
11 same type of geogrid throughout the structure?

12 MR. ARDON: No, I did not.

13 MR. BERNSTEIN: How many layers of geogrid
14 in the structure?

15 MR. ARDON: I'm trying to remember. I
16 think it was 14 or 15 down at the lowest point.

17 MR. BERNSTEIN: Is that total or not?

18 MR. ARDON: Sorry?

19 MR. BERNSTEIN: Is that total or not?

20 MR. ARDON: What do you mean total?

21 MR. AGUGLIA: Again, before you answer,
22 where are we going with this? I just --

23 MR. BERNSTEIN: This gets to the question
24 of whether it's a retaining wall or a structure.

25 CHAIRPERSON GRIFFIS: It does?

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1 MR. BERNSTEIN: I think it does.

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. BERNSTEIN: How is this thing
4 constructed? How many layers of geogrid did we need
5 and how much soil?

6 CHAIRPERSON GRIFFIS: What's your
7 understanding of when it would become a structure?
8 How many layers of geogrid would it take or not take?

9 MR. BERNSTEIN: Well, I think what I would
10 like to do is defer that question to our professional
11 engineer who will be on shortly.

12 CHAIRPERSON GRIFFIS: Okay. Then let's
13 hear it from him. Any other questions?

14 MR. BERNSTEIN: When you took those
15 pictures of the other walls along the park boundary,
16 you have already said that you --

17 MR. ARDON: I didn't take those pictures.

18 MR. BERNSTEIN: Oh, you didn't take the
19 pictures? So you --

20 MR. ARDON: I walk.

21 MR. BERNSTEIN: Okay.

22 MR. ARDON: After Mr. Aguglia gave me
23 those pictures, I walked the place and I saw those.

24 MR. BERNSTEIN: So you don't know how far
25 from the park boundary those walls are, because you

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1 weren't there?

2 MR. ARDON: I was there. I said I walked
3 those properties.

4 MR. BERNSTEIN: Okay. You were there.

5 MR. ARDON: Yes.

6 MR. BERNSTEIN: But you don't know where
7 the boundary was, because you are not a boundary
8 expert, right?

9 MR. ARDON: Well, you can see the boundary
10 stick.

11 MR. BERNSTEIN: Well, but do you know what
12 the boundary stick means?

13 MR. ARDON: No, I don't.

14 MR. BERNSTEIN: Because for the Park
15 Service it doesn't always mean that that's where the
16 boundary is. Do you know where the markers were on
17 the walls, the memorials, the cornerstones on the
18 property lines? Did you go to look for that?

19 MR. ARDON: On the properties, on the
20 other walls?

21 MR. BERNSTEIN: On the other walls.

22 MR. ARDON: Yes.

23 MR. BERNSTEIN: So you looked for the
24 boundary markers?

25 MR. ARDON: The boundary markers.

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1 MR. BERNSTEIN: The corners, not the
2 sticks, not the sticks of the Park Service.

3 MR. ARDON: That's the boundary markers.

4 MR. BERNSTEIN: No, it's not.

5 MR. ARDON: Not the property line sticks,
6 you mean?

7 MR. BERNSTEIN: I'm talking about the
8 actual memorials for the property. You don't know
9 where those were?

10 MR. ARDON: No.

11 MR. BERNSTEIN: Okay.

12 MR. AGUGLIA: How do you define memorials?

13 MR. BERNSTEIN: Well, it's usually a metal
14 pipe or some other permanent structure that has been
15 placed at the corners of the property. Those sticks
16 along the line aren't the actual boundary. Okay.

17 There was some discussion of weep holes on
18 those walls, that there was water coming out. Did you
19 witness any water coming out into the park?

20 MR. ARDON: I could see wet pipe. I
21 didn't actually see the water coming out.

22 MR. BERNSTEIN: So you don't know what
23 kind of quantity was coming out?

24 (Whereupon, at 6:00 p.m. the Public
25 Hearing continued into the evening session.)

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1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 (6:00 p.m.)

3 MR. ARDON: No, I don't.

4 MR. BERNSTEIN: Okay. You -- okay. Never
5 mind. I think I'm done. Yes, that's true. What is
6 the purpose of a weep hole?

7 MR. ARDON: For the excess water to drain,
8 so it won't create pressure against the wall.

9 MR. BERNSTEIN: Okay. How much water
10 should be coming out of a weep hole on a wall such as
11 the one that you constructed?

12 MR. ARDON: It depends on the rain.

13 MR. BERNSTEIN: Depends on the rain. Did
14 you supervise the installation of all of the outlets
15 on the wall?

16 MR. ARDON: I would say 90 percent of the
17 time, yes.

18 MR. BERNSTEIN: But do you know where all
19 the outlets on the wall are?

20 MR. ARDON: Yes.

21 MR. BERNSTEIN: Okay. When you and I
22 first met, we had gone out to take a look at that
23 property.

24 MR. ARDON: Yes.

25 MR. BERNSTEIN: What were we actually

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1 looking for? What were we trying to assess?

2 MR. ARDON: The placement of the wall, the
3 weep holes in the wall and location.

4 MR. BERNSTEIN: That was one. Damage to
5 the park property was another.

6 MR. ARDON: Yes.

7 MR. AGUGLIA: But again, where are we
8 going with this? If, in fact, there was damage to the
9 park property, which we don't concede, it's got
10 another forum. The question is how is that a zoning
11 violation?

12 CHAIRPERSON GRIFFIS: Agreed.

13 MR. BERNSTEIN: Okay.

14 CHAIRPERSON GRIFFIS: You can cover a lot
15 more ground I think in your case presentation.

16 MR. BERNSTEIN: Okay. That goes beyond
17 the scope and I don't want to do that. I've got no
18 questions.

19 MR. MURPHY: We need to go to -- can we
20 get an assistant to find these photographs, since we
21 don't have --

22 CHAIRPERSON GRIFFIS: Which photograph are
23 you looking for?

24 MR. MURPHY: Somebody needs to come up to
25 operate it.

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1 CHAIRPERSON GRIFFIS: I know. Which
2 photograph do you want?

3 MR. BERNSTEIN: Would it be okay if I
4 stepped down and turned the questions over to Mr.
5 Murphy?

6 CHAIRPERSON GRIFFIS: What are we
7 questioning? The photographs?

8 MR. MURPHY: Mr. Chairman, we saw many
9 photographs and I think it would be valuable to have.

10 CHAIRPERSON GRIFFIS: I know. Which
11 photographs do you want to see?

12 MR. MURPHY: Well, that's what I'm trying
13 to establish. It appeared to have been a photograph
14 showing a staircase and a corner boundary. I think it
15 was at Wisconsin Avenue. The descriptions went beyond
16 my ability to relate to which one it was. I noticed
17 the able assistant was able to find these very
18 rapidly.

19 CHAIRPERSON GRIFFIS: Well, let's go.
20 Let's grab those quickly. Mr. Murphy?

21 MR. MURPHY: Can I ask for that
22 assistance?

23 CHAIRPERSON GRIFFIS: Do you have any
24 questions?

25 MR. MURPHY: Thank you for your

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1 forbearance, Mr. Chairman.

2 CHAIRPERSON GRIFFIS: Do you want the
3 curved retaining wall? Is that the one you're looking
4 for from the street?

5 MR. MURPHY: No, sir.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. AGUGLIA: Are you talking about Dale
8 Carlia Parkway?

9 MR. MURPHY: That one right there. Now,
10 this photograph --

11 CHAIRPERSON GRIFFIS: It's 45th Street?
12 Is that right? Is it 45th?

13 MR. MURPHY: I guess. I had the advantage
14 of a pointer.

15 MR. ARDON: That was the New Mexico.

16 MR. MURPHY: Were you talking about a
17 hollow pipe here? Was that what you were describing?

18 MR. ARDON: That was the boundary.

19 MR. MURPHY: That right there?

20 MR. ARDON: Yes.

21 MR. MURPHY: Okay.

22 MR. ARDON: It says boundary on it.

23 MR. MURPHY: And it said something?

24 MR. ARDON: Yes.

25 MR. MURPHY: Okay. And what was this

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1 here? Did you recall what that was?

2 MR. ARDON: (No audible answer.)

3 MR. MURPHY: Okay. And but based on this,
4 did you decide that that was the boundary between one
5 property and another? Is that the basis of your --

6 MR. ARDON: I'm saying appears. I'm not
7 saying that it is, because I'm not certain of it.

8 MR. MURPHY: Okay. And do you know that
9 it was park land and private land on one side or the
10 other of the boundary?

11 MR. ARDON: No, I don't.

12 MR. MURPHY: Okay. Based on your field
13 observation, you thought it was?

14 MR. ARDON: I thought it was, but I'm not
15 certain of it.

16 MR. MURPHY: Okay.

17 MR. AGUGLIA: But here we go with, you
18 know, I suggested that we have one person cross
19 examine him. They designed his counsel to cross
20 examine him. It was unfair to have two.

21 MR. MURPHY: With all due respect --

22 CHAIRPERSON GRIFFIS: I know.

23 MR. MURPHY: -- Mr. Chair.

24 CHAIRPERSON GRIFFIS: We let it go because
25 we needed to know this information. Mr. Murphy,

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1 what's the address on this photograph?

2 MR. MURPHY: I have no idea.

3 CHAIRPERSON GRIFFIS: I'm sorry. I didn't
4 mean to ask you that.

5 MR. AGUGLIA: The address is 2801.

6 CHAIRPERSON GRIFFIS: This is 2801?

7 MR. AGUGLIA: New Mexico Avenue.

8 CHAIRPERSON GRIFFIS: New Mexico. Indeed,
9 it is. Okay.

10 MR. AGUGLIA: The --

11 CHAIRPERSON GRIFFIS: This is New Mexico.
12 Mr. Murphy, on the right side of that photograph is a
13 large retaining wall or that is what has been pictured
14 with something on top of it, correct?

15 MR. MURPHY: Well, I believe it's --

16 CHAIRPERSON GRIFFIS: What's on the left
17 side?

18 MR. MURPHY: -- a retaining wall, but I
19 don't know if it's part of a structure that was --

20 CHAIRPERSON GRIFFIS: Okay. I didn't want
21 to argue about it.

22 MR. MURPHY: -- approved by -- no, no.

23 CHAIRPERSON GRIFFIS: It looks like, oh,
24 gosh, on the right side of that photograph there is
25 something. On the left side, first of all, are you

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1 familiar with what this photograph is?

2 MR. MURPHY: No, I'm not.

3 CHAIRPERSON GRIFFIS: All right. Forget
4 it.

5 MR. MURPHY: No, what I'm trying to --

6 CHAIRPERSON GRIFFIS: Let's move on to
7 another question.

8 MR. MURPHY: -- determine is whether the
9 witness --

10 CHAIRPERSON GRIFFIS: I know. Let's move
11 on. Next question.

12 MR. MURPHY: All right. Could we go to
13 the photo of what you described as Dunbarton Oaks and
14 that stone wall. All right. Thank you. Now, you
15 said, and I can't remember who said this, that this
16 wall was next to park land. Now, your description of
17 that is based on what? Did somebody tell you it was
18 next to park land? I'm asking you, because I believe
19 this was your testimony.

20 MR. AGUGLIA: First of all, Mr. Ardon did
21 view this site personally.

22 CHAIRPERSON GRIFFIS: Right.

23 MR. AGUGLIA: All right. When you enter
24 the site in upper Georgetown, there is a big chain
25 link fence and it says park property. And there's a

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1 Park Mechanum Road that circles along side and this
2 retaining wall is completely surrounded -- surrounds
3 the park.

4 MR. MURPHY: No.

5 MR. AGUGLIA: The park land.

6 MR. MURPHY: Could you identify what was
7 behind the photographer that was taking this picture?
8 Was this P Street, R Street? I don't know. I can't
9 get an orientation here. I'm trying to be very
10 specific, because, Mr. Chair --

11 MR. AGUGLIA: It's Q Street.

12 MR. MURPHY: Q Street.

13 MR. CAROME: Is Mr. Aguglia going to be
14 sworn as a witness?

15 VICE CHAIR MILLER: Yes.

16 CHAIRPERSON GRIFFIS: Yes, we were about
17 to cut that out.

18 MR. CAROME: Okay.

19 CHAIRPERSON GRIFFIS: Let's move ahead.

20 MR. MURPHY: If we indicated after a
21 review of these sites on the ground, would you be
22 surprised if we indicated some of these were District
23 roadways, District highways rather than park land?
24 Would it make any -- based on what you were told,
25 would that change your opinion at all?

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1 MR. ARDON: (No audible answer.)

2 MR. MURPHY: Okay. Let's move on. Could
3 we go to the Dale Carlia photograph? Can you tell me
4 exactly where this is?

5 MR. ARDON: That's on the -- coming from
6 Massachusetts Avenue and Dale Carlia on the left, on
7 the left side. As soon as you turn in from the
8 circle, it's on the left side.

9 MR. MURPHY: I see.

10 MR. ARDON: You can see it from the
11 parkway.

12 MR. MURPHY: And do you know that that is
13 joining national park land?

14 MR. ARDON: I walked from the corner and
15 it says park property. I didn't walk all the way
16 behind it.

17 MR. MURPHY: I see. Would it make any
18 difference if that was Dale Carlia Parkway that has
19 been a District road for the last 70 years?

20 MR. ARDON: It will make a difference.

21 MR. MURPHY: To you based on your saying
22 it was next to park land?

23 MR. AGUGLIA: There seems to be, excuse
24 me, a misleading question. The question is it
25 fronting on a park, not -- we didn't say it was

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1 fronting on a District road.

2 MR. MURPHY: Mr. Chair, I'm trying to
3 establish that these photos may be an interesting tour
4 of the city and it may show many retaining walls. But
5 the assertion that (a) they are next to park land or
6 (b) next to any park land remains to be seen. We
7 would be happy to go and find these sites, visit the
8 sites and make comment if we were given the
9 opportunity.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. MURPHY: The other piece is --

12 CHAIRPERSON GRIFFIS: I've heard a little
13 bit of the Zoning Regulations and I have yet to find
14 where retaining walls are prohibited, required or
15 somehow are defined by the adjacency, direct line or
16 non-adjacency of park land. So I don't really see the
17 relevance of figuring this out.

18 MR. MURPHY: Well, I think the relevance
19 may be that some of these cases were by actions of the
20 Board of Zoning Adjustment in itself. Some might be
21 unit developments that included these walls as part of
22 either mitigation or a consideration. And I think
23 that it's very unfair to you and to us to have them
24 lumped together and not have that winnowing out of
25 what these things actually are. And that's why we

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1 would be happy to take that opportunity if afforded
2 it.

3 MR. AGUGLIA: All these pictures --

4 CHAIRPERSON GRIFFIS: But that opens up an
5 endless hearing.

6 MR. MURPHY: All right. Well, we would --

7 MR. AGUGLIA: All these pictures have been
8 in the record for more than a month, except the Dale
9 Carlia Parkway. All the other ones have been in.

10 UNIDENTIFIED SPEAKER: That's not right.

11 CHAIRPERSON GRIFFIS: Let's move ahead.

12 MR. MURPHY: Could we go to -- let's talk
13 about this. Mr. Ardon, you're a mason?

14 MR. ARDON: Yes.

15 MR. MURPHY: Are you familiar with the
16 construction technique that built this wall?

17 MR. ARDON: No, I'm not.

18 MR. MURPHY: All right. And so you don't
19 know what's holding it up?

20 MR. ARDON: No, I don't.

21 MR. MURPHY: And you don't know what its
22 footer is?

23 CHAIRPERSON GRIFFIS: He answered the
24 question.

25 MR. MURPHY: All right. Okay. Could you

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1 go to the wall that is next to the Economides? Would
2 you show that? Now, that appears to be a masonry
3 wall. Do you think that's a masonry wall?

4 MR. ARDON: That's what it appears to be,
5 yes.

6 MR. MURPHY: Do you know how it is held
7 up?

8 MR. ARDON: No, I don't.

9 MR. MURPHY: All right. So basically,
10 visually you can't tell?

11 MR. ARDON: No, I don't.

12 MR. MURPHY: Okay. Okay. Now, I think
13 you said, but it may have been Mr. Aguglia, that --
14 and I got a little confused on this, too. How long
15 have you been on this project? How long have you been
16 working on the residence of the Economides at Dexter
17 Terrace?

18 MR. ARDON: Since end of June.

19 MR. MURPHY: End of June?

20 MR. ARDON: Of 2004.

21 MR. MURPHY: And so you only worked on the
22 structure that's in the back yard, the structure and
23 the fill?

24 MR. ARDON: That's when I started work on
25 the wall, yes.

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1 MR. MURPHY: I see. And the condition of
2 the rear yard at that time, the back yard, behind the
3 house, down the park land was there a great amount of
4 fill?

5 MR. ARDON: It was a big pile of dirt
6 behind the house.

7 MR. MURPHY: I see. Were there trees and
8 debris also in that dirt?

9 MR. ARDON: Yes, it was.

10 MR. MURPHY: And broken concrete and so
11 on?

12 MR. ARDON: I don't remember seeing
13 concrete, but I know I remember seeing trees.

14 MR. MURPHY: All right.

15 MR. ARDON: Branches and stuff, yes.

16 MR. MURPHY: Was it the demolished house?
17 Was there any of the old brick bed and concrete block
18 from the demolished portions of the house there?

19 MR. ARDON: I don't remember encountering
20 any brick or concrete, but I know we found trees and
21 stuff, you know, tree branches and stuff.

22 MR. MURPHY: Okay.

23 MR. ARDON: Yes.

24 MR. MURPHY: And Mr. Kish and you had
25 conversations, I presume, or you witnessed

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1 conversations concerning storm water runoff and
2 erosion control?

3 MR. ARDON: Yes.

4 MR. MURPHY: And did you build or
5 construct at somebody else's direction the filter, the
6 silt cloth and erosion control at the bottom of the
7 Economides' property? Did you build that?

8 MR. ARDON: Yes.

9 MR. MURPHY: I see. And did you build
10 that according to District standards?

11 CHAIRPERSON GRIFFIS: Why are we talking
12 about that?

13 MR. MURPHY: I'm just trying to find out
14 what criteria he would have used. Did he build it
15 according to Park Service instruction?

16 CHAIRPERSON GRIFFIS: I know.

17 MR. MURPHY: Or District standards?

18 CHAIRPERSON GRIFFIS: We're still in the
19 room, too. What does that have to do with the appeal
20 that we're hearing? How does that go to the zoning
21 issue, the Zoning Administrator properly reviewing the
22 application or not properly reviewing?

23 MR. MURPHY: Well, an awful lot of the
24 construction seems to have been delegated to the mason
25 building the wall. And the question is were there

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1 others on this?

2 CHAIRPERSON GRIFFIS: And the Zoning
3 Administrator would have known that looking at the
4 drawings when he stamped it approved or denied that
5 somehow there would be construction issues of who is
6 delegating who is going to build it.

7 MR. MURPHY: Okay. Thank you. I'll move
8 on.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. MURPHY: So you never saw the backyard
11 before it was disturbed?

12 MR. ARDON: No.

13 MR. MURPHY: All right. So you would have
14 no way to observe or make comment on the conditions of
15 the rear yard? I have heard someone, and I think it
16 may have been Mr. Aguglia, say that it was too steep
17 for use. That must not have been you.

18 MR. ARDON: No.

19 MR. AGUGLIA: If you look at the model in
20 front of you, sir?

21 MR. MURPHY: No, I know. I'm looking at
22 the condition of the ground and the evidence. I was
23 hoping to find you would say something. Okay. I
24 think that will cover my questions. Thank you, sir.

25 CHAIRPERSON GRIFFIS: Thank you very much.

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1 Does the ANC have cross?

2 MS. GATES: Alma Gates, ANC-3D. Good
3 afternoon, Mr. Ardon.

4 MR. ARDON: Good afternoon.

5 MS. GATES: Did I hear you say you didn't
6 know how the wall was held up or was built? Just a
7 minute ago.

8 MR. ARDON: I do know how the wall was
9 built.

10 CHAIRPERSON GRIFFIS: He was looking at a
11 different wall.

12 MS. GATES: Oh.

13 CHAIRPERSON GRIFFIS: He was looking at a
14 wall he didn't build.

15 MS. GATES: Oh, thank you.

16 CHAIRPERSON GRIFFIS: Sure.

17 MS. GATES: At the beginning of your
18 presentation, you said that the residents of 4825 have
19 been concerned about the safety of the wall. We were
20 talking about the fence.

21 MR. ARDON: I never said that.

22 MS. GATES: Mr. Aguglia?

23 MR. ARDON: Mr. Aguglia, it might have
24 been.

25 MS. GATES: You said that, I believe?

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1 MR. AGUGLIA: That was regarding the
2 objection that I made to Mr. Carome, who wanted to
3 include the construction of the fence in this appeal
4 and that was rejected, so I think we're done with
5 that.

6 MS. GATES: Okay. I don't know what
7 geogrid looks like. Is it something like the cover on
8 a swimming pool that is pulled tight in the winter?

9 MR. ARDON: No, it's not. It's made of
10 like -- it looks like strings, so it's not a solid
11 sheet. It's made of strings so that dirt will
12 penetrate over it.

13 MS. GATES: But once all the earth is
14 compacted and the geogrid layers are put in, what is
15 there is solid, isn't it? I mean, isn't that the
16 point of it? That it will be solid earth and geogrid
17 behind the wall?

18 MR. ARDON: The purpose of the geogrid is
19 to contain the wall in size. It won't pull out with
20 the pressure.

21 MS. GATES: Right.

22 MR. ARDON: Not to compact the ground. Is
23 that what you meant? I didn't follow the last part of
24 your question. But the geogrid pulls the wall back
25 into the -- it's in the backfill area, so it won't

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1 pull out with the pressure of the dirt or any water
2 that comes through it.

3 MS. GATES: But now the geogrid and the
4 wall are one piece?

5 MR. ARDON: Yes, they are.

6 MS. GATES: Okay. So it's not just a wall
7 any more? It's not just a wall any more, it's
8 connected to this geogrid?

9 MR. ARDON: Yes, it is.

10 MS. GATES: They are all one piece?

11 MR. ARDON: Yes, it is connected to it,
12 yes.

13 MS. GATES: Okay.

14 MR. AGUGLIA: I have to object to the
15 phrasing of the question. She is trying to get him to
16 admit that it's not a retaining wall.

17 CHAIRPERSON GRIFFIS: Right.

18 MR. AGUGLIA: Because they use an anchor
19 and they need an anchor to make it meet the Building
20 Code.

21 CHAIRPERSON GRIFFIS: Right.

22 MR. AGUGLIA: So that's my objection.

23 CHAIRPERSON GRIFFIS: Agreed.

24 MS. GATES: If we look at the retaining
25 walls that you have presented --

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1 MR. ARDON: That Mr. Aguglia presented.

2 MS. GATES: Whoever presented them. Would
3 it appear that any of the retaining walls were built
4 to retain earth that existed prior to construction?

5 MR. ARDON: It might have been.

6 MS. GATES: Pardon?

7 MR. ARDON: I can't say that it is or it
8 wasn't, because I don't know.

9 MS. GATES: So you don't know if earth was
10 removed?

11 MR. ARDON: No, I don't know.

12 MS. GATES: From behind those walls.
13 Okay. I noticed on the plans for the wall, those
14 plans --

15 MR. ARDON: Yes.

16 MS. GATES: -- it calls for a super silt
17 fence and straw bales.

18 MR. ARDON: Yes.

19 MS. GATES: Has a super silt fence with
20 chain link ever been in place there?

21 MR. ARDON: It was in place all the time
22 during the construction, yes.

23 MS. GATES: And the straw bales?

24 MR. ARDON: Yes.

25 MS. GATES: But you saw something I didn't

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1 see.

2 MR. ARDON: Well, it not --

3 MS. GATES: Because now there are two silt
4 fences there.

5 MR. ARDON: It's no longer there now. It
6 was taken up after the wall was completed.

7 CHAIRPERSON GRIFFIS: Okay. It's part of
8 the Building Code requirement for construction, is it
9 not?

10 MR. ARDON: Yes.

11 CHAIRPERSON GRIFFIS: This doesn't have
12 anything to do with the retaining fence or wall.

13 MS. GATES: All right. Are any of the
14 walls that you have presented 420 feet long?

15 MR. ARDON: I never -- I didn't measure
16 any of them, so I don't know.

17 MS. GATES: Mr. Hildebrand asked if the
18 way this is constructed, this wall, this rear yard,
19 this structure would create a new ground plane.

20 MR. ARDON: I believe that's yes.

21 MS. GATES: You think it would. Okay.

22 MR. AGUGLIA: I'm sorry, I didn't
23 understand the question. Please, would you state the
24 question again? I didn't understand.

25 MS. GATES: Would the structure that has

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1 been built create a new ground plane?

2 MR. AGUGLIA: A new ground what?

3 MS. GATES: Plane.

4 MR. ARDON: I guess what you mean is level
5 the ground?

6 MS. GATES: A new level for the backyard.

7 MR. ARDON: I guess, yes.

8 MS. GATES: Okay. Specialized
9 Engineering, are they employed by Mr. Economides?

10 MR. ARDON: They are independent
11 contractors.

12 MS. GATES: But are they in the employ of
13 Mr. Economides?

14 MR. ARDON: I don't know.

15 MS. GATES: Does he pay them?

16 MR. ARDON: I'm sure he pay them, I mean.

17 CHAIRPERSON GRIFFIS: Are you sure? Are
18 you sure he paid them?

19 MR. ARDON: Well, I guess he paid them.
20 I mean, I can't assert to that.

21 CHAIRPERSON GRIFFIS: I don't think he can
22 answer that question.

23 MS. GATES: And they certified the wall?

24 MR. ARDON: Yes.

25 MS. GATES: Did we have any third party

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1 inspector certify the wall?

2 MR. AGUGLIA: I would object and say that
3 Specialized Engineering was a third party, unless she
4 is going to say that they were -- can prove that they
5 were in collusion and fraud with the owner.

6 MS. GATES: No, but I think they might be
7 thought to have a conflict of interest.

8 CHAIRPERSON GRIFFIS: So that would be a
9 DCRA issue.

10 MS. GATES: A letter was sent by the ANC
11 regarding the dirt that was used. When Mr. Aguglia
12 came initially he told us that more absorbent dirt was
13 used. Then in his submission, he scratched that out
14 and said dirt that would drain more easily was used.
15 And then today I heard him say again more absorbent
16 dirt. Do you know where this dirt came from?

17 MR. ARDON: Yes.

18 MS. GATES: Where?

19 MR. ARDON: Rockwood Parkway.

20 MS. GATES: Okay. And do you know
21 anything about the dirt in Spring Valley?

22 MR. ARDON: I don't know exactly what your
23 question is.

24 MS. GATES: Okay.

25 MR. ARDON: Do you know if this dirt was

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1 tested at all?

2 MR. ARDON: Yes, it was.

3 MS. GATES: For chemical munitions?

4 MR. ARDON: It was tested, yes.

5 MS. GATES: And where is that report?

6 MR. ARDON: You would have to ask Mr.
7 Aguglia. I don't know where the report is.

8 CHAIRPERSON GRIFFIS: As serious as that
9 is, which I certainly hope it was all tested coming
10 in, whether it was or wasn't I'm not sure there is
11 much we could do about it in this forum.

12 MS. GATES: Well --

13 CHAIRPERSON GRIFFIS: Would you agree?

14 MS. GATES: -- I think there is a lot we
15 can do about it.

16 CHAIRPERSON GRIFFIS: Is that right?

17 MS. GATES: The earth can be removed if
18 it's contaminated.

19 CHAIRPERSON GRIFFIS: You think I have the
20 authority of removing the earth on that property
21 because I find that it is contaminated?

22 MS. GATES: Perhaps the Zoning
23 Administrator does.

24 CHAIRPERSON GRIFFIS: I would argue that
25 also, but let's move ahead.

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1 MS. GATES: Okay. Can you give me the
2 address on Rockwood Parkway?

3 MR. ARDON: I don't know exactly what the
4 exact address is. I guess, Mr. Aguglia can get it for
5 you, because I don't know what the actual number of
6 the house is.

7 MS. GATES: We did request a letter from
8 you.

9 MR. ARDON: The house it is under
10 construction though. The dirt was hauled out, so I'm
11 sure it would be easy to get the number from them.

12 MS. GATES: Did you take 6,000 cubic yards
13 of dirt out of the Economides' yard?

14 MR. ARDON: Not me, no.

15 MS. GATES: Were 6,000 cubic yards
16 removed?

17 MR. ARDON: I don't know. I don't know
18 exactly how many were removed.

19 MS. GATES: Well, 6,000 were brought in.

20 MR. ARDON: I didn't keep track of how
21 much dirt was brought in. That was not my job. I was
22 just as my requirement just to backfill, so I would
23 just either ask for more or less.

24 MS. GATES: No more questions.

25 CHAIRPERSON GRIFFIS: Okay. Just for

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1 clarification. The question was did you remove the
2 dirt and your point was that's not your scope of work?

3 MR. ARDON: No, they hired an independent
4 subcontractor.

5 CHAIRPERSON GRIFFIS: All right. So it's
6 not your scope of work.

7 MR. ARDON: To haul the dirt away.

8 CHAIRPERSON GRIFFIS: You just said this
9 has got to go. This is how much I need. This is
10 what's moving around?

11 MR. ARDON: Exactly.

12 CHAIRPERSON GRIFFIS: I got you. Okay.
13 Anything else? Is that everybody?

14 MR. AGUGLIA: Two questions.

15 CHAIRPERSON GRIFFIS: Two. Redirect.

16 MR. AGUGLIA: Only two.

17 CHAIRPERSON GRIFFIS: Good.

18 MR. AGUGLIA: Did Mr. Kish the Park
19 Service Boundary Line Specialist ever tell you to stop
20 work because you were over the line?

21 MR. ARDON: No, he never.

22 MR. AGUGLIA: And was that based on the
23 reasonable assumption that the private survey stake as
24 well as the park survey stake showed you had plenty of
25 room?

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1 MR. ARDON: Yes.

2 MR. AGUGLIA: Thank you.

3 CHAIRPERSON GRIFFIS: How do you know
4 that?

5 MR. ARDON: They were there and then the
6 second survey was done as the wall was being built
7 just to make sure that all was --

8 CHAIRPERSON GRIFFIS: So that process of
9 staking actually occurred while you were no --

10 MR. ARDON: There wasn't one done before
11 we started. It was one in the middle of the process
12 just to double check and make sure nothing has been
13 moved.

14 CHAIRPERSON GRIFFIS: Okay. Good. Thank
15 you.

16 MR. AGUGLIA: Thank you.

17 CHAIRPERSON GRIFFIS: Cross on those two
18 questions, answers?

19 MR. MURPHY: I'm curious. You watched the
20 private surveyors do work surveying the rear property
21 line of the Economides' property. Is that correct?

22 MR. ARDON: Yes, I did.

23 MR. MURPHY: Okay. And did they point out
24 to you or did you ever see a drawing that showed that
25 they had found corners of the Economides' property?

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1 MR. ARDON: I didn't.

2 MR. MURPHY: Would you know what a corner
3 is? Excuse me.

4 MR. ARDON: I know what a corner is.

5 MR. MURPHY: Okay.

6 MR. ARDON: I never -- I always find their
7 stakes. I never actually went and checked a corner
8 myself, personally, no.

9 MR. MURPHY: Okay. And on any project
10 you've ever worked on, have you ever seen a --

11 MR. ARDON: No, I would not.

12 MR. MURPHY: -- property corner?

13 MR. ARDON: No, rely on their survey.

14 MR. MURPHY: I see. So you are relying on
15 their survey and their survey is marked how?

16 MR. ARDON: I don't know exactly how it's
17 done.

18 MR. MURPHY: Well, no, no, no. How would
19 you in the field see a survey and know that that is
20 the property? Is there some sign? Is there a nail on
21 a stake? Is there any kind of device, a piece of
22 orange flag?

23 MR. ARDON: They just insert stakes in the
24 ground.

25 MR. MURPHY: They set stakes?

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1 MR. ARDON: The stakes on the ground, yes.

2 MR. MURPHY: And do they mark?

3 MR. ARDON: And then they mark them.

4 MR. MURPHY: They mark the stakes?

5 MR. ARDON: Yes.

6 MR. MURPHY: On the top, so that you can
7 say that's exactly the boundary?

8 MR. ARDON: Yes.

9 MR. MURPHY: Okay. Did they mark on this
10 site the top of the wood stakes to say this is exactly
11 the boundary?

12 MR. ARDON: Yes, they did when they came
13 in.

14 MR. MURPHY: Okay. And how did they mark
15 that, with a nail or a pencil or what?

16 MR. ARDON: They wrapped a string on the
17 stakes.

18 MR. MURPHY: They wrapped a string around
19 the stake?

20 MR. ARDON: Yes.

21 MR. MURPHY: I see.

22 MR. ARDON: It was pretty visible, so they
23 had an orange string on it.

24 MR. MURPHY: An orange string. So they
25 stretched string between the wooden stakes?

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1 MR. ARDON: No, no. They will actually
2 tie the string to the stakes and leave them in there.

3 MR. MURPHY: I see. Okay. Did they tell
4 you that that was the boundary?

5 MR. ARDON: The told me it was the
6 property line.

7 MR. MURPHY: They told you it was the
8 property line?

9 MR. ARDON: Yes.

10 MR. MURPHY: Okay. Did Mr. Kish tell you
11 anything about property line?

12 MR. ARDON: Not exactly, no.

13 MR. MURPHY: Okay.

14 CHAIRPERSON GRIFFIS: Like the secret of
15 the property line?

16 MR. MURPHY: Thank you.

17 CHAIRPERSON GRIFFIS: What do you mean
18 tell him anything about it?

19 MR. MURPHY: There is a -- the convention
20 is that the plastic stakes that say park boundary are
21 similar to a posted sign which is approximate
22 boundary. They are not the legal designation. There
23 are iron stakes on the site that have been there for
24 well over 40 years, apparently, that have shown the
25 corners. I wanted to point out that Mr. Aguglia

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1 apparently was not aware that those corners were in
2 existence and within theory have been very important
3 to the surveyor, any surveyor on the site. Thank you.

4 CHAIRPERSON GRIFFIS: Agreed.

5 MR. CAROME: Just a couple of very quick
6 questions. Mr. Ardon, there are -- the wall as built
7 was not straight, was it? It had some bulges and
8 curves in it.

9 MR. ARDON: Yes.

10 MR. CAROME: Is that right?

11 MR. ARDON: Yes.

12 MR. CAROME: Why is that?

13 MR. ARDON: As to the request of the
14 homeowners.

15 MR. CAROME: And what was the purpose for
16 that request?

17 MR. ARDON: Because when we started, the
18 wall was calling for being a foot plus or minus.

19 CHAIRPERSON GRIFFIS: Wait a minute.
20 Wait. We're not getting into bulges and curves.

21 MR. ARDON: 3 feet or so.

22 CHAIRPERSON GRIFFIS: I don't understand.
23 We're crossing the last two questions.

24 MR. AGUGLIA: Right.

25 MR. CAROME: This goes to the very same

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1 boundary issue. I think that the witness was just
2 answering that this had to do with the boundary issue.

3 MR. AGUGLIA: Would you rephrase? I
4 didn't hear the question. I'm sorry. Would you
5 restate the question?

6 MR. CAROME: I think the witness
7 understands the question.

8 MR. AGUGLIA: Could you restate the
9 question for me?

10 MR. CAROME: I don't remember exactly what
11 it was. I would like the witness to answer the
12 question that he was just -- answer the question that
13 he was just answering.

14 MR. AGUGLIA: Well, I'm going to object as
15 beyond rebuttal.

16 MR. CAROME: All right. Go ahead.

17 MR. ARDON: What was the question?

18 MR. AGUGLIA: No, no, no. The Board will
19 rule. I have objected.

20 CHAIRPERSON GRIFFIS: All right. I don't
21 see where the bulging of the wall comes into the
22 answer.

23 MR. CAROME: Well, let me go right to the
24 point then.

25 CHAIRPERSON GRIFFIS: Go ahead.

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1 MR. CAROME: Was the reason that there was
2 a sharp curve in the wall was a concern that the wall
3 was getting too close to the park boundary?

4 MR. ARDON: No, actually it was to bring
5 the wall closest to the park line, because it was too
6 far off when we started in the corner, not as the
7 plans show.

8 MR. CAROME: Did the plans call for the
9 wall to be perfectly straight?

10 MR. ARDON: Yes, they did.

11 MR. CAROME: No further questions.

12 CHAIRPERSON GRIFFIS: What does that mean,
13 perfectly straight?

14 MR. ARDON: Straight, straight wall,
15 straight line.

16 CHAIRPERSON GRIFFIS: Straight like on the
17 ground?

18 MR. ARDON: So you see the wall is
19 straight.

20 CHAIRPERSON GRIFFIS: Or straight like up
21 in the air?

22 MR. ARDON: No, straight. When you look
23 at the wall parallel, you will see it as straight
24 instead of having it ready as wall.

25 CHAIRPERSON GRIFFIS: Really? I mean,

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1 isn't the construction of that wall to lean back
2 against itself?

3 MR. ARDON: Yes, but it's still straight.
4 Nothing is leaning, but the whole thing is leaning all
5 at once.

6 CHAIRPERSON GRIFFIS: It's being straight.

7 MR. ARDON: So the line from the top.

8 CHAIRPERSON GRIFFIS: It's a straight wall
9 that isn't straight.

10 MR. CAROME: Just to be clear, we're
11 talking straight. We're talking about if the --

12 MR. ARDON: The top of the wall being
13 straight basically.

14 CHAIRPERSON GRIFFIS: Okay. Thanks for
15 the fun. Okay. Now, oh, gosh, let me follow-up,
16 because I think it's critical on the point of getting
17 into this boundary and where the boundary was taken
18 and all of that element. Of course, it's fairly clear
19 the fact that this survey by the Park Service and all
20 the other engineers was during construction.

21 MR. ARDON: Yes.

22 CHAIRPERSON GRIFFIS: Of course, the Board
23 is interested in that as it sets the stage for how it
24 was built according to plans or not according to the
25 plans reviewed and whether those plans that were

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1 reviewed and approved were actually reviewed and
2 approved correctly. Is your statement, let me ask
3 you, after this survey and the staking and the
4 restaking or whatever the boundaries were set, was it
5 built according to the plans that were approved by the
6 Zoning Administrator?

7 MR. ARDON: Yes.

8 CHAIRPERSON GRIFFIS: Okay. Let's move
9 ahead then. Yes?

10 MR. CAROME: Just one further question,
11 just to follow-up on that. Didn't the plans from the
12 Zoning Administrator call for the wall to run -- each
13 exterior wall of the structure to run in a straight
14 line?

15 MR. ARDON: Yes.

16 MR. CAROME: So in that respect, it was
17 not built in accordance with the plans, right?

18 MR. ARDON: We called the engineer to have
19 it -- you know, before we actually did anything, we
20 called the engineer to actually ask him if it was
21 possible to do anything. But he say it will have
22 nothing to do with the structure, with the, what do
23 you call it, strength or building of the wall by not
24 being straight. So it was not an issue.

25 MR. CAROME: When during the construction

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1 did that call get placed?

2 MR. ARDON: Half the way during
3 construction.

4 MR. CAROME: And how placed that call?

5 MR. ARDON: Well, I believe it was my
6 boss.

7 MR. CAROME: And who was that?

8 MR. ARDON: Robert McCoy.

9 MR. CAROME: Thank you.

10 CHAIRPERSON GRIFFIS: So that we can get
11 clarity on this, I think there has been a conceding
12 that it wasn't built directly on a straight line in
13 accordance with the drawings. And I think it's open
14 then to the fact of whether that rises to a zoning
15 issue or not. But other than that, go ahead.

16 MR. CAROME: Yes. I think that's right.
17 I mean, also didn't the plans call for one of the
18 corners to be made into a radius?

19 MR. ARDON: Yes.

20 MR. CAROME: And why wasn't that done?

21 MR. ARDON: Because we probably never
22 because the sharp corner that they have with the
23 property will not allow us to actually turn the wall.
24 So we had to make a square corner to actually have the
25 wall placed where the plan calls for.

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1 MR. CAROME: Was there any written record
2 made of either of these calls to the engineers?

3 CHAIRPERSON GRIFFIS: I still don't see
4 the relevancy.

5 MR. ARDON: Yes.

6 CHAIRPERSON GRIFFIS: Wait I still don't
7 see the relevancy for this.

8 MR. CAROME: I think it goes to
9 credibility.

10 CHAIRPERSON GRIFFIS: Credibility?

11 MR. CAROME: Yes.

12 CHAIRPERSON GRIFFIS: Of who?

13 MR. CAROME: Of this witness.

14 MR. AGUGLIA: Really?

15 MR. CAROME: Yes.

16 CHAIRPERSON GRIFFIS: All right. I don't
17 agree. I don't think that is time well spent
18 actually. Let's move ahead. What else do we have?
19 Any redirect?

20 MR. AGUGLIA: No, that's --

21 CHAIRPERSON GRIFFIS: Redirect?

22 MR. AGUGLIA: Redirect I did.

23 CHAIRPERSON GRIFFIS: You did.

24 MR. AGUGLIA: I did want to point out
25 again that as a factual matter, he testified that the

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1 far right stake --

2 CHAIRPERSON GRIFFIS: You want to save it
3 for closing?

4 MR. AGUGLIA: Pardon me?

5 CHAIRPERSON GRIFFIS: Do you want to save
6 it for closing?

7 MR. AGUGLIA: Save it for closing.

8 CHAIRPERSON GRIFFIS: Good. Okay. Where
9 are we? We're ready for the ANC. Am I correct? Let
10 me see a show of hands of folks that are here to
11 present testimony. Persons to present testimony. You
12 are, sir, too? Okay.

13 MR. WATSON: With the ANC.

14 CHAIRPERSON GRIFFIS: You're going to be
15 called as a witness of the ANC? Ms. Gates, are you
16 calling this gentleman as a witness?

17 MS. GATES: No, I'm calling him as the
18 president of --

19 CHAIRPERSON GRIFFIS: Now, don't be nasty.
20 Very good. Go ahead.

21 MS. GATES: I wasn't sure who was getting
22 that. Sorry. I couldn't resist.

23 CHAIRPERSON GRIFFIS: That's fair. It's
24 after 6:00. We can all joke.

25 MS. GATES: Mr. Watson.

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1 CHAIRPERSON GRIFFIS: I just want to be
2 sure to get through the rest of the process going.
3 And he just indicated he is coming up as a witness to
4 the ANC's case. We're at the case presentation.

5 MS. GATES: Yes, he is a witness.

6 CHAIRPERSON GRIFFIS: So he's part of your
7 case presentation.

8 MS. GATES: He is going to testify with
9 me.

10 CHAIRPERSON GRIFFIS: Excuse me. We have
11 one person who know has decided not to, because I have
12 been so obscure to give testimony. And now we'll have
13 further clarification from Mr. Murphy.

14 MR. MURPHY: Mr. Chair?

15 CHAIRPERSON GRIFFIS: Yes.

16 MR. MURPHY: I presume that the Park
17 Service will have its time to testify. We have not
18 been given that period and I wanted to make sure we
19 had our time.

20 CHAIRPERSON GRIFFIS: I can't imagine why
21 you would miss that in the chronology.

22 MR. MURPHY: We got of -- we in a sense
23 are --

24 CHAIRPERSON GRIFFIS: Are we going out of
25 sequence?

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1 MR. MURPHY: I don't know. I'm asking
2 you.

3 CHAIRPERSON GRIFFIS: It would be my
4 understanding that the ANC is next and then we go to
5 intervenor.

6 MR. MURPHY: Okay. That would be the Park
7 Service then, intervenor.

8 CHAIRPERSON GRIFFIS: Exactly.

9 MR. MURPHY: Thank you.

10 CHAIRPERSON GRIFFIS: Am I missing my
11 official chronology here? Yes, no, maybe I confused
12 Mr. Murphy at asking who persons to give testimony.
13 I'm sorry. It's getting close to 7:00. I figured
14 people have been here all day, persons that we might
15 get them in and then get into the intervenor's case
16 and the ANC.

17 I want to do the ANC next, but I also want
18 to take just 10 minutes, so we can all get some colder
19 air on us or something. Anyway stretch your legs.
20 But I anticipate continuing, depending on -- actually,
21 Ms. Gates, what's your estimation of time for your
22 case presentation?

23 MS. GATES: Maybe maximum 30 minutes.

24 CHAIRPERSON GRIFFIS: Okay. I think we
25 will get through the ANC and the intervenor this

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1 evening.

2 MR. MURPHY: Okay.

3 CHAIRPERSON GRIFFIS: Okay. Yes?

4 MS. BELL: Excuse me, I just wanted to
5 raise one point. I haven't received anything, a
6 submission, so if there is any submissions that were
7 filed today, the Government hasn't received a copy.

8 CHAIRPERSON GRIFFIS: >From anybody?

9 MS. BELL: From anybody.

10 CHAIRPERSON GRIFFIS: How could you guys
11 leave her out? That's the second --

12 MS. GATES: Neither has the ANC.

13 CHAIRPERSON GRIFFIS: First she didn't
14 have a chair and how she doesn't get any of the
15 paperwork. All right. Now, we've got a 10 minute
16 break. We're going to make sure that she's got
17 everything that she needs to. I don't think the ANC
18 submitted anything into the record today. Is that
19 correct?

20 MS. GATES: It's all with the testimony.

21 CHAIRPERSON GRIFFIS: Indeed. We've got
22 filing from the appellant, so we can get that clear
23 and get them copies. We'll be back.

24 (Whereupon, at 6:52 p.m. a recess until
25 7:09 p.m.)

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1 CHAIRPERSON GRIFFIS: Very well. Let's
2 resume. Yes, a question?

3 MS. GATES: Well, no, more than that. I
4 may take a bit more than -- together we may take a bit
5 more than half an hour, but I know.

6 CHAIRPERSON GRIFFIS: Just be
7 deliberative.

8 MS. GATES: Thank you.

9 CHAIRPERSON GRIFFIS: Good. Let's go.

10 MS. GATES: Good afternoon, Chairman
11 Griffis and Members of the Board. My name is Alma
12 Gates. I'm Chair of the ANC-3D. My home is located
13 at 4911 Ashby Street, just southwest of the subject
14 property.

15 Advisory Neighborhood Commission 3D
16 submitted its letter to the Board on February 15,
17 2005. Our discussions did not stray into pending
18 federal allegations against Economides in this case
19 and, therefore, the scope of the letter submitted by
20 the Commission was limited to the Commission's support
21 of the appeal based on Title 11 in the Wesley Heights
22 Overlay.

23 With me today is George Watson, an
24 environmental scientist and ornithologist, president
25 of the Wesley Heights Historical Society and the

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1 founding member of ANC-3D Zoning Committee.

2 Acclamation Park, Fulton Street Park, by
3 whatever name you know it, has acquired a structure
4 that would have made Abraham Lincoln proud for by the
5 end of 1863 a series of 68 enclosed forts and 93
6 batteries known today as the Fort Circle Park
7 surrounded Washington, D.C. Among them is Battery
8 Kemball, which is located directly across 49th Street
9 from Wesley Heights Park at Fulton Street.

10 Fulton Street Park, a narrow stretch of
11 federal park land that connects Glover Archibald Park
12 with Battery Kemball Park has taken on the look of a
13 civil war encampment. Now almost complete, a fortress
14 like structure looms over the park land and its
15 irregular 30 foot wall threatens anyone walking or
16 jogging on the path beneath it.

17 The wall at 4825 Dexter Terrace fails to
18 meet the most basic objectives of the National Capital
19 Open Space System that encourages the protection and
20 restoration of the ecological values of
21 environmentally sensitive areas, such as steep slopes,
22 the development of a continuous trail system for
23 pedestrians by connecting the Fort Circle Parks and
24 the protection of the park networks from adverse
25 impacts.

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1 Further it states these natural areas
2 should be protected from border development that would
3 adversely impact their natural resources and visual
4 quality. The use of generous building setbacks,
5 height controls, the donation of scenic easements or
6 the transfer of development rights from adjacent land
7 owners should be pursued to ensue protection.

8 The retaining wall is not in harmony with
9 Title 11, section 1541, the Wesley Heights Overlay
10 District. Prior to the construction of the wall, the
11 rear yard of the 4825 Dexter Terrace property was
12 wooden, park-like and steeply sloped. The adjacent
13 park land was enjoyed by hikers and joggers. Once the
14 trees lost their leaves last fall, it was clear the
15 view of the park from 49th Street had changed
16 irreversibly. Where there were trees, there now
17 exists a huge structure that looms above the park.

18 The retaining wall impacts federal park
19 land. The federal parks within the region form its
20 prime building blocks. Under Carome Exhibit 45, the
21 National Park Service boundary markers are shown with
22 the wall almost touching them. There is clear
23 evidence that the park land has been impacted as a
24 number of trees on federal property were felled. Silt
25 has blocked the drain pipe that once allowed park

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1 runoff to flow on 49th Street and into the creek in
2 Battery Kemball Park, and a new stream of water spews
3 silt laden water from the base of the wall into the
4 Fulton Street Park stream.

5 George Watson and I watched during the
6 last substantial rain as a torrent of water came
7 pouring from the wall and ran into the Fulton Street
8 Park stream and then broke through the silt dike under
9 49th Street. Not only are the region's prime building
10 blocks being destroyed, the city's infrastructure is
11 being undermined by excessive, uncontrolled water from
12 4825 Dexter Terrace.

13 The Commission noted that over the course
14 of wall construction several permits were issued. Not
15 one of the construction permit application's
16 environmental questionnaires answers the question
17 "Will the proposed project involve construction that
18 will disturb the sediment in rivers, streams or wet
19 lands?" Each application checks that box no.

20 The attached 2001 and 2002 transcripts
21 from the Department of Health Office of Adjudication
22 and Hearings indicate failure to comply with an
23 approved Erosion and Sedimentation Control Plan and
24 storm water management criteria for two properties on
25 47th Street. And in 2005, adverse impacts to

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1 surrounding properties and the environment are
2 illustrated in the attached photographs taken of
3 properties being developed in the 5500 block of
4 Macarthur Boulevard. Both of these properties were
5 developed by Economides Development.

6 The Wesley Heights Overlay is meant to
7 preserve and enhance the low density character of
8 Wesley Heights by regulating construction and
9 alteration of residential and other buildings in the
10 area. Wesley Heights was built in the 1920s as a
11 development created and controlled by WC and AN
12 Miller. The original Wesley Heights architect
13 strongly valued balance between a home's design and
14 the topography of the home's lot, as well as balance
15 between each home and the whole neighborhood.

16 Situated among four parks, Wesley Heights
17 imparted a special sylvan quality that was
18 successfully maintained while still providing the
19 flexibility to meet the changing needs of those who
20 live in the neighborhood. The combined wall structure
21 and residents represent more than the 30 percent lot
22 coverage permitted in the Overlay District. These
23 combined structures increase density, restrict access
24 to light and air for the neighboring properties and
25 are precisely what the overlay is meant to prevent.

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1 The wall is built on the rear inside
2 property lines and does not meet the setback
3 requirements set out in Title 11, sections 404 and
4 405. The wall has provided the entire rear of the
5 4825 Dexter Terrace with a three dimensional quality.
6 The required setbacks have been raised and sit 30 feet
7 in the air. Section 403.2 states "No structure,
8 including its accessory building, shall occupy its lot
9 in excess of the percentage of lot occupancy set
10 forth."

11 Given that the retaining wall is built on
12 the property line, exceeds 4 feet in height and its
13 geogrid interior constitutes an attached structure
14 that extends to the edges of the property, the rear
15 and side yard setback requirements are not being met.

16 The Zoning Administrator did err in
17 permitting this walled structure. It is attached to
18 a geogrid core interspersed with compacted soil that
19 is similar in nature to a retaining wall filled with
20 concrete and topped with grass. The walled structure
21 and its attendant house occupy considerably more than
22 30 percent of the lot and, therefore, violate the
23 provisions of the Wesley Heights Overlay District.

24 Every tree on the rear lot was cut down to
25 construct the walled structure in an overlay district

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1 established to preserve existing trees and access to
2 air and light. The structure is clearly more than 4
3 feet high within the required rear yard, and its
4 elevated state does not meet the setback requirements
5 for a rear yard or a side yard.

6 And despite its record of inadequate
7 implementation of erosion control and storm water
8 management measures on previous construction sites,
9 permits were issued that have resulted in adverse
10 impacts to federal park land, to immediate neighbors
11 and to the community surrounding 4825 Dexter terrace.
12 The walled structure should be removed.

13 CHAIRPERSON GRIFFIS: Thank you.

14 MS. GATES: I now turn to Mr. Watson.

15 MR. WATSON: Good evening. I didn't know
16 whether to say good evening or good afternoon. At any
17 rate, I can say "kalispera sas."

18 CHAIRPERSON GRIFFIS: We like to fake it
19 for the record. Just say good morning. Go ahead.

20 MR. WATSON: I am George Watson, a long
21 time member of the ANC-3D Zoning Committee and almost
22 36 year resident at 4323 Cathedral Avenue in Wesley
23 Heights and President of the Wesley Heights Historical
24 Society.

25 The Society was established in 1989 in

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1 response to perceived overdevelopment that threatened
2 to change the character of our neighborhood. Our
3 members sponsored a zoning overlay that was adopted by
4 the Zoning Commission in 1993 as a means for keeping
5 new buildings or additions to existing homes to a
6 reasonable level. Ours was one of the very first
7 overlays in Washington and has served as a model for
8 others that were subsequently adopted by the Zoning
9 Commission.

10 As I have stated several times previously
11 in testimony before the BZA, "We are, therefore,
12 interested in seeing to it that the existing Zoning
13 Regulations, as well as the Wesley Heights Overlay
14 District, are enforced in an even-handed manner that
15 allows reasonable additions and modifications to
16 existing homes, but do not impact negatively on the
17 character of the entire neighborhood or the quality of
18 life of the immediate neighbors."

19 I now come before you to discuss the
20 appeal, in fact, of Fulton Street resident, Patrick
21 Drake Carome, of a huge wall and platform that he
22 looks out on one block away over Acclamation or Wesley
23 Heights Park constructed by Frank and Dina Economides.
24 It is Mr. Carome's contention that the wall and
25 platform, together with the house on the lot, are in

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1 violation of the Wesley Heights Overlay District and
2 that it is an environmental threat to both Acclamation
3 and Battery Kemball Parks, part of Rock Creek National
4 Park System.

5 We agree with Mr. Carome and,
6 incidentally, with Mr. Toye Bello, in testimony and
7 cross examination in this case that the wall and
8 platform constitute structures in the sense of the
9 D.C. Zoning Code, Title 11, DCMR paragraph 199 and
10 definitions on pages 1 through 128 and that, in
11 addition to the newly constructed house on Square
12 1381, Lot 806, exceed the 30 percent lot coverage and
13 the maximum floor area ratio allowed in the overlay,
14 and that the structures clearly intrude on both the
15 backyard and two side yard setbacks in the underlying
16 R-1-A Zoning Regulations.

17 In addition, the height of the wall,
18 towering to almost 30 feet above the steeply sloping
19 grade at its base abutting the park, exceeds that
20 allowed in the D.C. Code in backyards. The filled-in
21 platform sloping upwards toward the house and back of
22 the wall is part and parcel of the violation and its
23 surface measurements should be considered in the total
24 structure measurement on that lot.

25 Mr. Carome has already mentioned the

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1 uninviting and unneighborly visual aspect of the wall
2 on joggers and dog walkers traversing the two block
3 long park path between 49th Street beside Battery
4 Kemball Park and Foxhall Road. It is truly
5 overwhelming to see that towering structure.

6 Mrs. Gates has already identified me as an
7 environmental scientist and ornithologist. I have a
8 Ph.D. degree in zoology from Yale University. For 23
9 years I was curator of birds in the Smithsonian's
10 Museum of Natural History and later, for 27 years, was
11 a member of the National Geographic Society Committee
12 for Research and Exploration. Based on that
13 scientific training and experience, I present you some
14 environmental observations and documentation.

15 The wall and platform structures have an
16 additional environmental impact on adjacent
17 residential lots, particularly on Acclamation National
18 Park. Mr. Carome has already mentioned the drainage
19 and water runoff into the park, and I can attest to
20 the muddy seep from under the straw bales and flimsy
21 plastic sheeting when I visited the slippery slope in
22 early March, March 10th, for photo documentation.

23 But there is another impact that is less
24 apparent, although definitely intuitive. The new wall
25 shades the park's slope to its north and delays the

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1 melting of snow, thus changing the micro-environment.
2 Two photographs that I took of Wesley Heights slopes
3 in lots at the intersection of 44th and Hawthorne
4 Streets in the early morning of Thursday, March 10th
5 graphically illustrate that effect. Those are the two
6 first photographs that I have supplied to you.

7 A light snow had fallen the day before and
8 snow still covered almost all of the north facing
9 slope beneath the modest 4 foot high retaining wall
10 and wood fence at 2927 44th Street. In contrast, in
11 front of the house immediately across 44th Street at
12 4400 Hawthorne Street where there is no wall below the
13 U hedge, only a smidgen of snow persists. This
14 shading effect is even greater under the 30 foot wall
15 at 4825 Dexter Terrace during the winter and early
16 spring before the trees are leafed out.

17 In another demonstration of the micro
18 temperature environmental effect of shading by the
19 towering wall, I took measurements at 2:30 p.m. on
20 March 22nd with an accurate and sensitive Taylor
21 Etched Stem Mercury Thermometer. The day was summery
22 and mild and, of course, the tree leaves had not yet
23 begun to bud out.

24 At ground level, 8 feet from the base of
25 the wall to its north, the thermometer registered 55

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1 degrees fahrenheit and on top of one of the posts
2 holding up the mud fence, the reading was 57 degrees.
3 Ambient temperature at breast height in a sunny, open
4 area 18 feet from the base of the wall was a pleasant
5 61 degrees. The most striking reading, however, was
6 71 degrees at ground level 18 feet from the wall in
7 the sunlit path area, 16 degrees higher than in the
8 shade 10 feet away. Imagine the effect.

9 CHAIRPERSON GRIFFIS: Let me just ask you
10 a quick question as you go through that and also as
11 you move on to water runoff beneath the wall. What
12 pertinence would this be to the Zoning Administrator
13 in reviewing the permit documents that we have before
14 us?

15 MR. WATSON: Well, it's demonstrating the
16 environmental effects and this is part of the --

17 CHAIRPERSON GRIFFIS: Excellent. Okay.

18 MR. WATSON: -- Wesley Heights Zoning
19 Overlay District.

20 CHAIRPERSON GRIFFIS: Let's go right to
21 the Wesley Heights Zoning Overlay then and show where
22 the Zoning Administrator would have to refer 15, what
23 is it, 54, give it to me, oh, here, how we would
24 measure the impacts and the requirements to measure
25 those impacts.

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1 MR. WATSON: I'm sorry. I'm not sure I
2 get your --

3 CHAIRPERSON GRIFFIS: Just to refresh for
4 me, this appeal is set out to prove that the Zoning
5 Administrator made an error in approving this permit.

6 MR. WATSON: Yes.

7 CHAIRPERSON GRIFFIS: So an analogy, we
8 are the Zoning Administrator and you're telling us
9 what we have done incorrectly. And so stepping into
10 the shoes of the Zoning Administrator, I would look
11 and I would say okay, you're telling me I didn't
12 review this for the environmental temperature, storm
13 water runoff, snow melt impacts of this wall. Now, I
14 need to go to the regulations, the Zoning Regulations,
15 and refresh my memory of what is it that shows me how
16 to measure that and my requirement to measure, so that
17 I can stamp this denied or approved.

18 For instance, 1543.1, a restriction of
19 this section shall apply to both R-1-A and R-1-B
20 Districts within the WH Overlay District. Does that
21 pertain to this piece of property? Yes, this is in R-
22 1-A District. Okay.

23 MR. WATSON: This is in R-1-A.

24 CHAIRPERSON GRIFFIS: Indeed.

25 MR. WATSON: Yes.

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1 CHAIRPERSON GRIFFIS: So we can move on to
2 point two, 1543.2. "No structure, including accessory
3 buildings, shall occupy an area in excess of 30
4 percent of the lot." So we're at lot occupancy. I
5 don't see anything in there that goes to the impacts
6 of which you're describing for us.

7 MR. WATSON: You're at 1543. I was
8 looking at 1542.

9 CHAIRPERSON GRIFFIS: That's fine. I'll
10 look wherever you want to look.

11 MR. WATSON: Okay.

12 CHAIRPERSON GRIFFIS: I'm not familiar
13 with how the Zoning Regulations give jurisdiction to
14 the Zoning Administrator to regulate environmental
15 impacts, I guess is where I'm going.

16 MR. WATSON: Well, but that was part and
17 parcel of the material on which we based our zoning
18 overlay and that was the general ambience --

19 CHAIRPERSON GRIFFIS: Good.

20 MR. WATSON: -- of the neighborhood and so
21 on.

22 CHAIRPERSON GRIFFIS: Excellent.

23 MR. WATSON: And the openness of the
24 neighborhood and the effect on the neighbors, not the
25 effect on the property owner or the developer.

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1 CHAIRPERSON GRIFFIS: Okay. Which is
2 well-stated in 1541.1.

3 MR. WATSON: Yes.

4 CHAIRPERSON GRIFFIS: And it says --

5 MR. WATSON: And also, that was part and
6 parcel of the -- what's his name, Jim, I can't think
7 of the name of the city counsellor who was trying to
8 make the point that -- no, no, Ward 1.

9 UNIDENTIFIED SPEAKER: Oh, Jim Graham.

10 MR. WATSON: Jim Graham made the point
11 that the DCRA is the Department of Consumer, i.e.,
12 neighbors, neighborhood, and Regulatory Affairs.
13 There is nothing in there about developers or people
14 who are impacting. In other words, we don't have to
15 protect those who are impacting the neighborhood and
16 I think it is one of your, and I'm now talking to you
17 not as BZA, but I'm talking to you as -- you have
18 identified yourself now as the Zoning Administrator.
19 I think it is up to the Zoning Administrator to try to
20 protect the neighborhood interests and, obviously --

21 CHAIRPERSON GRIFFIS: Good.

22 MR. WATSON: -- I don't think he has done
23 his job here, and that's the point that I was trying
24 to make with these measurements.

25 CHAIRPERSON GRIFFIS: That's fine. The

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1 problem is we get to a very specific world very
2 quickly in development whether you're a developer or
3 a home owner. So I understand and I think I perfectly
4 agree with you. The Wesley Heights Overlay District
5 was set up to preserve certain aspects and in 1541, it
6 does say to establish, preserve, enhance the low
7 density character of Wesley Heights in regulating
8 construction and alterations to residential and other
9 buildings in the area. Very, very good paragraph.

10 Now, as the Zoning Administrator, I have
11 plans in front of me. How do I measure that? How do
12 I say this fits it or it does not fit it? Is there
13 anything in the regulations very specifically that
14 show you how that's measured?

15 MR. WATSON: There is nothing
16 specifically. We don't identify a 30 foot wall.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. WATSON: But how did he know that that
19 was going to be a 30 foot wall? He did not.

20 CHAIRPERSON GRIFFIS: Well, I think he did
21 on the drawings.

22 MR. WATSON: He had no information about
23 the height of the wall.

24 CHAIRPERSON GRIFFIS: Are you sure?

25 MR. WATSON: This was prior testimony

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1 here. I have heard their testimony.

2 CHAIRPERSON GRIFFIS: Okay. Okay. Let's
3 turn it back over to you. You want to conclude your
4 testimony?

5 MR. WATSON: Let me see. I was talking
6 about the measurements.

7 CHAIRPERSON GRIFFIS: I think you can move
8 down beyond Mr. Carome, how he has already alluded to
9 the water runoff beneath the wall.

10 MR. WATSON: Well, and I will just
11 summarize and then I would like to make two additional
12 points at the end that are not in the material that
13 you have.

14 CHAIRPERSON GRIFFIS: Excellent.

15 MR. WATSON: I'm upset that you won't
16 allow me to talk about phenology, but I do want you to
17 read the footnotes down there, because that is a very
18 important concept and one that I, as an ornithologist,
19 can speak to. I therefore urge you to support Mr.
20 Carome's appeal of the wall and platform on the basis
21 of the Zoning Code and overlay violations and their
22 neighborhood and environmental impacts, two of the
23 basic reasons that we have Zoning Codes in our city.

24 Now, the other two points I wanted to
25 bring up, I just noticed that in this long list of

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1 properties that have retaining walls, my property is
2 listed for a 6 foot retaining wall. I want to talk
3 about retaining walls in Wesley Heights. As you're
4 probably aware, Wesley Heights has got straight
5 streets that go right straight through in a regular
6 grid pattern, the way the city was outlined in the
7 1780s when it was lined out. I'm coming. I'm going
8 to be relevant.

9 And therefore, since this was a steeply
10 sloping area, my lot is always some -- goes up to 40
11 or 50 feet in the back of the lot since Cathedral
12 Avenue went through and they just jammed through. So
13 the houses on my side of the street, the north side of
14 the street, are up on a level well above street level,
15 some 15 or 20 feet. The houses on the other side of
16 the street are down below street level, some of them.

17 CHAIRPERSON GRIFFIS: Did you say that's
18 on Cathedral?

19 MR. WATSON: That's Cathedral Avenue, the
20 4300 block of Cathedral.

21 CHAIRPERSON GRIFFIS: Could they have
22 built Cathedral without making a retaining wall?

23 MR. WATSON: Excuse me?

24 CHAIRPERSON GRIFFIS: Could they have
25 built Cathedral Avenue without putting in a retaining

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1 wall?

2 MR. WATSON: That is precisely the point
3 that I'm getting at. They made the cut and they built
4 up the wall, the 6 foot wall in the case of my
5 property.

6 CHAIRPERSON GRIFFIS: And did the Zoning
7 Regulations prescribe how tall that retaining wall
8 could be, how low the road could be cut?

9 MR. WATSON: Were there in 1924? I doubt
10 whether there were any Zoning Regulations and skill
11 into that.

12 CHAIRPERSON GRIFFIS: It was lawless back
13 then.

14 MR. WATSON: This dated back. This Wesley
15 Heights was the first development.

16 CHAIRPERSON GRIFFIS: Good.

17 MR. WATSON: Or one of the first
18 developments in the United States that was developed
19 for use of private cars as transportation rather than
20 public transportation.

21 CHAIRPERSON GRIFFIS: Could they build
22 Cathedral Avenue today in accordance with the Zoning
23 Regulations?

24 MR. WATSON: All I know is that three
25 months ago, I went to the Public Space people and got

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1 a permit to replace my timber retaining walls in front
2 of my house with stone masonry ramparts, none of which
3 were over 4 feet high and because they were replacing
4 existing walls and less than 4 feet high, they just
5 gave me a walk-through permit.

6 So I think that there would have been
7 questions about it and I offer you as a contrast the
8 meandering streets of Spring Valley that follow the
9 natural contours for the most part.

10 CHAIRPERSON GRIFFIS: Like what street?

11 MR. WATSON: On what street?

12 UNIDENTIFIED SPEAKER: 49th Street.

13 MR. WATSON: Well, no, 49th Street is an
14 example of a grid.

15 CHAIRPERSON GRIFFIS: Doesn't matter.

16 MR. WATSON: Its overlook --

17 CHAIRPERSON GRIFFIS: What's the point?
18 What's the difference between the meandering and the
19 straight grid streets?

20 MR. WATSON: Well, because they follow
21 the --

22 CHAIRPERSON GRIFFIS: The grid.

23 MR. WATSON: -- the grid. Because the
24 grid was followed in Wesley Heights, retaining walls
25 were necessary.

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1 CHAIRPERSON GRIFFIS: So on the meandering
2 streets there's no retaining walls?

3 MR. WATSON: And the meandering streets
4 went around them.

5 CHAIRPERSON GRIFFIS: There is no
6 retaining walls on the meandering?

7 MR. WATSON: So they didn't need retaining
8 walls as much.

9 CHAIRPERSON GRIFFIS: Okay. Bring that
10 all back to what we're doing here today.

11 MR. WATSON: Well, what I'm trying to
12 demonstrate is that the retaining walls were put in
13 there to retain something.

14 CHAIRPERSON GRIFFIS: I see.

15 MR. WATSON: Rather than to build up the
16 level behind a wall.

17 CHAIRPERSON GRIFFIS: I see.

18 MR. WATSON: And I offer you as an
19 example --

20 CHAIRPERSON GRIFFIS: Actually, let me ask
21 you that on Cathedral. You're familiar with the
22 construction of your house perhaps and maybe you can
23 assume. When they were putting this road through for
24 the new age of cars, were all the lots level?

25 MR. WATSON: No.

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1 CHAIRPERSON GRIFFIS: Or were they leveled
2 out?

3 MR. WATSON: No, the lots were not leveled
4 out. I'm sorry.

5 CHAIRPERSON GRIFFIS: That's okay.

6 MR. WATSON: I didn't bring you the 1923
7 picture.

8 CHAIRPERSON GRIFFIS: We'll have time.
9 We'll meet for tea on Saturday. But as we're walking
10 through --

11 MR. WATSON: I can send you the picture,
12 the 1923 photograph.

13 CHAIRPERSON GRIFFIS: I would be very
14 interested.

15 MR. WATSON: I'm going to.

16 CHAIRPERSON GRIFFIS: I'm not sure
17 everyone here is, but we'll follow up on that.

18 MR. WATSON: Yes.

19 CHAIRPERSON GRIFFIS: You know, when I can
20 legally talk to you. Okay. So Cathedral is going
21 through and you have this meandering slope with all --
22 as the streets were meandering, these nice hills and
23 they carved in this Cathedral.

24 MR. WATSON: The slopes were going up,
25 yes.

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1 CHAIRPERSON GRIFFIS: Slopes were going up
2 and they're carving in this street, I'm sorry, grid
3 street. We got grids coming in. Did they level off
4 the lots to build your houses?

5 MR. WATSON: No.

6 CHAIRPERSON GRIFFIS: They didn't?

7 MR. WATSON: No.

8 CHAIRPERSON GRIFFIS: They built your
9 houses on the hill?

10 MR. WATSON: Not only did they not level
11 them off, they left all of the trees. When I moved
12 into my house, right beside my house was --

13 CHAIRPERSON GRIFFIS: There's no retaining
14 walls in the back of your house or on the sides of
15 your house or at the steps?

16 MR. WATSON: I have a retaining wall right
17 in back of my back door off the patio. I have a
18 retaining wall there and I put timbers going up the
19 continuing slope. As I said, there's some 50 to 60
20 feet of slope at my house.

21 CHAIRPERSON GRIFFIS: I see. Okay.

22 MR. WATSON: And I have water problems and
23 what I do is to retain that water as it goes down, so
24 there is virtually no runoff into the street.

25 CHAIRPERSON GRIFFIS: Okay. Good.

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1 Anything else you would like to conclude with or we
2 were at questions. Yes, Ms. Miller?

3 VICE CHAIR MILLER: I have a comment and
4 a question and my comment is, and I think that this is
5 what the Chairman was also getting at and it's to try
6 to keep us on track here and on focus, this is an
7 appeal and in an appeal case, we're looking to see how
8 the Zoning Administrator erred, what did he do wrong.
9 And these overlay regulations govern all sorts of
10 things.

11 I mean, at least with respect to the BZA,
12 we look at them for special exception proceedings,
13 variances, etcetera. And when we're doing variances
14 and special exceptions, we may be looking at adverse
15 impacts and environmental impacts or whatever. When
16 we're dealing with an appeal, we're looking at the
17 error that the Zoning Administrator made. Now, in
18 this case it's in granting a building permit.

19 And I think what the Chair was trying to
20 ask you is, you know, where in the regulations did it
21 say that the Zoning Administrator, in reviewing a
22 building permit, considers environmental impacts? And
23 I would guess that it's not in the regulations.

24 MR. WATSON: It's not spelled out in the
25 regulations. That is something that I lament that we

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1 didn't do 15 years ago, spell it out a little more
2 plainly, and the rampant overdevelopment, additions on
3 houses, tearing down houses and putting up new, huge
4 structures continues right to today.

5 VICE CHAIR MILLER: Okay. And then when
6 I was listening to you and I was trying to determine
7 what error you may be alleging, I'm wondering, did you
8 make a distinction that a retaining wall is lawful
9 depending on whether the lot is built up or not and
10 that this case is different from other cases, because
11 the lot has been built up?

12 MR. WATSON: Well, I don't know how many
13 of you were here for the Thai Bar situation, the pool
14 house up on Foxhall Road many years ago, some 15 years
15 ago. Thai Bar has since died.

16 CHAIRPERSON GRIFFIS: I think we heard
17 that this morning.

18 MR. WATSON: But that was a pool house
19 that was towering some 23 feet in the backyard looking
20 over into Thai Bar's swimming pool area. The BZA said
21 that they were -- they could not condone putting up a
22 retaining wall and then building the pool house above
23 that retaining wall and having that count as the
24 baseline, the level.

25 And I think that is one of the important

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1 points, that this structure, this is a structure and
2 that's the point that I'm trying to make, and that
3 that structure, when it was a wall -- before it was a
4 retaining wall, it was a structure, it was a wall and
5 then it had its attendant grids.

6 That is part and parcel of the structure
7 portion that comes under the 30 percent, and that's
8 what I think this whole case resolves on, is whether
9 you consider that a structure or that isn't there,
10 because the Zoning Administrator didn't look at it.
11 I look at it. I walked past that area and I am just
12 offended by it.

13 VICE CHAIR MILLER: Okay. So you're
14 saying he erred in not determining that this was a
15 structure instead of a retaining wall?

16 MR. WATSON: Exactly.

17 VICE CHAIR MILLER: Okay.

18 MR. WATSON: And counting that within the
19 30 percent allowance.

20 VICE CHAIR MILLER: Okay.

21 CHAIRPERSON GRIFFIS: But how do you
22 reconcile? You're saying this is either a structure
23 or a retaining wall. Is that correct?

24 MR. WATSON: No, no, it was a structure.

25 CHAIRPERSON GRIFFIS: Is it a structure

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1 now?

2 MR. WATSON: When the wall was built --

3 CHAIRPERSON GRIFFIS: Yes.

4 MR. WATSON: And when the grids were being
5 laid down --

6 CHAIRPERSON GRIFFIS: Sure.

7 MR. WATSON: -- it was a structure. When
8 they dumped 6,000 whatever it was --

9 CHAIRPERSON GRIFFIS: Is a retaining wall
10 a structure?

11 MR. WATSON: I think in this case that a
12 built-up platform --

13 CHAIRPERSON GRIFFIS: But for the Zoning
14 Regulations, is a retaining wall a structure,
15 according to the Zoning Regulations?

16 MR. WATSON: I believe it is.

17 CHAIRPERSON GRIFFIS: Okay. Good.

18 MR. WATSON: And --

19 CHAIRPERSON GRIFFIS: 2503 would agree
20 with you.

21 MR. WATSON: Let me also read one other
22 section of the Wesley Heights Overlay District.

23 CHAIRPERSON GRIFFIS: But no, let's
24 follow-up this issue of structure.

25 MR. WATSON: No, this is -- this is

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1 pertinent.

2 CHAIRPERSON GRIFFIS: It is?

3 MR. WATSON: Yes. This is talking now
4 about an open porch and if you'll remember, there was
5 a property on 43rd Street, the Sissen property, where
6 there was a porch in front of the house.

7 CHAIRPERSON GRIFFIS: Right.

8 MR. WATSON: And the first 200 square feet
9 of an open porch or total open porch space, if there
10 is more than one open porch, don't count. But that
11 implies that any --

12 CHAIRPERSON GRIFFIS: Don't count for
13 what?

14 MR. WATSON: Don't count within the 30
15 percent allowance.

16 CHAIRPERSON GRIFFIS: Of lot occupancy?

17 MR. WATSON: For lot occupancy. This to
18 me is no different from the porch in front of the
19 Sissen house if that porch did not have a roof.

20 CHAIRPERSON GRIFFIS: Really? You don't
21 see any difference between what we're looking at in
22 this application and a front porch with a cover on it?

23 MR. WATSON: Well, no, no. If the front
24 porch did not have a cover on it, a portion of it did
25 not count in lot coverage.

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1 CHAIRPERSON GRIFFIS: So you see no
2 difference between this and a porch with no cover?

3 MR. WATSON: I see no difference between
4 that structure and a porch uncovered.

5 CHAIRPERSON GRIFFIS: Interesting.

6 MR. WATSON: Or --

7 UNIDENTIFIED SPEAKER: A deck.

8 MR. WATSON: What do you call it, a deck,
9 an uncovered deck. And certainly, that uncovered deck
10 or platform or whatever the heck you want to call it
11 is more than 4 feet above baseline. I mean, 30 feet
12 is not something that I think the Zoning Administrator
13 should have overlooked. I think he should have aha.

14 CHAIRPERSON GRIFFIS: Okay. Understood.
15 Any other questions?

16 VICE CHAIR MILLER: I have one more
17 question, and that is I would like to ask you if you
18 could supplement the record and put in that Zoning
19 Commission decision or whatever context the Zoning
20 Commission acted in with respect to the example you
21 were giving about a property that was towering over
22 dealing with a retaining wall.

23 MR. WATSON: The Thai Bar situation?

24 VICE CHAIR MILLER: Yes.

25 MR. WATSON: I will have to go back into

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1 my files and consult with Patrick.

2 CHAIRPERSON GRIFFIS: You got about six
3 attorneys here that wrote it all down.

4 MR. WATSON: Yes.

5 CHAIRPERSON GRIFFIS: I'm sure they would
6 search it for you.

7 MR. WATSON: Okay.

8 VICE CHAIR MILLER: Thank you.

9 CHAIRPERSON GRIFFIS: Just give them what
10 you know.

11 MR. WATSON: Yes, it's the Davidson
12 property vs. Thai Bar.

13 CHAIRPERSON GRIFFIS: All right. So it
14 was an appeal?

15 VICE CHAIR MILLER: Was it a court case,
16 a Zoning Commission decision? What is it that you're
17 referring to?

18 MR. WATSON: It ended up in the courts,
19 but the -- it came before you all and you decided that
20 the building will have to be reduced in height.

21 CHAIRPERSON GRIFFIS: You did that?

22 VICE CHAIR MILLER: Do you mean the Zoning
23 Commission or do you mean the BZA?

24 MR. WATSON: No, I'm talking about the
25 BZA.

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1 CHAIRPERSON GRIFFIS: Right. Per the BZA,
2 so it must have been a special exception or a variance
3 of some sort. Then it was taken to the Court of
4 Appeals. Okay.

5 MR. WATSON: And then went to the Court of
6 Appeals.

7 CHAIRPERSON GRIFFIS: We apparently --

8 MR. WATSON: And the Court of Appeals
9 supported the BZA.

10 CHAIRPERSON GRIFFIS: Indeed.

11 VICE CHAIR MILLER: Thank you.

12 CHAIRPERSON GRIFFIS: Good. Any other
13 questions, follow-up? Anything else, Ms. Gates?

14 VICE CHAIR MILLER: I'm sorry, Ms. Gates.

15 MR. WATSON: I have to apologize for my
16 passion.

17 CHAIRPERSON GRIFFIS: Gosh, no apology
18 needed.

19 MR. WATSON: But you have touched the
20 sensitive areas in my heart.

21 CHAIRPERSON GRIFFIS: I don't think there
22 is anything wrong with passion.

23 VICE CHAIR MILLER: I just wanted to ask
24 Ms. Gates. You used the term wall structure. Does
25 that appear somewhere in our regulations?

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1 MS. GATES: I believe it's probably
2 something I made up. Can you tell me where it is? I
3 mean, did I cite?

4 CHAIRPERSON GRIFFIS: Is it in her
5 testimony, written testimony, or are you just
6 recalling?

7 VICE CHAIR MILLER: I think it was in your
8 written testimony that you called it a wall structure,
9 I thought.

10 MS. GATES: Well, what else is it?

11 CHAIRPERSON GRIFFIS: Well, there you go.
12 Good. Okay. Anything else?

13 COMMISSIONER HILDEBRAND: Mr. Watson, you
14 had said, and I may have misunderstood you, but that
15 the wall sort of transformed. At one point it was a
16 wall and now, it's something else. Do you feel that
17 now it is a retaining wall, because it has been filled
18 with earth?

19 MR. WATSON: From Spring Valley, yes.

20 COMMISSIONER HILDEBRAND: From Spring
21 Valley?

22 MR. WATSON: Yes.

23 COMMISSIONER HILDEBRAND: So it started
24 off as a wall and it has been transformed?

25 MR. WATSON: It started off as a wall and

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1 it started off as a wall with grids.

2 CHAIRPERSON GRIFFIS: Mr. Watson, you need
3 your microphone on.

4 MR. WATSON: Oh, sorry. It started off as
5 a wall. The grids were then laid down and the
6 material was brought in. Since that was extraneous
7 material, I think that all of that material fill plus
8 the grids have to be considered part of the structure.

9 COMMISSIONER HILDEBRAND: So as it was
10 being built, it was transforming from a wall to a
11 retaining wall?

12 MR. WATSON: Yes.

13 COMMISSIONER HILDEBRAND: As they were
14 building up?

15 MR. WATSON: And I invite you to come look
16 at my retaining walls, because I have a slope
17 approximately that in my front yard and I have built
18 little mini walls about this high --

19 CHAIRPERSON GRIFFIS: Good.

20 MR. WATSON: -- that step down and I can
21 use it gloriously for planting azaleas.

22 COMMISSIONER HILDEBRAND: And how do you
23 deal with section 2503.3, which specifically says that
24 retaining walls can occupy any yard required by the
25 provisions of the Zoning Title? Since this thing has

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1 transformed into a retaining wall by the way it was
2 constructed, how do you deal with that section?

3 MR. WATSON: I have no problem with them
4 occupying as long as they count as structures that are
5 -- I mean, there is no question. You have looked at
6 numerous examples of walls that are holding something
7 up that was there and we need those, absolutely.

8 COMMISSIONER HILDEBRAND: So you're --

9 CHAIRPERSON GRIFFIS: What about the road
10 that we saw?

11 MR. WATSON: The what?

12 CHAIRPERSON GRIFFIS: The last one,
13 whatever highway that was.

14 COMMISSIONER HILDEBRAND: But your
15 argument isn't that it cannot occupy those yards by
16 the code, but that it needs to be counted in the lot
17 occupancy as a structure.

18 MR. WATSON: Yes.

19 COMMISSIONER HILDEBRAND: Okay.

20 CHAIRPERSON GRIFFIS: All right.

21 VICE CHAIR MILLER: I just want to know is
22 there something on the permit or the drawings that
23 would indicate to the Zoning Administrator that the
24 lot was built up, that the dirt was taken out and then
25 more dirt taken in?

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1 MR. WATSON: I don't believe that there
2 was any indication on the zoning, on the application
3 for permits, that indicated how high this wall was to
4 be.

5 CHAIRPERSON GRIFFIS: Have you reviewed
6 the permit documents that were submitted?

7 MR. WATSON: I have looked at them, but I
8 have relied on --

9 CHAIRPERSON GRIFFIS: Was there an
10 existing site?

11 MR. WATSON: -- Patrick Carome, who is a
12 lawyer, to have read them in greater detail and his
13 support people.

14 CHAIRPERSON GRIFFIS: But we have the
15 existing site plan in the record. I believe I
16 reviewed it.

17 MR. WATSON: I believe that the --

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. WATSON: -- ANC reviewed the papers.

20 CHAIRPERSON GRIFFIS: Okay.

21 MR. WATSON: In great detail to see if
22 there was any indication of 7 feet or whatever.

23 CHAIRPERSON GRIFFIS: Good. Nothing
24 further, I take it? Very well. Let's move. Ms.
25 Gates, last word, closings? No? Excellent. Thank

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1 you very much. Let's go to cross. Mr. Carome?

2 MR. CAROME: Mr. Watson, are you aware of
3 any other walls, wall structures, in the Wesley
4 Heights Overlay area where a wall of, say, more than
5 7 feet has been erected and filled in in a place where
6 there was no dirt or earth to be retained, and then
7 thereafter --

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. CAROME: -- new material, not
10 previously there, was put in?

11 MR. WATSON: I'm not, with the exception
12 of the Thai Bar situation where --

13 CHAIRPERSON GRIFFIS: Mr. Watson, we're
14 going to ask you just to turn the microphone on and
15 put it near you.

16 MR. WATSON: Sorry. The only one that I
17 am aware of was a very small wall of 3 or 4 feet.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. WATSON: On Thai Bar's property, not
20 on Thai Bar.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. WATSON: But on Davidson's property.

23 CHAIRPERSON GRIFFIS: How would you become
24 aware of something like that?

25 MR. WATSON: Thai Bar?

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1 CHAIRPERSON GRIFFIS: No, no, no, not that
2 specific one.

3 MR. WATSON: Oh, how would you?

4 CHAIRPERSON GRIFFIS: The question is are
5 you aware of any other situation like this where a
6 retaining wall was built and the fill came in behind
7 it? How would you be aware of that in the
8 neighborhood?

9 MR. WATSON: Well --

10 CHAIRPERSON GRIFFIS: Being on the zoning?

11 MR. WATSON: Remember that I have been
12 associated with zoning questions and problems and the
13 Wesley Heights Zoning Overlay for at least 15 years,
14 and I am --

15 CHAIRPERSON GRIFFIS: Okay. So in that
16 capacity, in 15 years you have not seen any of that?

17 MR. WATSON: I am a sniffer. I go and
18 look for problems.

19 CHAIRPERSON GRIFFIS: Indeed.

20 MR. WATSON: And we have -- so watch
21 yourselves.

22 CHAIRPERSON GRIFFIS: I'm glad you pointed
23 at her and not me. Okay. Next question.

24 MR. CAROME: Were you aware that the plans
25 before the DCRA contained detailed drawings that

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1 showed preconstruction grading and post-construction
2 grading? Did you know that?

3 MR. WATSON: I had seen some of those
4 plans.

5 MR. CAROME: All right. No further
6 questions.

7 CHAIRPERSON GRIFFIS: Thank you. Where do
8 we want to go? Mr. Murphy, you have cross?

9 MR. MURPHY: Thank you. Mr. Watson, thank
10 you for your comments. Two questions. You were
11 involved in the Wesley Heights Zoning Overlay
12 development and, apparently, you have been involved
13 continually since then watching the overlay. There
14 was a discussion earlier on this hearing that the
15 overlay included park land, it extended over park
16 land, and that the National Capital Planning
17 Commission commented on that.

18 Do you recall or can you provide testimony
19 as to why the community asserted that both the private
20 land and park land should be within the overlay?

21 MR. WATSON: I can't specifically say
22 that, but I am under the impression that because we
23 are bounded on all or at least on three sides by
24 national park land, and I don't know the square of
25 Acclamation Park, but we delineated all of the squares

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1 that this encompasses and I wouldn't be surprised if
2 Acclamation was not inadvertently perhaps included.

3 MR. MURPHY: Okay. One of the comments,
4 one of the conditions of the Wesley Heights Overlay is
5 the preservation of trees and your testimony was
6 getting to the point of the micro climate immediately
7 to the north of the wall.

8 Can you provide testimony to this Board as
9 to what the conclusion is or what the Zoning
10 Administrator should have been basically aware of, of
11 the impacts of a wall immediately next to a forested
12 area and its ground cover? Do you see a change in its
13 ecology? Can we project a change?

14 MR. WATSON: I certainly can see a change
15 in those first 15 feet that is part of the shadow in--

16 CHAIRPERSON GRIFFIS: Okay. I think we
17 understand --

18 MR. MURPHY: Thank you.

19 CHAIRPERSON GRIFFIS: -- the very
20 interesting impact.

21 MR. MURPHY: Thank you very much.

22 CHAIRPERSON GRIFFIS: Any other questions,
23 Mr. Murphy?

24 MR. MURPHY: No more questions. Thank
25 you, Mr. Chair.

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1 CHAIRPERSON GRIFFIS: Good. Thank you.
2 Does the appellee have any cross? DCRA? No cross?

3 MR. AGUGLIA: I have a few questions.

4 CHAIRPERSON GRIFFIS: Indeed.

5 MR. AGUGLIA: Richard Aguglia again for
6 the property owners. A few questions for Ms. Gates
7 and a few questions for Mr. Watson. Ms. Gates, you
8 are aware, of course, that the house has been under
9 and the entire project under numerous Stop Work
10 Orders?

11 MS. GATES: Yes.

12 MR. AGUGLIA: All right. You're aware
13 then that this has prevented the owner from putting in
14 gutters? Were you aware of that?

15 MS. GATES: No, I'm not.

16 MR. AGUGLIA: This has prevented him from
17 putting in catch basins in the dry wells to catch all
18 the water running off of Dexter Terrace. Were you
19 aware of that?

20 MS. GATES: I believe he was told by Storm
21 Water Management to stabilize the property. I would
22 have assumed that that would have been part of it.

23 MR. AGUGLIA: Of course, under all the
24 numerous Stop Work Orders and every time he turns
25 around he is hit with --

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1 CHAIRPERSON GRIFFIS: Okay. What's the
2 question?

3 MS. GATES: I think you're exaggerating
4 slightly.

5 MR. AGUGLIA: Okay. Did you realize that
6 the silt fence behind the wall was required by the
7 Park Service?

8 MS. GATES: Yes.

9 MR. AGUGLIA: And it's the silt fence
10 that's ponding that's causing the runoff into the
11 park?

12 MS. GATES: Well, I could answer that with
13 a question. Why did the Park Service require that
14 silt fence?

15 MR. AGUGLIA: Well, but you are aware that
16 they required the silt fence?

17 MS. GATES: No, I wasn't.

18 MR. AGUGLIA: And that it --

19 MS. GATES: It said it was the Park
20 Service that required it.

21 MR. AGUGLIA: The Park Service required
22 it.

23 MS. GATES: Okay. But on those drawings,
24 it was not the Park Service that required it.

25 MR. AGUGLIA: All right. So you were not

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1 aware that the Park Service required the silt fence
2 that exists now behind the wall?

3 MS. GATES: You mean the second silt
4 fence? There are two silt fences.

5 MR. AGUGLIA: The silt fence behind the
6 wall.

7 CHAIRPERSON GRIFFIS: Are either one of
8 these on the property? Are either one of these on the
9 property?

10 MR. AGUGLIA: The silt fence is partially
11 on the property and partially on park property.

12 CHAIRPERSON GRIFFIS: Did the Zoning
13 Administrator approve it?

14 MR. AGUGLIA: No, it wasn't even part of
15 the --

16 CHAIRPERSON GRIFFIS: Okay. Let's move
17 on.

18 MR. AGUGLIA: All right. So move on.
19 Okay. At one point you said in your testimony that
20 the rear yard was filled with concrete?

21 MS. GATES: No.

22 MR. AGUGLIA: What did you say?

23 CHAIRPERSON GRIFFIS: It was like a
24 retaining wall filled with concrete.

25 MR. AGUGLIA: The retaining wall was

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1 filled with concrete?

2 CHAIRPERSON GRIFFIS: Even at 8:00 I have
3 a good memory, Ms. Gates.

4 MS. GATES: Thank you.

5 CHAIRPERSON GRIFFIS: Sure, sure, sure.
6 Question?

7 MR. AGUGLIA: I asked her to confirm the
8 fact.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. AGUGLIA: That she made a statement
11 that the retaining wall in the backyard is filled with
12 concrete. Is that correct?

13 MS. GATES: No, I didn't say that it was
14 filled with concrete. I said it is the same as if.

15 MR. AGUGLIA: It was filled with concrete?

16 MS. GATES: Yes.

17 MR. AGUGLIA: You said that you were
18 bothered by the aesthetics. Of course, you have --

19 MS. GATES: I don't think I said that.

20 MR. AGUGLIA: You did not say that you
21 were not bothered by the aesthetics of the wall?

22 MS. GATES: No, I don't believe that
23 I'm --

24 MR. AGUGLIA: You're not? Okay.

25 MS. GATES: -- the person who said that.

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1 MR. AGUGLIA: Okay. All right. A
2 question then for Mr. Watson. Mr. Watson, I'm showing
3 you what is Carome's Exhibit No. 51, which is the
4 application for the retaining wall, and I'm going to
5 point you to the second page of that application. I
6 believe it says number 86 and it shows the height.

7 MR. WATSON: I see what you're pointing
8 to.

9 MR. AGUGLIA: And what does that show us,
10 the height of the wall on the application?

11 MR. WATSON: It varies from 0 to 30 feet.

12 MR. AGUGLIA: Okay. Thank you.

13 MR. WATSON: Okay.

14 MR. AGUGLIA: That was my question. Now,
15 Mr. Watson, did you testify that the wall was
16 aesthetically unpleasing and, therefore, somehow
17 violated the Wesley Heights Overlay District?

18 MR. WATSON: I don't think I said
19 aesthetically, did I?

20 MR. AGUGLIA: No?

21 MR. WATSON: No, I did not.

22 MR. AGUGLIA: All right. So neither one
23 of you testified to that.

24 MR. WATSON: No. I certainly -- "de
25 gustibus non est disputandum." We can't talk about

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1 taste.

2 MR. AGUGLIA: Now, are you familiar on
3 Dexter Street, as you come on to Dexter Street, the
4 second house on the right is a new residence. Since
5 you're familiar with the area, are you familiar with
6 that? It's a brand new residence.

7 MR. WATSON: The second?

8 MR. AGUGLIA: Second house on the right.

9 MR. WATSON: On the right as you come off
10 Foxhall Road?

11 MR. AGUGLIA: As you come off Foxhall Road
12 onto Dexter, the second house on the right is a new
13 vacant structure. Are you familiar with that?

14 MR. WATSON: I'm -- not intimately. I
15 have seen it.

16 MR. AGUGLIA: Right.

17 MR. WATSON: But I haven't studied it.

18 MR. AGUGLIA: All right. Do you know
19 there is at least a retaining wall as high in that
20 back yard? Do you know that?

21 MR. WATSON: I do not know that.

22 MR. AGUGLIA: You do not know that. Ms.
23 Gates, you were nodding your head yes that you were
24 familiar with the house.

25 MS. GATES: I am familiar with the house

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1 and I believe that that retaining wall is very close
2 to the back of the house. I don't think it extends
3 out to the, you know --

4 MR. AGUGLIA: Right.

5 MS. GATES: It's not the whole backyard.

6 MR. AGUGLIA: But Mr. Watson's testimony
7 was that he didn't see any other retaining wall that
8 high in Wesley Heights. Do you know, approximately,
9 how high that is?

10 MS. GATES: I have never walked back
11 there.

12 MR. AGUGLIA: But have you seen it?

13 MS. GATES: I have seen it in your
14 photographs, I believe.

15 MR. AGUGLIA: Okay.

16 MS. GATES: Someone submitted photographs.

17 MR. AGUGLIA: Okay. All right.

18 MR. WATSON: I'm not sure that I said that
19 I was unaware of any walls that are that high. I
20 think I was talking about walls that had material
21 heaped in back of them.

22 MR. AGUGLIA: With respect to the water
23 runoff, are you sure that the water is not coming from
24 5500 Macarthur, but from the property? Did you make
25 any assertion that the property -- that the water

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1 runoff was coming from another property?

2 MS. GATES: I think the photographs fairly
3 well-illustrate where the water is coming from.

4 MR. AGUGLIA: Are you familiar that the
5 Department of Health gave the owner of 5500 Macarthur
6 Avenue two citations because of water runoff? Are you
7 familiar with that?

8 MS. GATES: No, but if you --

9 CHAIRPERSON GRIFFIS: Moving too far
10 afield.

11 MS. GATES: -- review this photograph,
12 this is --

13 MR. AGUGLIA: Am I going too far afield?

14 CHAIRPERSON GRIFFIS: Well, now we're off
15 the property.

16 MR. AGUGLIA: I'll withdraw the question.

17 CHAIRPERSON GRIFFIS: Aren't we in the
18 neighbors' house?

19 MR. AGUGLIA: I have no further questions.

20 CHAIRPERSON GRIFFIS: Okay. Where are we?
21 DCRA, you all set?

22 VICE CHAIR MILLER: I have a follow-up
23 question.

24 CHAIRPERSON GRIFFIS: Oh, indeed, Ms.
25 Miller.

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1 VICE CHAIR MILLER: I just have one more
2 question. Mr. Watson, when we were in discussion
3 before, I tried to frame what I thought was your
4 argument, which is that the Zoning Administrator erred
5 in calling this wall a retaining wall, because dirt
6 was taken out and new dirt was brought into the
7 property, and that was the distinction between this
8 wall and other retaining walls and that's why you
9 thought that this should be called a structure. Is
10 that correct?

11 MR. WATSON: Partly. The material was
12 brought in. But remember that the material that was
13 carted out was carved out in order to make way for the
14 house. That was not carved out of the long slope, so
15 that was -- in other words, the house, as you can see,
16 the house is up here.

17 CHAIRPERSON GRIFFIS: You're going to need
18 to be on a mike. Oh, that's not going to work.

19 MS. GATES: It's on the bottom.

20 MR. WATSON: The house is up here.

21 CHAIRPERSON GRIFFIS: It's not working.

22 MR. WATSON: And in order to --

23 CHAIRPERSON GRIFFIS: Can you turn the --
24 I'm sorry. We can hear you, but the recorder can't,
25 which means you're not on. So it's the bottom. There

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1 it is. See if that works.

2 MR. WATSON: It was on, I apologize,
3 before.

4 CHAIRPERSON GRIFFIS: Excellent.

5 MR. WATSON: To put this house in, and
6 there are a couple of levels below this, there had to
7 be earth taken out of here. It was that earth that
8 was taken out of here, which we saw piled up here.
9 That was not part of this natural slope that was
10 carted away. It was part of this material that was
11 carted away. So the material that was brought in was
12 to fill all of this area from ground level up, not to
13 replace stuff that was taken out for here.

14 VICE CHAIR MILLER: Okay. No. So my
15 follow-up question is what in the regulations or some
16 other legal authority would have told the Zoning
17 Administrator that that was the distinction he should
18 have made?

19 MR. WATSON: His experience.

20 MS. GATES: Can I answer that? I think if
21 you look at the site plans, I think it's Carome 32 or
22 something, it very clearly specifies on those plans
23 that 6,150 cubic yards of dirt is to be hauled in to
24 be put behind that wall.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MS. GATES: Is that what you're asking?

2 VICE CHAIR MILLER: No.

3 CHAIRPERSON GRIFFIS: Ms. Gates, Mr.
4 Watson, here is where Ms. Miller is going, I believe.
5 We know what happened here. We know how it was
6 constructed. The Zoning Administrator would not have
7 had any other difficulty in understanding what we have
8 seen. He knew what was going on here. Ms. Miller is
9 asking you what is the difference.

10 Where in the regulations does the Zoning
11 Administrator differentiate between that of a
12 retaining wall where you back-fill and that which you
13 don't, which you carve out? Where in the regulations
14 was he told to look at that and somehow take this
15 differently?

16 MR. WATSON: I think that is --

17 CHAIRPERSON GRIFFIS: It has got to be a
18 section.

19 MR. WATSON: That is a loophole that I am
20 unaware of, but it is obviously a loophole that the
21 formation of new platforms and of new terrace levels--

22 CHAIRPERSON GRIFFIS: Okay. Let me be
23 more direct. What in the Zoning Regulations, the
24 section, prohibit the construction of what you're
25 seeing here?

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1 MR. WATSON: I'm not talking about
2 prohibiting it. I'm talking about lot occupancy and
3 what I feel is that the error of the Zoning
4 Administrator was that he did not include this as a
5 structure. This was absolutely, as he has said before
6 us all here, this he didn't regard as being there. It
7 doesn't count. It was invisible, and I think it was
8 that lack of vision, which has carried him to the
9 point of having this hearing today.

10 VICE CHAIR MILLER: Well, I guess the
11 question is where in the regulations does it say that
12 this type of situation is a structure?

13 CHAIRPERSON GRIFFIS: Outside of 2503.3,
14 a fence or retaining wall construction in accordance
15 with the D.C. Building Code may occupy any yard
16 required under the provisions of this title. Where
17 else are you seeing that this structure, and that's
18 under the structures in required open spaces, where
19 else are you seeing it in regulations, I think this is
20 the last time we need to ask this, that would have the
21 Zoning Administrator look elsewhere?

22 MR. WATSON: Well, I'm not -- I have not
23 said that a structure of this sort -- I mean, people
24 are putting in swimming pools and all sorts of things
25 of that sort, but I feel that it ought to be

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1 considered a structure, because this was de novo.
2 This was not an existing area.

3 CHAIRPERSON GRIFFIS: Okay. Good. I
4 think we understand.

5 MR. WATSON: And I also think that we have
6 to consider the baseline for that wall as being the
7 foot of the wall, rather than counting that from this
8 area here. In other words, this is where you take the
9 measurement of the wall, rather than the ridiculous
10 point here, because what this means is --

11 CHAIRPERSON GRIFFIS: Is that where you
12 take the measurement for the height as above --

13 MR. WATSON: The height of a fence or a
14 wall in my backyard, which is some --

15 CHAIRPERSON GRIFFIS: Okay. I think I
16 understand.

17 MR. WATSON: Yes.

18 CHAIRPERSON GRIFFIS: I understand. Good.
19 Thank you very much.

20 MS. GATES: Ms. Miller, can I address that
21 as well, please?

22 CHAIRPERSON GRIFFIS: I think we're set on
23 that. Okay, Ms. Miller. Let's let her go. Yes, Ms.
24 Gates, please?

25 MS. GATES: I think the Zoning

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1 Administrator should have known when he looked at the
2 application that this wall and this structure that was
3 going to raise the rear yard to a height of 30 feet --

4 CHAIRPERSON GRIFFIS: Well, what is the
5 indication that the Zoning Administrator didn't know
6 that?

7 MS. GATES: Well, it doesn't even say what
8 -- first of all, I'm talking about lot occupancy here.

9 CHAIRPERSON GRIFFIS: I know. So is Mr.
10 Watson.

11 MS. GATES: When he issued a permit.

12 CHAIRPERSON GRIFFIS: Sure.

13 MS. GATES: It doesn't say Wesley Heights
14 Overlay District on it.

15 CHAIRPERSON GRIFFIS: Okay.

16 MS. GATES: This application.

17 CHAIRPERSON GRIFFIS: Right. Yes, and
18 that is all very firmly in our understanding. Okay.
19 Follow-up? Anything else? Good. All right. Thank
20 you both very much. Mr. Watson, great to see you
21 again. Is the Park Service ready? Ready to roll?

22 MR. MURPHY: Good evening, Mr. Chair,
23 Members of the Board. My name is David Murphy and I'm
24 representing the National Park Service, National
25 Capital Region as an intervenor on this appeal. With

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1 me are Mr. Jeffrey Bernstein, attorney advisor to the
2 National Park Service, Mr. Robert Pinciotti with USR
3 Corporation, URS Corporation at Gaithersburg, Mr.
4 Pinciotti is a consulting engineer to the National
5 Park Service, and Mr. Leon Chmura with the Bureau of
6 Land Management who is providing surveying expertise
7 for the Park Service in much of the National Capital
8 Region.

9 I wanted to provide a number of
10 photographs at the beginning just to give you a
11 context, because one of the things that we have talked
12 about is the Wesley Heights Overlay. The property in
13 question in 1996 was here. This was the previous
14 building owned by the Economides and this is the
15 national park land and also the forested buffer and
16 forested area of the backyards of the properties along
17 behind Dexter Terrace.

18 The property line, boundary line of the
19 National Park Service, is delineated in green
20 demonstrating the Economides' property and the forest
21 without leaves. So this is a summer photograph that
22 was enhanced with infrared, so that we could
23 differentiate species, but it does show a mature
24 forest cover.

25 The leaf-off condition demonstrates the

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1 number of stems both in the park and in the Economides
2 and other adjoining properties. Also on this photo is
3 the original preconstruction topography demonstrating
4 a continuous grade down from the property, the
5 adjoining private properties, down to essentially the
6 trail and then the stream.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. MURPHY: The next photo, and these
9 photos were provided at the last hearing.

10 CHAIRPERSON GRIFFIS: Right.

11 MR. MURPHY: So all I'm doing is providing
12 large versions, because they could be talking points.

13 CHAIRPERSON GRIFFIS: Excellent.

14 MR. MURPHY: Again, the Economides'
15 property is here. This represents a computer
16 generated analysis of the topographic slope, which is,
17 approximately, a line here or a line here,
18 demonstrating a continuous grade, which differs from
19 what you have heard in testimony saying it was
20 extremely steep or, therefore, unusable.

21 The vegetation in the backyard of the
22 Economides before any construction not only was a
23 backyard similar to the property next door, but also
24 there is no evidence of any erosion on that site
25 before any work.

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1 The next photo is, unfortunately, a very
2 garish purple, because it's an infrared photo, again,
3 for the Park Service to study tree crown health. It
4 demonstrates the Economides' construction, the new
5 house and the condition of the yard prior to the
6 retaining wall as we know it.

7 There is a fifth photograph, which was a
8 four way composite that showed the Economides'
9 property as it was being built. This was after the
10 original house was demolished and the foundations were
11 put in, and it shows the commencement of the rear yard
12 construction as well as the ongoing construction of
13 the house.

14 The fifth, excuse me, the sixth photograph
15 is sort of a segueway to Mr. Watson's commentary, the
16 retaining wall and then the park land. The range
17 poles that we placed 8 foot and then 4 foot
18 demonstrate the extent of the shade that this wall now
19 provides on park land and it is our position that that
20 shade will affect the long-term ecology and forest
21 cover of that area, so we'll see a change over time.
22 Perhaps it's 50 years.

23 CHAIRPERSON GRIFFIS: Right.

24 MR. MURPHY: But we will see a change.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MR. MURPHY: Okay. With that background--

2 MS. BELL: Excuse me. I would just like
3 to interrupt for a second. These copies, we have
4 raised this issue before, but the photographs
5 obviously weren't provided to anyone as well as the
6 statements, as well, from the two witnesses. So I
7 just wanted to --

8 CHAIRPERSON GRIFFIS: The photographs were
9 previously --

10 MR. MURPHY: Mr. Chair, these were
11 provided at the last hearing.

12 CHAIRPERSON GRIFFIS: Got you.

13 MR. MURPHY: Multiple copies.

14 CHAIRPERSON GRIFFIS: Got you.

15 MR. MURPHY: These photos were.

16 CHAIRPERSON GRIFFIS: But do you have
17 copies of these?

18 MS. BELL: Well, more importantly, I don't
19 have copies of these, but also more importantly, they
20 are providing two witnesses now who are experts,
21 apparently, because they're talking about a surveyor
22 as well as an engineer who are here to provide a
23 statement. We had no idea that they would provide
24 testimony. We don't have copies of their testimony.

25 CHAIRPERSON GRIFFIS: Right.

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1 MS. BELL: And there would be no way -- I
2 don't know if Mr. Aguglia -- just a moment, please.
3 I have no way -- I'm not speaking for Mr. Aguglia, but
4 the Government can't, at this late day, this late time
5 in the day, able to effectively cross examine at all.

6 CHAIRPERSON GRIFFIS: Let's see how it
7 goes. We'll listen to what their testimony is and
8 then we'll assess whether we need additional time to
9 substantively do it. Mr. Murphy, let's continue on,
10 but let's take some direction.

11 MR. MURPHY: Thank you very much.

12 CHAIRPERSON GRIFFIS: Because I understand
13 that --

14 MR. MURPHY: My intent was to provide you
15 background and bring you up to speed, because a number
16 of the --

17 CHAIRPERSON GRIFFIS: Right. But here's
18 the direction.

19 MR. MURPHY: -- preexisting conditions --

20 CHAIRPERSON GRIFFIS: This will go a lot
21 quicker if one of us speaks at one time. We
22 understand there's impact and I don't think it has
23 been refuted nor is it shown to be within the
24 jurisdiction or relevancy of this appeal. So we need
25 to cut to the chase very quickly to see what the

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1 Zoning Administrator would have reviewed and what
2 error he then produced in order to get us where we are
3 today.

4 MR. MURPHY: Thank you, Mr. Chair. And
5 with that, I would like to turn this over to Mr.
6 Robert Pinciotti, an engineer with URS Corporation,
7 who will provide commentary on the engineering and the
8 specific details of the structure in the rear yard.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. BERNSTEIN: I'll come back and tie
11 that into the legal arguments, his testimony at the
12 end.

13 CHAIRPERSON GRIFFIS: Good.

14 MR. PINCIOTTI: If it pleases you, I will
15 give you a synopsis of my resume.

16 CHAIRPERSON GRIFFIS: Excellent. I'll
17 tell you what. Why don't you sit. Are you proffering
18 him as an expert witness? Is that why we're looking
19 at his resume?

20 MR. BERNSTEIN: Yes.

21 CHAIRPERSON GRIFFIS: Excellent. Hand it
22 to someone at the table. They can get it up here, and
23 you can briefly summarize your resume. You're a
24 registered engineer? Structural?

25 MR. PINCIOTTI: Yes. I have probably

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1 enough in my testimony to cover this. My name is
2 Robert Dean Pinciotti.

3 CHAIRPERSON GRIFFIS: I don't want you to
4 start, unless you don't want to be established as an
5 expert.

6 MR. PINCIOTTI: Oh.

7 CHAIRPERSON GRIFFIS: But I'm trying to
8 gain time while this is coming forward. Summarize
9 your dossier for us.

10 MR. PINCIOTTI: All right.

11 CHAIRPERSON GRIFFIS: You're a structural
12 engineer?

13 MR. PINCIOTTI: I am a geotechnical
14 engineers Soils is my expertise. I've been in this
15 line of profession since -- well, for over 20 years
16 now. I've worked for the Federal Government, Corps of
17 Engineers, early in my career. I've worked for
18 private consulting firms for the last 15 plus years.

19 I have experience in all types of soil
20 investigations, recommendations for buildings, for
21 dams, for earth structures. I've served --

22 CHAIRPERSON GRIFFIS: Good. Any questions
23 from the Board?

24 MR. PINCIOTTI: The one other point that
25 might be of interest to you is I have served as a

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1 special inspections engineer of record for the
2 Government, for Fairfax County, as well as Alexandria.

3 CHAIRPERSON GRIFFIS: What did you
4 inspect?

5 MR. PINCIOTTI: What did I inspect?

6 CHAIRPERSON GRIFFIS: Yes.

7 MR. PINCIOTTI: The construction of
8 buildings.

9 CHAIRPERSON GRIFFIS: What sort of aspects
10 does a geotechnical engineer inspect on buildings?

11 MR. PINCIOTTI: In the case of being the
12 special engineer of record, I'm the one who is
13 responsible for the people who are in the field
14 monitoring the placement of soil compaction, also
15 responsible in the case of, for Fairfax County, that
16 was for a multi-story high-rise, and I was responsible
17 for making sure that the testing of the concrete for
18 the various floors was done properly and the
19 temperatures were controlled. We were working in the
20 winter.

21 Before the contractor could strip forms,
22 etcetera, the county wanted to know -- wanted it
23 signed off on by a professional engineer that it was
24 appropriate.

25 CHAIRPERSON GRIFFIS: Okay. Ms. Miller,

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1 any questions?

2 VICE CHAIRPERSON MILLER: How is your
3 experience relevant to retaining walls or this wall
4 that's at issue?

5 MR. PINCIOTTI: Well, my experience is as
6 a geotechnical engineer, as one who designs structures
7 in earth, who designs foundations, who oversees the
8 construction of various structures, who makes
9 recommendations to developers and builders and
10 property owners.

11 VICE CHAIRPERSON MILLER: Thank you.

12 CHAIRPERSON GRIFFIS: Is there anything
13 else? Any objections? Certainly.

14 MR. AGUGLIA: Have you ever been qualified
15 as an expert before on -- in any case?

16 MR. PINCIOTTI: I don't know that I have.

17 MR. AGUGLIA: You have not.

18 MR. PINCIOTTI: No.

19 MR. AGUGLIA: Have you ever testified
20 about a retaining wall?

21 MR. PINCIOTTI: No, I have never testified
22 about a retaining wall.

23 MR. AGUGLIA: Have you ever supervised the
24 construction of a retaining wall?

25 MR. PINCIOTTI: I have been involved in

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1 the oversight as a third party. I have been involved
2 in the monitoring of a -- of retaining walls, as well
3 as many other forms of geotechnical issues, which this
4 is a geotechnical issue, for construction. Yes.

5 MR. AGUGLIA: Give me one example of a
6 retaining wall.

7 MR. PINCIOTTI: One example of a retaining
8 wall would be the ATF facility in Beltsville.

9 MR. AGUGLIA: And you monitored the
10 construction?

11 MR. PINCIOTTI: I had people who were
12 monitoring the construction. At this point in my
13 career, I oversee people, I manage people.

14 MEMBER ETHERLY: Mr. Aguglia, can we just
15 confirm that the hand-held mike is on?

16 MR. AGUGLIA: Is this on?

17 MEMBER ETHERLY: Thank you.

18 MR. AGUGLIA: All right. I object to his
19 qualifications as an expert, number one. And, number
20 two, I think more importantly, because of the time and
21 where we're -- could he proffer what his testimony is
22 going to be, so we could see if it's relevant? Could
23 he make a proffer of what he's going to testify to, so
24 we can see if it's relevant to this -- to this case?
25 That is typical -- typically done.

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1 CHAIRPERSON GRIFFIS: Yes, indeed. It
2 would probably be faster to just hear the testimony,
3 though, I bet. However, let's get the issue of expert
4 status out of the way first, because we have one
5 objection. Based on what, the fact that he hasn't --

6 MR. AGUGLIA: Never been qualified as an
7 expert before, and he said that -- I thought he said
8 that he had not built a retaining wall.

9 MR. PINCIOTTI: I'm not a builder.

10 CHAIRPERSON GRIFFIS: Hasn't built one.
11 Okay. Have you designed one? As a geotechnical
12 engineer, have you designed a retaining wall?

13 MR. PINCIOTTI: I have designed and put --
14 yes, the soil parameters that are used, yes.

15 MR. BERNSTEIN: If I can interject,
16 there's an assumption here that this is a retaining
17 wall, and that hasn't been demonstrated yet. So --

18 CHAIRPERSON GRIFFIS: We're getting to a
19 level of interest, aren't we, at 8:30 at night.

20 MR. BERNSTEIN: So I think there are other
21 structures that are similar to what we have here that
22 Mr. Pinciotti has been involved in, and we'll discuss
23 those.

24 CHAIRPERSON GRIFFIS: Okay. Anything
25 else? Any other objections?

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1 MR. AGUGLIA: No.

2 CHAIRPERSON GRIFFIS: Government have any
3 objections?

4 MS. BELL: I also object to his
5 qualifications as an expert. But in -- in the
6 interest of time --

7 CHAIRPERSON GRIFFIS: What's the
8 objection, though?

9 MS. BELL: Because he hasn't been
10 qualified as an expert in the District of Columbia.

11 CHAIRPERSON GRIFFIS: Well, that's an
12 impossible threshold to get over for both of you to
13 object to. And we'd never have expert witnesses,
14 because if you ever -- if you weren't one before, you
15 couldn't be one now, then how could you be one in the
16 first place?

17 Okay. But what's the other objection?

18 MS. BELL: True. Well, people begin --
19 begin at different places. I'm also not quite sure
20 how familiar he is with the zoning regulations or even
21 with the subject matter of this particular appeal.
22 But I assume as his testimony goes on we'll have some
23 understanding about whether or not he had an
24 opportunity to review the plans, review the site,
25 those sorts of things.

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1 CHAIRPERSON GRIFFIS: Okay. Good. Any
2 other comments?

3 MR. PINCIOTTI: Can I defend myself?

4 MR. BERNSTEIN: I think we're good to go.

5 MR. PINCIOTTI: Okay.

6 CHAIRPERSON GRIFFIS: Now, we're not,
7 actually.

8 MR. BERNSTEIN: Oh, we're not?

9 CHAIRPERSON GRIFFIS: Okay. No other
10 comments? The ANC doesn't have any comment on the
11 status of the expert? Very well. Let's ask Board
12 members to -- any other comments on this?

13 I noted there wasn't any objection from
14 the Board members. I think in essence of time, but,
15 more importantly, in review of the resume that's in
16 front of me, it is in fact the Board's jurisdiction to
17 establish expert witnesses, and it's based not on
18 clear guidelines, but, rather, on our procedural
19 guidelines, of which we looked at the past experience.

20 I think you've risen to the level of
21 understanding the issues of geotechnical engineering,
22 of which you will be availing yourself to testify
23 today. In that, we will also limit the testimony of
24 your expert status to those elements.

25 So as far as they are jurisdictional or of

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1 relevance, we'll take them in. So with that, let's
2 move ahead. You were going to open.

3 MR. BERNSTEIN: I think you can just --
4 you can submit this later.

5 MR. PINCIOTTI: All right. My name is
6 Robert Dean Pinciotti. My work address is 200 Orchard
7 Ridge Drive, Gaithersburg, Maryland, (301) 258-5806.
8 I am a licensed professional engineer and an currently
9 licensed in Pennsylvania, Maryland, Virginia, South
10 Carolina, and the District of Columbia.

11 My area of practice is geotechnical
12 engineer. I have experience with the design and/or
13 construction of building foundations, basement walls,
14 earth retaining walls, bridges, highways, water tanks,
15 hydrospheres, dams, dikes, embankments, and other
16 earth structures.

17 CHAIRPERSON GRIFFIS: Excellent.

18 MR. PINCIOTTI: I am currently working as
19 a principal geotechnical engineer for URS Corporation.

20 CHAIRPERSON GRIFFIS: That's all right.
21 Let's skip down.

22 MR. PINCIOTTI: All right.

23 CHAIRPERSON GRIFFIS: You visited the
24 National Park Service parkland.

25 MR. PINCIOTTI: All right. I have visited

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1 the National Park Service parkland behind Dexter
2 Terrace three times and observed the site work that
3 has been performed on the Economides property. I
4 understand that one of the areas of dispute has to do
5 with where this structure fits into the D.C. Zoning
6 Code. That is, is this a structure -- is this
7 structure a retaining wall or something else?

8 A retaining wall functions to retain soil
9 on a site and/or to provide a means of a sudden change
10 in elevation. In 1977, when I understand the relevant
11 zoning provisions regarding required fences and
12 retaining walls was enacted, a typical retaining wall
13 was relatively thin and made of one or perhaps two
14 component parts.

15 Example of such retaining walls are
16 masonry, retaining walls made of stone or CMU set upon
17 each other with mortared joints, a cantilevered
18 concrete retaining wall made with a concrete base and
19 a relatively thin vertical stem or wall; and, three,
20 a sheet pile retaining wall made of wood or steel
21 sheathing, which is driven into the ground.

22 Soil retaining walls can be small, such as
23 the 18-inch high timber wall that supports my garden
24 in my backyard, or they can be as large as the Vietnam
25 War Memorial on the Mall.

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1 I also noted that during the April 5,
2 2005, PowerPoint presentation to the BZA entitled
3 "Response of the District of Columbia Zoning
4 Administrator" contains the following definition of a
5 retaining wall. "A wall that is not laterally
6 supported at the top, designed to retain" -- I'm sorry
7 -- "designed to resist lateral soil load." BOCA,
8 1996.

9 As an aside, I would make a note here that
10 this -- according to this part of the BOCA, a
11 retaining wall is not laterally supported, and that's
12 contrary to what Mr. Aguglia said about retaining
13 walls must be anchored. He is incorrect in that.

14 A cantilevered wall does not have anchors.
15 A gravity wall does not have anchors. A contifered
16 retaining wall does not have anchors. So it's not
17 required that they have anchors, and, in fact, the
18 BOCA says they don't.

19 After the April 5th meeting, I went back
20 and I looked specifically at the section of BOCA in
21 1996. Section 1812.2 defines retaining walls and
22 foundation walls. The importance of the difference
23 has to do with the way these two different types of
24 walls react to the lateral soil loading. That is the
25 reason for providing the definition in that section.

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1 More important to the discussion of
2 whether the Economides structure is a wall is covered
3 in Section 1825, Retaining Walls, Subsection 1,
4 General, where it states, "Walls built to retain or
5 support the lateral pressure of earth or water or
6 other superimposed loads shall be designed and
7 constructed of masonry, concrete, steel sheet piling,
8 or other approved materials. See Section 2311.7.

9 Section 2311.7 discusses the use of wood
10 for retaining walls. Further, Chapter 21, Masonry,
11 Section 2102.0, Definition, defines masonry as built-
12 up construction or a combination of building units or
13 materials of clay, shale, concrete, glass, gypsum,
14 stone, or other approved units bonded together with
15 mortar.

16 The structure at issue is not masonry
17 bonded together with mortar, nor is it concrete, nor
18 is it steel, nor is it wood. Thus, according to the
19 definition of retaining walls provided by BOCA, as
20 referenced by the Zoning Administrator, this structure
21 is not a retaining wall.

22 A structure such as the one in the
23 Economides' backyard on Dexter Terrace is more
24 accurately referred as a mechanically stabilized
25 earth, MSE, retaining structure or system. It is a

1 system or structure, because it is made up of several
2 different component parts that are interdependent.

3 It is composed of three components --
4 compacted soil, layers of geogrid embedded throughout,
5 and a vertical veneer or modular block facing. In
6 this case, the vertical veneer is composed of mesa
7 blocks. The geogrid, which here's another -- here's
8 an example that's not cut or not cut as this -- this
9 is a piece of waste off the site, this is an example
10 from the manufacturer.

11 The geogrid is a high-density polyethylene
12 plastic. According to the mesa design -- I'm sorry --
13 the MSE design prepared by Ryan Associates, the
14 structure has four different design sections, and each
15 section has approximately 20 layers of geogrid, up to
16 20 layers of geogrid.

17 The design also calls for four different
18 strengths of geogrid. Two of the design sections call
19 for different spacing of the geogrids within that
20 design section, and the design calls for various
21 lengths of grid/geogrid.

22 And some of these lengths -- that is, the
23 same length in the same section of wall are of
24 different strength. I only bring that up, that it is
25 a complicated structure.

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1 CHAIRPERSON GRIFFIS: Right.

2 MR. PINCIOTTI: The components of the --

3 CHAIRPERSON GRIFFIS: We'll call it this
4 mechanically stabilized earth. Where is that
5 terminology from?

6 MR. PINCIOTTI: That's a generic term --

7 CHAIRPERSON GRIFFIS: It's a generic term?

8 MR. PINCIOTTI: -- for this --

9 CHAIRPERSON GRIFFIS: All caps, MSE?

10 MR. PINCIOTTI: MSE.

11 CHAIRPERSON GRIFFIS: But who created the
12 generic term? Is that an engineering term?

13 MR. PINCIOTTI: The industry. Yes.

14 CHAIRPERSON GRIFFIS: The engineering
15 industry.

16 MR. PINCIOTTI: The engineering industry.

17 CHAIRPERSON GRIFFIS: The manufacturing
18 industry?

19 MR. PINCIOTTI: The manufacturing industry
20 also refers to it.

21 CHAIRPERSON GRIFFIS: Okay. But it's an
22 engineering term.

23 MR. PINCIOTTI: It's an engineering term.

24 CHAIRPERSON GRIFFIS: So you know exactly
25 what it is when someone says to you, "We're going to

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1 build an MSE."

2 MR. PINCIOTTI: Absolutely.

3 CHAIRPERSON GRIFFIS: "You ought to come
4 out and see it." Okay. Are they controlled by
5 building code?

6 MR. PINCIOTTI: There is nothing in the
7 building code or in BOCA that refers to this type of
8 a structure.

9 CHAIRPERSON GRIFFIS: Indeed. So, in
10 fact, what you're saying here was built as an MSE
11 doesn't need to conform to any building codes in the
12 District of Columbia.

13 MR. PINCIOTTI: It needs to -- does it
14 need to --

15 CHAIRPERSON GRIFFIS: It need not to have
16 a structural engineering permit? It didn't need to go
17 through any of those reviews. It doesn't need a
18 permit, as far as you're concerned, for building code.

19 MR. PINCIOTTI: No, I would not say that.
20 I would expect that it would be designed by a
21 geotechnical engineer or a structural engineer.

22 CHAIRPERSON GRIFFIS: Yes, but that would
23 keep you in business. But I'm concerned about the
24 building -- so who -- this is a new thing. You're
25 saying, boy, back in '77, we didn't know what we were

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1 doing. It was just --

2 MR. PINCIOTTI: No, we did other things.
3 This didn't exist.

4 CHAIRPERSON GRIFFIS: It didn't exist.

5 MR. PINCIOTTI: Right.

6 CHAIRPERSON GRIFFIS: So now we have this
7 in existence.

8 MR. PINCIOTTI: Right.

9 CHAIRPERSON GRIFFIS: And it's so far
10 ahead it's actually not --

11 MR. PINCIOTTI: It may be ahead of the
12 code.

13 CHAIRPERSON GRIFFIS: -- not covered in
14 building code.

15 MR. PINCIOTTI: It is not a retaining
16 wall.

17 CHAIRPERSON GRIFFIS: If it's not a
18 retaining wall, what is it?

19 MR. PINCIOTTI: It's a structure. It is
20 a structure.

21 CHAIRPERSON GRIFFIS: It's a structure for
22 building code. So how does that fly into the face of
23 zoning 2500, where it says that the retaining wall --
24 according to the zoning requirements, a retaining wall
25 shall be built according to the buildout. Retaining

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1 wall construction, in accordance with the D.C.
2 Building Code.

3 You're saying that this MSE is not
4 constructed because it's not covered in the building
5 code?

6 MR. PINCIOTTI: It is not referenced at
7 all in BOCA.

8 CHAIRPERSON GRIFFIS: So how did you --
9 how does anyone go about permitting these things? Is
10 this so Space Age no one has ever built these things?

11 MR. PINCIOTTI: No, they're built all the
12 time. You've seen pictures of them.

13 CHAIRPERSON GRIFFIS: My gosh. What
14 building codes are they under when they're building
15 these new things?

16 MR. PINCIOTTI: I would imagine that they
17 are reviewed by a structural engineer within the --

18 CHAIRPERSON GRIFFIS: But the structural
19 engineer has to review them for some code, right? I
20 mean, it's either --

21 MR. PINCIOTTI: No.

22 CHAIRPERSON GRIFFIS: -- BOCA or it's IBC.

23 MR. PINCIOTTI: No. I don't --

24 CHAIRPERSON GRIFFIS: Send them into these
25 jurisdictions and hope someone reviews them and kicks

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1 them out.

2 MR. PINCIOTTI: I would say that they are
3 -- the Zoning Administrator and the zoning people rely
4 on the PE stamp of a professional engineer who
5 designed the structure that it was properly designed.

6 CHAIRPERSON GRIFFIS: Properly designed to
7 what?

8 MR. PINCIOTTI: To be stable to --

9 CHAIRPERSON GRIFFIS: Well, what's the
10 threshold requirements to make it stable?

11 MR. PINCIOTTI: There are physical
12 properties involved. There's a science of engineering
13 that goes into an earth safety factor. There is the
14 strength of the material and how these soil -- how
15 these components interact with one another.

16 CHAIRPERSON GRIFFIS: Right.

17 MR. PINCIOTTI: And so based on education,
18 based on principles, based on equations, based on
19 analysis that has been done for years and years, a
20 structural -- a geotechnical engineer sits down,
21 designs this, puts his stamp on it, puts his signature
22 on it, tells the zoning officer --

23 CHAIRPERSON GRIFFIS: Right. I understand
24 that.

25 MR. PINCIOTTI: -- it's fine, go forward.

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1 CHAIRPERSON GRIFFIS: And our
2 jurisdictions review that for proper compliance with
3 the building code. If I take your testimony and
4 understand it completely, that a mechanically
5 stabilized earth is not covered under IBC or BOCA, or
6 any sort of building code, then, in fact, your
7 testimony is to me that this is not allowed in the
8 District of Columbia. How can we have a structure?
9 How can you build a structure that isn't covered in
10 the building code? Is there --

11 MR. PINCIOTTI: I don't have the expertise
12 to answer that one, sir.

13 CHAIRPERSON GRIFFIS: All right.

14 COMMISSIONER HILDEBRAND: Would you
15 consider this to be emerging technology? How long has
16 this technology been in existence?

17 MR. PINCIOTTI: MSE walls have been around
18 for, I would say, at least 15 years. They have become
19 much more popular in the last seven or eight years.

20 COMMISSIONER HILDEBRAND: Do they function
21 as retaining walls? In other words, that they resist
22 lateral loads and transvert vertically to the soil to
23 keep something from moving.

24 MR. PINCIOTTI: They do. So does an
25 earthen dam. You know, I have here a dam that we've

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1 constructed, or we were involved in it, in
2 Gaithersburg that is built of geogrid and soil. Now,
3 there's no face on that. There's no block face to
4 make a vertical wall.

5 CHAIRPERSON GRIFFIS: What is geogrid? Is
6 geogrid a mechanically stabilized earth?

7 MR. PINCIOTTI: This is geogrid.

8 CHAIRPERSON GRIFFIS: This is one of
9 the --

10 MR. PINCIOTTI: This is one of the
11 components that goes into --

12 CHAIRPERSON GRIFFIS: Excellent point.
13 What jurisdiction was that built in?

14 MR. PINCIOTTI: This was built in
15 Gaithersburg, Maryland.

16 CHAIRPERSON GRIFFIS: In Maryland. Do
17 they have building codes in Maryland?

18 MR. PINCIOTTI: They do.

19 CHAIRPERSON GRIFFIS: Thank goodness.
20 It's safe to go to Maryland. Okay.

21 So when you were looking at that, and you
22 said you reviewed it or you designed it?

23 MR. PINCIOTTI: This particular one my
24 company was involved in the design of it. I
25 personally was not.

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1 CHAIRPERSON GRIFFIS: In the design of it?

2 MR. PINCIOTTI: In the design of it.

3 CHAIRPERSON GRIFFIS: Did you design it in
4 conformance with the building code of Gaithersburg,
5 Maryland?

6 MR. PINCIOTTI: We designed it in
7 accordance with engineering practice.

8 CHAIRPERSON GRIFFIS: Was it in
9 conformance with the building code?

10 MR. PINCIOTTI: It is a dam. It doesn't
11 -- it's not a building. It doesn't -- isn't affected
12 by building code. It doesn't come under a building
13 code.

14 CHAIRPERSON GRIFFIS: It's not covered by
15 a building code.

16 MR. PINCIOTTI: That's right. It comes
17 under dam safety.

18 CHAIRPERSON GRIFFIS: That's an
19 interesting sign all together. Okay. Let's move on.

20 MR. PINCIOTTI: It's the same type of
21 structure, doesn't have the vertical facade, but it
22 retains. It retains in that case water.

23 CHAIRPERSON GRIFFIS: But you were saying
24 it's a different type of structure, to Mr.
25 Hildebrand's question.

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1 MR. PINCIOTTI: I'm sorry?

2 CHAIRPERSON GRIFFIS: You said this is
3 different than a retaining wall, and now you've just
4 said it's the same.

5 MR. PINCIOTTI: No, no. I said this
6 structure in the back of the Economides property is
7 the same as this MSE dam. They're both MSE
8 structures.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. PINCIOTTI: You wouldn't call this a
11 retaining wall, would you?

12 CHAIRPERSON GRIFFIS: I don't know. I
13 don't know what the heck that is. Okay. Let's move
14 on.

15 MR. PINCIOTTI: So I don't need to call
16 that a retaining wall. It retains, yes. It retains.
17 So does a dam retain.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. PINCIOTTI: But by BOCA code -- or by
20 BOCA code it's not a wall. It's something else. It's
21 a structure. Actually, it's not -- according to BOCA
22 code it's not a structure, because it's not in BOCA
23 code. But it's not a retaining wall according to BOCA
24 code, which, you know, was brought up by the Zoning
25 Administrator.

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1 COMMISSIONER HILDEBRAND: Under what
2 guidelines are these things engineered, then?

3 MR. PINCIOTTI: They are engineered --

4 COMMISSIONER HILDEBRAND: What structural
5 guidelines?

6 MR. PINCIOTTI: They're more by
7 geotechnical guidelines and based on stability,
8 internal stability of the wall, of the structure. The
9 fact that one of the items internally is to make sure
10 that these straps are long enough --

11 CHAIRPERSON GRIFFIS: He's going -- it's
12 a very direct question.

13 MR. PINCIOTTI: What?

14 CHAIRPERSON GRIFFIS: So a bunch of
15 geotechnical engineers can just run around, design
16 whatever you want.

17 MR. PINCIOTTI: Absolutely.

18 CHAIRPERSON GRIFFIS: And you just rely on
19 the fact that you are professionally registered, and
20 you all get together and go to conferences in Las
21 Vegas at the end of the year and say, "We've done some
22 great designs." But no jurisdiction reviews your
23 work.

24 MR. PINCIOTTI: You rely on that. You
25 rely on it. That's why you insist that such things be

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1 designed by professional engineers. That's why there
2 are professional engineers.

3 COMMISSIONER HILDEBRAND: But you design
4 to minimum standards. You don't just design off of
5 total theory.

6 CHAIRPERSON GRIFFIS: Actually, this --
7 I'm sorry. What is it? This dam thing you have?

8 MR. PINCIOTTI: Yes. Earthen dam. You
9 wanted to say that, didn't you?

10 CHAIRPERSON GRIFFIS: No, I didn't,
11 actually.

12 (Laughter.)

13 Was it built by a municipality or a
14 private developer?

15 MR. PINCIOTTI: It is owned by the
16 municipality.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. PINCIOTTI: It is -- they hired
19 someone to build it.

20 CHAIRPERSON GRIFFIS: Okay. Which may be
21 why you didn't know of or go through any sort of
22 building code reviews.

23 MR. PINCIOTTI: It's not the jurisdiction.
24 It's regulated by dam safety.

25 CHAIRPERSON GRIFFIS: Who is that? Is

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1 that --

2 MR. PINCIOTTI: It's a dam. It's a state
3 organization. It's part of the Department of the
4 Environment of the State of Maryland. It's the
5 Division of Dam Safety.

6 CHAIRPERSON GRIFFIS: And they do
7 structural review of it?

8 MR. PINCIOTTI: They do review of -- they
9 do an engineering review of the structural -- I
10 hesitate to say structural, because I expect that
11 structural, in many minds here, is this structural
12 engineer -- beams, concrete beams, and steel girders.

13 CHAIRPERSON GRIFFIS: And you don't need
14 to worry about any of them, only us.

15 MR. PINCIOTTI: All right. Well,
16 particularly for you. You know, a structural review,
17 but for us structure is -- it's an earth structure.
18 Earth is a building material. Earth is a building
19 material, like concrete is a building material, like
20 steel is a building material, like wood is a building
21 material.

22 CHAIRPERSON GRIFFIS: All right. Let's
23 move on. Mr. Etherly?

24 MEMBER ETHERLY: Thank you, Mr. Chair. It
25 seems like as we proceed through your testimony, kind

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1 of cutting to the chase here, that there are kind of
2 two important pieces here. One question is it seems
3 as though you're saying, simply put, because this is
4 not as you -- as you know on page 2, because it's not
5 a masonry construction, that takes it out of the realm
6 of being a retaining wall.

7 MR. PINCIOTTI: Masonry with mortar.

8 MEMBER ETHERLY: With mortar. Okay.

9 MR. PINCIOTTI: The facade is a masonry
10 facade.

11 MEMBER ETHERLY: So if it were -- if it
12 were masonry with mortar, but otherwise had all of
13 these other characteristics of an MSE structure, it
14 would still qualify, according to your analysis, as a
15 retaining wall. But because it's not a masonry
16 construction held together by mortar, bonded together
17 with mortar, that takes it out of retaining wall
18 territory.

19 MR. PINCIOTTI: That is how it appears
20 that BOCA '96 reads, yes.

21 MEMBER ETHERLY: Okay. Okay. And then,
22 secondly, just moving further, you note towards the
23 tail end of your testimony that based on some of the
24 borings that were taken you've been able to confirm
25 that portions of the leveling pad which are part of

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1 the MSE structure are located on park property.

2 MR. PINCIOTTI: Yes, that's correct.

3 MEMBER ETHERLY: Okay. Have you been able
4 to -- it wasn't quite clear, but were you able to
5 quantify how much of that leveling pad incurs into
6 park property?

7 MR. PINCIOTTI: No, we did not investigate
8 enough holes to be able to do that. We know we did
9 encounter it. I think -- I would like to think that
10 of greater -- all night long you've said things that
11 exist in the field aren't -- you know, whether it was
12 built right or wrong, whether it encroaches as a fact
13 of construction, isn't your concern. What's your
14 concern is: should the Zoning Administrator have
15 allowed this?

16 And I believe the Zoning Administrator, if
17 I understand what I've heard, the Zoning Administrator
18 has structural engineers that looked at this, and
19 looked at the design. No, that's not correct?

20 CHAIRPERSON GRIFFIS: DCRA does.

21 MR. PINCIOTTI: Okay.

22 CHAIRPERSON GRIFFIS: But I'd stick to
23 your expertise.

24 MR. PINCIOTTI: Okay.

25 CHAIRPERSON GRIFFIS: I thought the

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1 attorney was going to tie it all back to zoning.

2 MR. PINCIOTTI: Well, perhaps.

3 MR. BERNSTEIN: But if I can interject,
4 you do have some calculations about what the projected
5 encroachment on the parkland was. We couldn't tell
6 from the numbers of holes we drilled, other than to
7 tell that it encroached some distance, but the design
8 you've calculated out projections on how much it
9 actually does.

10 MR. PINCIOTTI: The design by Ryan says
11 that the soil that that leveling pad had to sit upon
12 needed to be 5,000 psf, and had to have -- as a
13 quantifiable term for that, indicated that the blow
14 counts of a standard penetration test needed to be at
15 least 12.

16 Well, I looked at boring logs that were
17 provided by the builder, Mr. Economides, and that
18 indicated that those materials -- material of that
19 density would not be encountered in the borings that
20 they drilled until a depth of five feet. We have
21 heard that the footings -- the leveling pad was not
22 put down to five feet.

23 And what I observed when we drilled
24 through was that it was not 5,000. It did not have a
25 blow count of 12. I used a different tool with

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1 correlations based in practice. It's not there.
2 Therefore, the footings should have been bigger. The
3 footings should have been either 48 inches or 72
4 inches wide, and 12 to 18 inches thick, and reinforced
5 with two or three layers of the geogrid.

6 Now, our --

7 CHAIRPERSON GRIFFIS: And this is getting
8 us to where?

9 MR. PINCIOTTI: Well, this is getting us
10 to the drawing says that the wall was only to be a
11 foot off of the property line. The borings indicate
12 that you needed a bigger footing. You didn't need a
13 two-foot footing. You needed a four-foot leveling pad
14 or a six-foot leveling pad.

15 You can't fit a six-foot leveling pad in
16 a one-foot gap. It doesn't fit. It had to go over
17 the property line, and the building -- the Zoning
18 Administrator had that information in front of him.
19 And so in essence --

20 CHAIRPERSON GRIFFIS: Did he? How did he?

21 MR. PINCIOTTI: I can walk you through
22 that.

23 MR. BERNSTEIN: I could do that now or
24 later.

25 CHAIRPERSON GRIFFIS: Yes, right now. It

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1 should take about two seconds.

2 MR. BERNSTEIN: Okay. I don't know if you
3 have Mr. Carome's exhibits up there.

4 CHAIRPERSON GRIFFIS: Actually, we do.

5 MR. BERNSTEIN: Okay. At Exhibit 51. And
6 it's -- let me get my notes, and I'll tell you how
7 many pages in approximately. We're looking for the
8 plat, and that is at page 19. I had to count them out
9 because they weren't labeled. It's three pages from
10 the back.

11 Okay. This is the official plat, and if
12 you recall -- I'm sorry. Hold that this way. Okay.
13 This is what Mr. Bello said that they use in part when
14 they're looking at these proposals. Right here on
15 this line we've got -- it's one foot plus or minus
16 typically, which is this center line is pointing to,
17 which is a buffer between what the next line is, which
18 is the wall.

19 The wall bricks or this space -- both
20 spaces are equal, which is about one foot. And what
21 that's representing, the second line, is the actual
22 mason wall, the gap between the second and third line.
23 So now you've got the Zoning Administrator with a
24 drawing that basically says the wall is very close to
25 the property line.

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1 Then, if you turn to Carome Exhibit 24,
2 and you go in -- I think it's the first drawing, page
3 13, you actually get a drawing of this wall. And this
4 is -- there's two examples of this, and this drawing
5 shows you the footer, and it says that the footer --
6 this example of a footer in a typical wall section is
7 two feet wide at 5,000 pounds per square foot.

8 They weren't finding 5,000 pounds per
9 square foot until it got down about five feet. They
10 never got down that far when they put this wall in.
11 What they actually found, and where they put in the --

12 CHAIRPERSON GRIFFIS: So you're saying
13 that the Zoning Administrator should have been
14 concerned where the footer was below grade?

15 MR. BERNSTEIN: I think the Zoning
16 Administrator should have -- if he had this
17 information before him, just due diligence, just, you
18 know, I've got information before me that looks like
19 it may impinge on the property next door.

20 CHAIRPERSON GRIFFIS: Because it's a
21 zoning issue if the footer goes beyond the property
22 line.

23 MR. BERNSTEIN: I think absolutely it's a
24 zoning issue.

25 CHAIRPERSON GRIFFIS: It is.

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1 MR. BERNSTEIN: Zoning focuses on -- in
2 part on --

3 CHAIRPERSON GRIFFIS: Where is the section
4 that the Zoning Administrator is required to --

5 MR. BERNSTEIN: Well, if you look at
6 Section 101.1, which is the preamble to the zoning
7 regs --

8 CHAIRPERSON GRIFFIS: Yes.

9 MR. BERNSTEIN: -- it talks about
10 interpreting the regulations in a manner that protects
11 private property.

12 CHAIRPERSON GRIFFIS: Certainly.

13 MR. BERNSTEIN: And protects recreation.

14 CHAIRPERSON GRIFFIS: And you can read
15 that in a million ways.

16 MR. BERNSTEIN: Pardon?

17 CHAIRPERSON GRIFFIS: You can read it in
18 a million ways.

19 MR. BERNSTEIN: You could. I'm trying to
20 --

21 CHAIRPERSON GRIFFIS: 101 does not lay out
22 any requirements in the zoning regulations, does it?

23 MR. BERNSTEIN: I think what it does is it
24 sets a tone, and the tone is if you have information
25 before you in this context that indicates an

1 infraction onto somebody's property, or indicates
2 damage to a recreational resource, which this is --

3 CHAIRPERSON GRIFFIS: What are we looking
4 at?

5 MR. BERNSTEIN: Right now, at the moment?

6 CHAIRPERSON GRIFFIS: Yes.

7 MR. BERNSTEIN: I'm still looking at --
8 now --

9 CHAIRPERSON GRIFFIS: No, no, no. I want
10 -- you began to try and quote the regulations. Give
11 us the section.

12 MR. BERNSTEIN: It's 101.1.

13 CHAIRPERSON GRIFFIS: Interpretation and
14 Application.

15 MR. BERNSTEIN: Which is --

16 CHAIRPERSON GRIFFIS: "These provisions
17 shall be held to minimum requirements adopted for the
18 promotion of public health, safety, and morals." Wow.
19 I didn't know we regulated morals. Convenience,
20 order, prosperity, and general welfare.

21 MR. BERNSTEIN: Okay. The preamble talks
22 about that they interpret the code to protect private
23 property and recreational resources. That is in
24 101.1.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. BERNSTEIN: So what I think -- what
2 I'm getting at, absolutely what I'm getting at, is
3 there is a partnership between the District and the
4 NPS that we have to work with each other to protect
5 these resources.

6 CHAIRPERSON GRIFFIS: I don't disagree.

7 MR. BERNSTEIN: If we don't do that --

8 CHAIRPERSON GRIFFIS: I think it's a very
9 important direction to take.

10 MR. BERNSTEIN: And that, plus the tone
11 set in the zoning code, which says you should be --

12 CHAIRPERSON GRIFFIS: So the Zoning
13 Administrator erred in taking the wrong tone?

14 MR. BERNSTEIN: No. The Zoning
15 Administrator erred in not undertaking due diligence
16 with respect to investigating whether or not this
17 footer was going to trespass onto the park property.

18 CHAIRPERSON GRIFFIS: Based on the
19 requirement in what section?

20 MR. BERNSTEIN: I've explained it to you
21 the best I can. I believe that --

22 CHAIRPERSON GRIFFIS: 101.

23 MR. BERNSTEIN: -- 101 sets the tone, but
24 he has also the obligation to ensure -- well, let me
25 take that back. Let me -- at the beginning of Ms.

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1 Bell's testimony from last week, she started it, I
2 believe, with saying that there was no authority to --
3 of the District government to permit a project that
4 would trespass on somebody -- on the park. So --

5 COMMISSIONER HILDEBRAND: Are you saying
6 that the Zoning Administrator should have somehow
7 known that there was a potential inaccuracy in the
8 drawing that he was reviewing?

9 MR. BERNSTEIN: It wasn't inaccurate.
10 That was the thing.

11 COMMISSIONER HILDEBRAND: But you're
12 saying this drawing here, if this is what was
13 submitted to him, it says you have 5,000 psf of
14 bearing capacity. How does he know that they're going
15 to have 5,000 psf of bearing capacity --

16 CHAIRPERSON GRIFFIS: Well, why wasn't it
17 the zoning -- the structural engineer's review and his
18 responsibility and his error not to bring it to light
19 that it went beyond the property?

20 MR. BERNSTEIN: What I think is that the
21 -- there's two things. One, I didn't get to show you
22 the very next page of this, which actually shows a
23 footer that's much larger, that goes to four foot.

24 CHAIRPERSON GRIFFIS: That's fine.

25 MR. BERNSTEIN: That comes out -- that

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1 would come out over the park property. I think that
2 there is this attempt to sort of wall off the Zoning
3 Administrator from the rest of the DCRA with respect
4 to zoning decisions. I would argue that the Zoning
5 Administrator, once he has reasonable doubt as to
6 whether or not this is going to affect the neighboring
7 property, has an obligation to walk down the hall and
8 say, "You know, this came across my desk. It's got a
9 large footer."

10 CHAIRPERSON GRIFFIS: Okay. And how do we
11 judiciously find that he walked far enough, or he
12 didn't walk far enough? How can you say that we are
13 then the body of which you're bringing an appeal
14 because the Zoning Administrator didn't walk around to
15 make sure the rest of the review agencies properly
16 looked at this?

17 MR. BERNSTEIN: Well, I don't think it was
18 the other review agencies' responsibility entirely.

19 CHAIRPERSON GRIFFIS: Who is he walking
20 to, then? He is walking to the structural, he's
21 walking to the fire marshal, he's walking to -- who
22 else do you want him to walk to?

23 MR. BERNSTEIN: No, no. I think that he
24 should have gone to them, and he should have
25 investigated for the purposes of his decision as to

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1 whether or not this was going to encroach. He had
2 enough information before him to let him know that
3 there was that possibility.

4 I'll also note that there is a requirement
5 in the D.C. Law --

6 COMMISSIONER HILDEBRAND: How so? Were
7 there boring logs or calculations that were provided
8 as part of the application that would indicate that
9 the bearing capacities on the soil weren't there? Is
10 it typical for bearings to be done before an
11 application is --

12 MR. BERNSTEIN: That information I
13 understand --

14 COMMISSIONER HILDEBRAND: -- submitted, or
15 is it typical for that to happen during the
16 construction process?

17 MR. BERNSTEIN: I understand that
18 information -- it was available. But I do not know
19 that it was submitted. But I think there was enough
20 information here for somebody to ask the question, "Do
21 you have boring logs?"

22 CHAIRPERSON GRIFFIS: Is there required
23 submission of this permit?

24 MR. BERNSTEIN: I'm sorry?

25 CHAIRPERSON GRIFFIS: Would it be

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1 information required by this permit?

2 MR. BERNSTEIN: I can't answer that. But
3 I believe it was not submitted with the permit. But
4 the information did exist, and a query to the permit
5 applicant would have yielded that information.

6 CHAIRPERSON GRIFFIS: Okay.

7 VICE CHAIRPERSON MILLER: Can I just ask
8 one question? Is it somewhere in the zoning
9 regulations or in another statute that provides that
10 the Zoning Administrator needs to review to make sure
11 that a building permit doesn't result in encroachment
12 on federal property or other private property?

13 MR. BERNSTEIN: There is a provision that
14 deals with party walls. And I can get the citation
15 for that in a moment, but basically, under the party
16 wall concept, the -- a building permit cannot be
17 signed off if the footer -- if that -- the leveling
18 pad that we're talking about goes over onto the
19 adjacent property without the adjacent property
20 owner's approval.

21 And in this case, we were not asked. We
22 didn't know that it was coming over onto us.

23 COMMISSIONER HILDEBRAND: But doesn't the
24 building application permit say that -- specifically
25 that it's entirely on the owner's land?

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1 MR. BERNSTEIN: It did say that. And I
2 will not dispute that.

3 COMMISSIONER HILDEBRAND: So wouldn't the
4 Zoning Administrator be able to rely on the statement
5 of the owner --

6 MR. BERNSTEIN: I think that you can --

7 COMMISSIONER HILDEBRAND: -- as being
8 accurate?

9 MR. BERNSTEIN: -- rely on the statement
10 of the owner to a point. Where you have information
11 in front of you that conflicts with the statement,
12 that you have an obligation to use due diligence to
13 investigate it.

14 CHAIRPERSON GRIFFIS: But when would the
15 Zoning Administrator have known that they were over
16 the property and weren't actually at the point of
17 which he was reviewing it? When did it change for the
18 Zoning Administrator?

19 MR. BERNSTEIN: The Zoning Administrator
20 had two documents in front of him. One is that plat,
21 and the plat showed there was only a one-foot buffer
22 between the face of the wall --

23 CHAIRPERSON GRIFFIS: Right. And what
24 you're saying, he should have done the calculations
25 and then called in the geotechnical engineer and

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1 established the fact that, man, this footer is big,
2 and it's going across the property line.

3 MR. BERNSTEIN: What I'm saying is then he
4 had a second document that showed this potentiality,
5 and that's when he should have called somebody in and
6 said, "Can you please take a look at this and see
7 whether or not we have information that would indicate
8 that it's going to cross over that line."

9 CHAIRPERSON GRIFFIS: Because something
10 that was below grade -- you said at five feet you
11 were getting 5,000 psf?

12 MR. BERNSTEIN: Five feet would have been
13 -- five feet is actually what the -- I believe the
14 original borings from the Economides said where they
15 found it --

16 CHAIRPERSON GRIFFIS: Five feet below the
17 earth --

18 MR. BERNSTEIN: -- but they ended up --

19 CHAIRPERSON GRIFFIS: -- the Zoning
20 Administrator would have been concerned that that
21 footer was coming across the property line.

22 MR. PINCIOTTI: No, sir. That's not --
23 you misunderstand. At a depth of five feet below the
24 surface --

25 CHAIRPERSON GRIFFIS: Turn your mike on.

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1 Thank you.

2 MR. PINCIOTTI: At a depth of five feet
3 below the surface, based on the borings that I have
4 seen that were taken on the property, the bearing
5 pressure, the bearing capacity, is 5,000.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. PINCIOTTI: And at that point --

8 CHAIRPERSON GRIFFIS: Where are these --
9 what do you call it, the --

10 MR. PINCIOTTI: The leveling pad?

11 CHAIRPERSON GRIFFIS: -- the piece --

12 MR. PINCIOTTI: Leveling pad?

13 CHAIRPERSON GRIFFIS: The leveling pad.

14 All right. So --

15 MR. PINCIOTTI: The leveling pad is not
16 supposed to be that deep.

17 CHAIRPERSON GRIFFIS: So how deep is it
18 supposed to be?

19 MR. PINCIOTTI: It is supposed to be
20 between one and a half and two and a half feet below
21 ground surface.

22 CHAIRPERSON GRIFFIS: So it's your
23 understanding --

24 MR. PINCIOTTI: According to the design.

25 CHAIRPERSON GRIFFIS: It's your statement

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1 that the Zoning Administrator should be concerned with
2 those aspects that are two feet below the surface.

3 MR. BERNSTEIN: Yes, sir. It's all one
4 unit.

5 CHAIRPERSON GRIFFIS: Okay. I think
6 that's a clear position. Let's move ahead.

7 COMMISSIONER HILDEBRAND: I have one
8 question. Is 5,000 pounds per square feet a typical
9 measuring point, or is that unique in some way?

10 MR. PINCIOTTI: Could you rephrase the
11 question, please?

12 COMMISSIONER HILDEBRAND: Is the 5,000
13 pounds per square foot a unique requirement, or is it
14 a typical requirement for -- to standard structural
15 foundations.

16 MR. PINCIOTTI: I would -- it varies by
17 site, by geology. Whether or not one would expect to
18 encounter 5,000 -- 5,000 is a little on the high side
19 for shallow soils. I might not -- based on my
20 experience, I wouldn't have expected 5,000 at two feet
21 below the ground surface in this geology.

22 CHAIRPERSON GRIFFIS: I think what he's
23 asking is, is that varying capacity typical for this
24 type of construction? Is that what you're asking, Mr.
25 Hildebrand?

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1 COMMISSIONER HILDEBRAND: Yes.

2 CHAIRPERSON GRIFFIS: That you would find
3 this anywhere else in the earth.

4 COMMISSIONER HILDEBRAND: Yes. No. No,
5 I mean, you can find --

6 CHAIRPERSON GRIFFIS: Is that a typical
7 bearing capacity for this type of structure, or what's
8 analogous to this?

9 MR. PINCIOTTI: I think anything between
10 2,000 and 5,000 -- 5,000 may be a little -- 2,000 to
11 5,000 is typical, and it's partially based on the
12 preference of the professional engineer who is doing
13 the work and what he sees in the borings that he
14 should have done to design this wall.

15 CHAIRPERSON GRIFFIS: Okay. Followup?
16 All right. Let's move ahead. What's next?

17 MR. PINCIOTTI: I described that it is a
18 structure. It's an MSE structure. It is -- I think
19 I've explained to you it is similar to a dam, so we've
20 talked about that. That is an MSE structure.

21 CHAIRPERSON GRIFFIS: Okay. We've gotten
22 through your written testimony.

23 MR. PINCIOTTI: Okay.

24 CHAIRPERSON GRIFFIS: Is there anything
25 else?

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1 MR. PINCIOTTI: So this does go in,
2 because I didn't say it all. But you've read it all,
3 and it's in the record. That's --

4 CHAIRPERSON GRIFFIS: It's all in there.

5 MR. PINCIOTTI: All right. Thank you very
6 much.

7 CHAIRPERSON GRIFFIS: Ms. Miller?

8 VICE CHAIRPERSON MILLER: If you look on
9 page 2 where you were distinguishing between a
10 retaining wall and a foundation wall, and I followed
11 why you're saying this doesn't fall within the
12 definition of a retaining wall. What's the relevance
13 of the foundation wall? Is there any relevance of
14 that to this wall we're talking about in this case?

15 MR. PINCIOTTI: I only brought that up
16 because the District of Columbia Zoning Administrator
17 had brought this phrase up about that a wall -- a
18 retaining wall -- they had brought up the definition
19 of retaining wall. And when I look at that section,
20 it's not a question of defining what a retaining wall
21 is.

22 It's a question of differentiating between
23 a retaining wall that does not have tied support at
24 the top to a basement wall that has not only a footer
25 at the bottom but has a floor at the top, so that that

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1 basement wall cannot rotate. And it has to do with
2 the analysis of how the two walls behave differently.

3 VICE CHAIRPERSON MILLER: I got that.
4 Okay. Is there any relevance to foundation wall? Do
5 we need to do anything with that term?

6 MR. PINCIOTTI: No.

7 VICE CHAIRPERSON MILLER: Okay. Thank
8 you.

9 CHAIRPERSON GRIFFIS: Excellent. Any
10 other questions from the Board? Let's move ahead,
11 then.

12 MR. BERNSTEIN: There was -- Mr. Chairman,
13 there was one other matter that we wanted Mr.
14 Pinciotti to cover, if we can go back to that.

15 CHAIRPERSON GRIFFIS: What is it?

16 MR. BERNSTEIN: At your leisure.

17 CHAIRPERSON GRIFFIS: We're past leisure
18 at this point.

19 (Laughter.)

20 Please do.

21 MR. PINCIOTTI: You know, this structure
22 contains -- covers a certain footprint. It is a
23 structure, and it fills a certain part of the
24 backyard. Not only does it fill a certain portion of
25 the backyard, and you have that example -- I know, I

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1 need a mike.

2 Okay. You've seen this many times. The
3 green here --

4 MR. CAROME: For the record, he's
5 referring to the blowup of Exhibit 23.

6 MR. PINCIOTTI: The green area here is the
7 MSE structure, and it fulfills a certain amount.
8 Behind it it has soil, and I'm going to pull these
9 off, so I can put another one up in its place. Sorry.
10 They just fall down.

11 MR. BERNSTEIN: Maybe it would help, Bob,
12 if I made the legal points, and then you sort of
13 explained the calculations you came up with.

14 MR. PINCIOTTI: All right.

15 MR. BERNSTEIN: Okay. We're doing this a
16 little ad hoc, so please bear with me.

17 MS. BAILEY: Mr. Murphy, is that
18 submission in the file, sir?

19 MR. MURPHY: I'm sorry? Excuse me?

20 MS. BAILEY: Is the submission in the
21 file?

22 MR. MURPHY: Yes, the base sheet is. The
23 cover -- the document is -- if you can call the
24 document that's the underlying document out, please.
25 Exhibit 23, and this is an explanation of Exhibit 23.

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1 CHAIRPERSON GRIFFIS: All right. The
2 question is: is this in the record? It isn't that
3 hard.

4 MR. BERNSTEIN: No, it is not.

5 CHAIRPERSON GRIFFIS: Okay. We're going
6 to get it into the record.

7 MR. MURPHY: All right.

8 CHAIRPERSON GRIFFIS: All right. Let's
9 move ahead.

10 MR. BERNSTEIN: Okay. So this goes to --
11 I'm sorry, this goes to the definition of rear yard.
12 Okay. We're going to start off with the definition of
13 yard, which I think most of us know. But the key
14 there is no building or structure shall occupy in
15 excess of 50 percent of a yard required by Title XI.

16 MS. BELL: Excuse me, but --

17 MR. AGUGLIA: We're going to object here.
18 He's asking for conclusions of law from his expert or
19 --

20 MR. BERNSTEIN: No.

21 MR. AGUGLIA: This is the point for the
22 attorney to make from the facts that are derived.

23 MR. BERNSTEIN: Other way around.

24 MS. BELL: And, actually, my objection is
25 I thought he was considered an expert for the limited

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1 purpose of talking about the geotechnical engineering,
2 not whether or not a side yard or the yard or the rear
3 yard was correctly identified by the Zoning
4 Administrator.

5 CHAIRPERSON GRIFFIS: Excellent.

6 MS. BELL: So I'm a little confused where
7 we're going.

8 MR. BERNSTEIN: I'm not speaking to that.

9 MS. BELL: Well --

10 CHAIRPERSON GRIFFIS: Good. Nor will we.
11 Okay. All right. Let's move ahead.

12 MR. BERNSTEIN: All right. So a rear yard
13 is defined as being between the rear line of the
14 building or structure and the real lot line.

15 CHAIRPERSON GRIFFIS: Okay. We've got the
16 definitions in front of us. Go ahead.

17 MR. BERNSTEIN: Okay.

18 CHAIRPERSON GRIFFIS: What are you doing
19 with them?

20 MR. BERNSTEIN: So this line here is
21 basically the line that Mr. Bello drew as the rear
22 building line on the fit, the green line.

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. BERNSTEIN: The rear lot line is here.
25 The question is: is more than 50 percent of this area

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1 covered by this structure? And so we asked Mr.
2 Pinciotti to take a look at the structure itself and
3 to try to calculate the area that covered the distance
4 between the rear building line and the rear lot line.

5 And in the instructions we gave, we said,
6 "We understand that the Board may be concerned about
7 the ability of people to do normal grading on their
8 property." And so could you calculate what could not
9 be considered normal grading in the sense that the
10 structure is necessary to hold it in place, and, but
11 for the structure, it couldn't rest there.

12 So he's got a calculation that I think you
13 can explain.

14 MR. PINCIOTTI: So what I did for them was
15 to take this, and when we design slopes, we consider
16 a one vertical, two horizontal slope to be a stable
17 slope for long-term application. A one on three, if
18 you want to put mowers on it, things like that,
19 safely.

20 But in this case, I looked at a one on two
21 slope. So one up, two over, I calculated the
22 difference in elevation between the upper layer and
23 the original grade. I laid back, then, twice that
24 difference in elevation and came up with this line
25 here. So everything that is above this red line could

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1 be there simply by grading a one on two slope, and
2 that would be a stable slope.

3 And the owner could have done that,
4 started here with a one on two slope, and he would
5 have gotten up to this point. All the soil between
6 this MSE structure and this red line, this soil in
7 here, is above that two on one. It's not long-term
8 stable. If it were not for this structure in front of
9 it, it would fall down over time.

10 So I conclude that this soil here is only
11 remaining here because of this structure. Therefore,
12 it is part of this structure and --

13 CHAIRPERSON GRIFFIS: So that structure is
14 retaining that soil behind it.

15 MR. PINCIOTTI: The structure is retaining
16 that soil, and that soil could not be there without
17 it. The soil above this line could be there, just by
18 grading. So if you look at this whole area behind
19 here, divide this area --

20 CHAIRPERSON GRIFFIS: So somehow because
21 you could regrade this, so a lawnmower wouldn't roll
22 down the hill, that --

23 MR. PINCIOTTI: No, I didn't do that.

24 CHAIRPERSON GRIFFIS: -- pulls it out of
25 Section 2503?

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1 MR. BERNSTEIN: What I was attempting to
2 do was respond to what I perceived as a concern of
3 yours, that people should be able to do normal grading
4 in their yards. And I heard that issue raised a
5 couple of times, so I asked him to do a calculation
6 that said basically if someone was doing normal
7 grading, what could they do, and take that area out of
8 the calculation of how big this structure is.

9 CHAIRPERSON GRIFFIS: I don't see where
10 that goes. I don't see where -- maybe that's the
11 trouble of trying to listen to the Board. But how
12 does it go -- how does it help us understand that this
13 is a retaining wall that is allowed in the rear yard
14 as a structure, or that this somehow is not allowed
15 under 2503 and falls within the structures not allowed
16 in the rear yard?

17 MR. BERNSTEIN: Mr. Pinciotti just went
18 through his description of what this is, and it's an
19 MSE structure --

20 CHAIRPERSON GRIFFIS: Right.

21 MR. BERNSTEIN: -- that doesn't fall
22 within the normal --

23 CHAIRPERSON GRIFFIS: Right. Which
24 doesn't fall within 2503.3. I got that.

25 MR. BERNSTEIN: Right. But even --

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1 CHAIRPERSON GRIFFIS: So once it's MSE,
2 it's not under retaining wall; therefore, it isn't
3 allowed.

4 MR. BERNSTEIN: Even if it doesn't fall
5 within 2503.3, it still covers 77 percent.

6 CHAIRPERSON GRIFFIS: Even if it does? Is
7 that what you said?

8 MR. BERNSTEIN: It covers 77 percent of
9 the rear yard under this calculation, and that's
10 prohibited even for retaining walls. If you consider
11 the testimony of Mr. Bello from last -- from the 5th,
12 he said that the -- in his example, he was talking
13 about 2503.2, with the height of structures.

14 And he basically said that the restriction
15 of -- the definition of -- you know, the 50 percent
16 restriction was a further restriction on the height of
17 structures that could be built in a yard under 2503.
18 That same analysis should apply here. The 50 percent
19 requirement limits the amount of -- the size of a
20 structure that can be put in the rear yard under
21 2503.3.

22 The retaining wall can't be more than 50
23 percent -- cover more than 50 percent of the yard, nor
24 could a structure under 2503.3 -- I mean, the same
25 logic applies.

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1 VICE CHAIRPERSON MILLER: What are you
2 calculating in your 77 percent?

3 MR. PINCIOTTI: What I did was I divided
4 everything on the property below the green and red
5 line. So all this area divided by everything below
6 the green line.

7 VICE CHAIRPERSON MILLER: So you're
8 calculating soil in your lot occupancy count?

9 MR. PINCIOTTI: I'm including -- I
10 included the soil that would not -- that could not
11 stay there without the MSE structure in front of it.

12 MR. BERNSTEIN: Well, you could make an
13 argument that everything that's put back -- you could
14 argue that everything back here that was brought in by
15 truck, the 300 some odd trucks, that would bring the
16 soil up to here, and it covers 99 percent roughly of
17 the rear -- required rear yard or the whole rear yard.

18 CHAIRPERSON GRIFFIS: So that soil will
19 count towards lot occupancy.

20 MR. BERNSTEIN: Yard occupancy, the 50
21 percent.

22 CHAIRPERSON GRIFFIS: Yard occupancy, Y0.

23 MR. BERNSTEIN: Correct.

24 CHAIRPERSON GRIFFIS: Instead of L0.

25 MR. BERNSTEIN: It exceeds the 50 percent

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1 limitation on structures that can go into a rear yard.

2 CHAIRPERSON GRIFFIS: So where does the
3 structure count towards the yard occupancy and not
4 towards the lot occupancy? It doesn't. All right.
5 Let's move ahead. What else?

6 MR. BERNSTEIN: Is there anything else on
7 this? The last point I'd like to make on this is that
8 the -- under 25.302, you've got a four-foot height
9 limitation on structures. And Mr. Pinciotti has
10 explained that this is a structure, and that that --
11 the height of that structure is measured from grade.

12 And if you take a look at the legislative
13 history of the 2503.2, there is an example in there of
14 where you measure grade from. And that is not at the
15 level of the first floor as has been suggested, but it
16 is actually at ground level.

17 CHAIRPERSON GRIFFIS: What ground level?

18 MR. BERNSTEIN: At the level from -- from
19 the original -- the original ground level. The ground
20 level that exists on grade.

21 CHAIRPERSON GRIFFIS: That's what the
22 legislative history says regarding 2503?

23 MR. BERNSTEIN: Right.

24 CHAIRPERSON GRIFFIS: Okay. Let's move
25 ahead.

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1 MR. BERNSTEIN: Did you want to talk about
2 Wesley Heights?

3 MR. MURPHY: No. Mr. Chair, I think we've
4 covered Wesley Heights, the preexisting conditions,
5 the average grade, the condition of what the
6 difference between a retaining wall as required and
7 what this -- this structure or structures -- what
8 these structures are, the fact that the Zoning
9 Administrator did not have a BOCA-based or a D.C.
10 Building code based criteria for building this sort of
11 structure.

12 We then talked about the structure
13 occupying space and how it relates to yard occupancy.
14 And I think we've covered it. Thank you very much.

15 CHAIRPERSON GRIFFIS: Thank you very much.
16 Let's go to cross. Who wants to start? Any questions
17 from the Board, first, before we get into it? I think
18 we've gotten all our questions answered. Does the
19 Government want to start first? Or not? Mr. Aguglia?
20 You guys decide.

21 MS. BELL: In light of the fact that this
22 has been new information, and particularly in light of
23 the fact that he is an engineer, and obviously I am
24 not, I would really like an opportunity to sort of
25 take a look at this a little more closely with the

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1 Zoning Administrator, and obviously our office.

2 So I would not like to cross on this
3 testimony, because I'm just not equipped to go into
4 his entire theory that --

5 CHAIRPERSON GRIFFIS: Right. You want to
6 cross at some other time?

7 MS. BELL: No. Actually, could we provide
8 something in writing to the Board?

9 CHAIRPERSON GRIFFIS: Absolutely.

10 MS. BELL: And not go through more of --

11 CHAIRPERSON GRIFFIS: Yes.

12 MS. BELL: Thank you.

13 CHAIRPERSON GRIFFIS: So we're going to
14 keep the record open for DCRA to submit rebuttal
15 testimony, I guess we'll take it as, to -- to the
16 testimony for today. And, of course, there will be
17 ample time for responses to that.

18 Mr. Aguglia, cross?

19 MR. AGUGLIA: Yes. I would like to start
20 off by saying that we need to reserve our right to
21 bring our expert engineer in rebuttal, because this
22 was totally unknown. I mean, beginning with the fact
23 that they were going to bring in an expert with his --
24 so I'm going to reserve the right, and I will start my
25 cross examination.

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1 Now, I take it, sir, that your basic
2 testimony is, number one, that this structure is not
3 a retaining wall. Correct? And, number two, if it --
4 let's say, just assume even if it were a retaining
5 wall --

6 CHAIRPERSON GRIFFIS: Hold on. We're
7 having some technical difficulties. Go ahead.

8 MR. AGUGLIA: Assuming even if it were a
9 retaining wall, the Zoning Administrator should have
10 noticed that it was going to trespass on the federal
11 parkland, and, therefore, should have said -- not
12 approved the permit.

13 MR. PINCIOTTI: That's correct.

14 MR. AGUGLIA: Right. And then, third,
15 perhaps the property owner could have recreated the
16 whole thing to level it off without being in violation
17 of the zoning regs.

18 MR. PINCIOTTI: Yes.

19 MR. AGUGLIA: Right. Even with the same
20 wall.

21 MR. PINCIOTTI: Even with the same
22 structure. Well, the issue -- he certainly could have
23 avoided the issue of being off the property with the
24 same structure by moving it back a few feet. Yes,
25 that could have been done.

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1 Now, in terms of structure and the amount
2 of structure that is allowed, that -- it's still a
3 structure.

4 MR. AGUGLIA: It's still a structure. All
5 right. Let's talk about the Zoning Administrator
6 should have realized that the wall was so close to the
7 boundary line that, in fact, it was going to be a
8 trespass. Do you base -- what do you base your
9 measurements on? Do you base your measurements on the
10 latest survey by the Park Service?

11 MR. PINCIOTTI: No. I base my -- I base
12 what I think the Zoning Administrator should have
13 known from the plat that said it was a foot, and the
14 design document by Ryan Engineers that said that it
15 could be six feet.

16 MR. AGUGLIA: You're losing me here. Let
17 me give you a hypothetical, since you're an expert.
18 If the boundary line was three or four feet away from
19 the wall, would the Zoning Administrator -- should the
20 Zoning Administrator have then said, "Okay. It's not
21 going to be a problem"? How -- what is the distance
22 that the zoning -- here's what I'm trying to get at.
23 What is the question --

24 MR. BERNSTEIN: I'd like to object. The
25 expert witness shouldn't be answering questions about

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1 what the Zoning Administrator -- how the Zoning
2 Administrator -- he's not to interpret the zoning
3 laws. He's just providing information on what that
4 engineering report said. The engineering report said
5 that --

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. AGUGLIA: But isn't that my point
8 precisely? His point is the Zoning Administrator
9 should have read and should have known, and,
10 therefore, rejected it?

11 CHAIRPERSON GRIFFIS: Right.

12 MR. AGUGLIA: That's my point precisely.

13 CHAIRPERSON GRIFFIS: Indeed. It's
14 understood. Let's move ahead.

15 MR. AGUGLIA: Thank you. All right. So
16 in order for you to make a judgment that they were
17 trespassing, wouldn't you have had to have a base
18 measurement?

19 MR. PINCIOTTI: I'm sorry. Can you repeat
20 that?

21 MR. AGUGLIA: In order for you to make a
22 judgment --

23 CHAIRPERSON GRIFFIS: We're going the same
24 direction. I mean, I think he has answered the
25 question, if I understand what you're asking. He

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1 looked at that, saw one foot, saw a footer larger, it
2 went over the property.

3 MR. BERNSTEIN: If I can ask a clarifying
4 question. Were you talking about after the actual
5 determination of a trespass, or the determination
6 based on the record?

7 MR. AGUGLIA: I'm asking him if he went
8 out -- what measurement he used to see how close the
9 wall was to federal parkland. What measurement did
10 you use?

11 MR. BERNSTEIN: And I think the best
12 answer to that is to defer that question to --

13 MR. AGUGLIA: No. No. He's the expert.
14 Excuse me. Excuse me. He's the expert.

15 MR. BERNSTEIN: If we had an expert on
16 side width, if I can clarify this --

17 CHAIRPERSON GRIFFIS: He's crossing his
18 testimony. We're not -- this is not new testimony.

19 MR. AGUGLIA: Right. His testimony is
20 that the Zoning Administrator should have seen that
21 the wall was going to encroach on federal property,
22 and I'm asking you, how did you make that
23 determination? You must have had a measurement to
24 make that determination.

25 MR. PINCIOTTI: It is in the design

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1 document by Ryan Engineering, and the plat -- the plat
2 that says it's one foot, and the design document that
3 says it's six feet, they don't jive. It doesn't work.
4 Perhaps I'm not understanding your question. You're
5 welcome to ask again.

6 MR. AGUGLIA: All right. If the Zoning
7 Administrator were -- under your interpretation, the
8 Zoning Administrator would have to go out and actually
9 measure the distance to see --

10 MR. PINCIOTTI: No, not at all, because he
11 is issuing a permit --

12 CHAIRPERSON GRIFFIS: I think we should
13 move on. I understand the question. I think it's
14 been answered.

15 MR. AGUGLIA: All right.

16 CHAIRPERSON GRIFFIS: Let's go ahead.

17 MR. AGUGLIA: Where is the greatest amount
18 of -- where would the greatest leveling pad be
19 required on the site? Would it be at the highest
20 point?

21 MR. PINCIOTTI: According to the design
22 document, the leveling pad is controlled -- the width
23 and the thickness of the leveling pad is controlled by
24 the ability of the soil below it to resist the load.

25 MR. AGUGLIA: And wouldn't that also then

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1 be controlled by the height?

2 MR. PINCIOTTI: No, not at all.

3 MR. AGUGLIA: The greater the weight.

4 MR. PINCIOTTI: No, not at all, because
5 it's not a question of the weight coming down. It's
6 a question of the ability of the earth to resist the
7 load. The ability of the earth to resist the load is
8 --

9 CHAIRPERSON GRIFFIS: Combination of both.

10 MR. PINCIOTTI: No, it's not a combination
11 of both.

12 CHAIRPERSON GRIFFIS: Of course it is. If
13 you're saying that the bearing capacity of the earth
14 establishes the size of the footing, well, the bearing
15 capacity is going to be based on the load that's put
16 upon it, and that's --

17 MR. PINCIOTTI: No, it's the capacity of
18 the earth. All right? If I have a gas tank that has
19 a capacity of 30 gallons, it doesn't matter whether I
20 have five gallons in it or 30 gallons in it, the
21 capacity is 30 gallons. The capacity of the earth is
22 5,000 psf, whether it's 5,000 psf brought down on it
23 or one pound brought down on it. It's regardless of
24 the load.

25 CHAIRPERSON GRIFFIS: All right. Okay.

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1 MR. AGUGLIA: All right. Let me ask you
2 this, sir. Are you aware that retaining wall is not
3 defined in the zoning regulations?

4 CHAIRPERSON GRIFFIS: Is that a yes or no
5 question?

6 *: I'm going to object to --

7 CHAIRPERSON GRIFFIS: Well, actually, it's
8 not your witness. I'm not sure what you object to.

9 *: I think I'm entitled to object.

10 CHAIRPERSON GRIFFIS: Object to his
11 question on cross of his witness?

12 *: This is a record that's being made for
13 my appeal, yes.

14 CHAIRPERSON GRIFFIS: Yes or no, are you
15 aware -- it's a simple question. Are you aware that
16 it's defined in the zoning regs, or not?

17 MR. PINCIOTTI: I'm not sure. I'm not
18 sure.

19 MR. AGUGLIA: All right. Let's assume it
20 is not defined in the zoning regulations, the zoning
21 regulations state that when a term is not defined you
22 go to Webster's Dictionary. All right? Webster's
23 Unabridged Dictionary.

24 I am showing you what is the definition of
25 a retaining wall under Webster's Unabridged

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1 Dictionary, latest. Would you read the definition of
2 a retaining wall?

3 MR. PINCIOTTI: Retaining wall, noun, a
4 wall built to resist lateral pressures other than wind
5 pressure, especially one to prevent an earth slide.

6 MR. AGUGLIA: All right. Could the Zoning
7 Administrator reasonably interpret that the wall --
8 that the wall on the subject property meets that
9 definition? Is that a reasonable interpretation of
10 that definition?

11 MR. PINCIOTTI: It's not a reasonable
12 question.

13 MR. AGUGLIA: It's not a reasonable
14 question?

15 MR. PINCIOTTI: Right.

16 MR. AGUGLIA: •The Zoning Administrator
17 looks at the zoning regulations. There is no
18 definition of the term "retaining wall." He is
19 required to go to Webster's Unabridged -- this is in
20 the record. Webster's Unabridged says it is a wall
21 built to resist lateral pressure, other than wind
22 pressure, one to prevent an earth slide.

23 So my question is: could the Zoning
24 Administrator have read this definition and looked at
25 these plans and reasonably concluded that this was a

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1 retaining wall?

2 MR. PINCIOTTI: No.

3 MR. AGUGLIA: No.

4 MR. PINCIOTTI: It is a structure. It is
5 not a wall.

6 MR. AGUGLIA: It is not a wall.

7 MR. PINCIOTTI: By BOCA, it's not a
8 retaining wall.

9 MR. AGUGLIA: Okay. By BOCA, we'll get to
10 that in a minute.

11 MR. PINCIOTTI: All right.

12 MR. AGUGLIA: All right. You've seen this
13 -- have you seen this document that I gave to the
14 Board today?

15 MR. PINCIOTTI: I have seen it. I have
16 not looked at all the exhibits in detail.

17 MR. AGUGLIA: All right. Now, in Exhibit
18 Number 1, Mr. Carome's expert, Neubauer, refers to the
19 structure as a rear yard retaining wall. Are you
20 saying that he is wrong? Is that your testimony, that
21 he is wrong?

22 MR. PINCIOTTI: It is my testimony that it
23 is a structure.

24 MR. AGUGLIA: Well, what kind of a
25 structure?

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1 MR. PINCIOTTI: It is a mechanically
2 stabilized earth structure.

3 MR. AGUGLIA: Not a retaining wall.

4 MR. BERNSTEIN: Isn't that asked and
5 answered?

6 MR. PINCIOTTI: This -- are you calling
7 this a retaining wall?

8 CHAIRPERSON GRIFFIS: All right.

9 MR. PINCIOTTI: This is not a retaining
10 wall, but it is a mechanically stabilized structure.

11 CHAIRPERSON GRIFFIS: Gentlemen, let's
12 keep the questions and answers going.

13 MR. AGUGLIA: All right. Exhibit
14 Number 2, this is by Mr. Carome's other expert. The
15 underlying portion that I have underlined, the
16 structure is a large geostructure type wall, relying
17 on earth characteristics and gravity for support and
18 an acceptable boot straps approach. Are you saying
19 that he is also wrong?

20 MR. PINCIOTTI: No, he is right. It is a
21 structure. It a geostructure.

22 MR. AGUGLIA: Geostructure type wall. Do
23 you agree or disagree?

24 MR. PINCIOTTI: Do I agree or disagree?

25 MR. AGUGLIA: With that statement. It has

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1 a veneer on it.

2 MR. PINCIOTTI: Yes, it has a veneer, but
3 that veneer is not what is holding back the soil. It
4 is not what is retaining the soil. You could strip
5 that veneer off, and you'd have this, and it would
6 hold that yard in place.

7 MR. AGUGLIA: All right. I'm referring
8 you to Exhibit Number 8, and Exhibit Number 4, the
9 affidavit of our --

10 MR. PINCIOTTI: Which one?

11 MR. AGUGLIA: Exhibit Number 4, the
12 affidavit of our engineer, our expert engineer.
13 Paragraph 5, "The retaining wall is indeed a true
14 retaining wall." Do you disagree with that?

15 MR. PINCIOTTI: According to BOCA, it is
16 not a true retaining wall.

17 MR. AGUGLIA: Okay.

18 MR. PINCIOTTI: The question is: what is
19 a true retaining wall?

20 MR. AGUGLIA: Okay.

21 MR. PINCIOTTI: It is a retaining
22 structure.

23 MR. AGUGLIA: Let's go to the BOCA Code.
24 What BOCA Code is now in effect in the District of
25 Columbia? What BOCA Code?

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1 MR. PINCIOTTI: I do not know which BOCA
2 Code is currently in effect. I --

3 MR. AGUGLIA: You do not know?

4 MR. PINCIOTTI: I went to the one that the
5 Zoning Administrator went to, 1996.

6 MR. AGUGLIA: But do you realize that's
7 not the BOCA Code that's now in effect when this
8 retaining wall was built? Do you know that?

9 MR. PINCIOTTI: I do, yes.

10 MR. AGUGLIA: It is not, correct?

11 MR. PINCIOTTI: That's --

12 MR. AGUGLIA: So you were submitting
13 evidence about a BOCA Code that was not in effect?

14 MR. PINCIOTTI: I was following the lead
15 of the Zoning Administrator.

16 MR. BERNSTEIN: The Zoning Administrator
17 identified that as what the Zoning Administrator
18 relied on, and he was responding to the Zoning
19 Administrator.

20 MR. AGUGLIA: Don't you think you have a
21 duty as an expert to tell this Board that perhaps that
22 was wrong and that's not the -- that is not the
23 building code that was relied on in issuing this
24 permit? You didn't have that duty to tell this Board?

25 MR. PINCIOTTI: No.

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1 MR. AGUGLIA: No.

2 MR. PINCIOTTI: No.

3 MR. AGUGLIA: So the 1996 BOCA Code is not
4 the one that's currently in effect in the District,
5 right? Do you know what is?

6 MR. PINCIOTTI: Well, you're handing me
7 the International Building Code.

8 MR. AGUGLIA: Yes.

9 MR. PINCIOTTI: 2000.

10 MR. AGUGLIA: Is that the one that's
11 currently in effect?

12 MR. PINCIOTTI: I believe that to be
13 correct.

14 MR. AGUGLIA: That's correct. Okay. Now,
15 I will refer you to --

16 MR. BERNSTEIN: My objection is that the
17 expert witness had the right to respond to what the
18 Zoning Administrator put forward as what the Zoning
19 Administrator relied on in making determinations about
20 this structure.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. AGUGLIA: All right.

23 CHAIRPERSON GRIFFIS: I don't think that
24 was refuted. That was a different question. Let's
25 move ahead.

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1 MR. AGUGLIA: Here is what an expert is
2 all about. An expert is almost an officer of the
3 court. An expert is an independent person, and he is
4 bound to tell, in a neutral fashion, to tell a board
5 or a court exactly what's going on.

6 He should have said that that definition
7 is no longer in effect, because his point was that all
8 of the materials that made up a retaining wall in the
9 '96 BOCA Code are not the materials in this wall.

10 Well, he should have gone on and say,
11 "Well, by the way, that's outdated." And it's
12 probably outdated because mesa walls are --

13 CHAIRPERSON GRIFFIS: Okay. You were
14 about to present something in the IBC.

15 MR. AGUGLIA: Here is the IBC Code. All
16 right. Here is Section 1610, which is currently in
17 effect. 1610.2 -- this is in my Exhibit Number 8 that
18 I handed out this morning. What does that say there
19 about the definition of a retaining wall?

20 MR. PINCIOTTI: Retaining wall shall be
21 designed to ensure stability against overturning,
22 sliding, excessive foundation pressure, and water
23 uplift. Retaining wall shall be designed for a safety
24 factor of 1.5 against lateral sliding and overturning.

25 MR. AGUGLIA: All right. Are you aware

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1 that our expert in Exhibit Number 4 stated that the
2 wall was built in accordance with that building code?
3 You're on the right page, paragraph 8, second page of
4 Exhibit 4.

5 MR. PINCIOTTI: Okay. "I review and
6 approve the final design for a mesa site retaining
7 wall as consistent with the D.C. Building Code for the
8 Economides residence at 4825 Dexter Terrace, N.W.,
9 Washington, D.C. Compiled by" --

10 MR. AGUGLIA: Okay. Now, in this
11 particular BOCA Code, does it say that there's certain
12 types of materials that must make up a retaining wall
13 as it said in 1996?

14 MR. PINCIOTTI: This is not BOCA Code.

15 MR. AGUGLIA: No. Does the IBC Code --

16 MR. PINCIOTTI: Oh, the IBC Code.

17 MR. AGUGLIA: Does the current IBC Code
18 that's in effect somehow restrict the elements that
19 make up a retaining wall as it did in 1996?

20 MR. PINCIOTTI: It does not, in this
21 section, nor do I know of any other section in this
22 document that defines a retaining wall in detail as it
23 did in 1996.

24 MR. AGUGLIA: All right. So I come back
25 to my first question, which is my last question, and

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1 that is, based upon the zoning regulations which refer
2 the Zoning Administrator to the definition of a
3 retaining wall, which is built to resist lateral
4 pressure, and the building code which says it is, one,
5 to be designed to ensure stability against
6 overturning, was that not then a reasonable
7 determination by the Zoning Administrator that the
8 wall met the code by the zoning regulations?

9 MR. PINCIOTTI: It's not a question of
10 whether the structure could retain and whether it had
11 stability. That was done by a PE signing -- doing the
12 calculations and signing off on it. The question at
13 hand is whether it is a wall, and the question then --
14 my last answer is the same as my first. Is this a
15 wall? This is not. This is a structure. It retains.
16 This retains. It is a structure.

17 MR. AGUGLIA: I submit that it's a non-
18 answer and he's being unreasonable with the facts
19 presented, and that the Zoning -- that the reading of
20 the regulations by the Zoning Administrator requires
21 him to do nothing more than to ensure that the wall
22 retains soil. He was given a --

23 MR. BERNSTEIN: Is that a question?

24 MR. AGUGLIA: Yes, that's a question. I'm
25 making a statement.

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1 And, therefore, my firm belief is that his
2 testimony is of no merit and should not be considered
3 -- given any weight by the Board. And, again, I
4 reserve my rights to perhaps bring in an expert
5 engineer to refute this.

6 VICE CHAIRPERSON MILLER: Mr. Pinciotti?
7 Oh.

8 MR. BERNSTEIN: Just for a moment -- I'd
9 just like to note that Mr. Aguglia made the statement
10 that he wasn't aware that we had an expert witness.
11 I notified him personally on April 5th, when we had
12 Mr. Pinciotti here, so Mr. Aguglia had plenty of time
13 to retain his own expert witness and have him here
14 tonight.

15 CHAIRPERSON GRIFFIS: Okay. Ms. Miller,
16 a question?

17 VICE CHAIRPERSON MILLER: Mr. Pinciotti,
18 I want to make sure that I understand what I just
19 think I heard. And it sounded to me as if Mr. Aguglia
20 was saying that you misrepresented to the Board what
21 the BOCA Code is that the Zoning Administrator would
22 have looked to, by bringing to our attention and our
23 spending an awful lot of time looking at the 1996 BOCA
24 provision on retaining walls when, in fact, Mr.
25 Aguglia was saying that that's no longer in effect at

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1 this time, and that you knew -- and you're saying that
2 you knew that.

3 MR. PINCIOTTI: My testimony was going to
4 on April 5th the Zoning Administrator came here and
5 brought to you a definition from BOCA 1996. I simply
6 followed their lead, trying to meet what they have put
7 forth. Why they did not tell you that it was not the
8 current one, I don't know. And I simply followed
9 their lead. They are the Zoning Administrator for the
10 District of Columbia.

11 VICE CHAIRPERSON MILLER: One minute,
12 please. Thank you.

13 MR. PINCIOTTI: You're welcome.

14 MR. CAROME: Patrick Carome, Appellant.
15 First off, in furtherance to the comment Ms. Miller
16 just made, just so it's clear, I mean, what --

17 CHAIRPERSON GRIFFIS: I think we're very
18 clear. The Zoning Administrator brought up the 1996
19 BOCA, and this is what the response was to that.

20 MR. CAROME: Not just brought up. I mean,
21 it was the most heavily relied upon definition that
22 they put forward.

23 CHAIRPERSON GRIFFIS: Okay. In fact, the
24 PowerPoint was just in front of me.

25 MR. CAROME: Mr. Pinciotti, I want to just

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1 make sure I heard you correctly. Is one reason that
2 this structure that we're talking about here is not a
3 retaining wall the fact that the wall is merely a
4 veneer and that even absent the wall -- for example,
5 if the wall were taken away, the structure still has
6 the capacity to stand up and be a permanent structure?

7 MR. PINCIOTTI: The soil along the face --
8 the outer face would fail and fall away unless the
9 geogrids were wrapped around. In temporary
10 construction, that's done. The answer is: the
11 majority of the structure would remain. The soil
12 would cave off.

13 CHAIRPERSON GRIFFIS: If you take the
14 masonry veneer away --

15 MR. PINCIOTTI: Yes, sir.

16 CHAIRPERSON GRIFFIS: -- would that stand?
17 Yes? No?

18 MR. PINCIOTTI: The majority of it would
19 stand.

20 MR. CAROME: How much of it would fall?

21 MR. PINCIOTTI: To the angle of repose
22 between the two -- between the geogrid layers. So it
23 would be probably -- it would go back to an angle
24 probably 70 degrees roughly.

25 MR. CAROME: So you'd lose the first few

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1 feet of it off the front near the top, is that right?

2 MR. PINCIOTTI: That's correct.

3 MR. CAROME: The rest --

4 MR. PINCIOTTI: You need to understand, I
5 hesitate to answer these questions because no one does
6 that.

7 CHAIRPERSON GRIFFIS: It would be an
8 absurd thing to --

9 MR. PINCIOTTI: It would be an absurd
10 thing.

11 CHAIRPERSON GRIFFIS: -- to put a geogrid
12 there and not have the veneer, as you call it.

13 MR. PINCIOTTI: Without having it laid
14 back, yes.

15 CHAIRPERSON GRIFFIS: I see.

16 MR. PINCIOTTI: But on the case of the
17 dam, we do.

18 CHAIRPERSON GRIFFIS: It was part of
19 what's being built there.

20 MR. PINCIOTTI: What's that?

21 CHAIRPERSON GRIFFIS: It's an integral
22 part of what's being built there.

23 MR. PINCIOTTI: Not at all.

24 CHAIRPERSON GRIFFIS: You take it away and
25 the thing fails.

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1 MR. PINCIOTTI: You take it away, you need
2 to design it differently.

3 CHAIRPERSON GRIFFIS: So you need to
4 design something new.

5 MR. PINCIOTTI: Excuse me?

6 CHAIRPERSON GRIFFIS: You need to design
7 something different.

8 MR. PINCIOTTI: You need to design
9 something different.

10 CHAIRPERSON GRIFFIS: So it is part of the
11 design of what we're looking at in --

12 MR. CAROME: Yes. But the point is -- I
13 think is that it's not a retaining wall. It's
14 something else. It doesn't -- the structure -- most
15 of it will stand as if it -- it would stand -- if you
16 put concrete in that area, you wouldn't need a wall.
17 That would still be a structure, I would think.

18 MR. AGUGLIA: I have to object. Mr.
19 Carome is not the expert.

20 CHAIRPERSON GRIFFIS: I know.

21 MR. PINCIOTTI: Mr. Pinciotti is the
22 expert.

23 CHAIRPERSON GRIFFIS: Okay. We're going
24 to questions.

25 MR. CAROME: And I take it that the -- in

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1 addition to the wall, what are the other components of
2 the structure? I take it that it would include the
3 geogrid sheets, is that right?

4 MR. PINCIOTTI: Yes, the geogrid and the
5 soil itself.

6 MR. CAROME: And the layers of compacted
7 soil?

8 MR. PINCIOTTI: That's correct.

9 MR. CAROME: And it is those things
10 operating as a system, I take it, that is the essence
11 of this structure, is that right?

12 MR. PINCIOTTI: That's correct. Veneer by
13 itself cannot stand more than a few courses. Above
14 that point, the earth pressure itself would push them
15 over.

16 MR. CAROME: And just so it's clear, I
17 take it that the -- the geogrid are part of the
18 structure that occupies the lot, is that right, that
19 occupies the yard?

20 MR. PINCIOTTI: Yes. It is shown on that
21 overlay.

22 MR. CAROME: I have no further questions.

23 CHAIRPERSON GRIFFIS: The ANC doesn't have
24 any cross? Okay. Well, what else can we accomplish
25 today? It's only 10:00.

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1 There it is. I think we're going to
2 conclude for tonight. Let's set the schedule very
3 quickly and get everyone home to have some sort of
4 dinner or semblance of an evening.

5 I think I want to get this done as quickly
6 as possible, and I want to especially thank Ms. Bailey
7 from the Office of Zoning who has sat with us now --
8 I think we're on our 14th hour today.

9 Let's see if we can't -- as far as I
10 understand, we're going to have time for closing. Do
11 we have an anticipation of any rebuttal witnesses that
12 are going to be called, Mr. Carome?

13 MR. CAROME: I'm going to reserve on that,
14 since I just --

15 CHAIRPERSON GRIFFIS: I just want to get
16 a -- right now you don't think you have or you have --

17 MR. CAROME: I would say likely zero, but
18 there may be one or two. But likely zero.

19 CHAIRPERSON GRIFFIS: Mr. Aguglia, you've
20 asked to be able to reserve the right to call an
21 expert engineer. I would like to open -- keep the
22 record open for you to rebut, as I have DCRA, in
23 writing. That would be timely enough to get to any
24 closings, I would think, and then also any final
25 submissions will be in writing, if that's amenable to

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1 you.

2 Mr. Carome, objection?

3 MR. CAROME: I would object and request
4 that any further engineering testimony be presented
5 orally, so that there can be cross examination.

6 CHAIRPERSON GRIFFIS: We'll note that
7 objection. I think -- I actually find that it would
8 probably be more productive in writing, unless Board
9 members feel differently. It's going to be limited in
10 scope, of course, to rebutting the testimony that
11 we've heard.

12 Of course, then we'd allow for, as I said,
13 time enough that, Mr. Carome, if you were to address
14 it in rebuttal witnesses or in closings it would be
15 allowed. Okay.

16 MR. CAROME: I have a further request
17 regarding the continuation of the hearing. There was
18 -- may I speak?

19 CHAIRPERSON GRIFFIS: Yes.

20 MR. CAROME: I'm sorry. At the last
21 hearing, the Zoning Administrator put up a PowerPoint.

22 CHAIRPERSON GRIFFIS: Yes.

23 MR. CAROME: And it was --

24 CHAIRPERSON GRIFFIS: You're in receipt of
25 that now, right?

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1 MR. CAROME: It was stated in the record
2 that we should be permitted to have cross examination
3 on that. That we were not -- you may recall that
4 after that was presented on the screen the Zoning
5 Administrator was unable either to provide us with
6 copies or to provide us -- even to put it back up on
7 the screen.

8 And during the cross examination, which
9 was limited because we couldn't do that --

10 CHAIRPERSON GRIFFIS: What are you asking?

11 MR. CAROME: That Mr. Bello be required to
12 come back for cross examination. There has been
13 correspondence back and forth that's in the record on
14 that point. Ms. Bell simply refused our request, even
15 when we pointed out in the -- the part in the
16 transcript where it was specifically said that he
17 would need to come back for that.

18 So I would ask that at the next hearing
19 Mr. Bell be directed to come back. Mr. Bello.

20 CHAIRPERSON GRIFFIS: Ms. Gates, did you
21 want to respond to that?

22 MS. GATES: It's easy. I don't. But what
23 I would like is some respect shown to the ANC. We
24 have not been served with any of this from the Zoning
25 Administrator. And if new material is going to be

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1 submitted into the record, I request that we receive
2 a copy as well. Thank you.

3 CHAIRPERSON GRIFFIS: Okay. Actually, we
4 require it. Do you mind? We need to clear some
5 chairs up here, if you wouldn't mind having a seat.

6 We've got the request to have the Zoning
7 Administrator back for cross. What are your thoughts?

8 MS. BELL: Yes. Actually, Mr. Carome did
9 make a request as well as the National Park Service,
10 and our position was that it really wasn't appropriate
11 at this time. At the time that I displayed the
12 PowerPoint presentation, I indicated that it -- they
13 would be talking points, and that his oral testimony
14 is his testimony.

15 It was provided as illustrative and
16 demonstrative evidence. I think it was the Board at
17 some point requested that we provide a copy, which we
18 were happy to do so. But his testimony -- his oral
19 testimony is his testimony.

20 CHAIRPERSON GRIFFIS: Well, the PowerPoint
21 is part of the record and --

22 MS. BELL: Right.

23 CHAIRPERSON GRIFFIS: -- of course, his
24 testimony also. I don't see where you're going.

25 MS. BELL: But the PowerPoint doesn't

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1 include anything that his -- it doesn't include any
2 evidence or any information --

3 CHAIRPERSON GRIFFIS: So you're saying the
4 PowerPoint doesn't have any information that wasn't
5 already crossed with him.

6 MS. BELL: That's correct. And he was --
7 he was subjected to four hours of cross examination by
8 Mr. Carome, and by the National Park Service, I might
9 add. So in view of the fact that he was here until
10 8:30, he answered all the questions that -- both
11 questions that were -- that stemmed from his oral
12 testimony and other questions that the parties had, I
13 don't think it's appropriate to bring him back or
14 necessary to bring him back after the government has
15 closed its case, which we have.

16 VICE CHAIRPERSON MILLER: All right. Ms.
17 Bell, I thought that you didn't want to close your
18 case and that you wanted the opportunity to have Mr.
19 Bello submit some rebuttal testimony from what --

20 MS. BELL: No. Actually not even
21 rebuttal. The problem that I have at this point is
22 that the National Park Service has provided both an
23 engineer as well as a resume that we have -- we saw
24 moments before he testified. I really wasn't in a
25 position to effectively review it to raise any issues,

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1 or if we have issues to raise, which I believe we
2 would.

3 But Mr. Bello wouldn't be here to do that.
4 Since he is a structural engineer, I would probably at
5 least seek some counsel of my Building and Land
6 Administration. But the testimony that I would be
7 providing would not be oral testimony from a
8 structural engineer. It would be written.

9 VICE CHAIRPERSON MILLER: And why
10 shouldn't that be subject to cross?

11 MS. BELL: The written statement by the
12 structural engineer, if we provide one?

13 VICE CHAIRPERSON MILLER: Why should that
14 be written as opposed to oral?

15 MS. BELL: Well, you know, we're of the --
16 you know, we're of the position that this is a narrow
17 appeal that has sort of expanded in many ways, and on
18 issues that the Zoning Administrator doesn't perceive
19 is -- is a fair assessment of his role with regard to
20 this particular building permit.

21 I don't think that Mr. Carome -- and I
22 Don't think the National Park Service -- would be at
23 a disadvantage at not being able to cross examine any
24 subsequent statement we may provide with regard to a
25 structural engineer. And that would still be

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1 different than whether or not Mr. Bello needs to be
2 subjected to cross examination based on the PowerPoint
3 presentation.

4 MR. CAROME: Another possibility --

5 CHAIRPERSON GRIFFIS: Go ahead.

6 MR. CAROME: -- and it might be -- it
7 might be the most efficient. As to further rebuttal
8 witnesses, I would suggest that if they're going to
9 present their testimony in writing that they should
10 be, at our request, made available if we think we can
11 identify particular areas that would be worth
12 exploring, or if the Board feels that they would be
13 worth exploring, that we would get better -- we would
14 get closer to the truth if we had the opportunity for
15 questioning and cross examination to avoid, you know,
16 being able to -- not have to take conclusory
17 statements and written statements at face value.

18 Also, on the question of Mr. Bello coming
19 back, I mean, it said right here Chairperson Griffis,
20 page 193, after it was pointed out that we didn't have
21 -- couldn't cross -- the Chairperson said, "Right.
22 No, I think we should be able to cross on that." I
23 think both parties here relied on the opportunity we
24 would have to do that later. I would have pursued
25 further questioning if I knew that that was my last

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1 chance.

2 I understood, and I think the Park Service
3 understood --

4 CHAIRPERSON GRIFFIS: Understood what?
5 What was that excerpt from?

6 MR. CAROME: That's page 193 of last --

7 CHAIRPERSON GRIFFIS: What was that
8 talking about?

9 MR. CAROME: You were speaking about the
10 PowerPoint presentation that DCRA was unable to
11 present, either back on the screen or in hard copy, so
12 that we could have full cross examination.

13 MS. BELL: I think it might be helpful for
14 the Board to take a look at the transcript. Actually,
15 I have read --

16 MR. CAROME: I have it right here. Would
17 you like to read it?

18 MS. BELL: Mr. Carome, I have already read
19 the transcript. I think it might be helpful for the
20 Board to take a look at it to get a flavor of how that
21 statement was made and the context in which it was
22 made. But it was at the beginning of the four-hour
23 cross examination by both the National Park Service
24 and Mr. Carome on Mr. Bello's oral testimony as well
25 as other extraneous issues that --

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1 CHAIRPERSON GRIFFIS: Good. Okay.

2 MS. BELL: -- weren't raised in his oral
3 testimony.

4 CHAIRPERSON GRIFFIS: Let's not get too
5 absurd here. I think we understand the base facts and
6 issues involved in this. And, quite frankly, although
7 it seems to be precariously complex, I think for the
8 Board's purposes it is not for our jurisdiction. And
9 I don't see -- I'm not compelled that the PowerPoint
10 brought up so much more expansive evidence that wasn't
11 covered in the cross examination of Mr. Bello here in
12 person.

13 What did raise the concern was when you
14 indicated that you wanted to leave the record open,
15 which is I think what Ms. Miller was talking about.
16 There may have been an impression that you were
17 calling Mr. Bello back to respond. That's been
18 quieted at this point.

19 I think for great efficiency, which I have
20 lost total control of tonight, and so far in all these
21 proceedings, but let's try and gain some back with
22 this, let's move ahead for written submissions. I
23 don't see -- I don't see a lot of additional
24 information for the Board's concern coming from
25 additional cross examination on that.

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1 So what I then would do is we need to set
2 time for closing, Mr. Carome. We need to set in ample
3 time I guess for --

4 CHAIRPERSON GRIFFIS: Ms. Bailey, the date
5 I indicated on --

6 MS. BAILEY: The date that you gave me was
7 May 24th, the fourth case in the afternoon. The
8 fourth case.

9 CHAIRPERSON GRIFFIS: Am I reading that
10 second case correctly?

11 MS. BAILEY: On May 24th, Mr. Chairman?

12 CHAIRPERSON GRIFFIS: 17310, moving to the
13 7th? Mr. Aguglia, you are going to put your
14 additional information in writing into the record, is
15 that correct? Is that amenable to you?

16 MR. AGUGLIA: What date do you want it by?

17 CHAIRPERSON GRIFFIS: It's going to be due
18 in one week.

19 MR. AGUGLIA: One week? One week from
20 today?

21 CHAIRPERSON GRIFFIS: That's correct, on
22 the 17th of May. So -- okay. And DCRA's also.

23 MR. CAROME: May I ask -- as a possible
24 way of advancing the question of the point about Mr.
25 Bello, could we submit as -- you know, a limit of five

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1 questions in writing that he would respond to in
2 writing? That would not take any time of the Board.

3 CHAIRPERSON GRIFFIS: Based on the
4 PowerPoint presentation?

5 MR. CAROME: Yes.

6 CHAIRPERSON GRIFFIS: Oh, absolutely.
7 We'll get that in. We need that in. How fast can you
8 get that?

9 MR. CAROME: I can get that in in two
10 days.

11 CHAIRPERSON GRIFFIS: Can you get it in in
12 one?

13 MR. CAROME: I can get it in in one day.

14 CHAIRPERSON GRIFFIS: Close of business
15 tomorrow?

16 MR. CAROME: Yes.

17 CHAIRPERSON GRIFFIS: Okay, good. In that
18 case --

19 MS. BELL: Are we talking about five
20 additional questions as a result --

21 CHAIRPERSON GRIFFIS: We'll have Mr. Bello
22 respond to that. If they're questions that have
23 already been answered, then so be it. He can indicate
24 that's his answer.

25 MS. BELL: I can indicate that this was

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1 answered transcript page --

2 CHAIRPERSON GRIFFIS: Absolutely.
3 Absolutely. Let's get them addressed, though.

4 Okay. I'm going to lay it all out here.
5 So what we're going to have is yours over as quickly
6 as possible, hopefully by, you know, first thing --
7 first thing Thursday. They're going to clear the
8 building soon.

9 Okay. That's going to go over. Responses
10 are going to be back by the -- responses back into the
11 record and served by the 17th of May. We're going to
12 call this at the first afternoon hearing on the 24th
13 of May.

14 What we will have as we open is just any
15 rebuttal witnesses you have, the cross of the rebuttal
16 witnesses and that evidence, and then we're going
17 straight to closings. I would anticipate we'd take no
18 more than 15, 17 minutes. Nah, I can't say that.

19 Okay. I wouldn't expect that we'd be in
20 the hours, though, Mr. Carome. I would hope that we'd
21 be within 60 minutes. We have two other cases in that
22 afternoon. Hopefully, we'll start our afternoon on
23 time at 1:00 and get right to this. As I said, I put
24 this first in the afternoon, so we can get this done
25 and finished.

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1 MR. CAROME: What is the order that --
2 other than my rebuttal and my closing, is --

3 CHAIRPERSON GRIFFIS: That's it. That's
4 all we have left. We will have the submission, and
5 the record will be full at that point. I don't have
6 anything else that we're holding out there in terms of
7 submissions. At the closing of that day, of course,
8 I'll set final submissions and decision date, and, of
9 course, finals will go for proposed orders. We'll
10 access all of that as we finalize after the 24th.

11 Ms. Miller, you've got a question?

12 VICE CHAIRPERSON MILLER: Well, I had
13 asked National Park Service to submit the provisions
14 that they referenced regarding party walls and the
15 issue of encroachment.

16 CHAIRPERSON GRIFFIS: Oh, that's true.

17 VICE CHAIRPERSON MILLER: And then, the
18 other submission from the ANC regarding the tie case
19 dealing with a property that was towering over.

20 CHAIRPERSON GRIFFIS: Ms. Gates, are you
21 aware of that responsibility? Okay. We're going to
22 have that submitted in by the 17th also. Is that
23 understood? Excellent. Okay.

24 MR. CAROME: One housekeeping matter that
25 if we don't clear up now we may not be able to. There

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1 were two pieces of geogrid that were referred to in
2 the record. I'm wondering whether either by
3 photograph or otherwise those could be made part of
4 the record or just themselves -- they're small enough
5 that they perhaps wouldn't add that much to the bulk
6 of this record.

7 CHAIRPERSON GRIFFIS: I'd rather not
8 because we need copies. Let's get photographs --

9 MR. CAROME: Also, there was that acetate
10 that was tacked up on one of the exhibits. I would
11 suggest that that be photocopied and circulated and
12 served.

13 CHAIRPERSON GRIFFIS: Sure. If it wasn't
14 already stated --

15 MR. CAROME: And made a part of the
16 record.

17 CHAIRPERSON GRIFFIS: -- it should come
18 into the record. Excellent point.

19 Anything else? Ms. Bailey, are we leaving
20 anything else out?

21 Wow. I thank you all very much and
22 appreciate your being here all night with us.

23 If there's no other business before the
24 Board, let's adjourn our afternoon session. Thank you
25 all.

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(Whereupon, at 10:05 p.m., the
proceedings in the foregoing matter were
concluded.)

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