

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY
APRIL 6, 2010

+ + + + +

The Regular Public
Hearing convened in Room 220 South, 441 4th
Street, N.W., Washington, D.C., 20001,
pursuant to notice at 1:30 p.m., Meridith
Moldenhauer, Madam Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MERIDITH MOLDENHAUER, Chairperson
SHANE L. DETTMAN, Vice Chairperson
(NCPC)
NICOLE SORG, Member

ZONING COMMISSION MEMBER PRESENT:

PETER MAY, Commissioner (NPS)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
BEVERLEY BAILEY, Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

The transcript constitutes the
minutes from the Public Hearing held on April
6, 2010.

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T-A-B-L-E O-F C-O-N-T-E-N-T-S

WELCOME:

Meridith Moldenhauer4

STEUART INVESTMENT COMPANY:

APPEAL OF APPLICATION NO. 18041 - ANC - 6C:

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Guy Steuart 20

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

2 1:43 p.m.

3 CHAIRPERSON MOLDENHAUER: This
4 hearing will please come to order.

5 Good afternoon, ladies and
6 gentlemen. This is the afternoon session of
7 April 6th, 2010's public hearing of the Board
8 of Zoning Adjustment for the District of
9 Columbia.

10 My name is Meridith Moldenhauer,
11 chairperson. Joining me today is Vice Chair
12 Shane Dettman, representing the National
13 Capital Planning Commission. To my left is
14 Nicole Sorg, mayoral appointee. Mr. May has
15 just stepped in as the representative of the
16 Zoning Commission. We have Mr. Moy still
17 present, Ms. Nagelhout and Ms. Bailey also
18 present.

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

22 Please be aware that this
23 proceeding is being recorded by a court
24 reporter and is also being Web cast live.

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1 Accordingly, we must ask you to refrain from
2 any disruptive noises or actions in the
3 hearing room.

4 When presenting information to the
5 Board, please turn on and speak into your
6 microphone, first stating your name and home
7 address. When you finish speaking, please
8 turn off your microphone so that your
9 microphone is no longer picking up any sound
10 or background noise.

11 All persons planning to testify
12 either in favor or in opposition are to fill
13 out two witness cards. These cards are
14 located to my left on the table near the door
15 and on the witness tables. Upon coming
16 forward to speak with the Board, please give
17 both cards to the court reporter to my right.

18 The order of proceeding for an
19 appeal application is as follows: (1)
20 Statement and witnesses of the applicant; (2)
21 the Zoning Administrator the Government
22 official's case; (3) the case for the owner,
23 lessee or operator of the property involved if
24 not the applicant; (4) the ANC within which

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1 the property is located; (5) in the
2 intervener's case, if permitted by the Board;
3 (6) rebuttal and closing statements by the
4 applicant.

5 Pursuant to 3117.4 and 3117.5,
6 the following time constraints will be
7 maintained: The applicant/appellant, persons
8 and parties, except the ANC, in support,
9 including witnesses have 60 minutes
10 collectively. Appellees, persons and parties,
11 except for the ANC, in opposition, including
12 witnesses have 60 minutes collectively. And
13 individuals have three minutes. These time
14 constraints do not include cross-examinations
15 and/or questions from the Board.

16 Cross-examination of witnesses is
17 permitted by the applicant or parties. The
18 ANC within the property is located is
19 automatically a party in a special exception
20 or variance case.

21 Nothing prohibits the Board from
22 placing reasonable restrictions on cross-
23 examination including time limits and
24 limitations on the scope of the cross-

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1 examination.

2 The record will be closed at the
3 conclusion of each case except for any
4 material specifically requested by the Board.
5 The Board and the staff will specify at the
6 end of the you know exactly what is expected
7 and the date when that person must submit the
8 evidence to the Office of Zoning. After the
9 record is closed, no other information will be
10 accepted by the Board.

11 The Sunshine Act requires that the
12 public hearing on each case be held in the
13 open before the public. The Board may
14 consistent with its Rules and Procedures and
15 the Sunshine Act, enter executive session
16 during or after the public hearing on a case
17 for purposes of reviewing the record or
18 deliberating on the case.

19 The decision of the Board in these
20 contested cases must be based exclusively on
21 the public record. To avoid any appearance to
22 the contrary the Board requests that persons
23 present do not engage the members of the Board
24 in conversation.

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1 Please turn off all beepers and
2 cell phones at this time so as to disturb
3 these proceedings.

4 The Board will make every effort
5 to conclude the public hearing as near as
6 possible to 6:00 p.m. If the afternoon cases
7 are not completed by 6:00 p.m., the Board will
8 assess whether it can complete the pending
9 cases or the cases remaining on the agenda.

10 At this time the Board will
11 consider any preliminary matters. Preliminary
12 matters are those that relate to whether a
13 case will or should be heard today such as
14 requests for postponement, continuance or
15 withdrawal, or whether the proper adequate
16 notice of the hearing has been given.

17 If you are not prepared to go
18 forward with a case today, or if you believe
19 the Board should not proceed, now is the time
20 to raise this matter.

21 Does the staff have any
22 preliminary matters?

23 MS. BAILEY: Madam Chair, good
24 afternoon.

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1 CHAIRPERSON MOLDENHAUER: Good
2 afternoon.

3 MS. BAILEY: To everyone as well.
4 There is a preliminary matter, Madam Chair,
5 concerning the appeal, but that's the only
6 scheduled case on the agenda this afternoon,
7 so staff is suggesting that we'll take that up
8 after the case has been called.

9 CHAIRPERSON MOLDENHAUER: Thank
10 you. Would you like to call the case?

11 MS. BAILEY: Madam Chair, I'll
12 just swear the witnesses and then call the
13 case.

14 CHAIRPERSON MOLDENHAUER: Sounds
15 fabulous. Thank you.

16 MS. BAILEY: All those wishing to
17 testify, please stand to take the oath.

18 (Whereupon, the witnesses were
19 sworn.)

20 MS. BAILEY: Members of the Board,
21 this is Appeal No. 18041 of Steuart Investment
22 Company and Steuart Square North 515 Company,
23 and its pursuant to 11 DCMR 3100 and 3101,
24 from an October 20th, 2009 decision of the

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1 Zoning Administrator, Department of Consumer
2 and Regulatory Affairs, determining that a
3 proposed commercial development does not
4 comply with the combined lot development (off-
5 site residential) provision under subsection
6 1706.7(b)(2), at premises 442-444 New York
7 Avenue, Northwest and K Street, Northwest.

8 Madam Chair, the preliminary
9 matter has to deal with the applicant's
10 prehearing statement. It was filed 11 days
11 prior to the hearing today. And as you know,
12 it is required to be filed 14 days prior to
13 today's date. So that is the preliminary
14 matter that staff has.

15 CHAIRPERSON MOLDENHAUER: Thank
16 you very much. Exhibit 18 is the prehearing
17 statement that you're referencing, and in that
18 statement there were reasons for the
19 submission being late and good cause shown,
20 and evidence that there would be no prejudice.
21 And so, I believe that it's the consensus of
22 the Board that we will permit that evidence
23 into the record.

24 MS. BAILEY: Thank you.

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1 CHAIRPERSON MOLDENHAUER: So, now
2 moving forward, why don't we have each of the
3 members introduce themselves for the record?

4 MS. BRAY: Good afternoon, members
5 of the Board. My name is Kinley Bray with the
6 law firm of Arent Fox on behalf of the
7 appellant, Steuart Investment Company.

8 MR. STEUART: Good afternoon. My
9 name is Guy Steuart. I am senior vice
10 president for Steuart Investment Company, and
11 we are the land owners of the lots in question
12 today.

13 MR. ALEXANDER: My name is James
14 Alexander. I'm a developer with the Steuart
15 Investment Company.

16 MR. LeGRANT: Good afternoon.
17 Matt LeGrant. I'm the Zoning Administrator
18 with DCRA.

19 MR. SURABIAN: Assistant Attorney
20 General Jay Surabian on behalf of the
21 Department of Consumer and Regulatory Affairs.

22 MS. BOILING: Good afternoon,
23 Madam Chair and Board Members. My name is
24 Melinda Boiling. I'm the General Counsel for

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1 DCRA.

2 MS. MCCARTHY: And my name is
3 Ellen McCarthy. I'm testifying as an expert
4 in zoning on behalf of the appellant.

5 CHAIRPERSON MOLDENHAUER: Okay.
6 Would the appellant like to begin?

7 MS. BRAY: Thank you, Madam Chair.
8 Well, you have been introduced to our team.
9 We have two witnesses today, and Mr. Alexander
10 is here as well in case there are additional
11 questions that he can answer.

12 As an additional preliminary
13 matter I would ask that the Board accept Ms.
14 McCarthy as an expert in planning and zoning
15 in the District of Columbia, as we requested
16 in our prehearing statement. And I'm happy to
17 qualify her if there's any objection.

18 CHAIRPERSON MOLDENHAUER: Is there
19 any objection on the record?

20 MR. SURABIAN: No objection at
21 this time.

22 CHAIRPERSON MOLDENHAUER: Okay.

23 COMMISSIONER MAY: Did we receive
24 the résumés? What tab was that?

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1 MS. BRAY: I believe it should be
2 tab G. That actually may have been with our
3 initial application. Bear with me for just
4 one moment. I mean, as you know, Ms. McCarthy
5 has been accepted as an expert before this
6 Board and the Zoning Commission on numerous
7 occasions and has 35 years of experience. I
8 don't see that her résumé was properly
9 submitted, but I'd be happy to submit it for
10 the record.

11 COMMISSIONER MAY: Yes, I'm very
12 familiar with Ms. McCarthy. I have absolutely
13 no objection to her being qualified as a
14 witness, but the Zoning Commission as a rule
15 has been very strict about making sure that
16 the qualifications are in the record for each
17 case. So, if it's not already in the package
18 -- and I may have missed, but if it's not
19 already in there, it should be submitted for
20 the record.

21 MS. BRAY: Happy to do so. I
22 believe it was identified as an exhibit to our
23 prehearing statement, and I apologize if it
24 didn't actually make the package, but we'd be

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1 happy to submit it for the record. And if you
2 would like, we can for the record go through
3 Ms. McCarthy's qualifications.

4 COMMISSIONER MAY: If you intend
5 to submit the résumé, I think that's fine.

6 MS. BRAY: Okay. Thank you.

7 COMMISSIONER MAY: From my
8 perspective, but I don't speak for the whole
9 Board.

10 CHAIRPERSON MOLDENHAUER: I think
11 for time efficiency, I don't think we actually
12 need to go through Ms. McCarthy's entire
13 résumé. I think we can note that we have had
14 Ms. McCarthy qualified as an expert in other
15 cases. I think that it is a great point by
16 Mr. May that we would request that that be one
17 of the different documents that we'll ask to
18 have the record supplemented after the close
19 of today's hearing.

20 MS. BRAY: Absolutely. We'll get
21 that for you.

22 With that, I just have a couple of
23 brief opening remarks to guide you through our
24 case presentation.

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1 As I'm sure you've noted in
2 reviewing the prehearing filings in this case,
3 there are very few, if any, facts in dispute.
4 This really is a question of legal
5 interpretation. And the primary question is
6 what is bonus density for purposes of
7 utilizing density in a combined lot
8 development process under chapter 17 of the
9 Zoning Regulations.

10 For clarity in the record and also
11 to prevent us from becoming tongue tied, I
12 know that in rehearsing our presentation we've
13 referred to 1706.7(b)(2) as just (b)(2)
14 because we tend to trip over that somewhat
15 long provision number. So, we'll refer to
16 that provision as (b)(2). We are referring to
17 1706.7(b)(2) of the Zoning Regulations.

18 We have a conflict between two
19 provisions governing density when a combined
20 lot development is used. 1708.1 says that
21 combined lot developments are to be treated as
22 one lot, and the maximum density, the minimum
23 requirements for preferred uses are all
24 calculated in the same way. Essentially, the

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1 denominator for purposes of calculating FAR is
2 the combined lot. And (b)(2) controls bonus
3 density in the DD and discusses how a bonus is
4 available by virtue of developing a completely
5 or an entirely residential project in the DD
6 and how that bonus is to be treated for
7 purposes of future transfers. The goal is to
8 prohibit generation of additional commercial
9 density by allowing the bonus volume to be
10 filled by a second CLD or swap.

11 (b)(2) refers to a limitation on
12 the transfer density from another lot, but it
13 doesn't not specify the denominator to be
14 used. This combined lot development in
15 question transfers 3.5 FAR residential to the
16 receiving lot. Because the receiving lot is
17 smaller, that translates to additional FAR
18 only when you use the land area of the
19 receiving lot in the calculation. No bonus
20 density is being generated or added to either
21 lot in the proposed transaction. So, we
22 comply with the requirements of 1708 in that
23 treated as one the maximum Board, the minimum
24 requirements are all satisfied on the combined

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1 lot.

2 The provisions of the DD are
3 highly complex. I know Ms. McCarthy likes to
4 refer to them as richly textured, but I find
5 them often confusing, and I know many of us
6 do.

7 The Zoning Administrator, in his
8 determination letter from which we appeal,
9 relied on a single provision in this very
10 complex scheme of regulations that work
11 together to provide incentives and
12 flexibility. And in the end, the reliance on
13 this single provision has essentially flipped
14 the intended goal of the DD and the combined
15 lot development on its head. Instead of
16 developing additional housing units, which is
17 indisputably the goal of the DD in creating a
18 living downtown, the Zoning Administrator's
19 interpretation at best requires a vertical mix
20 of housing and office, contrary to the regs'
21 specific intention of providing that
22 locational flexibility. And at worst, it
23 results in the reduction of a significant
24 number of residential units in the Mount

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1 Vernon Triangle Area, the very area that the
2 Comprehensive Plan and the Zoning Regulations
3 themselves in 1706 say that the greatest
4 concentration of residential uses should be.

5 We'd like to walk you through our
6 analysis in the proposed transaction, how it
7 accomplishes the intent of the regulations and
8 why we believe that the Zoning Administrator's
9 determination is in error.

10 At the outset, I'd like to thank
11 the Zoning Administrator and counsel for the
12 Zoning Administrator for being so thorough and
13 timely in their filings, particularly in light
14 of the fact that we weren't, because this is
15 the first case that I've dealt with DCRA where
16 there was a timely filing, and I appreciate
17 that.

18 So with that, I'd like to
19 introduce you to the appellant, Guy Steuart of
20 Steuart Investment Company.

21 MR. STEUART: Good afternoon,
22 everybody. We've gone through the
23 introductions, so I'll skip to point B, which
24 is Steuart Investment Company, for whom I

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1 represent today.

2 Steuart Investment Company is a
3 family-owned business and we've been operating
4 in the D.C. Area since 1904. The two lots in
5 particular we're speaking about today, Square
6 483, we bought in 1928, and for 70-plus years
7 it was an automobile dealership. Lot 62,
8 which is the newly re-subdivided lot that we
9 created out of an assemblage of land that we
10 owned in Square 515, we've owned some of that
11 for about the same length of time, but spent
12 the better part of the last decade assembling
13 the balance of the lots within that square
14 closing alleys and essentially consolidating,
15 I think it was 34-35 lots into two building
16 lots, Lot 61 and Lot 62. And we're talking
17 about Lot 62 solely today.

18 I was also a founding member of
19 the Mount Vernon Triangle Community
20 Improvement District, which you all may be
21 familiar, and actively participated in the
22 creation of that organization and its
23 endorsement of the Mount Vernon Triangle
24 Overlay. My parcel, Square 483, has been

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1 identified as a primary important part of the
2 Mount Vernon Triangle. And as part of the
3 Overlay we endorsed the Overlay as well as
4 sacrificed about 25,000 square feet of
5 commercial density for placemaking identity at
6 the corner of 5th and K.

7 All this was, you know, in the
8 spirit of being a good Boy Scout and
9 cooperating with the incentive of creating
10 more housing downtown and making smart use of
11 land. And it was my understanding that by
12 creating through the Combined Lot Rules,
13 taking two parcels, Lot 62 and Square 483, and
14 essentially shifting uses, I was doing what
15 was intended through the regulations, which
16 was pretty residential or residential made
17 more sense to be built and commercial where
18 commercial made more sense to be built.

19 And the two lots are unique in
20 some respects. Square 483 is DD/C-3-C and Lot
21 62 is a DD/C-2-C, so they have different FAR
22 requirements. Each has a mandated housing
23 requirement however. And it's my intent to
24 take the mandated housing, the required

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1 housing on Square 483 and put on N-515, Lot
2 62, and move the commercial vice versa over to
3 Lot 483. Together, the two parcels in
4 combination would add no more density, have no
5 more density than they do individually within
6 their own should I decide to develop them
7 individually as a mixed-use project, as
8 opposed to just shifting uses under the
9 Combined Lot Development Rule.

10 So, I was a bit taken aback in
11 understanding that there was this concept of
12 bonus density that I'm not using anywhere that
13 is throwing my development, our development
14 scheme into question at this point. So,
15 that's partly why we're here today, is to try
16 to iron out this, what to me is semantics,
17 unfortunately very important semantics.

18 Let's see, my other points.
19 Talked about that. We talked about using the
20 uses -- it's important to note that I'm not
21 looking to relieve myself of any kind of
22 required housing at all. In fact, I'm trying
23 to comply with the intent of the combined lot
24 development and develop housing where it makes

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1 sense to be developed. This is of course a
2 very important part of Mount Vernon Triangle.
3 We're directly across from the Safeway. It's
4 a great spot for residential development, and
5 that's what we're trying to accomplish on
6 Square N-515, just trying to do it within the
7 Combined Lot Development Rules as they were,
8 in my mind, generally laid out to be
9 interpreted and incentivized people to do.

10 In understanding the Zoning
11 Administrator's ruling and the AG's ruling, it
12 strikes me as -- you know, I'm sort of a
13 common man interpretation of this, but you
14 know, looking at calculus, this is $a + b$ and
15 $a + b = 2(a) + 2(b)$ is kind of how I
16 figured the combined lot development to have
17 worked. But the Zoning Administrator and the
18 Attorney General's office would suggest that
19 $a + b + a + b = 2(a) + 2(c) - c$.

20 And by virtue of the ruling that
21 the receiving site, in this instance Lot 62,
22 is too small to accommodate the mandated
23 housing, I'm essentially being not
24 incentivized, but penalized for trying to do

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1 what I'm required to do, which is build
2 required housing. And in the simplest forms,
3 as a developer you wonder, well, why would I
4 be incentivized to lose density in doing a
5 combined lot development? And so, that is
6 sort of at the heart of my incredulity, I
7 suppose, of the interpretation.

8 That's the extent of my comments.
9 I have worked with the Zoning Administrator.
10 We've had discussions with the Office of
11 Planning. And I think we just disagree on
12 this concept of bonus density. I'm not using
13 any bonus density in this development. I'm
14 not doing anything other than which the sites
15 are entitled to do individually by combining
16 them. I'm trying to use land efficiently and
17 do it the required housing. So, that's the
18 extent of my comments. Thank you.

19 CHAIRPERSON MOLDENHAUER:
20 Obviously there will be cross-examination at
21 this point, but I don't know if any Board
22 Members have any questions. I think maybe
23 it's best we wait until after the applicant
24 has gone through their entire testimony, to

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1 then open up the floor to Board questions.

2 So, if the District of Columbia
3 has any cross-examination, they can proceed.

4 MR. SURABIAN: Thank you, Mr.
5 Steuart. I presume that you've read and you
6 understand the Zoning Administrator's
7 position, or you may not agree, but at least
8 you understand them? What are you saying?

9 MR. STEUART: I do. Yes, I
10 understand and I disagree.

11 MR. SURABIAN: And taking the
12 Zoning Administrator's interpretation, have
13 you applied that in such a way to see if there
14 were alternative ways that you could develop
15 the lots within his interpretation?

16 MR. STEUART: Well, I think that
17 the resultant of his determination is that I
18 would have to increase the size of the
19 receiving lot in order to do what we were
20 hoping to do.

21 I think it's important to note
22 that the residential lot that we were
23 intending to create on Lot 62 would total in
24 residential density about 390,000 square feet.

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1 And we have some charts that are more precise,
2 but fundamentally that receiving lot could
3 arguably create a building much greater
4 density. If you just do 14 floors times 80
5 percent lot occupancy times the 42,824 square
6 foot parcel, you get about 480,000 feet. So,
7 I could develop that site much more densely
8 than I'm just trying to do and fundamentally
9 have it count as satisfying my mandated
10 housing.

11 So, I'm not sure if I'm getting to
12 your point, counselor, of alternative
13 developments, but you know, one would be just
14 to develop them individually as mixed-use.

15 MR. SURABIAN: Well, that would be
16 one way. Could you not also engage in a CLD
17 transaction, but then have a small portion of
18 the commercial building as residential, the
19 remaining -- what the Zoning Administrator has
20 labeled as bonus density?

21 MR. STEUART: Well that -- you
22 know, I suppose anything's possible, but that
23 doesn't seem to make sense in light of what
24 the combined lot development was meant to do,

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1 which was to try to move uses and develop them
2 efficiently and intelligently.

3 When you start to mix residential
4 into a commercial building or a retail
5 building, if it's -- you know, if that's what
6 we choose, and we have a retail requirement on
7 Square 43, which we of course will adhere to,
8 you know, you start to make compromises in
9 design and you start to make the building much
10 more complex. And fundamentally, the intent
11 of the combined lot I think was to incentivize
12 housing.

13 MR. SURABIAN: And could you not
14 also engage in two CLD transactions which
15 would completely satisfy the housing minimum
16 and allow you to do the commercial building
17 entirely commercial? Are you aware of that
18 alternative?

19 MR. STEUART: Well, we'd take more
20 land that we own and put into a combined lot
21 development. I'm in a fairly unique position
22 I suspect that, you know, we do have enough
23 land down there. But it doesn't strike me as
24 efficient for one reason, and that is that you

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1 kind of compromise the development
2 opportunities for the parcel presently not
3 encumbered by this -- or proposed to be
4 encumbered Lot 61. I would have to re-
5 subdivide that and CLD that. And I'm going,
6 well, what was the point of that? That's not
7 the intent of the CLD. I mean, if I can
8 fundamentally fit it and I can do so under the
9 Height Act and I'm not using anymore density
10 than which the two sites are allowed by their
11 underlying by-right density, I don't know why
12 would I have to do that. And that's why we're
13 here today.

14 MR. SURABIAN: Are you also aware
15 that under the Zoning Administrator's
16 interpretation that you could also -- on the
17 residential lot you could actually continue to
18 build up to the Height Act, but part of that
19 FAR just can't be through CLD? You can
20 actually on your own keep -- build going up to
21 the Height Act, but you're not limited in that
22 way.

23 MR. STEUART: I understand that to
24 be the case.

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1 MR. SURABIAN: Okay. Okay.

2 MR. STEUART: However, I think
3 this is where we get down to the semantics of
4 the question, the regulations, and where
5 there's a conflict between 1708 and (b) (2),
6 1706.7 (b) (2).

7 MR. SURABIAN: I don't have
8 anything further.

9 CHAIRPERSON MOLDENHAUER: Any
10 redirect?

11 MS. BRAY: Yes, just a couple of
12 questions.

13 Mr. Steuart, you were asked
14 whether you could engage in a second CLD
15 transaction, and you mentioned that you might
16 be able to do something with the other lot
17 that's on Square N-515. If you were to engage
18 in a CLD transaction with your own property,
19 thereby keeping that lot unencumbered, as you
20 mentioned, what would you need to do to engage
21 in another CLD transaction with another
22 property? Would that involve payment to
23 another property owner?

24 MR. STEUART: Oh, it would.

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1 Absolutely. I would have to go through the
2 whole process for a more complex combined lot
3 development than what is intended and logical.

4 MS. BRAY: Okay. Thank you.

5 CHAIRPERSON MOLDENHAUER: The
6 Board's going to hold their questions until
7 the end, so if you want to continue on with
8 your next witness?

9 MS. BRAY: Okay. Could I have the
10 Board's indulgence for just one moment to
11 confer with my client?

12 Thank you. Well with that, I'd
13 like to move onto Ms. McCarthy. And if we
14 could have the lights dimmed, Ms. McCarthy is
15 going to walk through a PowerPoint
16 presentation.

17 MS. McCARTHY: Actually, you know
18 what, I don't think we need to dim the lights
19 because it's not a dark PowerPoint.

20 MS. BRAY: Okay.

21 MS. McCARTHY: And it will be hard
22 enough for people to stay awake.

23 COMMISSIONER MAY: Could somebody
24 move the flag so we can see the whole thing?

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1 Sorry. Sorry to make to do that.

2 MS. McCARTHY: Good afternoon,
3 Chairman Moldenhauer and members of the Board.

4 I do get the unenviable task of
5 trying to simplify and clarify the Downtown
6 Development District today. But I think that
7 we have been able to do that with the aid of
8 some fabulous graphics from Mr. Steuart's
9 office.

10 But I do feel that to a certain
11 extent the appropriate start to the
12 presentation should be in the beginning, or at
13 least in the late '70s the downtown was not
14 looking very good. After the Metro
15 construction and the civil disturbances,
16 everything had pretty much moved to
17 Connecticut and K. But it was clear that the
18 Connecticut and K Street, Farragut North area,
19 was beginning to fill up and development was
20 going to move east.

21 However, there was a feeling among
22 many in the development community and the
23 planning community that moving east meant
24 having more of these kinds of sterile single-

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1 use office buildings, maybe, you know, a lunch
2 counter or something on the ground floor, that
3 wasn't really the way to go either.

4 So, the mayor appointed a
5 taskforce on the downtown to make
6 recommendations about what ought to be the
7 goal as the downtown redeveloped. And this
8 was the result. It is the report of the
9 mayor's commission on downtown. And it
10 basically produced the 1982 Downtown Plan.
11 Its overarching theme was the need to create
12 a living downtown, one that would not die
13 after 5:00 or on weekends. And there was a
14 recognition that the key to achieving that was
15 to achieve a variety of uses beyond office
16 space; arts, retail and housing, along with
17 preserving the scale of the historic district
18 in the downtown. The plan was adopted
19 virtually intact in the city's first Home Rule
20 Comp Plan in 1984.

21 I was hired in 1985 as the
22 executive director of a brand new organization
23 called the D.C. Downtown Partnership, which
24 was a public/private partnership that was

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1 established to implement the recommendations
2 of the Downtown Plan to achieve this lively
3 mixed-use area. And one of the things we were
4 able to do was, through some money from the
5 Arts Commission and the National Trust, we
6 commissioned a study from Halcyon and a
7 nationally-known zoning expert, Edie Netter
8 from Boston, called Preserving Small Buildings
9 in the Downtown, which was looking at how
10 could we create a variety of incentives or
11 mechanisms that would make it feasible to
12 achieve the kind of mix of uses that we
13 wanted. Some of the very concepts that later
14 became part of the DD emerged from the
15 recommendations of Ms. Netter as part of that
16 study.

17 So, in 1989, finally, five years
18 after the Downtown Plan was adopted in the
19 Comp Plan, the DD Overlay case was brought,
20 but there was a lot of drama in even having
21 this case introduced. By then I was not in
22 the Downtown Partnership anymore and I was
23 frustrated with the total lack of any action
24 on the part of the city to put into place

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1 zoning that was going to actually guarantee
2 that we could meet the requirements of the
3 Downtown Plan.

4 So, a very small group of
5 activists from the local chapter of the
6 American Planning Association, Metropolitan
7 Washington Planning and Housing Association,
8 Cluster of Congregations banded together,
9 basically about five of us, and spent nights
10 and weekends, like the true zoning nerds we
11 were, taking the recommendations partly from
12 this small building study, partly from what
13 the Office of Planning had originally put
14 forward, and coming up with a proposal for the
15 Downtown Development District. Later the
16 Office of Planning presented an alternative
17 one. And months and months and months and
18 months of public hearings ensued after that
19 point. The final version was adopted -- this
20 says in 1991. I believe it was actually
21 December of 1990. By far the most
22 controversial part of the DD, a part that only
23 passed three to two, was the housing
24 requirements.

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1 It was the late '80s. There was a
2 booming commercial office environment.
3 Developers were strongly opposed to having to
4 build residential. You know, they swore and
5 their appraisers swore that there was
6 absolutely no value. Land use for housing
7 wouldn't work. But the Zoning Commission
8 determined that the only way they were going
9 to achieve residential was to require it.

10 They compromised basically and
11 they permitted the properties that were in the
12 housing priority areas to keep their matter of
13 right commercial entitlement, but then to
14 impose -- then the Zoning Commission imposed
15 residential requirements above that.
16 Recognizing this would make a pretty difficult
17 set of buildings with commercial and
18 residential. They adopted -- they created the
19 mechanism to allow office to cross-subsidize
20 residential by allowing commercial developers
21 to pay the owner of a property willing to take
22 residential to accept that residential and to
23 execute this through a combined lot agreement.

24 The notion was these combined lot

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1 agreements would be extremely flexible and a
2 totally private market transaction. There was
3 no specifying what had to be paid or how, or
4 anything else. There was a -- well, with the
5 agreement it was a flexible and private
6 market. There was a requirement for a
7 covenant to make sure that the commitments met
8 the basic requirements and they were recorded.

9 There were also some additional
10 requirements basically -- and the most
11 problematic of which was if you were doing --
12 if an office developer and a residential
13 developer were doing a combined lot, the
14 Certificate of Occupancy for the office
15 development could not be received until the
16 Certificate of Occupancy for the residential
17 building had been received. You can imagine
18 this made it really difficult to convince a
19 lender to give you a loan for an office
20 development when the lender knew that your
21 ability to actually open that building was
22 dependent upon an entity over which you had
23 absolutely no control and over the lender had
24 no control. But that was just a slight

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1 problem.

2 But, let me talk a little bit
3 about the CLD Regs as they were first
4 conceived and articulated in the DDD.

5 1708.1 was pretty basic. You got
6 two lots. You take the maximum permitted
7 gross floor area for all the uses on both
8 lots, the minimum required gross floor area
9 for the preferred uses, bonus density, if you
10 have some through purchasing a TDR, whatever.
11 And then you put them together and you
12 calculate it as if the combined lot were one
13 lot and the total project had to conform with
14 the maximum and minimum gross floor area
15 requirements.

16 There was -- and we have done an
17 extensive search of the DDD case, the OP
18 reports, the transcripts. They revealed that
19 consistently the combined lot was discussed as
20 once that deal was struck, once that covenant
21 was recorded, it was to be considered as one
22 lot from then on and it had to comply on the
23 basis of being one lot.

24 There was no limitation ever

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1 provided on the FAR in the individual lots
2 despite the fact that the Zoning Commission
3 did, in some cases, specify limitations on the
4 ground floor uses for each lot, if there were
5 required ground floor use, that those could
6 not be transferred. So, they obviously had
7 thought about the concept of dealing with the
8 requirements on each individual lot, but that
9 was not part of the regulations.

10 So, as this diagram shows, the --
11 you know, the basic sort of simple way that it
12 was to operate. And, you know, essentially
13 the Reg said gross floor area can be
14 transferred. When it gets transferred, you
15 just incorporate it into the building design
16 and it's occupied.

17 Interestingly enough, in the order
18 that adopted the DD Regs, 681, in that case
19 there was a subsection 1708.1(k) that
20 specifically said the instrument of the
21 transfer, the covenant, shall increase the
22 development rights under this zoning ordinance
23 otherwise available to the receiving lot to
24 the extent of the rights transferred. There

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1 is no evidence in 00-30TA or any subsequent
2 hearing that the Zoning Commission ever acted
3 to remove that. It just somehow in the course
4 of the rewrite over 003TA -- 00-30TA fell out
5 of the list of provisions under the covenant.

6 So, let's look at a hypothetical.
7 Say you have two lots of -- that are both
8 zoned C-2-C and the -- and they each are
9 100,000 square feet, and I know it's a big
10 number. Just to make that math easier. So,
11 you take the commercial entitlement, which at
12 3.5 on 100,000 square foot lot would be
13 350,000. You move that over and move the
14 commercial entitlement over. You take the
15 residential. You move them over. And
16 basically, you've got two times 450,000 of
17 residential requirements, or 900,000 square
18 feet of residential, and you've got two times
19 350,000 square feet of commercial, or two
20 times the 3.5 that's permitted on each site,
21 and together that makes 700,000 square feet.
22 Add those together, you have 160,000 square
23 feet. Divide it by the overall size of -- the
24 200,000 for the two lots and you come with 3.5

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1 FAR commercial, 4.5 FAR residential.
2 Everything is in compliance and you get
3 900,000 square feet of residential.

4 So, fast forward to 1999. The
5 market starting to pick up, recovering from
6 the recession. MCI Center has opened. People
7 are starting to say, hmm, you know, actually
8 maybe people might be willing to live
9 downtown. But several of us that were on the
10 original activists' group, in talking to
11 developers that we knew were interested in
12 doing residential, began to realize, boy, this
13 timing mechanism on combined lot is really a
14 serious problem. So, we just began meeting
15 informally with a number of those developers
16 to say, okay, so we want to be sure that we
17 don't lose any of the housing that's already
18 required, but what kind of mechanism could we
19 adopt that might make that more flexible?

20 And, as we were beginning to come
21 up with that and beginning to look at some
22 other downtown housing issues, Mayor Williams
23 came in, Andy Altman was made planning
24 director. He sort of took that taskforce; I

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1 believe he added a few more people, and turned
2 it into the Mayor's Taskforce on Downtown
3 Housing. And that group then brought --
4 agreed on some changes that needed to be made,
5 and as a result we brought 00-30TA.

6 We made some changes to the escrow
7 mechanism to make CLD easier. That was our
8 original goal. But in the course of meeting
9 with members of the taskforce, I believe it
10 was Greg Fazakerley from DRI who first said,
11 you know, we have these standard FAR
12 entitlements and they apply the same whether
13 you're building office or residential, but in
14 the same volume, you can fit much more
15 residential because you're floor to ceiling
16 heights are lower. So, why don't we eliminate
17 the cap for residential? And, you know, we
18 need to get as many units as possible to
19 create a critical mass, so why don't we just
20 eliminate that cap?

21 And we thought about it and it
22 seemed to make sense. And our major concern
23 was, okay, we'll create that free bonus
24 density, but let's be sure -- since it is

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1 basically additional free density, you can't
2 use that to generate TDRs, which were one --
3 on a one-for-one basis for housing north of
4 Mass. Ave. and two-for-one south of Mass. Ave.
5 So that -- you know, TDRs were partly there to
6 compensate the housing developers. If you're
7 getting free density, you shouldn't need that
8 compensation.

9 And then with regard to combined
10 lot, we said, you know, if you get an extra
11 increment of residential, you shouldn't be
12 able -- you should be able to do your combined
13 lot just like you always could, but you
14 shouldn't be able to take that extra increment
15 of bonus density and in turn go to some other
16 lot and make a deal with a developer and say,
17 ooh, I got this free bonus density. Pay me to
18 take your residential requirement and put it
19 -- put it here in my bonus and you'll get more
20 commercial than you might otherwise have
21 gotten for not making any new housing units,
22 because instead of those bonus units being
23 bonuses, they would have just been tied up in
24 a CLD with another commercial landowner. That

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1 was the concept.

2 So, when (b) (2) was articulated,
3 it was part of a whole section on bonus
4 density and the (b) (2) part was basically,
5 okay, we're going to take the density
6 limitations off, provided that for these bonus
7 units that -- this bonus, this free density
8 that's being created you can't use that as
9 part of a TDR with another property.

10 The chart which the Zoning
11 Administrator has relied on was basically
12 irrelevant because we were only talking about
13 limitations on the use of the bonus density,
14 not the density that you were entitled to as
15 a matter of right on two individual lots.

16 And I think -- oh, one more piece
17 of evidence that the Zoning Commission had
18 always intended that the combined lot before
19 00-30TA to be flexible was the -- a question
20 about combined lots in the Uptown Arts
21 District Overlay had come before the
22 Commission at one point, and I'm looking at
23 the transcript from November 18th of 2002, in
24 which case Mr. Bastida, who was the secretary

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1 of the Zoning Commission at the time, says,
2 "The staff has provided you with a copy of the
3 Office of Corporation counsel's memorandum
4 regarding combined lot provisions in the Arts
5 Overlay District and would like to hear from
6 the Commission some discussion regarding that
7 memo." Chairman Mitten says, "Okay. Thank
8 you. Does anyone have any thoughts they would
9 like to share on this memo?" Mr. May says --

10 MS. BOLLING: Excuse me, Ms.
11 McCarthy. Is that in your exhibit? We'd like
12 to follow along.

13 MS. McCARTHY: I don't think it's
14 in the exhibit. I just found this when I was
15 looking through the transcripts.

16 MS. BRAY: Do you have a case
17 number so that we can --

18 MS. McCARTHY: It's actually not a
19 case. It's just from a regular meeting of the
20 Zoning Commission from Monday, November 18th,
21 2002. Oh, you know what? I --

22 MS. BOLLING: If you could just
23 give us a copy, that would be great. Thank
24 you.

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1 MS. McCARTHY: Okay. I'm --

2 CHAIRPERSON MOLDENHAUER: Ms.

3 McCarthy, when you're finished reading that,
4 why don't you provide a copy to Ms. Bailey and
5 she'll make a copy for the Board Members and
6 also for the District?

7 MS. McCARTHY: Okay.

8 CHAIRPERSON MOLDENHAUER: Thank
9 you.

10 MS. McCARTHY: Great.

11 MR. SURABIAN: And I'm sorry, I
12 think it's also relevant, what is the context
13 of that transcript?

14 MS. McCARTHY: It was a discussion
15 about -- there -- a question had been raised
16 on this very similar issue with regard to
17 combined lots in the Uptown Arts Overlay.
18 There was a transfer that was taking place
19 that met the overall requirements, but the
20 density on the receiving lot was more than the
21 FAR maximum on that receiving lot. And I
22 would love to have the Office of the Attorney
23 General memo, but because that was
24 attorney/client privilege, all I could get is

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1 the reference to it that was in the
2 transcript.

3 But Commissioner May says, "In the
4 memorandum, in the second paragraph, there's
5 a recommendation that there be a clarifying
6 amendment to indicate that the FAR may be
7 allocated between the two lots within the Arts
8 Overlay without regard to the FAR limitations
9 applicable to the particular lots so long as
10 the lots, when combined, remain within the FAR
11 cap. As I recall, from what I understand of
12 this issue, I think that a clarifying
13 amendment is in order since it's apparent in
14 the interpretation of the original Arts
15 Overlay that this issue is not perfectly
16 clear. So, I would support the notion of
17 having a clarifying amendment." Commissioner
18 Parsons agrees. Commissioner May,
19 Commissioner Mitten.

20 Now I have to admit to my
21 embarrassment that I was the deputy director
22 of Development and Review at the Office of
23 Planning at the time, and so really we should
24 have come away from that meeting and said,

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1 ooh, here's a clarifying memo that we've
2 prepared that will make this language clearer
3 and then none of us would have to be here
4 today. But somehow that fell threw the
5 cracks. 2002 was a pretty busy time at the
6 Zoning Commission.

7 But, so with that as the
8 background, that the original intention of the
9 Zoning Commission was always that you measured
10 things overall based on the two lots together
11 -- and note there's not discussion in the
12 wordings of these regs on FAR. It just talks
13 about the gross floor area to be allocated.
14 They weren't worried about the FAR on the
15 individual lot. FAR was used to tell you what
16 the gross floor area requirements were, but
17 then it ceased to be relevant after that.

18 MS. BRAY: Can I pause you for
19 second there? We said we would submit the
20 exhibit to Ms. Bailey.

21 MS. McCARTHY: Oh.

22 MS. BRAY: So, let's go ahead and
23 do that. But I actually have a question about
24 what you just said, Ms. McCarthy.

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1 Is it your testimony that in 2002
2 it was you needed a clarifying amendment, or
3 was it the Office of Planning's position that
4 no clarifying amendment was necessary?

5 MS. McCARTHY: Well, actually,
6 right, that was one reason that we weren't --
7 there was no fire lit, because we thought that
8 it was pretty obvious. And in fact, the --
9 and I don't see it in my files, but we were
10 the law firm that brought the question to the
11 Zoning Commission and subsequently the Zoning
12 Commission signed off on the combined lot
13 development for Ashley Gornstein in the 14th
14 Street Corridor. So, they -- the Office of
15 the Attorney General felt that the guidance
16 from the Commission had been sufficient to
17 allow them to go forward and approve the memo,
18 approve the CLD.

19 MS. BAILEY: Madam Chair, in
20 addition to this document, is it possible for
21 us to get a copy of Ms. McCarthy's
22 presentation?

23 MS. McCARTHY: Yes, we have that.
24 We have some animation as part of this, so

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1 we'll just go through this and then the -- if
2 they have the static copy in front of them,
3 it's going to be a little confusing.

4 MS. BAILEY: Okay.

5 MS. McCARTHY: Hopefully the
6 animation will be really clear.

7 So, bonus density is provided but
8 with restrictions. You can't use it to
9 combine with another lot and get more
10 commercial than you would otherwise be
11 permitted to do.

12 Okay. So, even after 00-3T -- can
13 we just call this 30TA? Even after 30TA the
14 -- everything would still work on these
15 hypothetical lots, at least on the Office of
16 Planning's understanding as we brought that
17 case to the Zoning Commission, and I think as
18 the Zoning Commission debated it.

19 Under the ZA's interpretation,
20 however, since you -- even though you have
21 identical zoning and identical size lots, you
22 can only transfer 3.5 of the 4.5 residential
23 that you've got here over to this site. So,
24 100,000 square feet of residential density is

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1 in effect lost because you then either have to
2 go do another transaction, or you just eat it,
3 or, you know, the Office of the Attorney
4 General suggests, you know, you could put a
5 little tiny bit of residential in your
6 building, which is of course the whole reason
7 why combined lot was created so you could
8 avoid that.

9 It's also important to note that
10 in the Office of the Attorney General's
11 prehearing statement they say the proposed CLD
12 would be permitted under the Zoning
13 Regulations if the residential lot were
14 larger, or if the residential lot were located
15 in either a C-3-C or a C-4 Zone. But it's
16 important to recognize there are also
17 restrictions. You can only do combined lots
18 within your particular Housing Priority Area.
19 This one is in -- the Housing Priority Area A,
20 which is north of Massachusetts. With the
21 exception of Square 483, I don't believe there
22 are any other lots in that entire area that
23 are zoned C-3-C or C-4. The only other lots
24 that you have there are C-2-C. It's really an

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1 anomaly that the C-3-C was even placed on
2 Square 483.

3 So, it basically -- under the
4 Zoning Administrator's interpretation, we
5 essentially have zoning by Escher. You take
6 this leftover 100,000 and then you go and
7 search of a project that's just the right size
8 so that you don't then generate more surplus
9 of one kind or another and then you have to go
10 to another one. And it's the hand drawing --
11 the picture of the hand drawing the hand.
12 It's never ending when we have in fact a much
13 more simple way to resolve this.

14 It's also important to note that
15 in effect this liberalization, 30TA, that was
16 supposed to create more units, has, by the
17 Zoning Administrator's interpretation, ended
18 up losing units, which really defeats the
19 whole purpose of the change.

20 So, that's sort of the conceptual
21 background of how combined lot is supposed to
22 work, why the change with the bonus density
23 didn't affect the calculation of matter of
24 right density. And now let's look

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1 specifically at the Steuart Company lots.

2 We have Square 483. You see the
3 size of the lot, the commercial/residential
4 entitlements and Square 515, Lot 62. And you
5 see the residential in kind of a maroon, would
6 you say?

7 PARTICIPANT: (Off microphone.)

8 MS. McCARTHY: Oh, burgundy? And
9 blue. So, if you take the commercial
10 entitlement from 483 and you take it from 515
11 and you put it onto -- or these -- this is the
12 way that the -- that it works at this point in
13 time, then you've got the vessel that's
14 created. With the lifting of the cap, you
15 could take the size of the lot, the square
16 footage of 42,824 square feet on Lot 62, and
17 if you applied 80 percent lot occupancy
18 multiplied by 14 stories that you could get
19 with the lower height limit for residential,
20 you come up with a maximum FAR of 11.2. So,
21 you take the residential from Lot 62 and you
22 put it on there. That's up to 4.5. You take
23 the 3.5 of residential from 483. You put it
24 on there. That actually totals 4.6 when you

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1 apply it on the smaller site. That would get
2 you up to 9.1 FAR of residential on that site.

3 And then, you could go ahead and
4 utilize the bonus density and throw in another
5 2.1 FAR up to the maximum that you could
6 achieve under the Zoning Regs. But that's
7 bonus density, so you wouldn't be able to use
8 that as a combined lot with any other site,
9 but you'd have all the commercial and
10 residential that you were entitled to under
11 the Zoning Regs on that site.

12 Same with the commercial site, but
13 on that site, because of the uneven -- the 4.5
14 and the 3.5, you're going to be less than the
15 9.5 that would be your commercial entitlement
16 on this site. You're down at only 8.66. So,
17 you have a little bit under on the one side;
18 little bit over on the other. This is another
19 reason why the Zoning Commission didn't find
20 a need to specify maximums on each individual
21 lot, because there's a certain natural
22 governing process that will keep you -- nobody
23 is going to want to do a development with 2
24 FAR so that they could go to, you know --

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1 well, you're limited by the Height Act anyway,
2 but you -- you know, you understand there was
3 generally felt that there would be a rough
4 equilibration, so there was not a need to
5 worry a lot about additional regulations.

6 So, you lose in effect 47,000
7 square feet of commercial in unused density.
8 But the Zoning Administrator's determination,
9 since you can only get to 8 FAR on the
10 receiving site, you lose 47,000 square feet on
11 that site.

12 This shows you those calculations
13 in a more mathematical sense, but basically
14 you lose 47,000 square feet on Square 483, but
15 you gain that 47,000 square feet on Lot 62.
16 So in the end, you get no more commercial
17 density than you were entitled to, you build
18 no less residential density than you were
19 entitled to, you just have the flexibility to
20 put that in individual lots.

21 So, bringing that sort of back to
22 why we are arguing that the -- why we are
23 appealing the Zoning Administrator decision.
24 Number one, combined lot was always intended

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1 to apply to the sum of the two lots, not to
2 the individual ones, and I think the order
3 that says your development rights are
4 increased on the receiving zone just supports
5 that as well. 1708.1(e) shows you in that
6 section in bold that if they had wanted to tie
7 requirements to individual lots, you know,
8 well, here they do it in 1708.1, "provided any
9 applicable ground levels uses required on any
10 affected lot shall not be transferred."

11 Why we think the interpretation of
12 30TA is flawed is, first of all, because the
13 restrictions in (b) (2) are written you get
14 this bonus density provided that you do these
15 other things. It only relates to the bonus
16 density created by that section. It doesn't
17 relate to all combined lots that don't have
18 anything to do with bonus density.

19 It's also -- we also feel that the
20 interpretation is flawed because the
21 restriction on bonus density is only supposed
22 to relieve you of cutting into the number of
23 units that you would otherwise be able to do,
24 or otherwise be required to do in a combined

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1 lot -- or by your matter of right density on
2 each site, and that in the end the Zoning
3 Administrator interpretation contradicts the
4 whole purpose of creating more units.

5 Looking at -- just briefly at the
6 prehearing statement from the Office of the
7 Attorney General, it says that -- just flip to
8 that -- it says on page 4, "Although the
9 Zoning Commission wanted to prevent
10 residential buildings to exceed matter of
11 right FAR limits, the Commission included
12 1706.7(b)(2) to ensure that the FAR limits
13 would not be exceeded by CLD transactions."
14 No, it didn't. That wasn't the purpose. The
15 purpose was to make sure that you didn't use
16 your bonus density to reduce housing
17 requirements on another site. As we've shown
18 you, we're fully complying with the housing
19 requirements on both sites, so that whole --
20 that notion is incorrect.

21 In addition, it cites -- the OAG
22 report cites the Office of Planning report and
23 virtually all of the citations that are in
24 here from the Office of Planning report on

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1 30TA really support our position. If you go
2 to page 10 of the Office of the Attorney --
3 no, I guess of the Office of Planning report
4 cited by the Office of the Attorney General,
5 to me it's pretty clear. The Office of
6 Planning's explaining. So if the FAR bonus
7 were given credit in a combined lot; the
8 bonus, not the matter of right, the bonus,
9 then no net increase in housing units would be
10 achieved. The -- and that's why they said the
11 ability to do combined lot transfers should be
12 limited to the original target DD density.
13 That's all we're talking about is the original
14 target DD density.

15 The Office of the Attorney General
16 cites attachment 3 that talks about -- and the
17 Office of Planning says the increase in GFA
18 may not be used to accomplish the transfer of
19 residential use through a CLD the increase in
20 GFA, nor to meet the minimal residential
21 requirements on the site.

22 And lastly, the report explains
23 the maximum combined lot a residential site
24 may accept is equal to the residential density

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1 achieved by the project minus the minimum
2 housing requirement, but in no case greater
3 than the FAR listed on the table below. And
4 that's one of the first times you see that
5 table. Well, go back to our hypothetical. If
6 you have a total project that has 1,120,000
7 square feet of residential, which is what we
8 would have if we got to build the whole
9 900,000 plus the bonus of 220,000, and you
10 subtract the minimum housing requirement, the
11 two 4.5 FAR requirements on each of the
12 100,000 square foot sites; the 900,000 square
13 feet, you get 220,000 square feet. If you
14 divided that by 100,000 square feet, the size
15 of the individual lot, it would be 2.2 FAR,
16 well below the 3.5 FAR that the limitation was
17 imposing on bonus density and not within the
18 limitation that the Zoning Administrator is
19 proposing in this case.

20 So, I think that it's pretty clear
21 that the flexibility that we are seeking was
22 present in the regulations before they were
23 modified and the modifications deal only with
24 a bonus density that is not involved in our

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1 project. Thanks.

2 CHAIRPERSON MOLDENHAUER: Cross-
3 examination?

4 MR. SURABIAN: Sure. First point,
5 Ms. McCarthy, you stated during your testimony
6 that the zoning on Square 43 is an anomaly.
7 Am I quoting you right, that it's C-3-C? Were
8 you aware of the history of that lot, that it
9 wasn't always zoned C-3-C?

10 MS. McCARTHY: Yes, I am very
11 aware of the history of that lot.

12 MR. SURABIAN: Okay. Were you
13 aware that the lot was only -- obtained that
14 zoning through an amendment which was
15 requested by Steuart Investment Company?

16 MS. McCARTHY: Well, you need to
17 go back further.

18 MR. SURABIAN: Well, I'm talking
19 about 1996.

20 MS. McCARTHY: Right.

21 MR. SURABIAN: When it was changed
22 from C-2-C.

23 MS. McCARTHY: And originally when
24 the DD was established, there was a mixed-use

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1 requirement put on that site because it was in
2 the area for mixed-use development. The --
3 there was subsequently an amendment to the
4 Comprehensive Plan that removed that from the
5 mixed-use area so it became plain C-3-C, not
6 DD/C-3-C. Later on Mr. Steuart -- when I was
7 at the Office of Planning Mr. Steuart had
8 asked for a change in zoning for DD/C-3-C for
9 both of his sites. The Zoning Commission did
10 not grant C-3-C for 515, but it allowed him to
11 keep the C-3-C, but made it DD/C-3-C on Square
12 483. Did I get that right?

13 MR. STEUART: Your memory is right
14 on target.

15 MR. SURABIAN: And you referenced
16 the Zoning Commission case 30T in your
17 presentation, which is the zoning case that
18 resulted in 1706.7(b) --

19 MS. MCCARTHY: (b) (2).

20 MR. SURABIAN: -- as we know it.

21 Or the entirety of --

22 MS. MCCARTHY: Right. Right.

23 MR. SURABIAN: -- as we know it.

24 And you referenced a Office of Planning report

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1 that I included in my statement. And were you
2 with the Office of Planning at the time this
3 report was drafted?

4 MS. McCARTHY: I was.

5 MR. SURABIAN: In what capacity
6 were you in?

7 MS. McCARTHY: I was the deputy
8 director for Development Review, maybe by then
9 deputy director for Development Review and
10 Historic Preservation.

11 MR. SURABIAN: Okay. And who's
12 Andrew Altman?

13 MS. McCARTHY: He was the director
14 of the agency.

15 MR. SURABIAN: Okay. And did you
16 work on this report at all?

17 MS. McCARTHY: I did.

18 MR. SURABIAN: You did? Okay.
19 And I'm going to refer you to page 16 of that
20 report, which is Exhibit A in my prehearing
21 statement.

22 MS. McCARTHY: I'm sorry. Exhibit
23 A, page what?

24 MR. SURABIAN: It's 16 in my

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1 prehearing statement, which is the January
2 30th, 2001 Office of Planning report.

3 MS. McCARTHY: Right.

4 MR. SURABIAN: Okay. And I'm
5 referring to -- there's a box, the portion of
6 the text. And part of it reads, "The bonus
7 density gained through this provision should
8 not be used to accept additional combined lot
9 transfers beyond the amount which would
10 normally be permitted in that zone. This is
11 outlined in the following table." And then
12 there's a table which follows that. Do you
13 see that?

14 MS. McCARTHY: Correct.

15 MR. SURABIAN: Okay. Is that
16 table -- wasn't that included and adopted by
17 the Zoning Commission in 1706.7(b)?

18 MS. McCARTHY: Yes. And -- but,
19 see, it's as Ms. Bray said. We're not
20 disagreeing on the facts. We're disagreeing
21 on the interpretation. When the report said,
22 "The bonus density gained through this
23 provision should not be used to accept
24 additional combined lot transfers beyond the

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1 amount which would normally be permitted in
2 that zone," that's what it meant. You could
3 go ahead and do a combined lot transfer as it
4 would normally be permitted. As I cited that
5 other section in my testimony from another
6 part of the report that talked about the
7 situation before the regulations were changed,
8 that's what was prevailing. And the only
9 change that the Office of Planning was looking
10 to achieve was only directed at the bonus
11 density.

12 MR. SURABIAN: Okay. Where did
13 the Office of Planning derive those numbers
14 from, the 3.5 for C-2-C, 6.0 for C-3-C, and so
15 forth, if you know?

16 MS. MCCARTHY: That was the -- I
17 have to admit that was the Art Rodgers side of
18 the job. He was our Mr. Numbers. So, I can't
19 say for sure. But I know when I went to the
20 transcript for 30TA, I was quoted on page 55
21 of the decision meeting, or of the
22 presentation meeting as saying all we were
23 trying to do was to provide the opportunity
24 for additional residential and we just wanted

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1 to be sure that nobody took that extra density
2 and converted it into commercial instead of
3 residential. There's just a very consistent
4 theme through the Office of Planning report
5 and all of those statements, and it's only
6 whether you choose to say, as I believe the
7 Zoning Administrator has, oh, well, but that
8 gets you more density on the receiving site
9 than would be the case if you only had the
10 receiving site and you only calculated the
11 combined lot based on that receiving site.

12 So therefore, anything over the
13 eight matter of right density must be bonus.
14 It might be more than would typically be
15 matter of right, but it is all perfectly
16 within the matter of right -- it might be more
17 than would be matter of right were Lot 62 by
18 itself in a corn field. But, since it is part
19 of a combined lot, that additional density,
20 the eight-point -- no, 9.1 is within the
21 matter of right limits when you do, as the
22 Combined Lot Regs direct you to, consider the
23 project as one once the combined lot is
24 effectuated.

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1 MR. SURABIAN: Okay. Well, I
2 wonder if we can actually get some
3 clarification on those numbers from within the
4 report itself. So, I'll direct you to page 11
5 of that same report. And again, there's a
6 boxed portion of the text, and I'm referring
7 to the first paragraph.

8 MS. McCARTHY: Right.

9 MR. SURABIAN: Okay. And part of
10 it says, "The residential FAR eligible for
11 transfer should be limited to the amount of
12 non-residential FAR permitted on the
13 residential lot under the current
14 regulations." Do you see that section?

15 MS. McCARTHY: Right.

16 MR. SURABIAN: Okay. Now in your
17 graphics how much commercial FAR are you
18 transferring to the residential lot?

19 MS. McCARTHY: Whatever our matter
20 of right commercial entitlement is.

21 MR. SURABIAN: Approximately
22 149,844 square feet?

23 MS. McCARTHY: Yes.

24 MR. SURABIAN: Okay. And how much

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1 residential are you transferring from the
2 square 843 over to the residential receiving
3 lot? Is it about 197,000 square feet?

4 MS. McCARTHY: Yes, 197. Right.

5 MR. SURABIAN: So, are you
6 transferring more residential than the amount
7 of commercial permitted on the residential
8 receiving lot?

9 MS. McCARTHY: As we are permitted
10 to do under the Combined Lot Regulations, yes.

11 MR. SURABIAN: The Office of
12 Planning seems to be saying you can't do that
13 in that portion I just read to you.

14 MS. McCARTHY: Well, you know what
15 Ms. Bray was saying about how you shouldn't
16 just take one part of the regs? You're
17 forgetting the paragraph that's within your
18 box and is the next paragraph down that says,
19 "While the Office of Planning endorses
20 providing relief from density restrictions for
21 housing in the DDD commercial zones, the
22 ability to complete combined lot transfers
23 should be limited to the original target DD
24 density." That's what we're doing. We're --

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1 it's no more and no less than what your
2 original target density is.

3 MR. SURABIAN: Doesn't that say
4 the exact opposite of what you're proposing
5 that it says?

6 MS. McCARTHY: No.

7 MR. SURABIAN: Okay. Okay. Well,
8 let's go forward. I am reading this report in
9 its entirety, and so we'll see if -- go back
10 to page 16 and back to the chart there. And
11 is 3.5 FAR the amount of the commercial
12 entitlement allowed on a lot in a C-2-C Zone?

13 MS. McCARTHY: I'm sorry. Say it
14 again?

15 MR. SURABIAN: Is three point FAR
16 -- 3.5 FAR, is that the commercial entitlement
17 of a lot in a DD/C-2-C Zone is?

18 MS. McCARTHY: Right.

19 MR. SURABIAN: Yes. And is the
20 commercial entitlement of a lot in a C-3-C
21 Zone 6.0 FAR?

22 MS. McCARTHY: Right.

23 MR. SURABIAN: Okay. And isn't
24 the Office of Planning here saying that you

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1 can't transfer more than the commercial
2 entitlement on that lot in a combined lot
3 development?

4 MS. McCARTHY: No. Look at the
5 second paragraph, the second sentence of that
6 paragraph. "The bonus density gained through
7 this provision should not be used to accept
8 additional combined lot transfers beyond the
9 amount which would normally be permitted in
10 that zone." Like as I said --

11 MR. SURABIAN: And why isn't bonus
12 density being used here?

13 MS. McCARTHY: As I said, the
14 Combined Lot Regs say you take the gross floor
15 area that's required and the gross floor area
16 that's permitted on each of the lots and you
17 combine them. And as long as the finished
18 product meets the requirements treated as one
19 zone, that's the way combined lot is supposed
20 to work. It never gets into, oh, and
21 incidently, on lot B you have to conform with
22 no more than 3.5 of commercial and no more
23 than 4.5 of commercial, or residential.

24 MR. SURABIAN: Okay. Let's turn

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1 to Exhibit G in your filing. Do you see
2 Exhibit G?

3 MS. McCARTHY: I do.

4 MR. SURABIAN: And what is this
5 document?

6 MS. McCARTHY: It was a PowerPoint
7 that the Office of Planning used to present
8 the original concept for 30TA.

9 MR. SURABIAN: And this is part of
10 the Zoning Commission's case in the creation
11 of (b) (2), as we'll call it?

12 MS. McCARTHY: Right.

13 MR. SURABIAN: Okay. And then
14 there's a portion of this which is the Summary
15 of Recommendations. It's the very last
16 section. And I'm looking at the third page
17 from the very end.

18 MS. McCARTHY: Okay.

19 MR. SURABIAN: It says Summary of
20 Recommendations at the top, Combined Lot
21 Transfers.

22 MS. McCARTHY: Yes.

23 MR. SURABIAN: And on the first
24 bullet point it says, "Require recordation of

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1 a covenant binding the receiving site to
2 construct an amount of housing equal to the
3 commercial development rights which are being
4 transferred." Is the CLD proposed here
5 transferring an amount of housing equal to the
6 commercial development rights that are being
7 transferred?

8 MS. McCARTHY: Require recordation
9 of a covenant -- receiving site to construct
10 -- development rights which are being
11 transferred. Yes.

12 MR. SURABIAN: How so?

13 MS. McCARTHY: The covenant which
14 we would propose would bind Lot 62 to receive
15 the amount of -- oh, this is just for the
16 bonus density. This is not for all combined
17 lot --

18 MR. SURABIAN: But you don't
19 dispute that in this transaction you're
20 transferring 197,000 square feet of
21 residential and 149,000 approximately of
22 commercial?

23 MS. McCARTHY: Haven't disputed
24 that at all.

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1 MR. SURABIAN: Okay. And then if
2 you flip to the next page, the second bullet
3 point there, it says, "The extra density
4 should not be eligible to generate TDRs,
5 engage in combined lot transfers or meet
6 minimum housing requirements." You see that?

7 MS. McCARTHY: Right.

8 MR. SURABIAN: Aren't you
9 exceeding your matter of right FAR through
10 combined lot development in this case?

11 MS. McCARTHY: No.

12 MR. SURABIAN: How so?

13 MS. McCARTHY: Because our matter
14 of right is determined when the two lots
15 become one and are treated as such in the
16 combined lot development. There does not
17 remain anymore an individual entitlement on
18 each individual lot. Those entitlements
19 requirements are merged. And it -- you know,
20 go through the 89-25, you go through the
21 regulations, it always refers to the combined
22 lot as being -- once that covenant is
23 executed, it is bound together as a single lot
24 and you no longer can develop something else

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1 different on it. It has to be treated as if
2 Lot 62 and Square 43 are one lot.

3 MR. SURABIAN: Is the covenant
4 you're referring to the same covenant which
5 would bind the receiving site to construct an
6 amount of housing equal to the commercial
7 development rights which are being
8 transferred?

9 MS. McCARTHY: The covenant I'm
10 referring to is --

11 MR. SURABIAN: Would it be the --

12 MS. McCARTHY: -- the covenant in
13 1708.1. "The maximum permitted floor area for
14 all uses, the minimum required floor area
15 preferred uses and bonus density, if
16 applicable, shall be calculated as if the
17 combined lots were one lot and the total
18 project shall conform with the maximum and
19 minimum floor area requirements." That's on
20 the -- two pages from where we were looking
21 at.

22 MR. SURABIAN: Okay. So, under
23 your view when would bonus density come into
24 play?

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1 MS. McCARTHY: In the example that
2 I illustrated where you do a combined lot,
3 you've satisfied your matter of right
4 entitlements and requirements, you get
5 additional bonus density above that, and you
6 take -- I think in mine it was -- can kind of
7 make you dizzy. In my example it was 220,000
8 square feet if you had the 100,000. Right.
9 It's the -- this -- if you did this proposal
10 as we're talking about, Mr. Steuart would then
11 be eligible to add another 220,000 square feet
12 of bonus density because he had met all these
13 requirements on his site. And he could not
14 then take that bonus density and accept a
15 payment from somebody who wanted to get rid of
16 the residential requirement on their lot by
17 paying him to take it and count it as part of
18 that bonus density. That is the sole reason
19 that those restrictions were created.

20 MR. SURABIAN: My question was a
21 little different. I guess I want to know,
22 under your view what is Mr. Steuart's maximum
23 FAR at which point he would enter into bonus?

24 MS. McCARTHY: Once he satisfied

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1 the total residential and commercial
2 entitlements and requirements for both of
3 those lots. That creates his matter of right
4 requirements/entitlement, and anything above
5 the matter of right would then be bonus
6 density.

7 MR. SURABIAN: Okay. It might be
8 easier -- I'll refer you to the initial
9 appeal, and the second tab on the initial
10 appeal, tab B. There's a spreadsheet. Do you
11 have that in front of you?

12 MS. McCARTHY: I do.

13 MR. SURABIAN: And I'm talking
14 about line 12 where you show the combined FAR
15 density as being 8.85.

16 MS. McCARTHY: Right.

17 MR. SURABIAN: Where does that
18 number come from?

19 MS. McCARTHY: Since the combined
20 lot requirements require you to consider it as
21 one lot, if you take the total square footage,
22 the 535,221 square feet and the 342,592 square
23 feet -- anyhow, if you take both lot sizes as
24 the denominator and you take the total amount

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1 of development as the numerator? No, maybe I
2 -- yes. Then you -- it's in effect an
3 average.

4 MR. SURABIAN: It's an average of
5 what?

6 MS. MCCARTHY: For the -- it's the
7 average density of the two sites taken
8 together as one. It's not a calculation that
9 the Zoning Regs would require you to do or
10 that the covenant would require you to do. We
11 were just doing it for illustrative purposes.
12 It was a little easier to understand in some
13 ways with my hypothetical here because if you
14 had the same zoning and the same size lots,
15 and you take those two together without the
16 bonus density and you add them, and you get
17 16,000 square feet and you've got a lot size
18 of 200,000 square feet, then you get 3.5 FAR
19 of commercial and 4.5 FAR of residential. So,
20 you know you've met your matter of right
21 requirements in your combined lot.

22 MR. SURABIAN: Well, here we have
23 lots that zoned differently and I think what
24 you've done is that you've averaged out the

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1 maximum FAR based on the provisions of
2 1706.4(a) and 1706.5(a), and you've averaged
3 them together. Isn't that what you've done?

4 MS. McCARTHY: We combined what
5 we're proposing to build and we divided it by
6 the size of both lots. And we come to an
7 average FAR of 8.85.

8 MR. SURABIAN: So, you're saying
9 if one lot is over 8.85, it's bonus density?
10 Is that what you're saying? What is our
11 maximum FAR requirement?

12 MS. McCARTHY: The -- I just said
13 the 8.85 was just here for illustrative
14 purposes. As the regs read, the regs and the
15 covenant would simply say take the maximum
16 amount of preferred use you're required and
17 the minimum amount of commercial non-preferred
18 use that you're entitled to from both sites,
19 add them up together and that's your matter of
20 right density that you're entitled to in your
21 combined lot. And there is nothing in the
22 regs that says how you divide those between
23 the two lots that are part of your combined
24 lot. It says once you combine them you treat

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1 it as one lot and that's it.

2 MR. SURABIAN: Well, I think
3 that's interesting. So, what you're saying is
4 that there's nothing in the regs that
5 instructs you to average the maximum FAR
6 requirements for those two lots?

7 MS. McCARTHY: The -- if you read
8 the provisions, it's what I said, the regs
9 basically deal in GFA. They don't then talk
10 about FAR other than what you use to calculate
11 your initial requirements on each of the
12 individual lots. But once you've calculated
13 what your requirements are, then 1708.1 just
14 talks about the minimums, maximums, they get
15 combined, you treat it as one, and you have to
16 see that the combined lot meets the minimums
17 and maximums. It doesn't talk about --

18 MR. SURABIAN: Doesn't 1706.4(a)
19 say there's a maximum 9.5 FAR limit on a lot
20 in a C-3-C Zone?

21 MS. McCARTHY: Right. And it says
22 that within the C-3-C Zone you have a maximum
23 of 6.5 FAR that you can have commercial and
24 you have a maximum of 3.5; or 6.5 and 3,

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1 whatever, residential. And then in 1708.1 it
2 says, but you know what, you don't have to
3 build a project that looks like that. You're
4 allowed to mix and match across lots.

5 MR. SURABIAN: Well, I agree that
6 1708.1 says that you can transfer uses, but
7 what I'm asking is where in 1708.1 anywhere
8 does it say that the individual requirement of
9 a 9.5 for a C-3-C and 8.0 for a C-2-C do not
10 apply? Where is that language?

11 MS. MCCARTHY: In 1708.1.

12 MR. SURABIAN: Please identify it.

13 MS. MCCARTHY: "Two or more lots
14 may be combined for the purpose of achieving
15 the required FAR equivalent for preferred uses
16 as follows: The maximum permitted gross floor
17 area for all uses, the minimum required gross
18 floor area for preferred uses, and bonus
19 density if applicable, shall each be
20 calculated as if the combined lots were one
21 lot and the total project shall conform with
22 the maximum and minimum gross floor area
23 requirements." For the total project. Not
24 for the individual projects. It's not like in

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1 1708.1(e) where they say, yes, you can combine
2 it, but you know, you still have to keep those
3 required ground floor uses.

4 And in fact, as I showed you in
5 the testimony, the original text of the order
6 adopting the combined lot and the whole DD had
7 a provision which has mysteriously disappeared
8 that said the instrument of transfer shall
9 increase the development rights under this
10 Zoning Ordinance otherwise available to the
11 receiving lot to the extent of the rights
12 transferred. So --

13 MR. SURABIAN: What does
14 "mysteriously disappeared" mean? You mean
15 it's not part of the law anymore?

16 MS. MCCARTHY: Meaning it was in
17 the regs and then 00-30T came along and was
18 adopted. Office of the Attorney General
19 recodified the language. There was never a
20 vote before the Zoning Commission to say, oh,
21 should we take out 1708.1(k)?

22 MR. SURABIAN: So the Zoning
23 Commission did not remove it, or did remove
24 it?

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1 MS. McCARTHY: It was just
2 mysteriously not -- pardon me?

3 MR. SURABIAN: They did remove it,
4 or they did not remove it?

5 MS. McCARTHY: They never voted to
6 remove it. It just -- when everything got
7 reordered for the new round of regs after
8 30TA, it just wasn't there anymore.

9 MR. SURABIAN: Could you flip
10 ahead to that? Could you flip back to that
11 slide that you're referring to?

12 And you don't think that what this
13 means when referring to the develop rights is
14 referring to the commercial -- that the
15 commercial that you would be allowed to build
16 on one lot -- it's referring to your
17 commercial entitlement?

18 MS. McCARTHY: It's in the section
19 on combined lot development. 1708.1 has the
20 same language that we are familiar with. It
21 goes through (a), (b) and (c). They can be
22 on different squares. They can be eligible
23 for density and area allowances. When it
24 involves only linkage, it's got to be, you

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1 know, within certain areas. When combined lot
2 development involves a transfer of bonus
3 density. That's (d). (e) is the -- and (e)
4 is the language that we keep coming across,
5 maximum permitted floor area for all uses,
6 minimum required floor area for all preferred
7 uses and bonus density, if applicable, shall
8 be calculated as if the combined lots were one
9 lot. And if the total -- and the total
10 project shall conform with the maximum and
11 minimum floor area requirements. (f) talks
12 about the required floor area to be devoted to
13 preferred uses to be transferred from the
14 sending lot to the receiving lot.

15 So, the required floor area to be
16 devoted for preferred uses may be transferred
17 from the sending lot to the receiving lot on
18 which the required space for preferred uses
19 shall be incorporated into the building design
20 and occupied. Doesn't say shall be
21 incorporated into the building design and
22 occupied, but only up to the maximum FAR of
23 the receiving site. And then it has the
24 proviso about "but any applicable ground-level

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1 uses required on any affected lot shall not be
2 transferred."

3 Then you get to (g), Certificate
4 of Occupancy for the development sending, the
5 lots could be revoked. Then you get to (h),
6 which is no -- the transfers can't be
7 effectuated without a covenant approved by the
8 Office of the Attorney General. And then you
9 get to (i) -- I'm sorry. Oh, then you get to
10 (i), which is the historic preservation. You
11 get to (j), which is bonus density. And you
12 get to (k), instrument of transfer shall
13 increase the development rights under this
14 Zoning" -- it's not like (k) that's under a
15 section that says you get bonus density if you
16 -- if we remove the FAR limitations or
17 anything. It's just -- it's very
18 straightforward.

19 MR. SURABIAN: So, if I took your
20 interpretation, what you're saying is that
21 1706.4(a) and 1706.5(a) just don't apply in a
22 combined lot development transfer?

23 MS. McCARTHY: They do apply in
24 that they tell you what is the minimum

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1 required housing -- or preferred use on each
2 site and the maximum commercial use on each
3 site. And then that gives you the basis for
4 the calculations for the combined lot.

5 MR. SURABIAN: And there's no --

6 MS. McCARTHY: At that point they
7 don't --

8 MR. SURABIAN: And in your view
9 there's no consideration to the total density
10 of one lot, of an individual lot?

11 MS. McCARTHY: Right.

12 MR. SURABIAN: All right. And
13 doesn't 1706.7(b) limit 1708.1?

14 MS. McCARTHY: It does when you're
15 talking about the bonus density generated by
16 1706.7(b).

17 MR. SURABIAN: Okay. And
18 1706.7(b) was added after 1708.1, wasn't it?

19 MS. McCARTHY: Yes, 10 years
20 after.

21 MR. SURABIAN: Ten years after?
22 Okay. I don't have anything further.

23 CHAIRPERSON MOLDENHAUER: Okay.

24 At this time, what I'll do is I'll open up for

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1 Board questions.

2 COMMISSIONER MAY: What is
3 actually happening with Lot 61?

4 MR. SURABIAN: I'm sorry. Can I
5 just go back in time and ask one more
6 question?

7 CHAIRPERSON MOLDENHAUER: Yes, go
8 right ahead, Mr. Surabian.

9 MR. SURABIAN: Thank you. That
10 portion of the transcript which was just
11 handed around, I guess was that amendment that
12 was discussed ever passed?

13 MS. MCCARTHY: The -- a clarifying
14 amendment?

15 MR. SURABIAN: Or any kind of
16 amendment.

17 MS. MCCARTHY: No, that's what I
18 said. Subsequently, that whole issue came up
19 because the Office of the Attorney General
20 felt it wasn't clear and had refused to sign
21 a combined lot agreement in similar
22 circumstances that applied to the Uptown Arts
23 Overlay. When we raised the issue with the
24 Zoning Commission, Office of the Attorney

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1 General did a memo. Zoning Commission said,
2 yes, maybe we should clarify that you can
3 transfer more than the additional density.
4 But subsequently, the Office of the Attorney
5 General, having heard the Commission, signed
6 the CLD, so nobody was ever pushing to have it
7 clarified.

8 MR. SURABIAN: And aren't the
9 provisions of the Uptown Arts District
10 different than the Downtown Development
11 Overlay?

12 MS. McCARTHY: The concept is
13 basically the same. There are slightly
14 different provisions. There's combined lot
15 for Uptown Arts Overlay. There's combined lot
16 in the CR Zone, right? And each one is a
17 little bit different.

18 MR. SURABIAN: Okay. Nothing
19 further.

20 CHAIRPERSON MOLDENHAUER: Mr. May,
21 do you want to start off with some Board
22 questions?

23 COMMISSIONER MAY: Yes, please.
24 Okay. So, what actually is happening with Lot

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1 61?

2 MR. STEUART: At this point, it's
3 to be decided, Mr. May.

4 COMMISSIONER MAY: Has it been
5 fully assembled and --

6 MR. STEUART: No, not in its
7 entirety, it has not been.

8 COMMISSIONER MAY: Is it actually
9 possible for you to enlarge that, to subdivide
10 and change the configuration of Lot 62 in
11 order to change the size?

12 MR. STEUART: Well, I --

13 COMMISSIONER MAY: I'm not
14 suggesting that that's the solution. I'm just
15 wondering if that's a possibility.

16 MR. STEUART: I'd have to go
17 through another alley-closing process, I
18 suspect.

19 COMMISSIONER MAY: Is there alley
20 between --

21 MR. STEUART: Yes.

22 COMMISSIONER MAY: -- 61 and 62?

23 MR. STEUART: Yes, there's a alley
24 between the two parcels.

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1 COMMISSIONER MAY: Okay.

2 MR. STEUART: Well, three parcels.
3 There's a parcel that we don't own.

4 COMMISSIONER MAY: Right. Okay.
5 We mentioned the Uptown Arts case. Are there
6 other combined lot cases where you have a
7 disparity that's similar to this? I mean, I
8 imagine there's always some sort of disparity,
9 because otherwise you'd have to have
10 absolutely equal resulting FAR. Not even
11 equal lot sizes. Equal resulting FAR. The
12 3.5 trading -- you know what I mean? I mean,
13 are there other precedent cases that are
14 similar in the disparity here, that we see
15 here?

16 MS. MCCARTHY: No, because I
17 think; correct me if I'm wrong --

18 MS. BRAY: Well, perhaps I can
19 answer that question just from a pure legal
20 standpoint, because the Zoning Regulations
21 require a covenant to be recorded, and that
22 gets recorded among the land records. And
23 there's a process involved, but there's
24 actually no formal public process involved so

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1 there's no way to search whether there are
2 similar cases without going lot by lot through
3 the DD and the land records to find each
4 combined lot covenant and then backing into
5 the math for each lot.

6 COMMISSIONER MAY: Okay. Now that
7 you've found this other transcript, it may
8 actually be important to understand what
9 occurred in that particular case, since we
10 know that there was a disparity and it was
11 decided a certain way, not that I really want
12 to have a huge volume of information added to
13 the record in that. Just something that's
14 demonstrative of what the issue and what the
15 case -- and how it was decided.

16 So that I understand the basics of
17 the appellant's argument here, essentially
18 what you're saying is that when you decide to
19 do a combined lot development and you
20 aggregate the FAR and you, you know, move it
21 where you need it to be and so on, essentially
22 that's all simply the new matter of right as
23 a result of combined lot development. So,
24 none of the density that winds up on either of

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1 the sites is in effect bonus. What qualifies
2 as bonus would be TDRs or this ability to
3 build as much housing as you want?

4 MS. McCARTHY: Right.

5 COMMISSIONER MAY: You keep
6 referring to this paragraph (k) that never
7 made it into the regs. That was in your
8 presentation that we just had right now?

9 MS. McCARTHY: It made it into the
10 order. It -- I can't remember whether it made
11 it into the original Zoning Regs and then
12 dropped out at 30TA. I think that was the
13 case, but I've looked at a lot of orders in
14 the last few weeks and I don't remember
15 which --

16 COMMISSIONER MAY: In any case, it
17 doesn't exist in the regs right now?

18 MS. McCARTHY: Right. Yes, I talk
19 about it more as I think being a pretty clear
20 signal of the Zoning Commission's intention
21 that they recognized that nothing was going to
22 match up directly, so you just use the
23 covenant to increase the development rights,
24 and you have a lot of other constraints. You

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1 still have rear yard constraints, inside yard
2 and lot occupancy, and all of that that
3 govern. And even 00-30TA said nothing in the
4 bonus density should be construed as changing
5 any of those other regulations. So, between
6 the Height Act and the other area regulations,
7 plus the DD imposes a bunch of additional
8 design requirements. I think that I take that
9 (k) as being a sign that the Zoning Commission
10 was saying, yes, we're cool with it.

11 COMMISSIONER MAY: Because that's
12 the way we talk?

13 MS. MCCARTHY: Yes. Yes. Dude.

14 COMMISSIONER MAY: Yes. Thank you
15 very much. That's all my questions.

16 CHAIRPERSON MOLDENHAUER: In going
17 through the section (b)(2), and then in
18 contrast looking at the combined lot language,
19 you've made different references, and I'm
20 trying to mirror them in my understanding.
21 You've said things to the effect of in
22 calculating the individual lot FAR or
23 requirement, and then you've made comments to
24 the effect of in a combined lot development

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1 the lots are considered one and thus there is
2 no FAR or there are no real references to FAR
3 in the combined lot section, section 1708.
4 More references simply to gross floor area.

5 Even if you have a combined lot,
6 don't you still have certain FAR limitations?

7 MS. McCARTHY: The FAR limitations
8 are -- the FAR is used to initially calculate
9 what's your matter of right entitlement and
10 requirement on each lot in the DD.

11 CHAIRPERSON MOLDENHAUER: Okay.

12 So --

13 MS. McCARTHY: So, that's where
14 the governing is put on it. And then --

15 CHAIRPERSON MOLDENHAUER: So, then
16 --

17 MS. McCARTHY: -- how you mix and
18 match them, that's --

19 CHAIRPERSON MOLDENHAUER: Okay.

20 So, you have your individual two lots.
21 Instead of referring them to as lot numbers,
22 I'm going to refer to it as a commercial lot
23 and a residential lot, because that's how it
24 ends up being.

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1 You have your commercial lot and
2 your residential lot. And based on the regs,
3 you have certain FAR obligations for --
4 certain residential obligations for your
5 residential lot, and thus the total
6 requirements that you would have for that
7 residential lot. Is that correct? You add
8 the two requirements so that you then have --
9 kind of in your diagram you were adding the
10 requirements from each lot to total how much
11 residential obligations you would have.

12 MS. McCARTHY: Right.

13 CHAIRPERSON MOLDENHAUER: Now, in
14 doing that, I think one of the first things
15 that Mr. Bray said was what is the
16 denominator? And I think that's an important
17 issue, because I can't disregard section
18 (b) (2). And it says that there is a maximum
19 residential FAR that may be accepted, that may
20 be accepted through a combined lot
21 development. And it identifies a specific
22 Zone District and then a maximum allowed
23 transferrable FAR.

24 So, is your understanding that the

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1 denominator -- that's the question of, well,
2 where does the denominator come into effect in
3 that calculation of the 3.5?

4 MS. BRAY: Perhaps it makes sense
5 to back up. I think what I began with in our
6 argument is saying that the denominator is so
7 important. And I think what Ms. McCarthy
8 testified to is that when you engage in a
9 combined lot development, the first thing that
10 needs to be looked at is what is the total --
11 your maximum square footage that could be
12 constructed on the two lots? And so, for
13 those purposes you look at both the overall
14 maximum required, or maximum FAR allowed on
15 each lot. Then you look at the minimum
16 required residential and the difference, which
17 is essentially your commercial entitlement.
18 And in aggregating the two, you use that
19 square footage figure rather than an FAR
20 figure to move the volume around among the two
21 uses.

22 I think to be clear, we're not
23 asking the Board to completely disregard
24 1706.7(b)(2). We're asking that the Board

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1 read it in context with the whole of 1706.7,
2 which as Ms. McCarthy testified, tees up the
3 possibility of calculating your maximum volume
4 in a different way. That is to say, it's not
5 9.5, or I'm sorry, it's not 8.0 in the DD/C-3-
6 C. It actually could be whatever your maximum
7 is under the Height Act, but you can't fill
8 that volume -- as a stand alone project you
9 can't build to your 8.0 and then fill with
10 combined lot so that you could then transfer
11 commercial density off of the site. It says
12 that 3.5 is the limitation provided that --
13 and that's the key language, is the preamble
14 to 1706.7 and 1706.7(b).

15 MS. MCCARTHY: Yes, I think when
16 you look at all of the OP reports and the
17 discussion, and you have OP saying things like
18 the bonus density should not be used for
19 combined lot transfers because if we allowed
20 this happen, we wouldn't get more units. We'd
21 just get more projects rewarded more heavily.
22 It's all about the units.

23 And ironically, the situation that
24 we have now is before 2000, before 00-30TA Mr.

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1 Steuart had entitlements in each of those two
2 lots. He was allowed to combine them.
3 Everything was fine. Along comes an amendment
4 which purports to increase the number of units
5 that can be constructed and to make it easier.
6 And lo and behold, based on how the density
7 bonus was given and then conditioned provided
8 that if you get this density bonus you can't
9 use it for X, Y and Z, he ends up being able
10 to do less residential within the confines of
11 those two lots. It just doesn't make sense.

12 CHAIRPERSON MOLDENHAUER: But, I
13 mean, I guess I see what you're saying, but I
14 think from the way I read it, or the way that
15 I'm trying to understand it right now, doesn't
16 it say that Mr. Steuart could -- he could
17 develop it all the way up to the 11 FAR, I
18 think it was, and thus, you could get more
19 units, which is what the OP report is saying
20 And the more units or more profit, you know,
21 in any regard whether it's qualifying as a
22 combined lot transfer, but that he cannot
23 count a portion of that as combining the lots.
24 Rather, he can only go up to 3.5 and the

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1 additional 1.1 would have to be attributed to
2 another lot somewhere else or would have to be
3 obtained through other means.

4 MS. McCARTHY: Not if you're just
5 talking about his matter of right density.
6 The limitation only applies if he were trying
7 to use the bonus density above the matter of
8 right entitlements on each of those sites and
9 then somehow use that to get himself more
10 commercial either on 483 or some other site.

11 CHAIRPERSON MOLDENHAUER: But does
12 that conflict then with (b) (1)? (b) (1) says,
13 "The increase in gross floor area shall not be
14 used to meet the minimum residential
15 requirements." So thus, if you have a minimum
16 residential requirement of 3.5 and you're
17 saying that the only way that this phraseology
18 in (b) (2) is applied, is applied in regards to
19 the bonus density? Wouldn't those two
20 sections, sections (1) and (2) conflict,
21 because it's saying that you can't use the
22 additional gross floor area to satisfy the
23 minimum requirements? But then you're saying
24 that you have to use the 3.5 only on the bonus

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1 density.

2 MS. McCARTHY: No, in fact (b)(1)
3 helps make our case. (b)(1) is saying you
4 can't use the bonus density to meet your
5 minimum residential requirements. You've got
6 to calculate them based on the matter of right
7 of each of those two lots, and that's what
8 you're entitled to go with. And then, so if
9 you were planning on putting less residential
10 on that combined lot than you were required to
11 under the regs, under 1706.4 or 5, and then
12 using the bonus density to make up the
13 difference, that's what it's trying to guard
14 against. But that's not what's happening
15 here.

16 He's doing -- he's meeting his
17 full matter of right entitlements. He's not
18 welshing on his number of units at all. And
19 that's the whole idea of bonus density was
20 don't use that to then get more commercial
21 than you're entitled to or do less residential
22 than you would have otherwise been required
23 to.

24 I admit it's not the best wording

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1 in the world, but I think that the -- you
2 know, the rule that the interpretation can't
3 result in something which is absurd is very
4 applicable here, because it would be absurd to
5 say something that was going to give you a
6 bonus ends up taking away what you're entitled
7 to as a matter of right.

8 CHAIRPERSON MOLDENHAUER: Thank
9 you. Mr. Dettman or Ms. Sorg, do you guys
10 have any additional questions?

11 MEMBER SORG: I have a follow-up
12 to that.

13 So, basically then you're saying
14 that the bonus density starts when he's done
15 fulfilling his requirements?

16 MS. McCARTHY: Right.

17 MEMBER SORG: Not at the number --
18 because from your argument --

19 MS. McCARTHY: That's when it --

20 MEMBER SORG: Right. Okay. So,
21 then in your argument, just to clarify, you're
22 saying that when you combine these two things,
23 that number 8.0 disappears?

24 MS. McCARTHY: Right.

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1 MEMBER SORG: From the C-2-C lot?

2 MS. McCARTHY: Right. That's your
3 required density. The bonus density is what
4 do you have over and above what you're
5 required to provide.

6 MEMBER SORG: So you don't have to
7 fulfill these requirements which is either 4.5
8 plus 3.5, or 4.5 plus 4.6, depending on how
9 you're calculating that at the beginning,
10 underneath the 8.0?

11 MS. McCARTHY: Sorry. I lost you
12 a little.

13 MEMBER SORG: So that you don't
14 have to satisfy the requirements for
15 residential underneath 8.0 regardless of how
16 you -- you know, which would have been, you
17 know, the FAR for the C-2-C lot?

18 MS. McCARTHY: Right. You have to
19 satisfy your requirements within the combined
20 lot, but you don't have -- there's no place in
21 the regs that imposes an additional constraint
22 that says, oh, yes, you have to divide them
23 together, or you have to add them together,
24 you have to make sure that the lot as a whole

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1 meets those requirements, but neither of the
2 individual lots has to be -- or can be more
3 than 8.0 or 9.5.

4 MEMBER SORG: Okay. Thanks.

5 CHAIRPERSON MOLDENHAUER: I just
6 want to clarify. So, you're saying that once
7 you combine two lots in a combined lot
8 development, the section under 1706 which says
9 that there's a maximum FAR of 8 is actually no
10 longer required? You only then have the
11 maximum gross floor area that is calculated
12 based on the combined lot?

13 MS. McCARTHY: Right.

14 CHAIRPERSON MOLDENHAUER: Okay.
15 Thank you.

16 MEMBER SORG: Can I ask another
17 follow-up to that?

18 But so, all right, I can buy that.
19 But what then happens to the fact that these
20 two have different zoning, the C-2-C and the
21 C-3-C? Does that also go --

22 MR. STEUART: Well, what happens
23 in the specific example of these two lots is
24 that the commercial is under-utilized

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1 essentially. It doesn't reach its maximum
2 permitted density of 9.5. And so there's, you
3 know, a gap on what I potentially could
4 develop on that commercial site. But it's the
5 same number as the additional residential on
6 the residential lot. It's just mathematically
7 that's how you divide it up. There's no
8 hidden card. There's no trick up my sleeve.
9 It's all the mandated housing is getting built
10 and I'm not exceeding my commercial
11 development under the two sites.

12 MS. McCARTHY: And in fact that's
13 why I used the hypothetical of the two lots in
14 the same zone of the same size, that this
15 problem is not occurring because you've got
16 two different zones or two different sized
17 lots, this problem would be occurring even if
18 you had identical ones. Because if you're in
19 C-2-C and you have a 4.5 residential and a 3.5
20 commercial, and we take the Zoning
21 Administrator's interpretation that you can
22 only transfer 3.5 of that 4.5 onto the
23 receiving site, you're still having a problem.
24 You're still losing what you were otherwise

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1 entitled to as a development right.

2 MR. STEUART: You're not achieving
3 your mandated requirement.

4 MS. McCARTHY: Right.

5 CHAIRPERSON MOLDENHAUER: I
6 believe that's all the questions the Board has
7 at this time.

8 Does the appellant wish to start a
9 closing argument at this point?

10 MS. BRAY: Actually, I have some
11 redirect questions for Ms. McCarthy.

12 Ms. McCarthy, I think it would be
13 helpful just to walk through particularly when
14 we talk about the problem of the denominator.
15 When we walk through what the minimums and
16 maximums are in each zone, first of all, is
17 there anything in section 1708 which provides
18 for the combined lot development mechanism
19 which says that the lots need to be in the
20 same zone?

21 MS. McCARTHY: No.

22 MS. BRAY: And what's the maximum
23 FAR as a matter of right in the C-2-C Zone?

24 MS. McCARTHY: Eight.

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1 MS. BRAY: Okay. And the maximum
2 FAR as a matter of right if Lot 62 were
3 developed as a stand alone building, not part
4 of a CLD, and entirely residential?

5 MS. McCARTHY: It would be limited
6 only by the Height Act. It would probably be
7 something like the 11.2 that we calculated.

8 MS. BRAY: So, as I understand
9 your testimony, you're saying that the
10 difference between 11.2 and 8.2 is a bonus
11 density?

12 MS. McCARTHY: Right. If you were
13 just dealing with that lot alone, yes.

14 MS. BRAY: If you're dealing with
15 that lot alone. But when you engage in a
16 combined lot development transaction, if I am
17 looking at the chart which was submitted and
18 you were questioned about with the initial
19 appeal at tab B, it appears that instead of
20 referring to FAR, the actual GFA has been
21 calculated.

22 MS. McCARTHY: Right.

23 MS. BRAY: For each lot.

24 MS. McCARTHY: Right.

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1 MS. BRAY: And then for the
2 combined lot.

3 MS. McCARTHY: Right.

4 MS. BRAY: And is it your
5 testimony that the GFA calculated in that
6 manner for both lots, when divided by the
7 total land area for both lots, is less than
8 the maximum FAR that would be permitted on the
9 two lots combined? That is line 12, 8.85.
10 Does that GFA represent any bonus density?

11 MS. McCARTHY: That does not
12 represent any bonus density, no.

13 MS. BRAY: And just to be clear,
14 because I'm not sure you covered it, but
15 there's a lot of reference to this in the regs
16 that were quoted in your cross-examination,
17 when we talk about preferred uses in the DD,
18 what are those preferred uses?

19 MS. McCARTHY: Arts, residential
20 and some retail.

21 MS. BRAY: So, for purposes of
22 this CLD transaction in question, we're
23 talking about the residential being the
24 preferred use?

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1 MS. McCARTHY: Right, because this
2 is in the Housing -- in a Housing Priority
3 Area.

4 MS. BRAY: Okay. Thank you.

5 MS. McCARTHY: Okay. The other
6 thing that made me realize -- when you were
7 asking me about if we weren't doing any
8 combined lot and we just had Lot 62, then we
9 could go to 8 FAR and then we could go to
10 whatever the maximum bonus is above that, it
11 reminds me that the other absurd result of
12 interpreting the regs this way is that part
13 and parcel of creating combined lot, when you
14 read the whole DD Overlay, was the idea that
15 office space was going to be more profitable.
16 So, you wanted to be able to do a combined
17 lot, because that office developer was going
18 to make money on the residential that he was
19 converting to commercial. So therefore, he
20 would pay you to take his residential.

21 So, what we're doing in this
22 interpretation is essentially saying it
23 doesn't make any sense for a developer to do
24 the bonus -- to do a combined lot anymore

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1 because otherwise you could take advantage of
2 the full density bonus, the full 8 FAR, but
3 you wouldn't get any benefit from the -- using
4 the office as the engine to help subsidize
5 your residential development. And that also
6 is contrary to the whole idea of the combined
7 lot.

8 MS. BRAY: Thank you, Ms.
9 McCarthy. That concludes the applicant's
10 presentation. We'd like to reserve the rest
11 of our time, if we could, for rebuttal and
12 would propose that we do our closing at the
13 conclusion of the case.

14 CHAIRPERSON MOLDENHAUER: Thank
15 you. At this time, would the District of
16 Columbia like to present their witnesses?

17 MR. SURABIAN: Sure. I have two
18 witnesses today. One is the Zoning
19 Administrator and the other is Paul Goldstein
20 who's with the Office of Planning. And I
21 think Mr. Goldstein may have stepped out of
22 the room for a second, so if I could -- I was
23 intending on having him go first, so hopefully
24 he'll come back soon.

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1 CHAIRPERSON MOLDENHAUER:

2 Actually, if you want, why don't we just --
3 this probably might be a good time. We'll
4 take a 10-minute break.

5 MR. SURABIAN: Okay.

6 CHAIRPERSON MOLDENHAUER: And
7 we'll reconvene let's just say at 3:45. Okay?

8 MS. BRAY: Thank you.

9 (Whereupon, at 3:40 p.m. off the
10 record until 3:57 p.m.)

11 CHAIRPERSON MOLDENHAUER: Okay.
12 We're going to reconvene the afternoon
13 session. I believe the District of Columbia
14 was going to be starting their testimony.

15 MR. SURABIAN: Thank you. And I'm
16 sitting next to my first witness, Paul
17 Goldstein.

18 And, Mr. Goldstein, could you
19 state your name for the record?

20 MR. GOLDSTEIN: Paul Goldstein.

21 MR. SURABIAN: And where are you
22 employed?

23 MR. GOLDSTEIN: I'm employed with
24 the Office of Planning.

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1 MR. SURABIAN: And what is your
2 title there?

3 MR. GOLDSTEIN: I'm a development
4 review specialist.

5 MR. SURABIAN: And what are your
6 job responsibilities as a document review
7 specialist?

8 MR. GOLDSTEIN: My
9 responsibilities include reviewing
10 developments that typically come before the
11 Board of Zoning Adjustment and the Zoning
12 Commission. Additionally, I review transfer
13 development right certificates and covenants,
14 as well as combined lot development covenants
15 for the Office of Planning, among other
16 duties.

17 MR. SURABIAN: Okay. Does your
18 job require you to be familiar with the Zoning
19 Regulations?

20 MR. GOLDSTEIN: Yes, it does.

21 MR. SURABIAN: And chapter 17
22 included?

23 MR. GOLDSTEIN: Yes, it does.

24 MR. SURABIAN: And could you give

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1 just a brief summary of your educational and
2 work history?

3 MR. GOLDSTEIN: Sure. I -- after
4 college, I received a law degree from the
5 University of Virginia and then practiced for
6 a couple years in both public and private
7 practice. At that point I went back to
8 graduate school. Got a master's in city
9 planning from the University of Pennsylvania.
10 And I've been working for the past two-and-a-
11 half years as a city planner with the Office
12 of Planning.

13 MR. SURABIAN: And do you have
14 experience working with CLDs?

15 MR. GOLDSTEIN: Yes, I do.

16 MR. SURABIAN: In what capacity?

17 MR. GOLDSTEIN: I am the person in
18 the Office of Planning who typically reviews
19 CLD covenants.

20 MR. SURABIAN: Okay. Do you
21 review all CLDs that are submitted to the
22 Office of Planning?

23 MR. GOLDSTEIN: I believe I have
24 reviewed every CLD that has been submitted to

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1 the Office of Planning in the last two-and-a-
2 half years, which I would put at about a dozen
3 CLDs.

4 MR. SURABIAN: Okay. And did you
5 advise or collaborate with the Zoning
6 Administrator in his making his determination?

7 MR. GOLDSTEIN: Yes, the Zoning
8 Administrator sought my opinion on this
9 proposal. At this point it's not a covenant,
10 which is typically what I end up reviewing.
11 It's more an interpretive point, but as has
12 been the case generally there's been increased
13 collaboration in the review of these CLDs and
14 my opinion was sought out by the Zoning
15 Administrator.

16 MR. SURABIAN: Okay. I'd ask to
17 submit him as an expert on the CLD matters
18 we're dealing with today.

19 CHAIRPERSON MOLDENHAUER: Is there
20 any challenge from the applicant?

21 MS. BRAY: I think I will object
22 to the qualification of Mr. Goldstein as an
23 expert. I would certainly agree that he's an
24 expert in planning and zoning, but with

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1 respect to the CLD covenants, having reviewed
2 12 by his own admission over the course of
3 two-and-a-half years, which is a fairly
4 limited amount of experience, I'm not sure
5 that qualifies him as an expert in CLD
6 covenants. I don't have any objection to him
7 coming in with his expertise in general
8 planning and zoning.

9 CHAIRPERSON MOLDENHAUER: Just for
10 clarification, what was the expert testimony
11 that you were submitting him for?

12 MR. SURABIAN: Well, he's going to
13 be testifying with respect to the
14 interpretation of 1706.7 that the Zoning
15 Administrator has put out.

16 CHAIRPERSON MOLDENHAUER: Mr.
17 Bray, do you still --

18 MR. SURABIAN: And chapter 17
19 generally.

20 CHAIRPERSON MOLDENHAUER: Based on
21 that, do you still maintain your objection?

22 MS. BRAY: I think yes, and we
23 would maintain that objection. The question
24 at issue here is the interpretation of the

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1 Zoning Administrator, and while I understand
2 that that was made in collaboration with the
3 Office of Planning, Mr. Goldstein's experience
4 and expertise in interpreting the Zoning
5 Regulations generally I think is relevant, but
6 two-and-a-half years and 12 transactions, I'm
7 not sure that that rises to the level of
8 expert status, particularly on CLDs.

9 I might ask whether Mr. Goldstein
10 has any experience reviewing similar
11 transactions in other jurisdictions, or
12 similar -- I just fail to see what the
13 relevance of expert status on CLD is and how
14 one rises to the level of an expert as opposed
15 to an expert in general planning and zoning.

16 MR. SURABIAN: I'll save everyone
17 a lot of time. If Mr. Bray concedes that an
18 expert in CLD is unnecessary, then I'll submit
19 him as an expert in land use generally.

20 MS. BRAY: We have no objection
21 with that.

22 COMMISSIONER MAY: Madam Chair,
23 once again, I would like to insist that we
24 have something in the record that attests to

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1 Mr. Goldstein's experience. And I know him as
2 well and I know he's very experienced, but
3 he's not been qualified before and again the
4 standard of the Zoning Commission is to have
5 that on a piece of paper in the record. That
6 may not be the consensus of the Board, but
7 that's what I would suggest.

8 CHAIRPERSON MOLDENHAUER: I don't
9 believe the regs actually require that the
10 appellee submit or the District submits their
11 submissions or their witnesses in advance, but
12 I think that in addition to voir dire-ing Mr.
13 Goldstein, you know, on the record, if you
14 could provide a copy, that would definitely be
15 helpful. But I think that in my view the voir
16 dire was sufficient in regards to going
17 through his résumé at this point in time.

18 Any other Board Members want to
19 present their opinion on the issue?

20 (No audible response.)

21 CHAIRPERSON MOLDENHAUER: I would
22 then just ask, if you can, just provide a
23 copy. I'm sure that would be something that
24 you have available.

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1 MR. SURABIAN: That shouldn't be a
2 problem.

3 CHAIRPERSON MOLDENHAUER: Thank
4 you. The record, Mr. Goldstein, is qualified
5 as an expert in planning and we can continue
6 on in the direct examination.

7 MR. SURABIAN: Thank you. Are you
8 familiar with the Downtown Development
9 District Overlay?

10 MR. GOLDSTEIN: Yes, I am.

11 MR. SURABIAN: And generally what
12 is the purpose of that overlay?

13 MR. GOLDSTEIN: The purpose of the
14 overlay generally is to create a balance of
15 uses in the downtown through requirements and
16 incentives. One tool in particular that was
17 adopted with the development, the Downtown
18 Development Overlay, was a housing requirement
19 on site, or off site, depending, that you've
20 heard. And the point of that was to create
21 new or -- new residential use downtown, or
22 retain residential use downtown.

23 MR. SURABIAN: And how does
24 combined lot develop relate to that purpose,

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1 would you say?

2 MR. GOLDSTEIN: The purpose of the
3 CLD is to give some flexibility to parties
4 that want to engage in creating a different
5 balance of uses between different lots within
6 the same geographic subarea.

7 MR. SURABIAN: But and are their
8 regulations that spell out sort of limits on
9 CLD?

10 MR. GOLDSTEIN: Yes, there are
11 some provisions that spell out limits on CLDs.

12 MR. SURABIAN: Okay. And are you
13 familiar with the CLD at issue today?

14 MR. GOLDSTEIN: Yes, I am.

15 MR. SURABIAN: Okay. And I
16 submitted some handouts, which is this
17 document here. Does the Board have that?

18 (No audible response.)

19 MR. SURABIAN: Okay. And Mr.
20 Goldstein's going to be going through those
21 handouts as part of his testimony.

22 CHAIRPERSON MOLDENHAUER: Just for
23 the record, the handouts are our Exhibit 19.

24 MR. SURABIAN: Let's just start on

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1 the first page. The title of the first page
2 is, "What is Bonus Density?" And that would
3 be my question to you.

4 MR. GOLDSTEIN: Bonus is density
5 is density above the matter of right FAR on a
6 lot. It's a pretty direct definition. It's
7 density above the matter of right that you're
8 permitted on a particular lot. That density
9 can result in a few ways. TDRs. It can
10 result from constructing or assisting
11 affordable housing, and generating preferred
12 uses, which could be arts and/or retail,
13 depending on where the property is, and
14 building residential uses on site.

15 MR. SURABIAN: And how do you know
16 if you're in the bonus or you're not in the
17 bonus?

18 MR. GOLDSTEIN: Well, each zone in
19 the DD has a certain FAR maximum that you're
20 permitted by right. In DD/C-2-C that maximum
21 is 8.0 FAR, C-3-C, 9.5, and C-4 is 10. So
22 density above the matter of right that you're
23 permitted in those zones is bonus density.

24 MR. SURABIAN: Okay. Thank you.

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1 Let's flip to the second page. And describe
2 what's going on here.

3 MR. GOLDSTEIN: Sure. This was an
4 attempt to reconstruct the proposed CLD that
5 the appellants have -- are trying to effect.
6 And first of all, it just lays out the various
7 requirements on each of the lots. If you look
8 to the left, there's Square 43, Lot 9, which
9 is in the DD/C-3-C District, which permits 9.5
10 FAR by right. 3.5 of that has to be
11 residential. Since the lot is approximately
12 56,000 square feet, you're allowed a total
13 density of a little more than 535,000 square
14 feet. And this is the lot that wants more
15 commercial use in their proposal.

16 Looking to the right, the column
17 to the right, you have the Square N-515, Lot
18 62. That's in a DD/C-2-C District. It is
19 permitted 8.0 FAR by right. 4.5 of that has
20 to be residential. Since the lot's a little
21 under 43,000 square feet, you're permitted a
22 total density by right of about 34 -- 342,000,
23 a little under 600 square feet. And this is
24 the lot that wants to be more residential.

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1 If you go a little further down,
2 you can see some boxes and arrows. And what
3 this is trying to show is what the appellant
4 is proposing, that 197,187 square feet of
5 commercial use -- I'm sorry residential use
6 would be transferred to the Square N-515 lot
7 and reciprocally 149,000, a bit more, would be
8 transferred to the Square 483 lot. As you'll
9 notice, there's an imbalance in that transfer.
10 And what is being received by the residential
11 lot is -- amounts to 4.6 FAR.

12 MR. SURABIAN: And how can you
13 calculate -- what relation does 4.6 FAR and
14 the 197,000 have -- what is the significance
15 of those numbers?

16 MR. GOLDSTEIN: Well, the 197,000,
17 how you calculate the 4.6 FAR is taking how
18 much is that divided by the lot area of Square
19 N-515. And that way you determine that it's
20 4.6 FAR. And this implicates the 1706.7(b)(2)
21 provision, which we contend is a problem.

22 MR. SURABIAN: Okay. I think
23 that's shown on the next page.

24 MR. GOLDSTEIN: The next page is

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1 designed to show what the problem is. The
2 problem is that the -- well, first let me just
3 say, the commercial lot would have 8.7 FAR
4 based on their transaction.

5 MR. SURABIAN: And that's 8.5
6 after receiving the commercial from Lot 62?

7 MR. GOLDSTEIN: That is correct.
8 And the residential lot would have 9.1 FAR.
9 That 9.1 represents an addition of 4.6 FAR of
10 residential use. You're permitted 8.0 FAR of
11 residential use on site. Any above that is
12 bonus density. They've received 1.1
13 additional density of residential use, about
14 47,000, a bit more, square feet. That is
15 bonus density.

16 MR. SURABIAN: And this was what
17 conflicts with 1707(b)(2), is that right?

18 MR. GOLDSTEIN: This is what
19 conflicts with 1706.7(b)(2). This is the very
20 situation that that provision is designed to
21 handle, and that's where the conflict lies.

22 MR. SURABIAN: And so, this
23 transaction implicates bonus density in your
24 view?

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1 MR. GOLDSTEIN: Absolutely.

2 MR. SURABIAN: Now, the appellant
3 is saying that no bonus density is being used
4 as long as the two lots combined are below
5 8.85. Is that an accurate understanding of
6 the law?

7 MR. GOLDSTEIN: That is not an
8 accurate understanding. There is bonus
9 density in this site. As I went through the
10 definition, it's density above your matter of
11 right on a lot is bonus density.

12 MR. SURABIAN: And do you know how
13 they calculated that 8.85 number?

14 MR. GOLDSTEIN: It's -- it
15 appeared to be an average.

16 MR. SURABIAN: And is that method
17 consistent with the applicable regulations?

18 MR. GOLDSTEIN: No, it is not.

19 MR. SURABIAN: So, in a CLD, just
20 for clarification, does the maximum FAR on a
21 lot still apply?

22 MR. GOLDSTEIN: Yes, it still
23 applies.

24 MR. SURABIAN: Okay. And let's

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1 flip to the next page. So, explain using this
2 how this transaction is prohibited by
3 1706.7(b).

4 MR. GOLDSTEIN: Sure. Just to
5 step back, the adoption of 1706.7 was designed
6 to incentive housing development in the DD.
7 And as a result, the FAR limitations were
8 removed for any lot that devotes the gross
9 floor area entirely to residential use on
10 site. And to that end, there was also put in
11 a limitation though on the use of that bonus
12 density, that what we don't want is for that
13 incentive, that bonus density that residential
14 lots can now build get extra residential
15 density. We don't want that to be able to
16 relieve other sites of their required housing
17 on that commercial site. So, we're going to
18 give you an incentive. We want you to build
19 more residential use, but if you're allowed to
20 relieve the residential use from commercial
21 sites in that bonus that we have incentivized,
22 that's defeating the very purpose of why
23 there's a housing requirement that applies to
24 these lots. It could -- you'd lose the

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1 housing requirement in the bonus density that
2 we're giving to these other lots.

3 MR. SURABIAN: So, let's look at
4 1706.7(b) in its entirety, and not just (2),
5 and I've quoted it in its entirety on page 3
6 of my prehearing statement. And so walk us
7 through this entire provision.

8 MR. GOLDSTEIN: Sure. It begins
9 by saying, "Except for historic landmarks and
10 properties listed in 1707.4," which is a
11 historic preservation section, "the maximum
12 FAR limitations of 1706.4, .5 and .6 shall not
13 apply to any lot that devotes the increase in
14 GFA to residential use on site."

15 MR. SURABIAN: Okay. So, stop
16 there for a second. So, those maximum FAR
17 limitations that are referred to that are in
18 6.4, 6.5 and 6.6, are those the same as the
19 9.5 limit in C-3-C, 8.0 limit in C-2-C? Is
20 that what that's referring to?

21 MR. GOLDSTEIN: Yes, it does.

22 MR. SURABIAN: Okay. Continue,
23 please.

24 MR. GOLDSTEIN: And here's the --

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1 you can exceed those limits provided the
2 increase in the GFA shall not be used to meet
3 the minimum requirements for those zones, the
4 minimum housing requirements.

5 MR. SURABIAN: So, what does that
6 mean?

7 MR. GOLDSTEIN: That you can't use
8 your bonus density to meet underlying housing.
9 You can't build a fully maxed out commercial
10 site. And then we've given you bonus
11 residential density on top that. You can't
12 use that bonus to then go back and say you've
13 met the residential housing on site.

14 MR. SURABIAN: Okay. And then how
15 does that relate to (2) right below it?

16 MR. GOLDSTEIN: Well, (2) is
17 designed to put that limitation and to
18 preserve the impact of the required housing.
19 If I look -- if you can look to page 4 of my
20 handout, there's a -- perhaps a more
21 illustrative chart of this, which is adapted
22 from 1706.7(b)(2). Again, we're talking about
23 the district of the lot receiving housing.
24 There's a distinction being made. That lot

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1 receiving housing has a residential use
2 requirement in the C-2-C of 4.5, has a maximum
3 FAR of 8.0. And then 1706.7(b)(2) inserts
4 what I have here in red. It's the difference
5 between the maximum on a site and the
6 residential requirement. It's the commercial
7 entitlement. You're allowed to receive up to
8 that commercial entitlement, but no more.
9 That's the maximum allowable combined lot
10 development that you can engage in.

11 MR. SURABIAN: So, let's say the
12 C-2-C. You have to build 4.5 and then you can
13 transfer 3.5. And then at that point you're
14 at your max of 8.0?

15 MR. GOLDSTEIN: Correct.

16 MR. SURABIAN: Okay.

17 MR. GOLDSTEIN: And I would point
18 out that there's a symmetry, there's a
19 deliberateness with these numbers in (b)(2).
20 They're the difference between the maximum FAR
21 and the required minimum residential. You go
22 down, C-2-C, C-3-C, C-4. It's each time the
23 difference between the two. Those numbers
24 were deliberate.

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1 MR. SURABIAN: So, now can you go
2 above 8.0?

3 MR. GOLDSTEIN: Yes, you can.

4 MR. SURABIAN: And that's what (b)
5 is saying, the first, the preamble here, (b),
6 isn't it?

7 MR. GOLDSTEIN: Exactly. You can
8 go above it if you want bonus residential
9 density. If you want to build more
10 residential, we're incentivizing it. We want
11 you to go above it, but (b)(2) specifically
12 says you can't except through combined lot
13 development, through CLD. It's referring
14 directly to it more than these limitations
15 provided in (b)(2).

16 MR. SURABIAN: So, in other words
17 you can't breach the maximum FAR limits that
18 are 6.4, 6.5, 6.6? You can't breach those
19 through CLD?

20 MR. GOLDSTEIN: Not through the
21 CLD.

22 MR. SURABIAN: Okay. And so,
23 what's the rationale for limiting how much
24 that you could transfer through CLD?

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1 MR. GOLDSTEIN: The rationale, and
2 I think maybe -- let me refer again to the
3 Office of Planning report. I'm sorry, the
4 handout, page 4, the second bullet. And this
5 is a report from the public hearing. This is
6 the Office of Planning public hearing report
7 when 16 -- 1706.7 was adopted. So this is the
8 Office of Planning position as submitted, was
9 that since the goal of this zoning change is
10 to encourage the development of additional
11 housing downtown, the bonus residential FAR
12 should not be permitted to relieve other
13 commercial sites that housing requirements
14 through CLD.

15 The point of this is, is that
16 we're -- again, we're incentivizing
17 residential, but we don't want that new
18 incentive that we're introducing to relieve
19 other commercial sites of their required
20 housing.

21 MR. SURABIAN: And then, could you
22 read the second sentence of that quote?

23 MR. GOLDSTEIN: Sure.

24 "Residential FAR eligible for transfer shall

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1 be limited to the amount of non-residential
2 FAR permitted on the residential lot under the
3 current regulations."

4 MR. SURABIAN: Okay. And is that
5 language, is that akin to language I pointed
6 out earlier in tab G of Arent Fox' filing on
7 the Summary of Recommendations, which begins
8 "Require?"

9 MR. GOLDSTEIN: Yes, it's directly
10 related to the appellant's own filing that
11 they made.

12 MR. SURABIAN: Okay. And --

13 MR. GOLDSTEIN: And may I say that
14 the goal then is more housing, not less
15 housing.

16 MR. SURABIAN: How does that
17 limit, how does that 3.5 limit create more
18 housing?

19 MR. GOLDSTEIN: What it's doing is
20 it's preserving the residential requirement
21 for all sites. You have to be able to build
22 that residential requirement, plus we're
23 giving bonus density. We're giving you more
24 housing, but we want to retain that required

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1 amount and not let that required amount
2 disappear in this new bonus residential
3 density that we're now allowing lots to build.

4 MR. SURABIAN: And why wouldn't
5 the Office of Planning adopt the appellant's
6 view that you can transfer as much as you want
7 through CLD?

8 MR. GOLDSTEIN: Well --

9 MR. SURABIAN: Why would they not
10 want that?

11 MR. GOLDSTEIN: Well, first of
12 all, again, you're losing through their
13 proposal required residential density. You
14 might get that bonus residential built on
15 residential lots anyway. You're losing that
16 required residential amount. Additionally,
17 depending on the size of the lots, you can
18 have some very strange density results if you
19 start eliminating whatever the maximum FAR is
20 on these lots.

21 MR. SURABIAN: Okay. Let's flip
22 to the next page. And what is this page
23 showing?

24 MR. GOLDSTEIN: What this page is

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1 intended to show is what the transaction, this
2 CLD would look like if it was consistent with
3 1706.7(b)(2). This is not what's been
4 proposed by the appellant. This is what we
5 would say would be consistent if they followed
6 that particular rule. And what you notice,
7 again, you've got the same columns, the same
8 requirements, but the key difference is that
9 there's a balance transaction going on here.
10 Hundred-and-forty-nine thousand, eight-
11 hundred-and-eighty-four residential square
12 footage is being received by that residential
13 lot, and that represents 3.5 FAR. That's the
14 requirement, the maximum allowable that you're
15 entitled under 1706.7(b)(2). Conversely,
16 149,884 square feet are going back as
17 commercial.

18 MR. SURABIAN: So, here it's an
19 equal transfer? You're transferring the same
20 amount of commercial entitlement as you are
21 residential?

22 MR. GOLDSTEIN: That's correct.

23 MR. SURABIAN: And is that exactly
24 what the Office of Planning stated in their --

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1 leading up to the creation of this provision?

2 MR. GOLDSTEIN: Yes.

3 MR. SURABIAN: Let's move to the
4 next page. And so, what is this depicting?

5 MR. GOLDSTEIN: This would depict
6 the result of a consistent 1706.7(b) (2)
7 transaction. What would happen is, you'll
8 notice on the right that you've got a wholly
9 residential lot up to its 8.0 FAR. Again,
10 under 1706.7(b) that lot can build additional
11 residential density. It's just not being
12 shown here.

13 On the commercial site, again
14 you've got the 8.7 FAR, but the key difference
15 here is there's still some remaining
16 residential requirement on that site. It's
17 the difference between the matter of right,
18 9.5, and the 8.7 as handled in the
19 transaction. It's that housing requirement
20 that's being preserved here.

21 MR. SURABIAN: And so again, on
22 the lot on the right hand, the all
23 residential, they can build that as high as
24 they want to go really under the Height Act,

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1 I guess?

2 MR. GOLDSTEIN: That is correct.

3 The residential lot can keep building
4 residential.

5 MR. SURABIAN: And so, would that
6 make sense to do that cost-wise?

7 MR. GOLDSTEIN: I've heard that
8 that would make sense, such things as economy
9 of scale.

10 MR. SURABIAN: Okay. And then on
11 the lot on the left, you know, you have a
12 remaining residential portion. And what could
13 be done about that?

14 MR. GOLDSTEIN: Well, there's a
15 few options. One is they could build a mixed-
16 use project, if they wanted. They also could
17 take advantage of additional residential bonus
18 density on site to build more residential so
19 there's more of a balance in the development.
20 Or, and this is something that is typical in
21 CLDs, is that you engage in a second CLD. The
22 regulations call for multiple CLDs. There's
23 often -- after CLDs things may not match up
24 perfectly. That's why you have -- you can do

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1 more than one CLD to eliminate that. If that
2 site wants to be entirely commercial, they can
3 just engage in another CLD.

4 MR. SURABIAN: So, the
5 regulations, in your view, contemplate
6 multiple CLDs?

7 MR. GOLDSTEIN: They specifically
8 contemplate multiple CLDs and --

9 MR. SURABIAN: If I was to take
10 appellant's view, would a multiple CLD ever be
11 necessary?

12 MR. GOLDSTEIN: Well, if they
13 wanted their lot to be entirely commercial,
14 yes, they could engage in a second CLD. They
15 could transfer out that remaining residential
16 density. And that's what's being preserved
17 here. That residential density has to be
18 accounted for on some other -- through at
19 least some other CLD, that matter of right
20 residential density.

21 MR. SURABIAN: Now, the appellant
22 has cited a few sections within 1708.1 which
23 they believe support their view, and some of
24 those are found on page 6 of their prehearing

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1 statement, the March 26th, prehearing
2 statement.

3 MR. GOLDSTEIN: Yes, I've got a
4 copy of the rule as well.

5 MR. SURABIAN: Okay. Page 6 is
6 calling out 1708.1(g), (i) and (j). Are you
7 familiar with those provisions?

8 MR. GOLDSTEIN: Yes, I am.

9 MR. SURABIAN: Okay. Are any of
10 those provisions inconsistent with the Zoning
11 Administrator's view?

12 MR. GOLDSTEIN: No, they're not.

13 MR. SURABIAN: Do these provisions
14 provide for the averaging of FAR limits of
15 different zoning districts?

16 MR. GOLDSTEIN: No, they do not.

17 MR. SURABIAN: So, how could one
18 read these provisions in context with
19 1706.7(b)?

20 MR. GOLDSTEIN: Well, these
21 provisions give general parameters of how to
22 review these CLD covenants, but they don't
23 override other applicable provisions. IT's
24 like -- an analogy would be if you meet lot

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1 area on a residence lot, you don't have to
2 look at lot width. You've got to look at
3 every applicable regulation that applies to
4 it. I would suggest they don't even meet
5 1708.1, those provisions. But they certainly
6 do not meet 1706.7.

7 MR. SURABIAN: And I'll turn to
8 page 7 of their report, prehearing statement.
9 There's a paragraph that begins, "The Office
10 of Planning confirms this understanding." Do
11 you see that?

12 MR. GOLDSTEIN: Yes, I do.

13 MR. SURABIAN: Okay. And then
14 there's some language quoted below. Could you
15 read that language?

16 MR. GOLDSTEIN: The language "In
17 both" -- beginning "In both types?"

18 MR. SURABIAN: Just the quoted
19 language, I guess.

20 MR. GOLDSTEIN: I'm sorry. Could
21 you point -- oh, I'm sorry. Yes. "In both
22 types of combined lots DD, as well as CR,
23 Capitol Gateway, and Uptown Arts, the
24 participating lots may also reallocate

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1 commercial density, which means that the
2 building on one lot may exceed the matter of
3 right FAR provided that the aggregate FAR with
4 the combined lots stays within the matter of
5 right limits."

6 MR. SURABIAN: And so, what does
7 that mean, that language, to you?

8 MR. GOLDSTEIN: Well, the language
9 is intended just to say that commercial
10 density can be transferred between sites. It
11 probably should have had the word "commercial"
12 FAR as opposed to just FAR at one point in it.
13 I've talked to the author of the report. That
14 was his intention. It's talking about
15 reallocating uses, not reallocating density.
16 This doesn't support what the appellant's are
17 trying to say.

18 MR. SURABIAN: So, is that report
19 a statement from the Office of Planning with
20 them stating a position as to how to interpret
21 the CLD Regulations?

22 MR. GOLDSTEIN: No, this was not.

23 MR. SURABIAN: What was the
24 context that this report was filed?

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1 MR. GOLDSTEIN: The context of
2 this is that it's part of the bigger ZRR
3 zoning rewrite that's going on. This is not
4 -- it was not intended to be an interpretation
5 of the CLD Rules.

6 MR. SURABIAN: So, where it says
7 "the building on one lot may exceed the matter
8 of right," you've stated that what that's
9 referring to is the commercial -- the matter
10 of right FAR in question is the commercial
11 entitlement?

12 MR. GOLDSTEIN: Yes.

13 MR. SURABIAN: Is that right?

14 MR. GOLDSTEIN: Correct. It's
15 saying that the commercial entitlement can be
16 moved between lots. It's just talking about
17 what is clear from 1708, that you can shift
18 around uses, but you're not shifting around
19 density here.

20 MR. SURABIAN: So, explain why
21 that is not inconsistent with the Zoning
22 Administrator's view?

23 MR. GOLDSTEIN: The Zoning
24 Administrator's view is saying that

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1 residential use can be received on the site up
2 to 3.5 FAR, but you just cannot exceed that in
3 what the residential lot accepts.

4 MR. SURABIAN: Okay. But the
5 amount of commercial FAR on a lot can be
6 exceeded? In other words, you can go above 6
7 on a C-3-C, is that right?

8 MR. GOLDSTEIN: Sure. Yes, you
9 can.

10 MR. SURABIAN: Okay.

11 MR. GOLDSTEIN: The commercial
12 uses can be re-balanced between the lots.

13 MR. SURABIAN: But you cannot
14 exceed the total density of a lot?

15 MR. GOLDSTEIN: That is correct.

16 MR. SURABIAN: And then I'll turn
17 to page 15 of the same document, and I'm at
18 the first paragraph where it's saying,
19 "Reading 1706.7(b)(2) in isolation."

20 MR. GOLDSTEIN: Yes.

21 MR. SURABIAN: Okay. And then
22 there's the language that says that "it
23 produces the absurd result of limiting the
24 number of housing units." You see that

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1 language?

2 MR. GOLDSTEIN: Yes.

3 MR. SURABIAN: Now, does the
4 Zoning Administrator's view limit the number
5 of housing units in any way?

6 MR. GOLDSTEIN: No, it doesn't.
7 In fact, it does the opposite.

8 MR. SURABIAN: Elaborate on that,
9 please.

10 MR. GOLDSTEIN: Well, you're
11 allowed to build additional residential bonus
12 density. We're allowing that incentive. What
13 this is doing, what this limitation is
14 intended to do, is to preserve the required
15 residential use. We want to make sure we get
16 every bit of residential use we can.

17 MR. SURABIAN: And I'll just refer
18 you to tab C of the appellant's prehearing
19 statement, which is a letter from the Zoning
20 Administrator, and that paragraph on the
21 second page. Could you read that paragraph?
22 You don't have to read it out loud. To
23 yourself.

24 And that last sentence which

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1 states, "Since the proposed CLD provides for
2 the residential receiving lot to receive
3 residential square foot in excess of 3.5 FAR,
4 1706.7(b)(2) prohibits the transaction." Is
5 that an accurate statement?

6 MR. GOLDSTEIN: That is an
7 accurate statement.

8 MR. SURABIAN: And do you agree
9 with that interpretation?

10 MR. GOLDSTEIN: I agree with that
11 interpretation.

12 MR. SURABIAN: Okay.

13 MR. GOLDSTEIN: I don't have
14 anything further.

15 CHAIRPERSON MOLDENHAUER: Cross-
16 examination?

17 MS. BRAY: Yes, thank you.

18 Mr. Goldstein, could you read to
19 me the preamble for 1708.1, the first
20 provision there before (a)? Do you have the
21 regs in front of you?

22 MR. GOLDSTEIN: Yes, I do. I'm
23 sorry, 1708.1?

24 MS. BRAY: 1708.1. Just can you

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1 read to me the beginning of that sentence up
2 to the colon?

3 MR. GOLDSTEIN: Sure. "Two or
4 more lots may be combined with a purpose of
5 achieving the required FAR equivalent for
6 preferred uses as follows."

7 MS. BRAY: How do you define FAR
8 equivalent?

9 MR. GOLDSTEIN: That would be the
10 FAR that you are required to provide.

11 MS. BRAY: And how do you
12 calculate that FAR?

13 MR. GOLDSTEIN: Well, you look as
14 -- you at each site and look at what the
15 housing requirement is on each of those sites,
16 and that would be your residential
17 requirement.

18 MS. BRAY: So, let's say
19 hypothetically speaking we're talking about
20 the two lots in the DD/C-2-C. They would each
21 be required to construct 4.5 FAR of
22 residential uses. Is that right?

23 MR. GOLDSTEIN: I'm sorry. In a
24 C-2-C scenario if both lots were in it, yes,

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1 I believe it is 4.5 required for each.

2 MS. BRAY: So, if you have a lot
3 that's say 10,000 square feet in area, and you
4 have a 4.5 FAR requirement, what does that
5 translate to in terms of gross floor area?

6 MR. GOLDSTEIN: Let's see, 4.5 of
7 10,000 is -- I'm sorry, my math -- it's been
8 a long day.

9 MS. BRAY: Would that be 45,000?

10 MR. GOLDSTEIN: Forty-five-
11 thousand.

12 MS. BRAY: Okay. And on your
13 second lot, if it were also 10,000 square feet
14 in area and you have a 4.5 FAR requirement,
15 isn't that also 45,000 square feet of required
16 residential uses?

17 MR. GOLDSTEIN: That is correct,
18 yes.

19 MS. BRAY: So, is it safe to say
20 that when you have two lots and you're using
21 the provisions of 1708.1, and you are
22 achieving the required FAR equivalent for
23 preferred uses, that you are required to
24 construct somewhere on the two lots a total of

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1 90,000 square feet in residential uses?

2 MS. BAILEY: Yes, you are required
3 to provide 90,000 square feet. Of course,
4 that doesn't mean you don't comply with other
5 provisions.

6 MS. BRAY: Well, that's an
7 interesting question, and obviously that's
8 what we're here for today, is we're talking
9 about how you read all of these requirements
10 together. Going back to 1706.7(b)(2), and I
11 think you stated in your testimony and you say
12 in your handout that what is proposed to be
13 transferred onto Lot 62 in Square N-515 is
14 more than 3.5 FAR. And that is what violates
15 1706.7(b)(2), is that right?

16 MR. GOLDSTEIN: Yes, that's
17 correct.

18 MS. BRAY: 3.5 FAR of what?

19 MR. GOLDSTEIN: The amount that
20 can be received on the residential site is
21 equal to 3.5 FAR on that site of residential
22 use.

23 MS. BRAY: In 1706.7(b)(2) can you
24 point me to where it says that FAR should be

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1 calculated based on the receiving lot's
2 capacity?

3 MR. GOLDSTEIN: Yes, it is the --
4 if you look at the titles of the chart, zoning
5 district of the lot receiving housing --

6 MS. BRAY: But it doesn't --

7 MR. GOLDSTEIN: -- maximum
8 allowable combined lot transfer.

9 MS. BRAY: That just refers to the
10 Zone District of the lot receiving the
11 housing, does it not?

12 MR. GOLDSTEIN: Sure.

13 MS. BRAY: Is there any provision
14 in 1706.7(a) or (b) which says that the
15 maximum allowable combined lot transfer FAR is
16 to be calculated solely on the basis of the
17 receiving lot?

18 MR. GOLDSTEIN: Yes, that's what
19 (b) (2) --

20 MS. BRAY: Can you point to that
21 explicit language?

22 MR. GOLDSTEIN: Sure. "The
23 maximum residential" -- I'm sorry, in (b) (2),
24 "The maximum residential FAR that may be

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1 accepted through the combined lot development
2 is listed in the following table." And it
3 refers to the residential lot which is doing
4 the accepting and the zone categories and
5 limitations.

6 MS. BRAY: In a combined lot
7 development there's a lot of talk about
8 averaging square footage, but going back to
9 the hypothetical and the idea of having in a
10 combined lot development 90,000 square feet of
11 residential uses to construct, if you have two
12 lots which are each 10,000 square feet in land
13 area, what is your denominator for purposes of
14 calculating overall gross floor area and
15 determining that a combined lot development
16 meets the requirements of 1708.1(g)?

17 MR. GOLDSTEIN: I'm sorry, there
18 were a few things in that statement. First of
19 all, I don't recall the word "averaging" being
20 used, which you just said is consistently
21 mentioned.

22 MS. BRAY: I think you had said
23 that the applicant was averaging and that that
24 was improper.

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1 MR. GOLDSTEIN: Yes.

2 MS. BRAY: So --

3 MR. GOLDSTEIN: You made the
4 statement that averaging is in the
5 regulations.

6 MS. BRAY: No, that's not what I
7 said. What I said was you made the statement
8 that averaging was improper. And so, I'm
9 asking you the question, if you have a
10 combined lot development under 1708.1 --

11 MR. GOLDSTEIN: Yes.

12 MS. BRAY: -- how do you calculate
13 what the maximum permitted gross floor area
14 for all uses shall be under 1708.1(g)?

15 MR. GOLDSTEIN: Well, you have to
16 look at the uses, the maximum density and
17 minimum densities on each site, and then you
18 have to look at whatever the limitations are
19 on a transfer of CLDs and make sure that both
20 sides balance. In my handout that would be
21 the last page that shows a balanced
22 transaction.

23 MS. BRAY: Can you point me to the
24 provision in 1708 which says that despite the

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1 language in 1708.1(g) maximum permitted gross
2 floor area for all uses and for the total
3 project shall conform with the maximum and
4 minimum gross floor area requirements on each
5 lot? Does it say that?

6 MR. SURABIAN: I'm sorry.

7 MR. GOLDSTEIN: I couldn't follow
8 that.

9 MR. SURABIAN: What was the
10 question?

11 MS. BRAY: 1708.1(g) says, "The
12 maximum permitted gross floor area for all
13 uses, the minimum required gross floor area
14 for preferred uses, shall each be calculated
15 as if the combined lots were one lot and the
16 total project shall conform with the maximum
17 and minimum requirements, or gross floor area
18 requirements." Does 1708.1(g) go on to say
19 that a combined lot development must also
20 comply with maximum FAR as calculated on each
21 lot?

22 MR. GOLDSTEIN: I think it does,
23 and I'd say that there's the clause "if
24 applicable, shall each be calculated."

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1 MS. BRAY: Isn't --

2 MR. GOLDSTEIN: There's the word
3 "each."

4 MS. BRAY: -- "if applicable" in
5 there to modify the term "bonus density?"

6 MR. GOLDSTEIN: I'm sorry. I was
7 just trying to orient. The "if applicable" is
8 not relevant. It's more that it shall each be
9 calculated. There's the word "each" in there.

10 MS. BRAY: Well, let's back up and
11 see exactly what "each shall be calculated"
12 refers to. Isn't "each be calculated"
13 referring to maximum permitted gross floor
14 area for all uses and minimum required gross
15 floor area for preferred uses, and not the
16 lots?

17 MR. GOLDSTEIN: I need to think
18 through your question. It's -- you need to
19 make sure that all uses are accounted for in
20 the CLD transaction.

21 MS. BRAY: Okay. So, you have to
22 account for each of the required uses, or I'm
23 sorry, each of -- the gross floor area for
24 each use. You started your testimony by

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1 talking about, and in referring to your
2 handout, you said that the maximum FAR allowed
3 -- or I'm sorry, the maximum square footage
4 allowed by right on site 483 is 535,221 square
5 feet. Is that correct?

6 MR. GOLDSTEIN: Yes, that is
7 correct.

8 MS. BRAY: And the maximum square
9 footage allowed by right on Square N-515, Lot
10 62 is 342,592 square feet. Is that correct?

11 MR. GOLDSTEIN: Yes, that is
12 correct.

13 MS. BRAY: What is the total
14 square footage allowed by right on both sites?

15 MR. GOLDSTEIN: The total -- let's
16 see, 535,000 is allowed on one site, 342,000
17 and change is allowed on the other. I guess
18 you can add those together.

19 MS. BRAY: Would that be 877,813
20 square feet?

21 MR. GOLDSTEIN: I -- it probably
22 is.

23 MS. BRAY: And referring to the
24 appellant's initial filing in this case, tab

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1 B, do you have that in front of you?

2 MR. GOLDSTEIN: Let me look for
3 it. Yes, I do.

4 MS. BRAY: Actually, you know
5 what, I'm going to refer you to a simpler
6 table. Do you have the applicant's prehearing
7 statement?

8 MR. GOLDSTEIN: Would that be the
9 most recent submission?

10 MS. BRAY: The most recent
11 submission, March 26th.

12 MR. GOLDSTEIN: Yes, I do.

13 MS. BRAY: Okay. And can I refer
14 you to tab E?

15 MR. GOLDSTEIN: Yes.

16 MS. BRAY: The last page on tab E
17 shows a total combined square footage. We
18 just established that the matter of right
19 maximum is 877,813 square feet. Is that
20 correct?

21 MR. GOLDSTEIN: Yes.

22 MS. BRAY: And under the column
23 that says "After CLD," in the gray on the
24 bottom line under "Total Combined," what is

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1 that figure, proposed to be built?

2 MR. GOLDSTEIN: I'm sorry, I
3 didn't get the question.

4 MS. BRAY: The total square
5 footage proposed to be built after the CLD.

6 MR. GOLDSTEIN: It looks like it
7 would still be 877,000.

8 MS. BRAY: So, there's no net
9 difference in square footage?

10 MR. GOLDSTEIN: That does not
11 indicate, correct, any net square footage
12 gained.

13 MS. BRAY: Going back to your
14 testimony, I believe you stated that the
15 purpose of the restrictions of 1706.7(b) (2)
16 were to avoid reducing the matter of right
17 residential units that were required in a
18 combined lot development. Is that right?

19 MR. GOLDSTEIN: That sounds right.

20 MS. BRAY: And can you show me,
21 going back to the applicant's prehearing
22 statement and the graphic we were just looking
23 at tab E, where the net reduction of
24 residential use is you're referring to as

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1 taking place?

2 MR. GOLDSTEIN: The point of this
3 is to show that bonus density is already an
4 incentive that you're getting. That bonus
5 density, which they can build if they want to,
6 cannot be used to relieve that remaining
7 residential requirement, as you can see on the
8 last page of the handout.

9 MS. BRAY: Well, that assumes that
10 we're going for bonus density, which I
11 understand, but let's go back to the
12 provisions of 1708.1 and the language. You
13 stated that 1708.1 allows a reallocation of
14 uses and not a reallocation of density. Is
15 that right?

16 MR. GOLDSTEIN: Yes, I think that
17 sounds like a true statement.

18 MS. BRAY: Are you familiar with
19 the term "gross floor area" under the Zoning
20 Regulations?

21 MR. GOLDSTEIN: Generally, sure.

22 MS. BRAY: And as an expert in
23 planning and zoning, would you construe gross
24 floor area as a term which measures density?

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1 MR. SURABIAN: Objection. It
2 doesn't. Density is a ratio. Gross floor
3 area is just -- without anything else, it
4 doesn't speak to density at all.

5 CHAIRPERSON MOLDENHAUER: Well, I
6 don't think your testimony as to the
7 definition of -- what be your objection?

8 MR. SURABIAN: The basis of my
9 objection is the question states a legal
10 wrong.

11 MS. BRAY: Well, the witness has
12 been proffered as an expert in planning and
13 zoning and has stated that his interpretation
14 of the Combined Lot Development Provisions is
15 that they allow a transfer of uses, but not
16 density. And so I'm trying to clarify what is
17 meant by the term "density" and how that
18 conforms to the plain language in 1708.1.

19 MR. SURABIAN: The question that
20 was asked was whether or not square footage
21 refers to density, and the witness can answer
22 that question. That's fine.

23 CHAIRPERSON MOLDENHAUER: Yes, I
24 think that the witness can answer that

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1 question and clarify his prior statement.

2 MR. GOLDSTEIN: I believe you'd
3 say that square footage divided by lot area
4 would be density.

5 MS. BRAY: And square footage
6 divided by lot area, that gives you an FAR
7 figure. Is that right?

8 MR. GOLDSTEIN: Yes, it does.

9 MS. BRAY: The term "FAR" has a
10 term "gross floor area" included in the
11 calculation. Is that right?

12 MR. GOLDSTEIN: I guess you'd
13 probably say gross -- whether it's square
14 footage or gross square footage, I think
15 it's --

16 MS. BRAY: But gross floor area --

17 MR. GOLDSTEIN: Yes, typically
18 that's a metric.

19 MS. BRAY: -- is a metric included
20 in a calculation of FAR?

21 MR. GOLDSTEIN: Probably yes. I'd
22 have to look at the definition here, but that
23 seems to make sense.

24 MS. BRAY: And FAR is a unit of

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1 density, measuring density?

2 MR. GOLDSTEIN: Yes, I would say
3 that's true.

4 MS. BRAY: Okay. Thank you.

5 CHAIRPERSON MOLDENHAUER: Mr.
6 Bray, are you completed with your cross-
7 examination?

8 MS. BRAY: If I could have the
9 Board's indulgence for one moment.

10 I think that concludes our cross-
11 examination, yes. Thank you.

12 MR. SURABIAN: I have a very brief
13 redirect.

14 So, we were referred to tab E, the
15 last page of tab E, where it shows how before
16 and after the CLD the square footage that's
17 being constructed of the two lots is 877,000-
18 plus. You see that?

19 MR. GOLDSTEIN: Yes, I do see
20 that.

21 MR. SURABIAN: And my question is,
22 why doesn't that matter?

23 MR. GOLDSTEIN: Because each --
24 the residential receiving lot has a limitation

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1 on the residential use it can accept. You
2 don't just throw them together and create a
3 new FAR.

4 MR. SURABIAN: And I'm going to
5 refer you back to the handout, page 4, and the
6 quoted language from the Office of Planning,
7 and ask you --

8 CHAIRPERSON MOLDENHAUER: Mr.
9 Surabian, can you please refer to what handout
10 you're --

11 MR. SURABIAN: Oh, I'm sorry.

12 CHAIRPERSON MOLDENHAUER: talking
13 about for the record?

14 MR. SURABIAN: It's the handouts I
15 submitted. It may be your Exhibit 19, and
16 it's page 4 of the handouts Mr. Goldstein was
17 referring to during his testimony. The Title
18 is "1706.7(b)(2) Limitation."

19 CHAIRPERSON MOLDENHAUER: Thank
20 you.

21 MR. SURABIAN: Okay. And there's
22 some quoted language from the creation, from
23 the report. And I'll just ask you, explain
24 again, please, of how that language affects

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1 the proposed transfer here.

2 MR. GOLDSTEIN: If you look at the
3 chart, it again, in red, provides what
4 1706.7(b)(2) provides. This is just more
5 illustrative. It's showing the symmetry.
6 These are deliberate numbers between the
7 residential maximum FAR for the residential
8 receiving lot and their minimum required
9 residential on site. What those numbers could
10 mean other than what I believe them to mean is
11 unclear. What an 8.0 limitation in a C-4 Zone
12 would mean if it didn't mean the difference
13 between maximum FAR and minimum residential
14 FAR, I don't know what else those numbers
15 could refer to.

16 MR. SURABIAN: Isn't that shown
17 perhaps on Exhibit A in my prehearing
18 statement on page 16?

19 MR. GOLDSTEIN: Yes.

20 MR. SURABIAN: Where it's that box
21 language, and there's above the chart?

22 MR. GOLDSTEIN: Beginning with
23 "The bonus?"

24 MR. SURABIAN: "The bonus," yes.

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1 MR. GOLDSTEIN: Yes.

2 MR. SURABIAN: Does that language
3 explain where those numbers are coming from?

4 MR. GOLDSTEIN: Yes, it does.

5 MR. SURABIAN: And does this
6 proposed transaction -- are they proposing the
7 transfer of more commercial entitlement than
8 residential which is being transferred?

9 MR. GOLDSTEIN: Yes, they do.

10 MR. SURABIAN: Okay. And is that
11 in violation of 1706.7(b)(2)?

12 MR. GOLDSTEIN: Yes, they are
13 exceeding the 3.5 FAR that's allowed. Section
14 (b)(2) specifically references in CLDs this is
15 the limitation. It references CLDs.

16 MR. SURABIAN: So, in your view
17 was 1706.7(b) created -- does it contemplate
18 CLD?

19 MR. GOLDSTEIN: Yes, it does.

20 MR. SURABIAN: And how so?

21 MR. GOLDSTEIN: It specifically
22 references CLDs in (b)(2). "The maximum
23 residential FAR that may be accepted through
24 combined lot development is listed in the

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1 following table."

2 MR. SURABIAN: And if you average
3 together, if you don't take in consideration
4 the maximum -- the total density allowed on
5 each lot, does that provision still have
6 meaning?

7 MR. GOLDSTEIN: No, it does not.

8 MR. SURABIAN: Explain, please.

9 MR. GOLDSTEIN: If you just
10 average, then the restriction of how much
11 residential use the residential lot can
12 receive doesn't matter at that point.

13 MR. SURABIAN: And why is this
14 important? Why is that limitation important
15 with respect to the goal of creating housing?

16 MR. GOLDSTEIN: Yes, again, I
17 don't want to -- it's we're incentivizing
18 residential. We still what to have our
19 housing requirements. We just don't want the
20 housing requirements to disappear through all
21 this residential density that's incentivized.
22 We want to maximize housing.

23 MR. SURABIAN: Well, just to play
24 devil's advocate, why can't they just take

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1 their entire residential and throw it up onto
2 the -- in the manner they're doing, transfer
3 the 4.6? Why can't they just do that?

4 MR. GOLDSTEIN: Well, they could
5 build as much residential on site as they want
6 to anyway, but what's being lost is that
7 residential requirement on the commercial lot.

8 MR. SURABIAN: And so, I guess;
9 and this may be what you testified to earlier,
10 is the theory that by removing -- by
11 1706.7(b), by removing the maximum FAR limits,
12 developers would build that FAR anyway.

13 MR. GOLDSTEIN: That is correct.
14 That was the point of the incentive.

15 MR. SURABIAN: And so, why not
16 allow them to build that through CLD? What's
17 the harm?

18 MR. GOLDSTEIN: Well, the harm is
19 that we're losing the residential requirement.
20 They're going to build that residential bonus
21 anyway. We just don't want that residential
22 bonus to be able to relieve that housing
23 requirement from the other site.

24 MR. SURABIAN: And does that

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1 really in way limit the development in here?
2 I mean, isn't it still possible?

3 MR. GOLDSTEIN: Absolutely.

4 MR. SURABIAN: Okay. That's it.
5 Thanks.

6 CHAIRPERSON MOLDENHAUER: I'm
7 going to open up the Board to some questions.
8 And actually, I'll start off with a couple of
9 questions for the witness.

10 In your exhibit, which is our
11 Exhibit 19, page No. 5, you show I guess what
12 you've attested to would be the typical
13 transfer of the same square footage from the
14 residential lot to the commercial lot and vice
15 versa, and you identified this as an equal
16 transaction. In the other 12 CLDs that you've
17 handled, is this the identical type of
18 transaction that has occurred in those?

19 MR. GOLDSTEIN: I believe so,
20 although that's -- the Arts Overlay or the CG
21 District may have different types of rules
22 that are involved. The ones that I've
23 reviewed I don't believe there was any that
24 violated 1706.7(b)(2).

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1 CHAIRPERSON MOLDENHAUER: Okay.

2 MR. GOLDSTEIN: Which then would
3 mean that, yes, they'd be reciprocal
4 transactions.

5 CHAIRPERSON MOLDENHAUER: So,
6 everyone that you've seen that you can recall
7 looked identical in this, I guess,
8 mathematical concept in regards to balancing
9 them out as page 5 in the handout?

10 MR. GOLDSTEIN: Yes, that would be
11 what -- I believe so, correct.

12 CHAIRPERSON MOLDENHAUER: And if
13 the Board -- I'm not saying what the Board's
14 going to do, but if the Board decided to, you
15 know, find in favor, couldn't the applicant
16 come before the Board to seek relief for that
17 additional, I guess, what do you have -- you
18 have an additional requirement of 47,000
19 square feet of FAR? Is that one of the
20 options that you're presenting as what, I
21 guess, the applicant could do?

22 MR. GOLDSTEIN: Are you suggesting
23 variance relief? Is that what -- I've never
24 know that to happen. I guess in theory that

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1 could be a possibility.

2 CHAIRPERSON MOLDENHAUER: All
3 right. Do any other Board Members have any
4 other questions?

5 COMMISSIONER MAY: Yes, you had a
6 very definitive definition of bonus density.
7 Where did that come from? Is that in the
8 regulations?

9 MR. GOLDSTEIN: I took that from
10 1706.7, which begins, "To assist the
11 development of residential and preferred uses,
12 the following density bonuses may be used."
13 Took it from that. You can additionally see
14 in 1706 that there are provisions for bonus
15 density from building residential use on site
16 above or below Mass. Ave., and among other
17 places for arts and such.

18 COMMISSIONER MAY: Okay. Let's
19 start with 1706.7, and it says, "The following
20 density bonuses may be used." Where does it
21 actually allow for combined lot development
22 underneath that section?

23 MR. GOLDSTEIN: It does under
24 (b) (2).

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1 COMMISSIONER MAY: (b) (2) provides
2 a limitation on combined lot development. It
3 doesn't allow combined lot development, right?

4 MR. GOLDSTEIN: I would have to
5 think that if it's providing a limitation, it
6 probably does. Let me look.

7 COMMISSIONER MAY: Well, the
8 provision for combined lot development is
9 under 1708.

10 MR. GOLDSTEIN: Oh, yes. I'm
11 sorry. That as well.

12 COMMISSIONER MAY: Right? So,
13 that's where it's allowed for.

14 MR. GOLDSTEIN: Sure.

15 COMMISSIONER MAY: I'm wondering
16 where it's actually defined within 1706.7. I
17 don't believe it is.

18 MR. GOLDSTEIN: Where? I'm sorry.
19 Bonus density or combined lot?

20 COMMISSIONER MAY: Combined lot is
21 not defined as a form of bonus density, as I
22 understand it. I mean, where do those two get
23 tied together? I mean, let's go the other
24 route. 1708, where combined lot development

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1 is mentioned. Is the word "bonus density"
2 mentioned there?

3 MR. GOLDSTEIN: I'd have to look.
4 Certainly not typically.

5 COMMISSIONER MAY: Not typically?
6 Right. So, what I'm trying to understand is
7 whether in fact combined lot development, when
8 it was conceived, was conceived as a form of
9 bonus density, a way of achieving bonus
10 density.

11 MR. GOLDSTEIN: My thinking would
12 be it wasn't.

13 COMMISSIONER MAY: Right.

14 MR. GOLDSTEIN: And it was amended
15 in 2001 to allow this bonus density for
16 residential. So really, before that time
17 we're dealing more with matter of right FAR
18 lots.

19 COMMISSIONER MAY: Right. It's a
20 circumstance that has popped up here that in
21 essence they want to exceed the limit in
22 1706.7 and not knowing -- and (b) (2), not
23 knowing how to address that. Essentially
24 you're treating it as bonus density.

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1 MR. GOLDSTEIN: Yes, I am treating
2 anything above the limitations as bonus
3 density.

4 COMMISSIONER MAY: Anything above
5 the limitation in 1706.7?

6 MR. GOLDSTEIN: Yes.

7 COMMISSIONER MAY: Yes. I mean,
8 your definition of bonus density, is it
9 essentially anything above matter of right?

10 MR. GOLDSTEIN: That is correct.

11 COMMISSIONER MAY: Okay. So, in
12 the other CLD covenants that you've reviewed
13 and cases you've been involved in, was the
14 combined lot development essentially treated
15 as matter of right density?

16 MR. GOLDSTEIN: Yes, that would be
17 my understanding.

18 COMMISSIONER MAY: Yes, okay.
19 That's all.

20 MEMBER SORG: I'll ask one
21 question following on Mr. May's questions. Of
22 the past CLDs that you've reviewed, can you
23 say a percentage or a number in which the lots
24 have been engaged in multiple CLDs?

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1 MR. GOLDSTEIN: I don't have a
2 number for you, but certainly I've done a
3 number that have been development -- CLD
4 development covenant two or three. It's not
5 at all uncommon to have more than one CLD.

6 MEMBER SORG: Thanks.

7 CHAIRPERSON MOLDENHAUER: You just
8 testified that you believe the additional
9 floor area or gross floor area that's created
10 by a combined lot development is then
11 considered to be bonus density.

12 MR. GOLDSTEIN: Yes.

13 CHAIRPERSON MOLDENHAUER: And I'm
14 just looking at section 1708.1(b), which says,
15 "A combined lot development shall be eligible
16 for the density and area allowances permitted
17 in 1703, 1704, 1705 and 1706." How does that
18 reference to then 1706 which talks about bonus
19 density and the ability to get bonus density
20 by creating an all residential development --
21 how does that conform with your statement that
22 -- wouldn't it be saying bonus density and
23 bonus density in your reading of the way
24 combined lot developments are created?

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1 MR. GOLDSTEIN: I'm sorry. Would
2 you mind saying that again?

3 CHAIRPERSON MOLDENHAUER: Sorry.
4 I know it was a little long-winded.

5 MR. GOLDSTEIN: Yes.

6 CHAIRPERSON MOLDENHAUER: You're
7 saying that combined lot developments,
8 anything above the maximum FAR would then be
9 bonus density. And I'm just asking how that
10 interpretation conforms with section
11 1708.1(b), which then references that a
12 combined lot development can be eligible for
13 density under 1706, which refers to bonus
14 density.

15 MR. GOLDSTEIN: I'm trying to
16 think of how that's inconsistent. It -- I
17 think that just is a true statement that these
18 are the rules, 1703 through 6, that allow for
19 CLDs. I don't know if it's specifically in
20 this provision contemplating with bonus
21 density, but certainly it's referencing 1706
22 for the rules of CLDs.

23 MR. SURABIAN: Well, could a
24 completed lot development -- after it's been

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1 transferred, couldn't they take advantage of
2 1706 with respect to just continuing to build
3 residential?

4 MR. GOLDSTEIN: Yes, they could.

5 MR. SURABIAN: Okay.

6 CHAIRPERSON MOLDENHAUER: Thank
7 you. Is there any additional redirect or any
8 additional witnesses?

9 MR. SURABIAN: I have the Zoning
10 Administrator to testify. And in the interest
11 of time, the Zoning Administrator is really
12 going to testify -- give background
13 information and discuss the steps leading up
14 to his determination letter. And I don't
15 believe that those facts are in dispute, but
16 the substantive legal portion of my case is
17 finished. So, if the Board is interested in
18 hearing the Zoning Administrator's testimony,
19 I'll certainly present him. Otherwise --

20 CHAIRPERSON MOLDENHAUER: I mean,
21 I don't personally believe that it's
22 necessary. I'll ask Mr. Bray, do you, I
23 guess, consent to any of the facts as to how
24 Mr. LeGrant came to the conclusions, or is

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1 there anything that you would object to just
2 simply taking the statement that all facts are
3 not dispute here?

4 MS. BRAY: I believe I began my
5 presentation by saying that there were very
6 few if any facts in dispute. However, as the
7 Zoning Administrator's decision is what we're
8 here to discuss, and because the Zoning
9 Administrator is the ultimate arbiter of
10 interpreting the Zoning Regulations, outside
11 of this density, of course, I'm not sure what
12 I would be stipulating to since all we can see
13 is the Zoning Administrator's letter. We
14 certainly engaged in multiple discussions with
15 the Zoning Administrator prior to receiving
16 the letter, but if what I'm being asked to
17 stipulate to is that the Zoning
18 Administrator's determination is just that
19 what he said in his letter, sure, we can
20 stipulate to that.

21 CHAIRPERSON MOLDENHAUER: The
22 letter would speak for itself, and if there's
23 no additional facts --

24 MR. SURABIAN: I think that's

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1 exactly my point, is that his letter can speak
2 for itself.

3 CHAIRPERSON MOLDENHAUER: I am
4 fine with that, and I think that obviously,
5 Mr. Surabian, if you don't believe it's
6 necessary -- this is your case as the
7 appellee, if you don't wish to put him on.
8 The appellant has already closed their case,
9 so I don't think that there would be any
10 additional information.

11 MR. SURABIAN: Yes, that's fine
12 with me. I just want to make clear that I'm
13 not trying to not have him testify, but it
14 just doesn't seem necessary in my view or
15 economical.

16 CHAIRPERSON MOLDENHAUER: If
17 that's the position, I think that we can then
18 move forward and we'll move back to the
19 appellant for closing statements.

20 MS. BRAY: Actually, Ms.
21 Moldenhauer, I believe we had a few minutes
22 left for rebuttal, and I have a couple of
23 questions of our witnesses that I'd like to
24 ask on rebuttal before proceeding to a closing

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1 statement.

2 CHAIRPERSON MOLDENHAUER: That's
3 fine. I believe that Mr. Moy has already put
4 your time back up on the clock, so we will
5 just -- as long as you keep to that, we're
6 good.

7 MS. BRAY: We'll be brief.

8 CHAIRPERSON MOLDENHAUER: Thank
9 you.

10 MS. BRAY: Mr. Steuart, I wanted
11 to ask you about the charts that were
12 submitted by the Office of the Attorney
13 General on which Mr. Goldstein relied on in
14 giving his testimony. And specifically, I
15 wanted to refer you to page 6 of the April
16 5th, 2010 submission, which is titled, "Result
17 of Transfer if Square 483, Lot 9, if
18 Consistent with 1706.7(b)(2)." Do you have
19 that in front of you?

20 MR. STEUART: Yes, I do.

21 MS. BRAY: And on that chart, on
22 the left hand side there is a remaining
23 residential requirement of 47,303 square feet
24 or .8 FAR, which the Zoning Administrator

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1 and/or the Office of Planning maintained
2 should be built either on site or as part of
3 a second CLD.

4 I have a question for you about
5 building that on site. That seems to me to be
6 a very small amount of FAR to be included in
7 a largely commercial building. Is that
8 feasible from a development standpoint?

9 MR. STEUART: Not particularly
10 feasible. I mean, anything's feasible,
11 counselor, but it's not logical to do a mixed-
12 use development of this magnitude or this kind
13 of ratio. You start to bring in the different
14 things of design intent, ADA issues, FHA
15 issues with respect to housing. You
16 complicate the development, the parking
17 issues, the corridors. You know, there's all
18 sorts of things that go into a residential
19 project that you have to then incorporate to
20 a commercial project. And that's partially
21 why I think the Combined Lot Rules were
22 designed initially was to simplify things, not
23 complex -- make the more complex.

24 MS. BRAY: Thank you, Mr. Steuart.

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1 Ms. McCarthy, the Office of
2 Planning testified as part of this chart on
3 page 6 of the April 5th submission from OAG
4 that either that 47,303 could be constructed
5 on the commercial site, transferred off in a
6 CLD. And then the Chairwoman suggested that
7 perhaps the applicant, as a third alternative,
8 might also seek a variance from what the
9 Office of Planning and the Zoning
10 Administrator determined to be a limitation of
11 3.5 FAR that can be accepted on the
12 residential piece. Have you looked at that
13 scenario and whether that's a viable
14 alternative?

15 MS. MCCARTHY: Yes, we have. When
16 we were at the Office of Planning, some
17 property owners sought to get a variance from
18 the application of the housing requirements to
19 their sites. Some of them were a similar kind
20 of issue, but we never supported them because
21 there's nothing unique about this site. It's
22 actually pretty much rectangular with a little
23 notch out of it. It's flat. It's vacant.
24 The rules show what is necessary to transfer,

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1 so it would be really hard to meet the test
2 for uniqueness or practical difficulty.

3 MS. BRAY: Thank you. And you
4 heard Mr. Goldstein's testimony, and have you
5 also reviewed the Office of the Attorney
6 General's prehearing statement dated -- I
7 believe it was March 23rd?

8 MS. McCARTHY: I have.

9 MS. BRAY: And that prehearing
10 statement includes a staff report from the
11 Office of Zoning, does it not?

12 MS. McCARTHY: Office of Planning?

13 MS. BAILEY: Or, I'm sorry, Office
14 of Planning in Zoning Commission case 00-30T.

15 MS. McCARTHY: Right.

16 MS. BRAY: One of the call outs
17 that has been made in that report, and I
18 believe that it is on page 11 of that cite,
19 says, "Therefore, while the Office of Planning
20 endorses providing relief from density
21 restrictions for housing in the DDD commercial
22 zones, the ability to complete combined lot
23 transfers should be limited to the original
24 target DD density."

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1 I believe you testified that you
2 were part of the Office of Planning team that
3 was involved in this case. Can you explain to
4 me what is meant by the "original target DD
5 density?"

6 MS. MCCARTHY: That would be the
7 requirements for housing and -- that were
8 preferred uses that were established for each
9 site and the entitlements to commercial
10 density for each site. So, as I testified,
11 this conveys I think quite well that our
12 thought was the bonus density should not
13 interfere at all with transfers -- with
14 combined lot transfers that existed to
15 transfer required preferred uses and
16 commercial entitlements. It only should limit
17 that extra density that was being provided,
18 and that could not substitute for required
19 residential on another site. But the -- we
20 didn't intend at all to interfere with the
21 original target DD densities.

22 MS. BRAY: And obviously you've
23 reviewed the proposed transaction. Can you
24 tell me whether (a) it's consistent with your

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1 experience in reviewing similar transactions
2 and with your understanding of what case 00-30
3 was intended to protect against?

4 MS. McCARTHY: It's definitely
5 consistent I think with both what we intended
6 when we originally drafted the Combined Lot
7 Regulations and then with what we intended
8 when we said over and above what you've got in
9 -- under combined lot, we'll provide this
10 extra density bonus as long as you don't use
11 it to reduce your housing requirement or to
12 engage in a combined lot. So, I think that
13 the transaction as proposed is very consistent
14 with my understanding of both of those.

15 MS. BRAY: And one last question.
16 Obviously, we've talked a lot about
17 legislative intent, but you've been qualified
18 before this Board and other boards, and
19 particularly in this case today you've been
20 qualified as an expert in planning and zoning.
21 In your expert opinion do we need to look at
22 the legislative intent of these provisions?
23 Is the meaning of 1706.7(b)(2) clear to you?

24 MS. McCARTHY: Well, my original

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1 reaction when we received the letter from the
2 Zoning Administrator was surprise, because I
3 thought it was very evident that (b) (2)
4 modifies only (b), and that is bonus density,
5 that one can get bonus density provided that
6 it doesn't substitute for required and
7 whatever. And that by taking that "provided
8 that" and applying it to a situation in which
9 nobody was talking about bonus density, nobody
10 was asking for bonus density, it was entirely
11 limited to what was readily available as
12 matter of right density, that that was clear
13 on its face.

14 Then when one goes to the
15 legislative history as well and sees that the
16 Zoning Commission had contemplated increasing
17 development rights on the receiving zone and
18 the rest of it, it just further amplified
19 that.

20 MS. BRAY: Thank you. All right.
21 One last question I guess is obviously it
22 sounds to me like from your testimony and
23 rebuttal, and listening to the Office of
24 Planning's testimony, that there's a

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1 significant disagreement with respect to what
2 bonus density means. Can you tell me whether
3 you agree with the Office of Planning's
4 determination, which I believe was any density
5 above the matter of right maximum equals bonus
6 density?

7 MS. McCARTHY: Right. And I think
8 that was what Mr. May had asked Mr. Goldstein
9 was, oh, that seemed like a very nice clear
10 definitive statement. The definition of bonus
11 density is density above matter of right
12 density. First of all, that's not any place
13 in the Zoning Regs, and if bonus density were
14 only defined in the Zoning Regs more
15 precisely, maybe we could have saved us all
16 several hours out of our lives.

17 Secondly, to a certain extent the
18 problem is when you say density above matter
19 of right density is bonus density, we look at
20 our situation here and say, but we're not
21 talking about any density above matter of
22 right density. We're strictly talking about
23 an exchange of matter of right densities
24 between two sites and we're not getting any

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1 more density than what we're entitled To.
2 Obviously, the Zoning Administrator and Mr.
3 Goldstein look at it and say, oh, no, that
4 somehow is density above your matter of right
5 density. And I think that's where we have a
6 disagreement.

7 But it's not based on -- you know,
8 the Zoning Regs don't define what they mean by
9 bonus density. The Zoning Regs don't say when
10 you do a matter of right lot and a combined
11 lot, and you're calculating your matter of
12 right requirements and then treating it all as
13 one lot, it doesn't then say, oh, yes, but
14 incidentally, each lot still has to meet its
15 own individual density requirements. That's
16 just not there. So, I think there's too much
17 reading into the Zoning Regs and that there's
18 not a foundation in the regs for saying -- for
19 making that conclusion.

20 MS. BRAY: Thank you. That
21 concludes our witness testimony on rebuttal.
22 And with that, I'd like to move into our
23 closing statement.

24 I'll be very brief. I think we

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1 have briefed this question extensively in our
2 prehearing statement, and really this is a
3 question, as I started out the outset, of
4 legal interpretation.

5 As Ms. McCarthy just testified, we
6 believe that the plain language of 1706.7 and
7 1708.1 are very clear and that one does not
8 necessarily relate to the other, that they are
9 two separate sections which one might proceed
10 under in the context of developing in the
11 Downtown Development District. Nonetheless,
12 it's clear from the alternative interpretation
13 of the Zoning Administrator that there is some
14 ambiguity there and there is a conflict.

15 So, with respect to the concepts
16 of statutory interpretation, when there is a
17 conflict or there is ambiguity in how one
18 interprets the regulations, there are few
19 principles of statutory construction that I
20 think are helpful here.

21 One is that although we think it's
22 clear the legislative intent -- and I think
23 this is indisputable and is backed up by even
24 the Office of Planning's testimony. The

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1 legislative intent of the DD Overlay, and in
2 fact even 1706.7 and 1708.1, was to create
3 more housing, not less in the Downtown
4 Development District. And one of the precepts
5 of statutory construction is that we need to
6 look at the plain language of a statute in the
7 context of the regulations as a whole.

8 1708.1(g) doesn't relieve a
9 developer of his requirement on each site. To
10 the contrary, it holds the developer to each
11 requirement on each site by forcing a
12 developer, if it chooses to develop more FAR
13 on one site, to forego development of an equal
14 amount of FAR on another. There are many
15 examples of this in the DD and in other areas
16 of the District in our combined lot
17 development. There are also many examples of
18 combined lot in the immediate surrounding
19 area. The old Convention Center site is one
20 of them.

21 Although we mentioned in our
22 testimony it's very difficult to determine
23 whether a site that has availed itself of
24 combined lot development has built over what

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1 would otherwise be the matter of right maximum
2 density on a particular site because of the
3 way the combined lot development covenants are
4 recorded an indexed, we do know that there are
5 at least one other -- I believe the old
6 Convention Center site has allocated its
7 density in this way. And Ms. McCarthy
8 testified, there is another combined lot
9 development where we know that the Zoning
10 Commission explicitly determined that there
11 was a -- and that the applicant in that case
12 exceeded the matter of right maximum and
13 determined that perhaps a corrective text
14 amendment might be necessary. Ultimately, no
15 action was taken. And we'd be happy to submit
16 that combined lot development into the record
17 as was suggested by Mr. May.

18 Another precept of statutory
19 construction is that once you read a section
20 of the Zoning Regulations in context with the
21 rest of the regulations, it can't produce
22 either an absurd result or an obvious
23 injustice. And while the Office of Planning
24 has stated quite clearly that the intent was

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1 to build more housing, not less, the
2 imposition of the requirements in 1706.7(b)(2)
3 result in less housing on Square N-515. It
4 would transfer additional housing off. This
5 combined lot development, if subject to the
6 limitations in 1706.7(b)(2), would necessarily
7 have to forego development of about 47,000
8 square feet of housing.

9 Now, that could come back if Mr.
10 Steuart or Steuart Investment Company decided
11 to develop that site as a stand alone and not
12 as part of a CLD, but it is an absurd result
13 that if it was developed as a stand alone
14 project. It could be developed to an 11.2
15 FAR, but in a combined lot development one is
16 limited to 8.0 FAR. It just doesn't make
17 sense.

18 And secondly, it produces an
19 obvious injustice, because as we heard at the
20 outset, Mr. Steuart and his company has owned
21 the property since 1928, actively participated
22 in the creation of the DD, actively
23 participated in the rezoning of both of these
24 properties over time and understood exactly

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1 what he was required to do in terms of
2 satisfying his required housing.

3 Mr. Steuart testified clearly and
4 the graphics show and the filings made to date
5 show that there is no bonus density being
6 utilized here. We're talking about a
7 calculation of a matter of right maximum
8 volume based on the combined lot, the required
9 uses based on the combined lot and nothing
10 additional is being built in this case.

11 With that, we stand on the filings
12 previously made to date and request that the
13 Board grant our appeal. Thank you.

14 CHAIRPERSON MOLDENHAUER: Thank
15 you very much. Thank you very much to both
16 parties for keeping everything succinct and
17 brief today. We are actually going to be
18 getting out of here at 5:25, and so that is
19 fabulous. As my first full day as
20 Chairperson, I'm very happy to be able to
21 provide that to the other members of the Board
22 and the staff.

23 So with that, I call this meeting
24 to adjourn.

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1 Oh, sorry. Actually, we're not
2 done yet.

3 We have two documents which we
4 have requested of both the appellant and the
5 appellee to supplement the record; Ms.
6 McCarthy's résumé and Mr. Goldsteins' CV.

7 And we need to schedule this for a
8 decision. I remembered that after. I did
9 speak too soon. I was getting all excited.
10 So, that's okay.

11 Is there anything else? Mr. May,
12 you had requested some additional documents.
13 I don't know if they were going to be
14 something that's going to be really necessary,
15 so I'll look to you to see whether you really
16 want to --

17 COMMISSIONER MAY: It's up to
18 them. If they think that there's something
19 that would help us decide, I would certainly
20 be open to seeing it.

21 CHAIRPERSON MOLDENHAUER: Okay.
22 Then we'll leave that open to the applicant to
23 determine whether or not they wish to submit
24 some additional information as to the

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1 background. What we'll do then is we'll also
2 leave some time frame in the schedule open for
3 the appellee to respond to that, if that
4 information is submitted on the record.

5 Mr. Moy, what are some of our
6 dates for decisions?

7 MR. MOY: I was going to add,
8 Madam Chair, whether or not the Board would be
9 interested in any draft findings of fact and
10 conclusions of law, which would probably have
11 more of a lead time in terms of a Board
12 decision. Or if not, then certainly maybe if
13 Board was interested in reviewing the
14 transcripts, within two weeks, or two or three
15 weeks for a decision.

16 CHAIRPERSON MOLDENHAUER: The
17 findings of fact and conclusions of law were
18 not requested. I don't think that they're
19 going to be necessary here.

20 MS. BAILEY: Okay.

21 CHAIRPERSON MOLDENHAUER: I think
22 that this was a fully briefed prehearing
23 statements by both parties and we are leaving
24 the record open just for maybe some potential

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1 additional information regarding past
2 decisions or past precedent in regards to the
3 hearing testimony that was presented. So, if
4 we give time for that, I think that's probably
5 all that would be necessary.

6 What? Two weeks for you guys to
7 submit that? So, two weeks from today would
8 be what?

9 MR. MOY: It would be April the
10 20th.

11 CHAIRPERSON MOLDENHAUER: April
12 20th.

13 MR. MOY: Which is a Tuesday.

14 CHAIRPERSON MOLDENHAUER: Okay.
15 For a deadline for the appellant. And then
16 providing another week, would that be
17 sufficient for the District to respond?

18 MR. SURABIAN: Yes, it would.

19 CHAIRPERSON MOLDENHAUER: Okay.
20 So, then that would be April --

21 MR. MOY: 27th.

22 CHAIRPERSON MOLDENHAUER: -- 27th.

23 And, Mr. Moy, when would we have the
24 transcripts by for the Board to review?

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1 MR. MOY: Probably during the week
2 of April 20th.

3 CHAIRPERSON MOLDENHAUER: Okay.

4 MR. MOY: Probably on the 21st or
5 the 22nd, for sure.

6 CHAIRPERSON MOLDENHAUER: Okay.
7 So then, would be open to make a decision then
8 on the next calendar? I don't have my
9 calendar to see -- the week after.

10 MR. MOY: We're looking at May the
11 4th.

12 CHAIRPERSON MOLDENHAUER: May 4th?

13 MR. MOY: Which is the first
14 Tuesday in May. And Mr. May is sitting that
15 day, as a matter of fact.

16 CHAIRPERSON MOLDENHAUER: That
17 works out well. Well then, why don't we
18 schedule that for the morning session for a
19 decision on May 4th?

20 MR. SURABIAN: Are there any
21 hearings that afternoon, Mr. Moy?

22 MR. MOY: Yes, sir. As a matter
23 of fact, there are. There are --

24 MR. SURABIAN: Are there any

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1 appeals?

2 MR. MOY: Not on May 4th.

3 MR. SURABIAN: Okay. Thanks.

4 MR. MOY: Unless you had one in
5 mind.

6 MR. SURABIAN: No.

7 CHAIRPERSON MOLDENHAUER: Okay.

8 Well, I believe that everyone has now the
9 dates, April 20th, April 27th and then May 4th
10 for a decision. And that now finally
11 concludes our hearing for today. Thank you.

12 (Whereupon, the hearing was
13 concluded at 5:30 p.m.)

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