

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY,

APRIL 20, 2010

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

MICHAEL G. TURNBULL	Commissioner FAIA (AOC)
KONRAD SCHLATER	Commissioner

OFFICE OF ZONING STAFF PRESENT:

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

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEPHEN MORDFIN

MATT JESICK

ARTHUR JACKSON

LAINÉ CIDLOWSKI

This transcript constitutes the minutes from the Regular Public Hearing held on April 20, 2010.

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

2 9:55 a.m.

3 CHAIRPERSON MOLDENHAUER: This
4 hearing will, please, come to order. Good
5 morning, ladies and gentlemen. This is the
6 April 20, 2010 Public Hearing of the Board of
7 Zoning Adjustment of the District of Columbia.

8 My name is Meridith Moldenhauer,
9 Chairperson. Joining me today is Vice Chair
10 Shane Dettman, a representative of the
11 National Capital Planning Commission. To my
12 left is Nicole Sorg, Mayoral Appointee and
13 Konrad Schlater, a representative of the
14 Zoning Commission.

15 Copies of today's hearing agenda
16 are available to you and are located to my
17 left in the wall bin near the door.

18 Please, be advised that this
19 proceeding is being recorded by a Court
20 Reporter and is also being webcast live.
21 Accordingly, we must ask you to refrain from
22 any disturbing noise or any actions in the

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1 hearing room.

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

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

16 The order of procedure for special
17 exception and variance is: One, statement and
18 witnesses of the applicant; Government
19 reports, including the Office of Planning and
20 the Department of Public Works; Reports from
21 the ANC; Parties and persons in support;
22 Parties and persons in opposition; and closing

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1 remarks by the applicant.

2 Pursuant to Sections 3117.4 and
3 3117.5, the following time constraints will be
4 maintained: The applicant, appellant, persons
5 and parties, except an ANC, in support,
6 including witnesses, will have 60 minutes
7 collectively. The appellee, persons and
8 parties, except an ANC, in opposition,
9 including witnesses, will have 60 minutes
10 collectively. Individuals will have 3
11 minutes.

12 These time constraints do not
13 include cross-examination or questions from
14 the Board. Cross-examination of witnesses is
15 permitted by the applicant and parties. The
16 ANC within which the property is located is
17 automatically a party in a special exception
18 or variance case.

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

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

10 The Sunshine Act requires that the
11 Public Hearing on each case be held in the
12 open before the public. The Board may,
13 consistent with its rules and procedures and
14 the Sunshine Act, enter into Executive Session
15 during or after the Public Hearing on the case
16 for purposes of reviewing the record or
17 deliberating on the case.

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

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1 conversation.

2 Please, turn off all beepers and
3 cell phones, at this time, so as not to
4 disturb these proceedings.

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

15 Does the staff have any
16 preliminary matters?

17 MS. BAILEY: Madam Chair, Members
18 of the Board, good morning.

19 CHAIRPERSON MOLDENHAUER: Good
20 morning.

21 MS. BAILEY: No, ma'am, we do not.

22 CHAIRPERSON MOLDENHAUER: Okay.

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1 Then will all individuals wishing to testify,
2 please, rise and take the oath?

3 (Whereupon, the witnesses were
4 sworn.)

5 MS. BAILEY: Thank you.

6 CHAIRPERSON MOLDENHAUER: Will you
7 call the first case, please?

8 MS. BAILEY: Thank you, Madam
9 Chair. It's the Application of Freeda's Child
10 Development Center and the Application No. is
11 18052, and it is pursuant to 11 DCMR ' 3104.1,
12 for a special exception for a child
13 development center, that is 24 children and 10
14 staff, under section 205. The property is
15 Zoned R-1-B. It is located at 3217 Alabama
16 Avenue, S.E., Square 5677, Lot 804.

17 Is Freeda's Child -- please, have
18 a seat at the table. And, Madam Chair, while
19 the representatives are coming up, I just
20 wanted to let you know that we did not receive
21 the Affidavit of Posting. I'm assuming that
22 the property was posted, but I don't have that

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1 document in hand.

2 CHAIRPERSON MOLDENHAUER: Yes, you
3 are the ANC Member, please, come up also.
4 Okay. Once you take a seat, you can introduce
5 yourself and provide your home address and
6 we'll just go down the table.

7 MS. WINDLEY: Good morning. My
8 name is Taniya Windley. My home address is
9 3210 8th Street, S.E., Washington, D.C. 20032.

10 MS. BROWN: Good morning. My name
11 is Vongela Brown. I'm the daughter of Alfreda
12 Wright-Brown, who could not be here today,
13 because she is ill.

14 CHAIRPERSON MOLDENHAUER: Okay.
15 Ms. Windley, are you a representative?

16 MS. WINDLEY: Yes, I'm a
17 representative representing Ms. Alfreda
18 Wright-Brown.

19 CHAIRPERSON MOLDENHAUER: Okay.
20 And do we have a letter in our file indicating
21 that you were going to be here representing
22 Ms. Brown?

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1 MS. BROWN: I'm not sure, but we
2 spoke to Mr. Nero who was aware that my mom
3 has been ill. But I have a letter from her in
4 reference to other situations why she couldn't
5 do certain things because of her illness.

6 CHAIRPERSON MOLDENHAUER: Okay.
7 What we will need for our record though is if
8 Ms. Windley is actually going to be your
9 representative for this proceeding, we will
10 need that in writing and that will be
11 submitted and you can supplement the record at
12 the end. Okay?

13 And then I see the ANC?

14 MS. HAMMOND-MARLIN: Good morning.
15 I'm Robin Hammond-Marlin, Commissioner for
16 Single Member District 7B05 in which the
17 property lies.

18 CHAIRPERSON MOLDENHAUER: Okay.
19 Ms. Windley, if you would like to start off
20 with going through the different standards and
21 walking through the case?

22 MS. BAILEY: Madam Chair, excuse

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1 me. We did not receive the affidavit.

2 CHAIRPERSON MOLDENHAUER: Yes.

3 Did you --

4 MS. WINDLEY: In reference to the
5 Affidavit of Posting, Mr. Nero just received
6 it this morning from Ms. Brown. What about
7 it?

8 MS. BROWN: I believe with the
9 Public Hearing posting, it was posted and the
10 public was aware of it. We originally had a
11 hearing date for the 13th of April, which was
12 postponed to the 20th, which is today, so the
13 public was aware of the whole hearing for
14 today with posting.

15 I took a picture of it, but I
16 didn't print it out, posted on the listing, I
17 believe I was told it needed to be on.

18 CHAIRPERSON MOLDENHAUER: Do you
19 know when you first put the posting up?

20 MS. BROWN: The posting was put up
21 yesterday.

22 MS. WINDLEY: There was, I

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1 believe, a misunderstanding with Ms. Freeda
2 and Ms. Vongela regarding what the procedure
3 was in terms of posting the signs. In fact, I
4 don't believe they received them until
5 yesterday.

6 MS. BROWN: Correct.

7 MS. WINDLEY: Until yesterday from
8 Mr. Nero.

9 MS. BROWN: Actually, it was an
10 oversight. We had the application and going
11 through the application, we didn't realize we
12 needed to have this posting and it needed to
13 be posted 15 days prior to the hearing date.
14 So a letter was posted. I mean, a note was
15 posted. I mean, a note was written from my
16 mom and it was saying her failure to post the
17 hearing notice for the required time period
18 was simply an oversight due to my mom's
19 illness for the past two months.

20 The hearing has been posted for
21 the public view and participation for the
22 upcoming hearing, which is today.

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1 CHAIRPERSON MOLDENHAUER: Okay. I
2 mean, does the ANC have any comments on that?

3 In my opinion, you know, obviously, we would
4 have to, the Board, grant a waiver of the
5 required time frame, since you did not satisfy
6 the required posting.

7 But with the ANC present, we do
8 have multiple documents in our record that
9 show that the area the local community was
10 informed and did have an idea of what was
11 going on. So I would like to open it up to
12 the ANC to make any comment on that issue.

13 MS. HAMMOND-MARLIN: I concur with
14 your assessment, yes.

15 CHAIRPERSON MOLDENHAUER: Then
16 what we will do is we'll waive the posting
17 requirement and we'll move on.

18 MS. WINDLEY: Thank you. Good
19 morning. As I stated previously, my name is
20 Taniya Windley and I'm standing in for Ms.
21 Alfreda Wright-Brown, who has been ill for the
22 past few months and she could not be present

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1 this morning.

2 I stand in not only as her
3 representative, but as a parent who has a
4 child who has attended Ms. Freeda's day care
5 center for the last two years.

6 As you are aware, Ms. Freeda
7 initially filed for a Certificate of Occupancy
8 application to use her subject premises as a
9 child care center. That application was
10 disapproved on December 2, 2009.

11 The disapproval letter cited the
12 need for Board of Zoning Adjustment relief.
13 And as such, Ms. Freeda has filed for a
14 special exception under the provisions of DCMR
15 Title 11, Section 205.1.

16 And pursuant to DCMR ' 3104.1, the
17 Board of Zoning Adjustment has the authority
18 to grant special exceptions where the general
19 purpose and intent of the Zoning Regulations
20 and Zoning Maps will not -- do not intend to
21 adversely affect the use of the neighboring
22 property.

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1 We submit to you that the use of
2 the neighboring property will not be adversely
3 affected by allowing Ms. Freeda to operate her
4 child care center -- to operate as a child
5 care center.

6 Here are the reasons why: Ms.
7 Freeda has already operated her day care
8 facility for 15 years at 3217 Alabama Avenue
9 without incident. Many of her neighbors were
10 not even aware that there was a day care
11 center in such close proximity to their
12 houses.

13 Ms. Freeda also offers quality
14 affordable day care which is very few and far
15 between in that neighborhood, in Ward 7.
16 There is a strong need for this service in the
17 immediate community.

18 And we have actually canvased the
19 neighborhood and we found that there were
20 neighbors who had children who were looking
21 for a place nearby for their children to
22 actually attend day care and they support it.

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1 And we have a petition actually that should
2 be in the record.

3 We have a petition. We have a
4 number of neighbors who actually supported the
5 existence of a good day care center in the
6 community. And they expressed their interest
7 in Ms. Freeda's day care.

8 Currently, she takes care of
9 several children from the immediate
10 neighborhood and has done so for the past
11 eight years.

12 In addition, parents will spend
13 only an average of about five minutes or less.

14 I believe there was an issue about this
15 expansion creating some type of traffic
16 congestion. And just to rebut that in
17 advance, the parents will spend an average of
18 only five minutes or less picking up their
19 children and dropping them off.

20 The Department of Transportation
21 has already evaluated the traffic and the
22 safety issues and the parking issues and has

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1 given their stamp of approval as well as the
2 Office of Planning, City Council, one of the,
3 I think, representatives from City Council,
4 OSSE, and the Department of Health and a
5 number of other agencies have already given
6 their stamps of approval.

7 As I have already stated before,
8 the immediate neighbors also support this
9 expansion, as indicated by the numbers of
10 signatures that we were able to gather as we
11 canvased the neighborhood.

12 There is no evidence, absolutely
13 no evidence of an adverse effect that allowing
14 Ms. Freeda to operate as a child care center
15 that it would decrease the property value or
16 that there will be sanitation issues or that
17 there will be traffic or the like.

18 And so as a result, we request
19 that this special exception be granted by the
20 Board today. Thank you.

21 CHAIRPERSON MOLDENHAUER: Ms.
22 Brown, do you have anything to add?

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1 MS. BROWN: I have also lived
2 there myself for 15 years. And we have had
3 absolutely no complaints of any sort, as far
4 as parking, any disruption or anything. The
5 parents have always been respectful with
6 neighbors, as far as, you know, talking to
7 them, meeting them and things of that nature.

8 We have never had an issue. And
9 also, as a correction with the number of
10 staff, as far -- I think originally it was
11 posted as 10 employees. Because originally
12 when the Department of Health came out to
13 measure the space, they granted us 32 children
14 there with 10 employees.

15 And my mom chose to do 24 children
16 and stay with six employees. And I was told
17 that the amendment could be given today. So
18 that is a correction with the number of
19 employees.

20 But just to say it's a lovely
21 neighborhood and we have actually had no
22 complaints of any sort since we -- as long as

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1 we have been there. And my mom, right now, is
2 a 23 hour day care facility, which will
3 change, you know, once and if the situation is
4 approved. It will just be a daytime from 7:00
5 a.m. to 6:00 p.m.

6 But right now, she is currently 23
7 hours.

8 CHAIRPERSON MOLDENHAUER: Okay.
9 May I just ask a point of clarification? You
10 said that you are going to amend the number
11 of?

12 MS. BROWN: Employees.

13 CHAIRPERSON MOLDENHAUER:
14 Employees. So are you amending it from 10 to
15 6?

16 MS. BROWN: Yes, ma'am.

17 CHAIRPERSON MOLDENHAUER: Okay.
18 So the final number is going to be six?

19 MS. BROWN: Yes, ma'am.

20 CHAIRPERSON MOLDENHAUER: I just
21 wanted to make sure. And the hours of
22 operation would be 7:00 a.m. to 6:00 p.m.?

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1 MS. BROWN: Yes, ma'am.

2 CHAIRPERSON MOLDENHAUER: Monday
3 through Friday?

4 MS. BROWN: Yes, ma'am.

5 CHAIRPERSON MOLDENHAUER: Okay.
6 And can you, either one of you, talk a little
7 bit about what the current parking is on the
8 site and then how you would accommodate the
9 employees?

10 MS. BROWN: Yes. Well, right now,
11 mom -- we have -- we do have for employees'
12 situation, we do have a two car garage, which
13 was told to my mom and I that we only needed
14 to create one parking space additional to the
15 two car garage to accommodate employee
16 parking.

17 And then also with parking for
18 parents, they usually park on 33rd or 32nd and
19 then they bring their child up to the day
20 care.

21 CHAIRPERSON MOLDENHAUER: So you
22 indicated that you were told that you would

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1 need one additional parking?

2 MS. BROWN: Correct.

3 CHAIRPERSON MOLDENHAUER: Are you
4 going to create that?

5 MS. BROWN: Yes, ma'am.

6 CHAIRPERSON MOLDENHAUER: And if
7 so, how?

8 MS. BROWN: Say that again? I'm
9 sorry.

10 CHAIRPERSON MOLDENHAUER: You said
11 that you were going to create that and then my
12 question is how are you going to create that
13 additional parking?

14 MS. BROWN: Well, the way the --
15 well, my mom has a fence up now that is going
16 to come -- that is going to actually come
17 down. So that area will be a parking space
18 area for that one additional parking space.

19 CHAIRPERSON MOLDENHAUER: And that
20 is in the rear?

21 MS. BROWN: In the back. Yes,
22 ma'am.

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1 CHAIRPERSON MOLDENHAUER: Okay.
2 And it sounds like you both have read through
3 the DDOT report. Can you comment a little bit
4 on the concern about students or children
5 crossing Alabama Avenue?

6 MS. BROWN: Yes. In that
7 statement, I wrote that parents will be
8 informed verbally, I will also put out memos
9 and it will actually be posted not to park
10 across Alabama Avenue, because it is, you
11 know, not a safe situation trying to get
12 across there all the time on Alabama Avenue.

13 So this is something that is
14 actually done on a daily basis right now.
15 Even before we had this hearing, you know, so
16 that's something that we were doing on a
17 regular basis is posting.

18 CHAIRPERSON MOLDENHAUER: All
19 right. Do any other Board Members have any
20 other questions for the applicant?

21 COMMISSIONER SCHLATER: How long
22 has the day care center been in operation?

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1 MS. BROWN: Oh, I'm sorry.

2 MS. WINDLEY: Do you want to
3 answer?

4 MS. BROWN: Yes. 15. 15 years.

5 COMMISSIONER SCHLATER: And did
6 you not have a Certificate of Occupancy for a
7 child care center during that 15 year period?
8 I'm just trying to understand how you came to
9 be here before the Board today.

10 MS. BROWN: For eight years, she
11 has been licensed for eight years.

12 COMMISSIONER SCHLATER: Yes.

13 MS. BROWN: And she operated as a
14 -- was it a family?

15 MS. WINDLEY: Family child care.

16 MS. BROWN: Family, yes, family
17 child care home provider.

18 MS. WINDLEY: Before.

19 MS. BROWN: Before the -- exactly.

20 COMMISSIONER SCHLATER: So there
21 is a change in the license status going from--

22 MS. BROWN: No, there's no change

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1 in the license status. She actually -- let me
2 back up to clarify some things.

3 She has had a day care center for
4 15 years.

5 COMMISSIONER SCHLATER: Yes.

6 MS. WINDLEY: For eight of those
7 years, she has been licensed as a child care
8 provider. Previous to that, she was just a
9 family --

10 COMMISSIONER SCHLATER: Okay.

11 MS. WINDLEY: -- child -- thank
12 you.

13 COMMISSIONER SCHLATER: And so for
14 the -- I'm just trying to clarify. So how did
15 you end up needing to be before the Board of
16 Zoning Adjustment today as opposed to eight
17 years ago?

18 MS. WINDLEY: She, Ms. Freeda,
19 applied for a Certificate of Occupancy.

20 COMMISSIONER SCHLATER: Okay.

21 MS. WINDLEY: Okay. I'll let Ms.
22 Brown address that.

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1 MS. BROWN: Actually, what
2 happened is my mom is inspected every year.

3 COMMISSIONER SCHLATER: Yes.

4 MS. BROWN: When the Department of
5 Health came out for an inspection, they saw
6 that, the setup, the space and they made the
7 suggestion to my mom to why don't you become a
8 center?

9 COMMISSIONER SCHLATER: Okay.

10 MS. BROWN: So, you know, my mom
11 said well, you know, how many children can I
12 have? And they said 32.

13 COMMISSIONER SCHLATER: Yes.

14 MS. BROWN: So my mom agreed to do
15 24. So that's how we applied for the special
16 permission to do an expansion of children in
17 that location.

18 COMMISSIONER SCHLATER: Okay.

19 MS. BROWN: So that's how.

20 COMMISSIONER SCHLATER: In your
21 application it says that "the outdoor play
22 space is in an off-site location." I think it

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1 was one of the rec centers, correct?

2 MS. BROWN: Yes. We actually have
3 two.

4 COMMISSIONER SCHLATER: Okay.

5 MS. BROWN: The first one is
6 Hillcrest Recreational Center, which is right
7 around the corner on 32nd.

8 COMMISSIONER SCHLATER: Yes.

9 MS. BROWN: And Oxon Run Park,
10 which is about five miles away, which we
11 transport the children in a 16 passenger van.

12 COMMISSIONER SCHLATER: How often
13 do the children go to the off-site location?
14 Is that once a day, twice a day in the van?

15 MS. BROWN: We will usually --

16 COMMISSIONER SCHLATER: I'm just
17 trying to get a sense for it.

18 MS. BROWN: -- to be honest, the
19 way -- if it's a nice day outside, it's a
20 picnic area.

21 COMMISSIONER SCHLATER: Yes.

22 MS. BROWN: And we may -- it's not

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1 every day, because we use the playground at
2 Hillcrest often.

3 COMMISSIONER SCHLATER: Yes.

4 MS. BROWN: More often that we use
5 the off-site area which is Oxon Run. If it's
6 a nice day, we may decide to have a picnic,
7 pack the kids up. We have lunch there and
8 it's not that often we use that off-site
9 location.

10 COMMISSIONER SCHLATER: How about
11 the van? How often does that get used?

12 MS. BROWN: Not that often. We
13 usually -- well, in the wintertime. We use it
14 in the winter. Okay. So the van is probably
15 moved maybe like three times a month.

16 COMMISSIONER SCHLATER: Okay.

17 MS. BROWN: Mainly during the
18 wintertime.

19 COMMISSIONER SCHLATER: We have
20 got some letters of, you know, community -- of
21 opposition, particularly around the parking
22 issue. Are there going to be any changes to

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1 the operation of the center now?

2 I realize the hours of operation
3 are going to change. So are there going to be
4 any additional changes beyond the hours of
5 operation that would create a worsened traffic
6 situation?

7 MS. BROWN: No. And I'm saying
8 that because living there myself for 15 years,
9 I have -- I mean, it's always, always parking
10 spaces on 33rd.

11 COMMISSIONER SCHLATER: Okay.

12 MS. BROWN: I mean, because most
13 of them have driveways and they use their
14 driveways or the house is basically on Alabama
15 Avenue and, like I said, they basically use
16 their driveways.

17 But coming home, I mean, any time
18 you can always find a parking space, morning
19 time, night time, you know, any time. It's
20 always available.

21 COMMISSIONER SCHLATER: Okay.

22 MS. BROWN: And it doesn't

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1 interfere, because people have different drop-
2 off times, so it doesn't interfere at all.

3 COMMISSIONER SCHLATER: Okay. Has
4 your mother had any problems with the
5 neighbors in the recent past?

6 MS. BROWN: Not at all, never,
7 never. No complaints of any sort.

8 COMMISSIONER SCHLATER: Okay.
9 Thank you.

10 MS. BROWN: Yes.

11 COMMISSIONER SCHLATER: No further
12 questions.

13 MS. WINDLEY: Excuse me, may I
14 also address the parking? As I stated before,
15 I have a son who attends Freeda's day care
16 center. And I have never ever had a problem
17 finding parking, because, as Ms. Brown said,
18 we come and go at different times.

19 So some parents pick-up their
20 children at 3:00, 4:00. I pick my son up at
21 5:00. So the varying times, I mean, I never
22 ever have a problem in the morning or evening.

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1 CHAIRPERSON MOLDENHAUER: Is there
2 any other comments from the Board? At this
3 point in time, if there is any comments from
4 parties, that will come at a later time.

5 At this point in time, we will, if
6 the applicant is completed with their
7 statement, we will go to the Office of
8 Planning for their report.

9 MR. MORDFIN: Good morning. I'm
10 Stephen Mordfin with the Office of Planning.
11 And the subject application is in conformance
12 with the criteria for the granting of a
13 special exception for a child development
14 center, because the child care licensing unit
15 of the Office of the State Superintendent of
16 Education recommended approval of the
17 application.

18 Parents would be instructed to use
19 32nd or 33rd Streets for pick-up and drop-off
20 and not Alabama Avenue due to traffic volume
21 on Alabama and the safety of the children.

22 The center would be located within

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1 a single-family detached dwelling with no
2 outdoor play space at the center. All outdoor
3 play would be provided at public parks and
4 within fenced playgrounds.

5 The children would go to and from
6 the playgrounds in a 16 passenger van operated
7 by the applicant. And the Office of Planning
8 is unaware of any other child development
9 center within the square or within 1,000
10 square feet.

11 Three on-site parking spaces are
12 required for the two uses that would be at the
13 site. Two for the child development center
14 and one for the dwelling that will be located
15 upstairs.

16 Only two off-street parking spaces
17 exist now within the detached two car garage.

18 A third space is required, which would be
19 necessary to accommodate the 16 passenger van.

20 Child development centers also
21 have the potential to generate excessive noise
22 and activity that could be objectionable to

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1 nearby residents.

2 Therefore, the Office of Planning
3 recommends that the application be approved
4 for a period of five years to give the
5 neighborhood and the Board to reevaluate the
6 application at that time.

7 The Office of Planning also
8 recommends that the application be approved,
9 subject to the following condition:

10 (1) That it be for a period of
11 five years.

12 (2) That the applicant shall
13 provide three on-site parking spaces,
14 including one on-site space for the 16
15 passenger van.

16 (3) That the child development
17 center be posted to inform parents that no
18 pick-up or drop-off shall occur on Alabama
19 Avenue.

20 Thank you.

21 CHAIRPERSON MOLDENHAUER: Does the
22 applicant have any questions for the Office of

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1 Planning?

2 MS. WINDLEY: No, we don't.

3 CHAIRPERSON MOLDENHAUER: Do any
4 of the Board Members have any questions for
5 the Office of Planning?

6 At this time, does the ANC have
7 any questions for the Office of Planning?

8 MS. HAMMOND-MARLIN: I do not.

9 CHAIRPERSON MOLDENHAUER: Okay.
10 At this time, what we will do is, we will turn
11 to the ANC for their report. Just for the
12 record, right now, we don't actually have a
13 written report from the ANC. So if you do,
14 can you provide a copy to the applicant and
15 also provide copies to Ms. Bailey?

16 MS. HAMMOND-MARLIN: Ms. Bailey?
17 Oh.

18 CHAIRPERSON MOLDENHAUER: If you
19 would like to present?

20 MS. HAMMOND-MARLIN: Okay. What I
21 did, I sort of folded the pages back, so you
22 could flip right to the zoning requirements as

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1 relates to child development center in a
2 residential R-1-B neighborhood.

3 I don't know if you are at that
4 page? The beginning of the package has the
5 motion in opposition to the application. And
6 behind that would be a couple emails that I
7 chose to include indicating that I did have
8 dialogue with both OSSE and also with one of
9 the impacted residents.

10 And then I provided for you in the
11 package our responses to the zoning matter-of-
12 right requirement in chapter -- I guess it's
13 section 205.2?

14 CHAIRPERSON MOLDENHAUER: Yes.

15 MS. HAMMOND-MARLIN: And then in
16 conclusion, I took the liberty to provide to
17 you the results of a questionnaire or survey
18 that I submitted to the impacted residents to
19 get sort of a feedback, if you will, of
20 whether or not they would support the project
21 expansion or whether or not they were in
22 opposition to this expansion.

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1 And then I have also provided some
2 photos of the traffic, if you will, that
3 usually occurs typically every day on Alabama
4 Avenue.

5 So would you like for me to start
6 with the responses to the Zoning Regulations?

7 CHAIRPERSON MOLDENHAUER: Yes.

8 What you can do is you can present your case.

9 And if you would like, you can either go
10 through and articulate how the ANC feels,
11 whether the applicant has met or not meet the
12 standards.

13 MS. HAMMOND-MARLIN: Okay.

14 CHAIRPERSON MOLDENHAUER: And
15 then, obviously, you know, we will be
16 reviewing this application, the package that
17 you presented to us also.

18 MS. HAMMOND-MARLIN: Okay. Well,
19 first of all, I would like to say that I
20 started my discussion about the project with
21 Ms. Brown. I did -- it was in January, the
22 last week of January. I was walking to --

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1 walking from my parents home to the Safeway
2 actually.

3 Since I had received notification
4 that this expansion was going to take place, I
5 will concede that I was not aware, even as a
6 Single Member District Commissioner, that the
7 home child care facility was there. So I
8 would yield to the applicant that I had not
9 been apprised of any disturbances or any
10 problems with the small child care home there.

11 So I did speak with her and she
12 shared a couple of thoughts with me in terms
13 of why she was expanding. She did also share
14 with me that if the community was in
15 opposition, that she would rescind her
16 application.

17 Now, of course, we all change our
18 minds as we go along, but in my discussion
19 with her, my concern as a prior health care
20 inspector was the size of the home and going
21 forward how many kids that she would like to
22 house there.

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1 I would like to address a couple
2 of points that were brought up by the
3 applicant, specifically that they found some
4 individuals that were in favor of the project
5 by way of, I think she mentioned, a petition
6 of some sort.

7 I did pass out 30 plus surveys and
8 I got 21 back and all of them were in
9 opposition. They were passed out among the
10 impacted residents. And by my definition of
11 impacted residents, would be those that are
12 registered in my Single Member District as
13 living in the impacted area. And also
14 registered voters in the impacted area.

15 With that said, the concerns that
16 were shared with me from my constituents would
17 be, first and foremost, is that Ms. Brown has
18 indicated on her application that she resides
19 elsewhere, that she does not live in the home.

20 I have had two or three residents,
21 including Ms. Foster, Mr. Chester, have stated
22 to me that she has admitted to them that she

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1 does not live in the home.

2 The regulation for a home care, of
3 which she currently runs, requires that the
4 operator reside in the home. So I take issue
5 with the Child Care Licensing Unit not clearly
6 and routinely monitoring to assure that is
7 occurring.

8 And I have indicated in the ANC
9 response that, as I go forward, I would like
10 for the letter of their approval to be
11 negated.

12 The other issue that I would like
13 to address would be traffic problems along
14 Alabama Avenue. Just yesterday, even though
15 it wasn't in the immediate block of the child
16 care, there was a very serious accident as a
17 result of high speed where it was on the news
18 this morning.

19 Alabama Avenue and Branch Avenue,
20 the corridors are very close to Prince
21 George's County. So those roads are used as
22 major commuter arteries.

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1 The traffic congestion and the
2 fatalities in our neighborhood have been so
3 great, that we had had to commission with DDOT
4 Traffic Calming studies. Now, what we have in
5 place specifically in this location around the
6 area of 3217 Alabama Avenue, we have "Do Not
7 Enter" signs during specific hours, so that
8 the commuter traffic doesn't cut through the
9 neighborhood.

10 We have rumble strips. We have
11 those, I don't know what they are called,
12 little things you put in the street to tell
13 you to slow down so pedestrians can go across
14 the street.

15 While I commend Ms. Brown and her
16 daughter for their good intent, if you will,
17 to instruct parents not to drop a kid off, you
18 know, drive up to the front door on Alabama
19 Avenue or what have you, we are all human. If
20 I'm in a rush, I have a 12 year-old, who is to
21 say that I won't do that?

22 There is no way that this body or

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1 Office of Planning or OSSE can assure that
2 that won't occur. So I don't know how that
3 would be enforced.

4 I do take issue with the
5 enforcement from the State Superintendent's
6 Office, not primarily her office, but the
7 Child Care Licensing Unit, because Ms. Brown
8 did share with me that Ms. Denise McCoy, who
9 was one of the supervisors there, did suggest
10 to her that she expand.

11 Now, my understanding of that unit
12 is for licensing purposes and only monitoring.

13 I feel that such strong, and as it was as
14 again when I was in the specter, disconnect
15 there and it's a potential conflict of
16 interest for any surveyor to go out and
17 recommend to any provider to expand or to
18 start a business, because ultimately, we would
19 have to go back and inspect that person for
20 compliance.

21 So how do you separate, basically,
22 striking up some time of accord that

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1 encourages a provider to do something that you
2 are ultimately going to have to be responsible
3 for monitoring?

4 The other issue that the residents
5 have raised to me is the number of children.
6 This is a three-bedroom, two bath home. And
7 even with a licensing for a community-based
8 residential facility or a group home, if you
9 will, there is a limit of five residents and a
10 limited number of staff.

11 And with that, when we license
12 those facilities, we take into consideration
13 staff parking, the comings and goings of
14 visitors and the like.

15 So the potential for 24, and I
16 understand that they have stated they have cut
17 it down from 32, which I'm very grateful for
18 that, children in a home of that size, and I
19 did -- I was able to see the living room area.

20 As soon as you open the door, you are right
21 there in the living room area.

22 And she had it setup in such a way

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1 where there were, I think what you call,
2 swings for infants. There were two there and
3 a mirror on the wall, very nicely done.

4 But my concern, as I expressed to
5 her, was the size of the home and trying to
6 accommodate that many children and staff at
7 any given time. And again, I express to you
8 that the monitoring here is also a key issue
9 for us, because I know firsthand that some
10 things just fall through the cracks.

11 There are so many staff that are
12 able to monitor these facilities that are out
13 here in the city that are being licensed. And
14 I'm sure that the best of their ability is
15 being done. But there is that room for error.
16 I'll just leave it at that.

17 Again, I was not aware of the day
18 -- of the child home center being there with a
19 licensed capacity of five presently for 15
20 years. So what I did, I looked on -- I went
21 back and looked at my Single Member District
22 voter roll and I had to turn away, if I can

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1 use that word, some of the parents that
2 approached me that were in favor of the
3 center, because they didn't live in the
4 neighborhood.

5 Actually, I'm only aware of one
6 resident, and I have attached her email, that
7 lives in the neighborhood and she is two doors
8 down and has a kid there.

9 Now, when I went up and met with
10 Ms. Brown in January, she told me she
11 currently had four kids there. As of this
12 weekend, Ms. Foster told me that she had seen
13 as many as 10 kids there.

14 Now, the center is only licensed
15 currently for five, unless there has been an
16 adjustment that has not been brought to my
17 attention or the ANC's attention.

18 In reference to, and you will see
19 in my response, play space, I did speak with
20 the Director for the Hillcrest Recreation
21 Center and I also reached out to the senior, I
22 think her title is, the Senior Ward Manager/

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1 Supervisor, she oversees all of the ward
2 managers in the city.

3 And I wanted to know if DPR was in
4 the practice of striking up agreements, if you
5 will, to ensure that a day care center or a
6 senior citizen center or something can
7 actually strike an agreement, if you will,
8 that they can use the center daily as a means
9 to supplement something that they are required
10 to do by law, but they can't meet that
11 requirement, so they reach out towards another
12 avenue.

13 Mr. Wright told me that Ms. Brown
14 did approach him, but only with the idea of in
15 the event of a catastrophic emergency or
16 something of that nature, could she bring the
17 kids to the center, which we welcome that in
18 our community. We are an inclusive community,
19 very open to everyone, if you will, in the
20 community.

21 For example, when one of the
22 apartment buildings caught on fire, the

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1 residents were housed at the rec center on a
2 temporary basis, like for two or three days.

3 But Mr. Wright shared with me that
4 he did not entertain a question of that
5 nature. He did tell me that he has seen her
6 once actually with the children at that
7 location.

8 I have also pointed out in my
9 responses to the play space adjacent to the
10 Hillcrest Recreation Center is Winston
11 Educational Center and they are mandated, if
12 you will, by DCPS to have outdoor space.

13 The kids come from the school
14 daily during recess, which is twice a day, and
15 then during the lunch hour and they use the
16 Hillcrest Recreation Center, the playground,
17 if you will.

18 CHAIRPERSON MOLDENHAUER:
19 Commissioner Marlin, I just want to focus you
20 a little bit. I think these are important
21 issues, but I really want you to focus just
22 specifically on the applicant.

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1 MS. HAMMOND-MARLIN: Yes.

2 CHAIRPERSON MOLDENHAUER: And if
3 you want to talk about different 205
4 criteria --

5 MS. HAMMOND-MARLIN: Okay.

6 CHAIRPERSON MOLDENHAUER: -- but I
7 mean, we want to be a little more focused on
8 whether or not -- you know, I think you have
9 already articulated some of your concerns
10 about the parking, about the, you know, off-
11 site facilities.

12 MS. HAMMOND-MARLIN: Yes.

13 CHAIRPERSON MOLDENHAUER: Do you
14 have any other specific concerns about
15 different elements of the 205? Maybe you want
16 to bring those up.

17 MS. HAMMOND-MARLIN: Let me be
18 clear on what you are asking me. So speaking
19 to the play space, you prefer to read it? Is
20 that what you are saying?

21 CHAIRPERSON MOLDENHAUER: No. You
22 have already, I think, articulated some of

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1 those issues. And I'm just trying to focus
2 you so that we can go through each of those
3 elements. And I'm trying to see if there is
4 any other elements that you have not yet, you
5 know, touched upon, if you want to bring those
6 up now, that would be great.

7 MS. HAMMOND-MARLIN: Okay. Let's
8 see here. Well, the only other thing that I
9 think I can reemphasize is the opposition to
10 this project.

11 She said that the applicant has
12 stated that they had received support. I did
13 put out the survey to each home within a two
14 block radius, that would be the 2300 Block
15 down to the 2500 Block of both 32nd and 33rd
16 Street, two blocks, both sides of Alabama
17 Avenue.

18 I got no response of support for
19 this project. They were all in opposition.
20 And the surveys that I received, as you can
21 see from the tally, that they were all in
22 support. 13 people said they were aware of

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1 the center being there.

2 They were not opposed to it
3 remaining licensed for five children. They
4 were just opposed to the expansion. And
5 that's the same position that the ANC has. We
6 are -- you know, given the size of the home,
7 the location, the safety concerns that we have
8 presented to you in our package, our concern
9 is going forward that the center operates in a
10 safe, effective and sanitary manner.

11 CHAIRPERSON MOLDENHAUER: Okay.
12 Thank you very much, Commissioner Marlin. I
13 have a couple of, I guess, procedural
14 questions for you.

15 MS. HAMMOND-MARLIN: Okay.

16 CHAIRPERSON MOLDENHAUER: One, I'm
17 looking through the motion that is signed by
18 the ANC-7B Chair. And I don't see here where
19 it specifically articulates your authority to
20 speak on behalf of the global ANC.

21 MS. HAMMOND-MARLIN: At the
22 community meeting or here?

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1 CHAIRPERSON MOLDENHAUER: Here
2 before the Board. The ANC-7B needs to
3 identify you as a, you know, Commissioner to
4 be appointed as someone that would speak on
5 behalf of ANC-7B.

6 MS. HAMMOND-MARLIN: Okay. Well,
7 let me apologize for that, but the other, I
8 guess, twice I have been here, that wasn't
9 asked or if it was, we maybe established it
10 prior to then. So I apologize for that.

11 But I am the Single Member
12 District Commissioner for that area. I was
13 the one that received the package and that's
14 the one -- that's the reason why I presented
15 the motion and I'm appearing here.

16 But if there is an issue for that,
17 please, tell me how it can be rectified.

18 CHAIRPERSON MOLDENHAUER: Okay.
19 Yes, I mean, you can come before the Board and
20 speak on behalf of your Single Member District
21 solely.

22 MS. HAMMOND-MARLIN: Yes.

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1 CHAIRPERSON MOLDENHAUER: But in
2 order to have the great weight of speaking for
3 the ANC-7B, we would actually need that as
4 part of your resolution or part of the motion
5 from the entire 7B or from the Chair of 7B.

6 So if you wanted to, you know, in
7 the future, obviously, supplement that or
8 provide that.

9 Just for the record, the motion
10 that we have, it doesn't specifically
11 articulate that there was a quorum present,
12 but it does, I guess, attach the agenda.

13 MS. HAMMOND-MARLIN: The agenda is
14 there. Yes.

15 CHAIRPERSON MOLDENHAUER: Which in
16 handwriting identifies that seven out of the
17 seven members were present.

18 MS. HAMMOND-MARLIN: And that's
19 typically how we record that.

20 CHAIRPERSON MOLDENHAUER: Okay.
21 Thank you.

22 MS. HAMMOND-MARLIN: And it is a

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1 matter of record.

2 CHAIRPERSON MOLDENHAUER: That
3 being said, I'm going to open it up to the
4 Board if any Board Members have any questions?

5 COMMISSIONER SCHLATER:
6 Commissioner Hammond, just to be clear on the
7 ANC vote itself. I think I read that the ANC
8 is not in opposition to a child care center
9 being in operation on that site. Is that
10 correct?

11 MS. HAMMOND-MARLIN: A home child
12 care center, what is currently there, that's
13 correct.

14 COMMISSIONER SCHLATER: So you are
15 objecting to the expansion of the center --

16 MS. HAMMOND-MARLIN: That is
17 correct.

18 COMMISSIONER SCHLATER: -- to hold
19 more children? And when you had your ANC
20 meeting, I just want to get to the nut of what
21 the specific objections were --

22 MS. HAMMOND-MARLIN: Yes.

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1 COMMISSIONER SCHLATER: -- of the
2 residents at the meeting. Was the parking the
3 primary issue?

4 MS. HAMMOND-MARLIN: Actually, the
5 first point raised was safety. The situation
6 with Alabama Avenue. It being designated the
7 second worst and fatal intersection in the
8 city.

9 COMMISSIONER SCHLATER: Yes.

10 MS. HAMMOND-MARLIN: And just a
11 concern for the children. The second was the
12 parking issue and contrary to what has been
13 presented here, those homes do not have
14 driveways. Some of them don't have garages
15 and the residents have no alternative but to
16 park on the street.

17 Actually, the email that I
18 provided for you, that resident who lives on
19 Alabama Avenue, she uses the day care center
20 and she parks on one of those side streets,
21 because I have seen her to it several times.

22 So the parking is an issue for the

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1 residents, yes.

2 COMMISSIONER SCHLATER: And the
3 safety clearly is an issue.

4 MS. HAMMOND-MARLIN: The safety
5 clearly is a concern. We are concerned about
6 the safety. I would think that the applicant
7 would be as well, but the ANC wants to go on
8 record that we are very concerned about the
9 safety of the children, yes.

10 COMMISSIONER SCHLATER: Do you
11 think there are any ways that the safety --
12 effective ways that that could be -- the issue
13 could be mitigated and the child care
14 development center could operate as they are
15 requesting?

16 MS. HAMMOND-MARLIN: Commissioner,
17 is it Schlater? Commissioner Schlater, the
18 ANC seven Members did discuss this. And
19 actually, I was a little surprised when I
20 arrived at the executive meeting where this
21 was discussed.

22 They had already read the package

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1 and they were already in opposition before I
2 could present the package to them.

3 One of the Commissioners does have
4 a child in one of the child developments
5 centers, which is actually two traffic lights
6 away from this particular facility, a five
7 minute drive. So we do have other child
8 development centers in the immediate area that
9 could be used. And they are more spacious.

10 You know, they have a separate
11 area for a playground. There is another one,
12 I think, that the Child Licensing Unit has
13 licensed that -- it's on Pennsylvania Avenue.

14 Again, the same incident, the same situation
15 that this facility will have.

16 There is no parking, no play space
17 and the residents -- I mean, I'm sorry, not
18 the residents, the parents resolve to parking
19 on the sidewalk. That has been a concern and
20 we have involved Metropolitan Police
21 Department with that issue and we have asked
22 that that provider be fined. And that has

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1 been going on since 2005.

2 So here, we have the situation
3 where we have an individual wants to turn a
4 residential home that is set-up for a family,
5 not a child development center, in a
6 development where safety is already a problem
7 for an adult trying to cross Alabama Avenue.

8 I see no way to answer your
9 question with any of us, the four of you or
10 myself, where the applicant can guarantee that
11 parents are going to adhere to a policy or a
12 sign. I mean, that's just not real life. So
13 our concern is that given the fact that we, as
14 residents, as adults in providing safety for
15 our children, we have instituted all these
16 traffic calming measures by shutting down the
17 street, if you will, during certain hours,
18 during rush hour, because we have commuter
19 traffic.

20 Then we have the speeding up and
21 down Alabama Avenue. We put the rumble
22 strips. We put those dummies, you know, so

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1 that the commuters hopefully will slow down
2 long enough for our safety.

3 When I was passing out the
4 questionnaire, an accident occurred in front
5 of my face, so, no. I don't see where she, me
6 or the four of you could provide any type of
7 safety measures, no.

8 COMMISSIONER SCHLATER: Thank you
9 very much.

10 CHAIRPERSON MOLDENHAUER: If there
11 is no other questions from Board Members,
12 then, at this point in time, if the applicant
13 has any questions for the ANC?

14 MS. BROWN: Not a question, but a
15 comment. Is that okay?

16 CHAIRPERSON MOLDENHAUER: No.

17 MS. BROWN: Okay. No questions.

18 CHAIRPERSON MOLDENHAUER: This
19 point of the proceeding is actually for
20 questions. If you have comments, there will
21 be a point in time at the end of the
22 proceeding for you to make a closing remark

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1 and that would be the time that you can make
2 any additional comments.

3 MS. BROWN: Thank you.

4 MS. WINDLEY: I do have a
5 question. My question is you mentioned that
6 Alabama Avenue was one of the worst
7 intersections in the city.

8 MS. HAMMOND-MARLIN: Second, yes.

9 MS. WINDLEY: Or the second most.

10 And I wanted to know whether or not you had
11 any written documentation as to any statistics
12 for fatalities in that area? You mentioned
13 that there were a number of fatalities and I
14 wanted to know if you had any written
15 documentation?

16 MS. HAMMOND-MARLIN: Okay. Fair
17 question. I don't have written documentation
18 with me now. However, but I did -- I had a
19 sit down meeting, if you will, with the Office
20 of Planning and with DDOT. The representative
21 there actually brought it to my attention,
22 sort of reminded me of that fact.

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1 If the pleasure of the BZA, I will
2 get that information and make it a part of the
3 record, yes. But I don't have it. To answer
4 your specific question, I don't have it
5 readily available with me. No, I do not.

6 MS. WINDLEY: Okay. And the next
7 question is do you know out of those
8 fatalities that have happened in the -- or
9 accidents that have happened at that
10 intersection? How many, if any, involved
11 parents or children from Ms. Freeda's day
12 care?

13 MS. HAMMOND-MARLIN: Okay. I
14 don't know that. I can't answer that question
15 as well. However, I would think that any
16 fatality would be a concern and an example of
17 whether or not that section block,
18 intersection would be safe. I don't think we
19 should quantify to parents and children.

20 I just think that anyone
21 attempting to cross that street,
22 unfortunately, it being a fatal accident,

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1 would be a concern for the ANC. And this is
2 why we have moved forward. And we have worked
3 with DDOT over the last four or five years to
4 try to implement safety measures along that
5 road.

6 Some of them have worked, some of
7 them have not.

8 MS. WINDLEY: Okay. And are you
9 aware of any safety issues with respect to the
10 traffic that have involved anyone from Ms.
11 Freeda's day care in the 15 years that she has
12 been in existence?

13 MS. HAMMOND-MARLIN: There again,
14 let me just say, my documentation shows that
15 according to OSSE's documentation, that she
16 hasn't been there 15 years. I can't speak to
17 that, because, again, I was not aware of it
18 until it was brought to my attention.

19 So I cannot speak to that
20 question.

21 MS. WINDLEY: Well, in the eight
22 years that you are aware that she has been in

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1 existence?

2 MS. HAMMOND-MARLIN: I'm not even
3 aware of the eight years. The documentation I
4 have has 2004 on it listed as her being in
5 operation. And the application shows that she
6 lives in Ward 6 and not Ward 7. So I can't
7 address those questions for you.

8 MS. WINDLEY: No further
9 questions.

10 CHAIRPERSON MOLDENHAUER: Does the
11 Board Members have any other questions based
12 on the testimony? No? Well, then thank you
13 very much, Commissioner.

14 At this point in time, we will
15 open up the floor to any individuals in
16 support or in opposition. You will have three
17 minutes to come forward and testify.

18 Do you want to come forward and
19 come to one of the --

20 MR. RYDSTROM: Is this all right?

21 CHAIRPERSON MOLDENHAUER: Yes, one
22 of the mikes. That's perfect. Turn on the

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1 mike, identify yourself by name and address,
2 please.

3 MR. RYDSTROM: Good morning. My
4 name is Justin Rydstrom. I live at 2106 34th
5 Street, which is two blocks from the day care.

6 I just encourage you to support the zoning
7 variance requested by Ms. Alfreda Wright-Brown
8 and Ms. Vongela Brown as owner/operators of
9 the day care located at 3217 Alabama Avenue,
10 S.E.

11 This day care offers high-quality
12 affordable day care to residents of our
13 neighborhood, a much needed service for
14 families in the area, which they have provided
15 to great satisfaction for many years.

16 My wife and I have been proud to
17 send our son there for over one year now. And
18 we are thoroughly impressed with the safe,
19 happy and well-structured learning environment
20 that they consistently provide for our son and
21 other children.

22 Most importantly, however, the

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1 genuine love and outstanding care which they
2 offer to young families in the neighborhood
3 consistently meeting the needs of parents and
4 children.

5 In fact, there are many parents
6 and residents located within the Hillcrest
7 neighborhood, including the immediate block,
8 that not only support the expanded operation
9 of the day care, but currently send their own
10 children in there or have sent their children
11 there in the past.

12 To that effect, I just want to
13 state that the majority of parents there that
14 currently do attend the day care do, in fact,
15 live in Ward 7, either the Penn Branch or
16 Hillcrest neighborhood. Although I do not
17 live in the Single Member District referenced
18 by Ms. Hammond-Marlin, the Commissioner, I do
19 live only two blocks away and regularly walk
20 there.

21 I can attest as to your concerns
22 for the safety of Alabama Avenue. I witnessed

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1 the aftermath of the accident yesterday, which
2 was tragic, and involved the loss of life.
3 And that was right after, presumably, a mother
4 picked up her four children at the elementary
5 school in our neighborhood.

6 This issue is certainly separate.

7 As I mentioned, I walk every day crossing
8 both Alabama and Branch Avenue from my house
9 in order to drop off my young son and have not
10 had an incident. And I have also been
11 informed, as stated by Ms. Brown, that the
12 days on occasion that I do drive, that I
13 should no longer park across the street from
14 the day care and cross. And I have respected
15 that wish since being informed of that a
16 couple weeks ago.

17 Finally, I just wanted to -- there
18 was some question, too, as to policing in the
19 neighborhood and how things would be enforced.

20 It's a very well-policed neighborhood. I
21 think that tends to happen when you have three
22 Council Members that live in your

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1 neighborhood.

2 So a number of the streets are
3 one-way. We have been pulled over ourselves
4 for violating the one-way at rush hour between
5 4:30 and 6:00 on occasion. And I think anyone
6 that attempts to park on Alabama Avenue in
7 order to drop-off their child or violates any
8 laws, will certainly be taken care of in a
9 quick, efficient manner as it is regularly
10 policed.

11 I also wanted to call to the
12 Board's attention the letter received,
13 hopefully, by Chairwoman Moldenhauer from
14 Council Member Alexander. And I brought a
15 copy just in case that was not received.

16 CHAIRPERSON MOLDENHAUER: All
17 right. We don't have a copy of that. If you
18 can provide that to Ms. Bailey? And just a
19 couple of questions.

20 How often do you walk your son
21 versus driving your son?

22 MR. RYDSTROM: I walk him every

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1 day. I do pick-ups and my wife generally does
2 drop-offs. I walk him every day I pick-up.

3 CHAIRPERSON MOLDENHAUER: And you
4 have recently been informed by Ms. Freeda that
5 you should not be dropping off your child on,
6 I guess, the far side of Alabama?

7 MR. RYDSTROM: Yes. Occasionally,
8 my wife will drive me in the morning and she
9 typically drives and drops him off and she no
10 longer parks on the other side of Alabama.

11 CHAIRPERSON MOLDENHAUER: Okay.
12 Are there any other questions from Board
13 Members?

14 MEMBER SORG: I have one. Just to
15 follow-up on that, since you have been
16 requested not to drop-off on Alabama Avenue,
17 what are the other options that you have found
18 available? And have they been easy to figure
19 out when you are driving?

20 MR. RYDSTROM: Yes, there is quite
21 a bit of parking available on 32nd and 33rd
22 Streets. It is not zoned parking. There is

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1 always spaces available. And you never have
2 to walk more than half a block.

3 MEMBER SORG: Thank you.

4 CHAIRPERSON MOLDENHAUER: Thank
5 you very much for your testimony. Are there
6 any other parties in the audience wishing to
7 support or oppose this application?

8 Seeing none, then, at this point
9 in time, we will turn back to the applicant
10 for closing remarks.

11 MS. BROWN: Okay. I don't know
12 what to do.

13 MS. WINDLEY: As I stated in the
14 opening, the standard is whether or not
15 creating this expansion is going to adversely
16 affect the neighboring property. And I
17 believe, based on what we have heard today
18 from the testimony of our supporters, the
19 letters that we have in the file, the letter
20 from City Council, the Office of Planning's
21 recommendation, Department of Transportation's
22 recommendation, I believe that it is clear

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1 that with any child care center or even a busy
2 street, there are going to be safety concerns.

3 However, there are ways to
4 mitigate those safety concerns. The ANC
5 actually brought up some interesting ways to
6 mitigate those, which are already in use now.

7 For instance, the "Do Not Enter" signs on
8 certain streets, mainly 32nd and 33rd Streets,
9 as well as the rumble strips.

10 We have already addressed the fact
11 that parking won't be an issue, because we
12 won't have pick-up and drop-off at the same
13 time for parents.

14 To rebut something that the ANC
15 brought out with respect to the size of the
16 child care or the square footage of the child
17 care facility, I have documentation that the
18 size of the home is 5,670 square feet. And
19 the space that is going to be used for the
20 child care, where the child care is, the first
21 level and the basement are about 2,500 square
22 feet. Is that correct?

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1 MS. BROWN: Yes.

2 MS. WINDLEY: Are about 2,500
3 square feet. So there is no issue with --
4 there should not be an issue in terms of the
5 number of children that can be maintained in
6 that 2,500 square foot space.

7 Okay. Additionally, the ANC
8 brought up a point about whether or not Ms.
9 Freeda Wright-Brown lives at the home. She
10 lived in the home up until the point in time
11 when she became ill. And she moved out
12 briefly to stay with her son, who is taking
13 care of her.

14 But Ms. Vongela Brown, who also
15 operates the facility, the child care
16 facility, has always lived there as well as
17 other family members have always lived there.

18 So there is no issue about whether or not
19 that requirement is met.

20 The Board's indulgence. And I
21 also want to bring up an issue. I actually
22 attended one of the ANC meetings and the way

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1 it was presented is as if my mom was trying to
2 change the zoning. And I believe that it was
3 incorrect. It was false information.

4 And I believe that's where most of
5 the opposed -- opposing of the expansion of
6 the day care came from, because it was
7 mentioned as if we were trying to change the
8 zoning.

9 MS. BROWN: The zoning.

10 MS. WINDLEY: It was the way it
11 was presented, changing the zoning, she didn't
12 live there, it was just negative to me
13 completely. So to me, it was false
14 information. And that's why I think most
15 people opposed to it more so than anything,
16 because they were misinformed.

17 Even when we walked around and did
18 the petition, they had no clarity as to what
19 was actually going on. They were misinformed.
20 So I just wanted to state that.

21 MS. BROWN: And also -- to also
22 clear up something with the 10 children, I

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1 stay there. I have a daughter and I have two
2 cousins that we -- that attend Anne Beers
3 Elementary School, so that the 10 count that
4 someone said they seen is correct. And it's
5 stated that she is licensed for six children
6 instead of five. And that she is a 23 hour
7 facility, which she has, approximately, eight
8 kids within that time frame, that 23 hour time
9 period.

10 MS. WINDLEY: And just to somewhat
11 piggyback off of what Ms. Brown was stating
12 with respect to the questionnaire, I looked at
13 the questionnaire myself and it came across as
14 extremely bias.

15 When I spoke to -- I actually
16 canvased the neighborhood myself and spoke
17 with many of the neighbors who had no clarity
18 or understanding as to what was really
19 happening.

20 As Ms. Brown stated, they thought
21 that the Zoning Laws would be changed to the
22 point where it would allow other businesses --

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1 one gentleman actually mentioned someone
2 actually having a liquor store in their
3 basement as a result of what Ms. Freeda was
4 trying to do.

5 And that is clearly not what she
6 is asking for. She is just asking this Board
7 for special permission. And based on what we
8 have presented today, I believe we meet the
9 standard. And, you know, we have provided
10 sufficient information as to our point of
11 view.

12 And we would just ask you again to
13 just consider this request favorably. Thank
14 you.

15 CHAIRPERSON MOLDENHAUER: Thank
16 you very much. At this point in time, I think
17 that we have some documentation that we are
18 going to need from both parties. So what we
19 will do is we will look for a date on the
20 calendar to deliberate this case.

21 But what we will need is you will
22 need a letter from Ms. Freeda indicating that

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1 Ms. Windley is actually authorized to
2 represent her during this proceeding.

3 We will also then need, we would
4 recommend to have, a letter, Ms. Hammond-
5 Marlin, from the ANC indicating that you are
6 authorized to represent the ANC today also.

7 So if we can get those
8 documentation, then what I will do is I'll
9 look on the calendar to see when we can
10 deliberate this case.

11 May 4th looks like a date that we
12 would be able to. So then if we can ask for
13 both of those documents to be provided to us.

14 Will both of you be able to get that in by,
15 let me just look at the calendar here --

16 MS. HAMMOND-MARLIN: Yes.

17 CHAIRPERSON MOLDENHAUER: -- by
18 the 27th?

19 MS. WINDLEY: Yes.

20 MS. HAMMOND-MARLIN: The 27th?

21 CHAIRPERSON MOLDENHAUER: 27th.

22 MS. HAMMOND-MARLIN: Certainly.

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1 CHAIRPERSON MOLDENHAUER: So April
2 27th if you both can get in those letters to
3 the Board, that would be fabulous. And then
4 we will put this on the calendar for
5 deliberation on May 4th.

6 MS. WINDLEY: Okay.

7 CHAIRPERSON MOLDENHAUER: So thank
8 you very much. The record will be closed for
9 this case, other than those two documents that
10 we have requested.

11 MS. WINDLEY: And just for clarity
12 on the procedure, do we come back for the
13 deliberation?

14 CHAIRPERSON MOLDENHAUER: You do
15 not have to. As we indicated, this is going
16 to be webcast, so you can simply log on to the
17 Internet and watch the deliberations. There
18 would be no testimony taken at the time of
19 deliberation.

20 MS. WINDLEY: Okay.

21 CHAIRPERSON MOLDENHAUER: Okay.

22 MS. HAMMOND-MARLIN: Chair

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1 Moldenhauer, I have one question. Given that
2 the applicant had a closing statement, does
3 the ANC -- are they afforded the same?

4 CHAIRPERSON MOLDENHAUER: No.

5 MS. HAMMOND-MARLIN: Oh.

6 CHAIRPERSON MOLDENHAUER: The ANC
7 is not afforded a closing statement.

8 MS. HAMMOND-MARLIN: That's fine.

9 Okay. And then my last question would be
10 with the April 27th date, you have asked for
11 those two pieces of documents. But is the
12 record closed as of today for additional
13 documentation?

14 CHAIRPERSON MOLDENHAUER: Yes, it
15 is.

16 MS. HAMMOND-MARLIN: Okay. Thank
17 you.

18 CHAIRPERSON MOLDENHAUER: I mean,
19 if you had a specific request for any
20 additional -- for us to keep it open for
21 something, we can consider that.

22 MS. HAMMOND-MARLIN: If I may,

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1 well, I'll just share with you real quickly.
2 The reason why I asked that question is
3 because I think it would be fair if the ANC
4 had an opportunity to rebut some of the
5 statements because the ANC in no way -- I have
6 been down -- this is my fourth visit here,
7 there is no way I could misrepresent an
8 application in terms of a zoning change, a
9 special exception what have you.

10 And I take exception to that,
11 because that did not occur.

12 CHAIRPERSON MOLDENHAUER: All
13 right. And, obviously, you know, we weigh all
14 testimony and we will consider testimony based
15 on, you know, our evaluations of that.

16 MS. HAMMOND-MARLIN: Yes.

17 CHAIRPERSON MOLDENHAUER: If that
18 was just a specific element that you wanted to
19 kind of rebut, I don't think that that's
20 necessary. I think that we, obviously, can
21 provide our analysis of what was presented.
22 And you have provided us with a very nice

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1 package showing emails, correspondence, things
2 to that effect.

3 MS. HAMMOND-MARLIN: Yes.

4 CHAIRPERSON MOLDENHAUER: That are
5 on the record.

6 MS. HAMMOND-MARLIN: Okay. And I
7 also supplied with the survey a listing of all
8 the matter-of-right facilities to give the
9 residents an idea of what exactly that meant.

10 CHAIRPERSON MOLDENHAUER: We have
11 that in the packet that you provided to us
12 today to review.

13 So that being said, then the
14 record will be closed for just those two
15 documents. Thank you very much for coming
16 forward today.

17 MS. HAMMOND-MARLIN: Thank you.

18 MS. WINDLEY: Thank you.

19 MS. BROWN: Thank you.

20 CHAIRPERSON MOLDENHAUER: And at
21 that point, if we can call the next case?

22 MS. BAILEY: Madam Chair, I'm just

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1 hesitating for a second, so the transition can
2 take place.

3 CHAIRPERSON MOLDENHAUER: Thank
4 you.

5 MS. BAILEY: Application of Bonnet
6 Development Group. The number is 18055, and
7 it is pursuant to 11 DCMR ' 3103.2, for a
8 variance from the lot area requirements under
9 subsection 401.3, to allow the conversion of a
10 church into two residential buildings to house
11 a four-unit apartment building. The property
12 is Zoned R-4. It is located at 304 Q Street,
13 N.W., Square 521, Lot 809.

14 CHAIRPERSON MOLDENHAUER: If the
15 parties could introduce themselves for the
16 record, please?

17 MR. FREEMAN: Good morning, Madam
18 Chair, Members of the Board. For the record,
19 my name is Kyrus Lamont Freeman of the Law
20 Firm of Holland & Knight here on behalf of the
21 applicant, the Bonnet Development Group.

22 Here with me today seated to my

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1 immediate right is Mr. Jason Bonnet, who will
2 present on behalf of the applicant. To my far
3 right standing is our project architect, Mr.
4 Robert Carhuff, principal of the architecture
5 firm, Plan 9 Associates. And seated to my
6 right, further right, is Mr. Steven Sher of
7 the Law Firm -- a planner with the Law Firm of
8 Holland & Knight.

9 CHAIRPERSON MOLDENHAUER: Thank
10 you very much. Just to kind of start us off,
11 so that we are all on the same page for this
12 case, I just wanted to state based on
13 reviewing the application and OP's report that
14 for the purpose of going through the
15 requirements today, we view this application
16 as an area variance, not as a use variance.

17 We're following Wolf v. D.C. Board
18 of Zoning Adjustment in which that was a
19 similar case, in our view, where there was a
20 relief for a two-unit to a three-unit where a
21 two-unit was provided as a matter-of-right and
22 a three-unit would have been a use that was

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1 not as a matter-of-right and, thus, they ceded
2 that that did not constitute an essential
3 change in the use of the property.

4 And here with a flat and moving
5 from a flat and a church to simply an
6 apartment use that is not permitted, we view
7 this as an area variance. And so just so that
8 there's no issues or there is no additional
9 time used to kind of go through that issue, we
10 will just start off with that. Thank you.

11 If you would like to begin?

12 MR. FREEMAN: I would also like to
13 try to qualify two experts. The first would
14 be Mr. Sher, who I'm sure you all know, as an
15 expert in zoning and land use. He has
16 appeared before the Board and the Zoning
17 Commission a number of times. I do not have
18 his r  sum   available, but it is definitely in
19 your records.

20 So I don't know if you want to
21 take a vote on that, but we would like to
22 proffer him as an expert.

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1 We would also like to proffer Mr.
2 Jason Bonnet as an expert in real estate
3 development and analysis. I have distributed
4 his r  sum   this morning. Attached to that is
5 an outline of some of the information he will
6 be discussing during his testimony today.

7 CHAIRPERSON MOLDENHAUER: Mr.
8 Freeman, you indicated that Mr. Sher's r  sum  
9 is in our application. I'm looking under your
10 Exhibit H and I don't see that. Can you point
11 me to where in your application we have his
12 r  sum  ?

13 MR. FREEMAN: His r  sum   is on
14 record with the Office of Zoning. I misspoke.
15 I might have misspoke.

16 CHAIRPERSON MOLDENHAUER: So it's
17 not actually in this application package?

18 MR. FREEMAN: I can definitely get
19 it. No, ma'am, it's not in this application
20 packet, but I can definitely get that in
21 within the day.

22 CHAIRPERSON MOLDENHAUER: I know

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1 we have heard Mr. Sher before, but I think
2 that for practical purposes, we want to have
3 each r  sum   in each of our application
4 packages. I know that it's something that the
5 Office of the Zoning Commission is also
6 starting to require that each of those come
7 within the application. So if you can provide
8 that for the record, that would be great.

9 MR. FREEMAN: Yes, Madam Chair.

10 CHAIRPERSON MOLDENHAUER: And I
11 want to just simply do a quick voir dire of
12 Mr. Sher. At that point, we can, also at that
13 point, review the architect's r  sum  .

14 MR. FREEMAN: We are not
15 proffering the architect as an expert. We are
16 proffering Mr. Bonnet as an expert in real
17 estate development and analysis. And his
18 r  sum   was included with the materials that
19 Ms. Beverley just distributed. It should have
20 been, I think, the first page of that.

21 CHAIRPERSON MOLDENHAUER: Do any
22 Board Members have any questions for Mr.

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1 Bonnet in reviewing his r  sum  ?

2 VOIR DIRE

3 COMMISSIONER SCHLATER: I don't
4 want to be a stickler here, but I'm going to
5 be a stickler anyway.

6 Mr. Bonnet has been doing real
7 estate development since 2003, that's evident
8 from his r  sum  . And he has done a total of
9 nine projects.

10 The only question I would have is
11 whether that constitutes being an expert in
12 real estate development or just somebody who
13 does real estate development? But I'll leave
14 that to other Board Members to decide.

15 MR. BONNET: Just to answer that,
16 I have obtained education. I'm a member of
17 ULI, Urban Land Institute, also CCIM, which is
18 Certified Commercial Investment Member, which
19 recognize experts in disciplines of commercial
20 investment real estate.

21 And I'm also licensed in D.C.,
22 Virginia and Maryland as a real estate agent

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1 for the past four years. So I have had
2 continuing education classes in not only real
3 estate transactions, but also classes in
4 investment and development to with ULI.

5 Not only --

6 COMMISSIONER SCHLATER: Mr.
7 Bonnet, I'm not trying to minimize your
8 experience.

9 MR. BONNET: Oh, no, no problem.

10 COMMISSIONER SCHLATER: Just so
11 you know. I mean, I work in real estate as
12 well.

13 MR. BONNET: Right.

14 COMMISSIONER SCHLATER: You know,
15 probably a similar amount of a period of time.
16 I just don't know whether I would qualify
17 myself as an expert in real estate
18 development. So it's not personal.

19 MR. BONNET: No problem.

20 CHAIRPERSON MOLDENHAUER: Do any
21 other Board Members have any other opinions on
22 whether or not we would support qualifying Mr.

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1 Bonnet as an expert?

2 MEMBER SORG: I have a sort of
3 comment, I guess, on this. You know, when we
4 qualify experts in, let's say, architecture,
5 and other sort of professional services and
6 other fields like that, you know, we always
7 require or tend to require, you know,
8 professional degrees for that.

9 And so it makes this a little bit
10 more of a hazy issue in that regard. So I'm
11 kind of on the fence, although sort of lean
12 with Commissioner Schlater on that.

13 CHAIRPERSON MOLDENHAUER: Yes, I
14 mean, I tend to agree. I don't think that
15 while Mr. Bonnet does have an extensive
16 rèsumé, I think that in this purpose, he
17 probably will not be qualified as an expert.

18 He can, obviously, give his
19 testimony as to his knowledge on this project,
20 his experience in that regard, but for expert
21 testimony, he will not be qualified for the
22 purpose of today's proceeding.

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1 MR. FREEMAN: Thank you. I'll
2 just proceed then with a quick summary of what
3 we are going to do today.

4 For the record, again, I'm Kyrus
5 Freeman here on behalf of the applicant. As
6 you mentioned, Madam Chair, we are here today
7 for an area variance from section 401.3 from
8 the minimum lot area requirements to, and I
9 think this is very important, convert the
10 church portion of a building into two
11 residential units.

12 You will hear our panel talk today
13 about how we meet the standard of proof. Mr.
14 Bonnet will talk about his approach in
15 developing the project and some issues with
16 respect to economics that would be practically
17 difficult for doing fewer units.

18 You would hear Mr. Sher talk about
19 all of the zoning and land use issues. And
20 our architect will go through just generally
21 the design of the building.

22 We filed a pre-hearing statement

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1 which is marked as Exhibit 25 of the record,
2 which outlines everything in terms of how we
3 meet the burden of proof. We will be
4 supplementing that today.

5 As you know, as you indicated, the
6 Office of Planning submitted a report
7 indicating that they agree that the site meets
8 the first standard of relief, but they don't
9 agree that we meet the second two tests.

10 We certainly thank OP for their
11 review. We have worked with Matt a number of
12 times. However, we disagree with their
13 conclusion. And we will provide evidence of
14 why we disagree.

15 I would just like to note for the
16 record, you mentioned the Wolf case. I have
17 additional cases here in which evidence of
18 economic feasibility has been considered by
19 the Board in section 401.3 cases. And the
20 Board has approved those cases over OP's
21 objections when such evidence has been
22 submitted. And we will be circulating a stack

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1 of cases pretty soon here.

2 Finally, we also would like to
3 note that we have a strong support of the ANC-
4 5C. Their letter should be included as
5 Exhibit No. 24 of the record. As you will see
6 in their letter, they specifically say they
7 believe conversion of that church into two
8 residential units would have -- would be an
9 improvement to the neighborhood and improve
10 the area.

11 So with that, I would like to turn
12 to Mr. Bonnet, who will proceed with his
13 testimony.

14 MR. BONNET: Hi, good morning.
15 Again, my name is Jason Bonnet. I'm the CEO
16 and founder of the Bonnet Development Group.
17 It's a family-owned development firm that has
18 been in business since 2003.

19 As we just spoke about my r  sum  ,
20 we have developed about nine projects to date
21 exceeding \$9 million and, approximately,
22 50,000 total square feet.

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1 We focus on property opportunities
2 as financial investments, but also community
3 revitalization.

4 Our goal is to redevelop
5 properties that help the immediate
6 neighborhood and its residents. So our
7 company strives to develop properties or what
8 we call building blocks in our local area to
9 support our community's future.

10 I'm also, I'll reiterate, a
11 licensed real estate agent in D.C., Maryland
12 and Virginia and a member of the Urban Land
13 Institute and the CCIM.

14 In regards to this property, 304 Q
15 Street, N.W., the prior use of this site was a
16 residential apartment building that was built
17 in 1900. We purchased it last year in June,
18 June 2009.

19 In the 1950s, a church moved in
20 and followed to use it, use the first floor
21 and the basement, for church services. This
22 church is the Tried Stone Church of Christ.

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1 But they -- actually, the building has been
2 abandoned since 2002.

3 And actually to clarify the
4 history of the building, I have obtained a
5 letter from the previous owners, the pastor
6 who actually represents the board of the
7 church for the Tried Stone Church of Christ,
8 and that is included, the letter, right behind
9 my r  sum  .

10 And just to hit on a few points
11 from that letter, they pretty much state that
12 the building became unsuitable for their needs
13 to use as a church and they relocated in 1971.

14 The last temporary use of the
15 first floor and basement by a church was in
16 2002, pretty much since they left between 1971
17 and 2002, it was only used as a temporary
18 relocation for churches going under
19 renovations, but no church actually moved in
20 and used it as a permanent residence.

21 However, the apartment units above
22 on the second and third floor were always

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1 used, except they have also been vacant since
2 2002.

3 And again, in the letter it says
4 no other churches have expressed interest in
5 renting the building for either temporary or
6 permanent use since 2002. And they actually
7 looked to sell it in 2008. And the majority
8 of their offers were from real estate
9 developers interested in converting the
10 property into rentals or condos.

11 And actually, the majority --
12 there was one church that was interested in
13 purchasing it, but, again, in the letter it
14 states that they were not going to use it for
15 church use, but instead for residential use.

16 And the reason why I sit here
17 today is because the proposed development, I
18 believe the most productive use of the
19 building is for four dwelling units, one unit
20 located on each floor.

21 And specifically, as we noted
22 before, we proposed to change the use of the

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1 first floor and basement from the church use
2 for 74 people into two separate dwelling
3 units, one on each floor.

4 The next large packet you have is
5 the economic feasibility analysis that I
6 provided. And this is pretty much in response
7 to the questions that the Office of Planning
8 report had about economic feasibility, so I
9 have prepared that for you and I'll go through
10 it with you.

11 The second page, which is right
12 after the cover sheet, is pretty much a
13 summary of the major points that I want to
14 hit. It compares doing three units where the
15 first floor and the basement would be one
16 combined unit, a two level unit, as compared
17 to four separate units where the first floor
18 and basement would be each individual units on
19 each floor.

20 As you can see, if the proposed
21 three units had to go into effect, on the
22 bottom if you look at the bottom, you will see

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1 after one year and after a five year profit
2 and loss, there will be a loss of around
3 \$3,200 for three units and a profit of \$1,800
4 for four units. And even a bigger loss over a
5 five year span and four units a profit.

6 Now, in regards to the rental
7 price per square foot, the next few pages is
8 the analysis of how I came to the market value
9 per square foot. In the yellow are market
10 comparables, rentals that have rented in the
11 last year in that vicinity. And these are all
12 one to two bedrooms around the approximate
13 same size as the units we're proposing, which
14 are around 700 to 770 square feet.

15 And as you can see, the rent per
16 square foot breaks down to \$17.95 for these
17 one level units. And when you look to the
18 right in the orange, these are two level
19 units. So they range from two to three
20 bedrooms. And they range from square footage
21 from about 1,400 to 1,800 square feet.

22 The majority of these listings are

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1 row houses, but some of them are also located
2 -- are apartments. But as you can see, the
3 two level units that have rented out in the
4 last year actually have a lower rental per
5 square foot of \$15.95.

6 And the following four pages after
7 that are just the comparables pulled from the
8 multiple listing service for one level units
9 and then the following three pages are for two
10 level units, just as backup for the numbers
11 that I ran on the front page with the yellow
12 and the orange.

13 Now, just to note that these are
14 the -- I figured the market rates per square
15 foot. I did not take into account the
16 difficulty of renting and also probably
17 getting less rent for residential units that
18 will be located above a commercial space or a
19 church space.

20 So in regards to the \$17.95 per
21 square foot of rent that I would assume, based
22 on market rate, that I would get for the

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1 second and third floors, I would expect to get
2 less if the church were to stay there on the
3 first floor and the basement.

4 Also, another note, based on what
5 we just talked about, the two level units that
6 I did price out for market value are really
7 not consistent with the neighborhood. Like I
8 said, the majority of the two levels are
9 actually row houses. There are only two --
10 one or two listings that were two level units.

11 And I did not run an economic
12 feasibility analysis on two level units in
13 this building. This is proposed in the Office
14 of Planning's report just based on the
15 negative numbers of just having one two level
16 unit on the first floor and basement.

17 If we included two two level
18 units, combining the second and third floor,
19 and then the first floor and basement, you
20 would see even more -- you know, greater
21 negative numbers in regards to investment
22 return.

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1 The next few pages is a proposal
2 from a contractor for the work to be done
3 comparing three units to four units. Just to
4 summarize, you know, the building is an
5 eyesore to the community. The property has
6 suffered from severe deferred maintenance.
7 And the increased renovation costs are pretty
8 much due to the deterioration from vacancy
9 since 2002. And actually not having a
10 consistent tenant in there since the church
11 left in 1971.

12 For a three-unit, you can see that
13 a three-unit will actually cost more than a
14 four-unit. The cost of building out that two
15 level unit on the first floor and basement
16 will be greater than if you built out
17 individual units on each floor.

18 Let's see, if you look through it,
19 the main points where you will get the cost
20 increase, it will be the additional walls and
21 closet build-outs for added bedrooms. The
22 majority of the cost is from additional egress

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1 windows at the basement level for Fire Code,
2 additional excavation, additional water
3 mitigation in regards to increased excavation
4 in the front yard, brick repair for more
5 exposed bricks, additional footings and block
6 wall work for front yard and basement level.

7 And then the staircase that needs
8 to be installed between the first floor and
9 basement for an interior entry between the
10 first floor and basement. And actually when
11 Robert Carhuff, the architect, speaks in a
12 little bit, he will show you the plans on the
13 boards and he can discuss that further, the
14 issues that we will run into if we were going
15 to do a two level unit on the first floor and
16 the basement.

17 Now, I did take into effect to
18 have the contractor get me a credit, of
19 course, for removing the kitchen appliances,
20 cabinets and fixtures in the basement. But
21 even with those credits, it still is a greater
22 cost to have the building finish off as a

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1 three-unit.

2 Also included in the packet are
3 tax records and property assessment paperwork
4 showing the current assessed value at \$376,220
5 and we acquired the property last June in
6 2009, as I had mentioned, for \$300,000 from
7 the church.

8 The last two pages of the report
9 are cash flow analysis worksheets for three
10 unit versus four unit. And this is pretty
11 much it shows you the worksheet used to come
12 up with the summary numbers that are shown on
13 the second page, which shows the loss after a
14 year and after five years for a three unit as
15 compared to a four unit.

16 Also, during this project, I
17 worked with the ANC. I have received support
18 from the ANC board and the owners and
19 residents of the neighborhood. And actually
20 that letter should have been -- will be
21 submitted or should have been submitted.

22 But in conclusion, in regards to

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1 the three units, we would not be able to move
2 forward with this project as proposed, because
3 it will result in a negative return as show in
4 the economic feasibility analysis. And it
5 will also create a practical difficulty in
6 creating an inconsistent design and use in
7 regards to this two level unit within the
8 building of the space in regards to the
9 neighborhood.

10 This property would, in all
11 likelihood, remain vacant if relief was not
12 granted. And again, based on the results of
13 my report, neither my company nor any other
14 developer, I believe, would be able to
15 economically make this proposed project work
16 with two units as proposed by the Office of
17 Planning or three units.

18 So in conclusion, I don't think,
19 and based on my economic feasibility analysis
20 and the other support that you're going to
21 hear and that you just heard from me and from
22 the rest of our panel, it's just not

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1 financially viable without the fourth unit.

2 And then, therefore, I request
3 your approval for four units or to change the
4 first floor and basement from church use to
5 two dwelling units.

6 CHAIRPERSON MOLDENHAUER: Thank
7 you very much. At this time, I will open up
8 the floor to any Board questions. None at
9 this time. What we will do is we will then
10 allow you to go on to your next witness.

11 MR. FREEMAN: That would be Mr.
12 Sher. I'm sorry, that will be Mr. Carhuff,
13 sorry.

14 MR. CARHUFF: Okay. Good morning.
15 My name is Robert Carhuff. My company is
16 Plan 9 Associates. I was responsible for
17 providing the architectural drawings for the
18 renovation of the subject property.

19 Just to let you know a little bit
20 of background, I have been in business for
21 about eight years and I have worked on several
22 projects. I haven't done any projects in this

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1 immediate vicinity, but just to illustrate a
2 couple of projects that are probably
3 comparable to this one.

4 I have done some basement
5 apartments, added into the basement of a
6 townhouse up in Mount Pleasant that involved
7 an excavation for a sunken patio and this was
8 in the Historic District.

9 I've also done an 18 unit
10 apartment building, existing plans to
11 coordinate for mechanical, electrical and
12 plumbing upgrades.

13 In other areas, I have been in
14 about 60 apartment buildings and have done
15 base building plans and evacuation plans for
16 those buildings, so, just to let you know, I
17 have been in a lot of apartment buildings.

18 This project -- I guess I can
19 start over here on the drawings. Hello?
20 Okay. Okay. The location of the project is
21 an existing building on the south side of Q
22 Street, N.W., just about a couple of blocks

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1 south of Florida and Rhode Island Avenue
2 intersect.

3 It is known as the Old City 2
4 Neighborhood. The area is predominantly
5 single-family townhouses, some schools,
6 churches and some apartment buildings mixed
7 in.

8 The site itself, the building
9 occupies 100 percent of the site, as can be
10 seen in the site plan here. It is bounded on
11 all sides. To the east is a neighboring
12 property, which I believe this property was
13 the backyard of this building, at one point,
14 and it was subdivided. To the south is the
15 neighbor's backyard. To the west an alley.
16 And to the north is Q Street.

17 This results in a property that
18 has no side or rear yards and just a small
19 front yard in the Q Street right-of-way. This
20 lot is about 896 square feet and it is
21 virtually level. Okay.

22 What the project involves is

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1 converting the two existing units onto the
2 second and third floors. I'm sorry,
3 renovating those two existing units and then
4 converting the first floor to a unit and the
5 basement to another unit.

6 We basically followed the same
7 layout that was there. There is a stair hall
8 on this side accessing the living areas on
9 each floor over here. And we have kept all
10 the layouts the same through all the floors.

11 We did some upgrades to the plan
12 to sort of open up the kitchens and add
13 washing laundry areas.

14 CHAIRPERSON MOLDENHAUER: Mr.
15 Carhuff?

16 MR. CARHUFF: Yes?

17 CHAIRPERSON MOLDENHAUER: I think
18 we have kind of gone through all the plans
19 right now.

20 MR. CARHUFF: Okay.

21 CHAIRPERSON MOLDENHAUER: And we
22 have a very good idea of the case.

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1 MR. CARHUFF: Okay.

2 CHAIRPERSON MOLDENHAUER: If you
3 want, maybe what you can do --

4 MR. CARHUFF: Sure.

5 CHAIRPERSON MOLDENHAUER: -- is
6 just to try to help focus. If you want to
7 maybe just talk about the challenge of the
8 site in regards to maintaining the current
9 layout versus providing, you know, the two
10 units or three units versus the four units.

11 MR. CARHUFF: I can discuss the --
12 I guess I can --

13 MR. FREEMAN: Madam Chair, if I
14 might? What we have and what Mr. Carhuff
15 would probably want to reference is the report
16 from our contractor which compares the three
17 versus four units and some of those. And he
18 could use that as a tool to go through and
19 kind of point out those differences on the
20 sheets --

21 MR. CARHUFF: Okay.

22 MR. FREEMAN: -- when he talks

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1 about the differences between a three and a
2 four unit. That might be helpful for him to
3 do.

4 MR. CARHUFF: Okay. Okay. Well,
5 I can pull up the -- these are the two floors
6 that are in question. And the first floor,
7 just the main, where you would enter from the
8 street. And here is the cellar plan.

9 MR. FREEMAN: Yes.

10 MR. CARHUFF: And then as you can
11 see, I have kept the plans stacked. It does
12 make for building systems a lot easier to
13 engineer and install.

14 Right here are stairs that go down
15 to the cellar level. They are very narrow and
16 they are very steep. And we opted to not use
17 those for access to the basement level, other
18 than as to general building utilities rooms
19 where the gas meters are, the electric comes
20 in, the water service, otherwise, that is not
21 -- this area is not going to be open for the
22 tenants.

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1 In order to create access to the
2 cellar, we excavated out an area way for
3 stairs going down here. Now, what we
4 discovered when we were surveying the plans
5 with that, this was actually already a cellar
6 here that was excavated out and it was just
7 under the front yard there. It was completely
8 invisible from the outside.

9 So which then just sort of landed
10 itself to put an area way in. We kept the
11 extension. This front property line here.
12 This is all in the Q Street right-of-way. We
13 have kept it as far back towards the building
14 as possible to get the stairs in.

15 In doing so, we were able to
16 create a couple of windows in where we were
17 excavating. And this window here is an egress
18 window from the bedroom. This is just an
19 additional window into the space. These are
20 two windows that were existing in the space
21 already, but they are very small.

22 MR. FREEMAN: To the point you are

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1 just showing and pointing out the area ways,
2 if you were to convert the lower level or if
3 you were to combine a basement and the first
4 level --

5 MR. CARHUFF: Yes.

6 MR. FREEMAN: -- into a single
7 unit, could you describe some of perhaps the
8 additional excavation costs, the additional
9 work you would have to do in terms of brick
10 work, additional work you would have to do in
11 terms of installing windows?

12 MR. CARHUFF: Yes.

13 MR. FREEMAN: How you would have
14 to install an additional stairwell to connect
15 the interior unit.

16 MR. CARHUFF: Um-hum, okay. Well,
17 first, we would need to put an interior stair
18 somewhere in the unit from this level going
19 down to this level. And it would have to
20 coordinate with both layouts to work.

21 I think the most obvious thing
22 would be that this would be the main living

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1 level and you would have two or three bedrooms
2 down at this level here.

3 Bedroom egress requirements are
4 very strict. These windows here do not meet
5 that requirement. This window well, in terms
6 of its amount of space, does not meet that
7 requirement neither. We would need to expand
8 this out to the minimum requirement, which is
9 3 feet of clearance, and also excavate further
10 down to meet the opening requirement.

11 This window here is 5 feet tall.
12 This one is only about 2 feet tall. So we
13 need to excavate a considerable amount more to
14 meet that requirement.

15 I'm not sure how the, you know,
16 public space or the DOT is going to respond to
17 that additional projection into the Q Street
18 right-of-way.

19 Inside, we need to create an
20 opening in the framing, a structural opening
21 in the framing, to accommodate a stair to go
22 down to this level here.

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1 Those are some of the additional
2 costs involved with doing that. Other costs
3 involved would be revising this layout to work
4 with the new configuration. And also this
5 level as well.

6 MR. FREEMAN: Just one last
7 question and then this will be it for our
8 architectural presentation.

9 Of all of those, based on your
10 experience, changes, would it be easy or would
11 it be practically difficult to make those
12 changes?

13 MR. CARHUFF: It would be
14 practically difficult in a couple areas. One,
15 like I said, with the additional excavation.
16 I'm not sure how the DOT is going to respond
17 to that.

18 MR. FREEMAN: Okay.

19 MR. CARHUFF: But more so, the
20 fact that a unit with basement bedrooms is not
21 a very appealing unit.

22 MR. FREEMAN: Okay. Thank you.

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1 Our last witness is Mr. Sher who will just
2 summarize how we meet the variance test.

3 MR. SHER: Good morning, Madam
4 Chair, Members of the Board. For the record,
5 my name is Steven E. Sher, the Director of
6 Zoning and Land Use Services with the Law Firm
7 of Holland & Knight.

8 This sort of background and
9 introductory piece of what I have prepared for
10 you has been done by previous witnesses, so I
11 will sort of skip to what I think are the
12 essential points that make this case suitable
13 for the granting of a variance.

14 The property is in the Shaw area.

15 And if you turn to the photographs and aerial
16 photographs at the back of the outline, the
17 first one, which is the larger scale view of a
18 several block radius with the property more or
19 less in the middle, shows the overall
20 character of the area being one of primarily
21 residential, mostly in row structures mixed
22 between single-family flats and conversions to

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1 apartments.

2 There is one large garden
3 apartment complex in the square to the
4 northeast and then you've got a whole bunch of
5 institutional uses, what I'm calling
6 institutional are schools, churches and other
7 similar type uses. You've got Dunbar High
8 School down there at the bottom of the
9 photograph.

10 And mixed in among all of these
11 blocks and houses are a lot of churches. Some
12 built as churches, other buildings converted
13 to churches.

14 If you turn to the next page, I've
15 blown that photograph up a little bit to just
16 the northern portion of the subject square and
17 the immediately surrounding streets.

18 And again, our building is the one
19 at the top on Q Street in the middle of the
20 block. And it is surrounded by other
21 residential development.

22 But if you then turn to the next

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1 three photographs, which are not aerial
2 photographs, but are street views of the
3 particular block front we are talking about,
4 the first one is the view looking south on 3rd
5 Street from the corner of Q Street.

6 And you can just see the edge of
7 the subject property visible at the upper
8 right hand corner of the photo, which that red
9 brick behind the while building that is there.

10 And what you are seeing, essentially, are a
11 series of two story typical row type
12 structures for a Washington, D.C. row house
13 neighborhood.

14 Turn to the next page and you see
15 the view of the subject property. It's a
16 three-story building and it occupies 100
17 percent of that lot. It goes from lot line to
18 lot line north to south, east to west. And it
19 just looks different from that typical
20 pattern.

21 And you can see again going
22 further west from there, again, the series of

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1 two-story more typical row houses for that
2 kind of development.

3 And then the last picture is the
4 view looking south on 4th Street. You have
5 now got to the opposite corner and are looking
6 further back down that square. And again,
7 it's a series of more or less typical
8 Washington row house type neighborhoods.

9 Now, when you actually look at the
10 last page in that set of exhibits here, you
11 can see those row house lots. Unfortunately,
12 the quality of the numbers make it a little
13 hard to read. These are actually most of them
14 not 18 foot wide, 1,800 square foot lots,
15 which would be what would be required today if
16 you were developing an R-4 type neighborhood.

17 Most of these are smaller and
18 narrower than what you would find for the
19 normal standard of R-4, which means that the
20 buildings themselves are smaller and narrower
21 than the typical row house would be if you
22 built it in R-4 today.

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1 So as we have indicated, we have a
2 lot that is only 896 square feet. It is
3 probably the smallest lot in that square and
4 maybe one of the smallest in that neighborhood
5 completely. But it is a relatively large
6 building.

7 It's a three-story plus now cellar
8 building. Each one of those floors is about
9 900 square feet, because the lot is 896. So
10 we have a 3,600 square foot building on a
11 slightly less than 900 square foot lot.

12 Now, what we need is a fairly
13 significant variance, 2,704 square feet, but
14 nonetheless, that's what we have. And the
15 building has been there since 1900.

16 And as you have heard any number
17 of our folks say, what this, essentially,
18 comes down to is taking the church use, which
19 was given a Certificate of Occupancy for up to
20 74 people and replacing it with two
21 residential units.

22 Okay. How do we meet the test for

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1 a variance? The Board has indicated at the
2 outset is looking at this as an area variance.

3 And I think that's correct. That's the way
4 we looked at it. And so the standard is is
5 there an exceptional or extraordinary
6 situation or condition of the property which
7 causes a practical difficulty for the owner
8 and can the variance be granted without
9 substantial detriment to the public good?

10 Okay. Let's take those one at a
11 time. Exceptional situation. As we have
12 said, the lot is extremely small, but it is
13 improved with a building which occupies 100
14 percent of the lot. The building is wider
15 than it is deep, which is an exceptional
16 situation compared to normal row dwellings.

17 It has a combination of approved
18 uses in the building, which is not typical for
19 that neighborhood. And, frankly, the building
20 is unlike any other property in that square or
21 in the immediate vicinity, which is why I took
22 you through those photographs, both aerial and

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1 street view.

2 If you go out there and look at
3 it, it just doesn't look like anything there.

4 It is truly an exceptional or extraordinary
5 situation.

6 Okay. What's the practical
7 difficulty then? Well, it's not possible for
8 us to increase the area of the lot. There are
9 improved properties on two sides. There is a
10 street on the third side. There is an alley
11 on the fourth side. The lot is what it is.
12 It has been that way since 1900. It's not
13 getting any bigger. So we have a 900 or 896
14 square foot lot with a building on it that is
15 there.

16 At the amount of floor area in the
17 building on this lot compared to the lot area
18 is disproportionate for this building type and
19 in this area.

20 This is effectively a 3 FAR
21 building and that doesn't count the below-
22 grade space, because that's not counted in FAR

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1 today. And row houses typically are not that
2 dense. They are more in the neighborhood of
3 if you factored it on an FAR basis, a 60
4 percent lot occupancy on two stories, that's
5 1.2. If it's 60 percent lot occupancy on
6 three stories, of which there are not a lot in
7 this neighborhood, that's only 1.8.

8 We have a 3.0 equivalent FAR
9 building. FAR is not the issue in R-4. We
10 don't have it. But I just want you to
11 understand the relative proportions of this
12 building compared to what else is around
13 there.

14 As Mr. Bonnet went through in his
15 analysis, if we had to do fewer than four
16 units, fewer than one unit per floor, we're
17 going to wind up with larger units that are
18 not going to be in that 750 to 800 or 700 to
19 800 square foot size. They are going to be
20 bigger.

21 If we have two units, they each
22 are going to be in the range of double that,

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1 say 1,500 square feet. If we had three units,
2 then the likelihood is the two top floors stay
3 the way they are. The first floor and the
4 cellar wind up as one unit. That becomes a
5 much larger unit.

6 Those larger units, whether it is
7 two or one, are out of scale and character
8 with the surrounding properties. Again, if
9 you look at the size of the lots and you look
10 at the size of the buildings, even for single-
11 family dwellings, the units are smaller
12 because the lots are smaller.

13 When you start looking at them as
14 flats, they come right down into the range
15 that we are talking about here. And they are
16 indicated and illustrated in the material
17 which Jason gave you earlier.

18 And as he went through the cost to
19 acquire and renovate the property, it cannot
20 be supported by fewer than four units in the
21 building and I'll just leave that stand on his
22 testimony, because I don't have anything to

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1 add to that.

2 There is one other point and we
3 have somewhat of a disagree with the Office of
4 Planning on this. It's our view and it's my
5 view, in particular, that we would need
6 variance relief from the Board for anything we
7 wanted to do with this lot, other than keep
8 the existing configuration of uses there.

9 We have a flat on the second and
10 third floor. We have a church on the first
11 floor and the basement. Because the lot area
12 doesn't meet any standard for lot area
13 anywhere in the R-4, when you change those
14 uses, I think, we need to come to the Board
15 for lot area relief. That's just another
16 factor that we had to look at in terms of what
17 you do here.

18 In terms of the substantial
19 detriment, as we have said, we are going to
20 put two units in there replacing the church.
21 While both the church is a matter-of-right and
22 residential is a matter-of-right, obviously,

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1 having two units in that space is going to be
2 a less intense use of that part of the
3 building than having a church that could
4 accommodate 74 people.

5 Now, the 74 people aren't going to
6 be there perhaps as many hours of the day as
7 the residents of the apartment house,
8 apartment units would be, but it's still a
9 substantially smaller number of people and
10 less likely to have an impact and more likely
11 to be what is desirable in an R-4 District.

12 As we have said, there will be no
13 increase in the building square footage. That
14 would be tough given that we already occupy
15 100 percent of the lot, but we could try, I
16 guess.

17 And that the units are of
18 appropriate size for one and two bedroom
19 apartments. The plans that you have in front
20 of you clearly show what can be fitted in the
21 building and then that doesn't seem to be
22 overcrowding the space, in my opinion.

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1 So I conclude, therefore, that the
2 property is small and improved with a
3 relatively large building, that it is unlike
4 any other property in the vicinity, that the
5 practical difficulty results from the need to
6 support the cost to acquire and renovate the
7 property and achieve a sufficient economic
8 return to justify the investment along with
9 the other factors that we have mentioned.

10 That approval will replace the
11 more intense church use with two additional
12 permanent residential units. And I would just
13 note that the purpose of the variance relief
14 is to provide a constitutional safety valve.

15 It's in part to prevent usable
16 land and buildings from remaining idle. Now,
17 this property has been vacant for about eight
18 years, at this point, and has not really had
19 consistent permanent use for quite a longer
20 period than that.

21 So for all those reasons, I
22 believe that the application meets the test

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1 under the variance provisions and should be
2 granted.

3 CHAIRPERSON MOLDENHAUER: Thank
4 you very much, Mr. Sher. Does the applicant
5 have any additional documentation or evidence
6 to present?

7 MR. FREEMAN: That concludes our
8 direct presentation. I will probably submit
9 some stuff after the Office of Planning goes,
10 but that concludes our direct presentation,
11 Madam Chair.

12 CHAIRPERSON MOLDENHAUER: Thank
13 you very much. Are there any questions for
14 any of the witnesses by the Board?

15 COMMISSIONER SCHLATER: One
16 question. Is the building under construction
17 presently?

18 MR. BONNET: Yes. We received a
19 DCRA permit in order to stabilize and maintain
20 the needed repairs and the structural
21 integrity of the building, as I noted before,
22 because of its vacancy, there is a lot of

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1 structural issues, so the building would not
2 collapse in on itself. So, yes, we have got
3 that approved by DCRA to do that.

4 COMMISSIONER SCHLATER: Very good.
5 Thank you.

6 CHAIRPERSON MOLDENHAUER: I just
7 have one question. Mr. Sher testified as to
8 the large scale aspect of this building on the
9 site compared to all the other units or all
10 the other properties in the area.

11 Do you feel that because of the
12 extensive, I guess, floor area, I know FAR
13 isn't actually a factor in an R-4 Zone, but
14 because of that, do you think that there would
15 be a detriment to the public good with that
16 extra number of units or how do you address
17 that?

18 MR. SHER: I would say that given
19 the fact that this building has been here
20 since 1900 more or less, early 1900s, that you
21 are not looking at a situation where someone
22 is coming in to propose to overcrowd a site

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1 that doesn't already have that condition.

2 So the question is you've got a
3 building that is 3 FAR or three some hundred
4 square feet, what do you do with it? The
5 approved uses, even though the property has
6 been vacant for some time, are a flat, two
7 units on the second and third floor and the
8 church on the first floor.

9 So your choice if you are any
10 property owner, not necessarily this property
11 owner, but any property owner is that's what
12 you can do with it as of right. You don't
13 have to ask anybody's permission to do that.
14 If you can find a church to go in there, if
15 you can fix the two units up and make them
16 habitable and rentable again, that's what you
17 can do.

18 So what we are looking at in terms
19 of responding to the integrity of the Zone
20 Plan is what is the basic premise of R-4? R-4
21 is a Residential District. It is a Row House
22 Residential District that allows conversions

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1 of buildings to apartments.

2 Clearly, if we met the 900 square
3 foot per unit rule, we wouldn't be here. So
4 we need a variance. But the variance is to
5 permit a use which is integral to what an R-4
6 District is all about. And to take out a
7 church, which is also again permitted in R-4,
8 but we think represents a more intense use of
9 those two floors.

10 So we think going to two units
11 there is a step in the direction of
12 conformance with what the R-4 Zone is all
13 about.

14 CHAIRPERSON MOLDENHAUER: So you
15 don't feel that changing from a flat and
16 church to four units would actually create any
17 detriment to the public good? Do you think
18 that it actually would potentially decrease
19 the use?

20 MR. SHER: I would say that, yes.
21 I do say that.

22 MR. FREEMAN: Could I just say one

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1 thing? If you looked at it, it's changing.
2 We're not changing from a flat, because a flat
3 will stay there, which is we are changing the
4 church into two additional units. So we look
5 at it as adding two units, which is a little
6 different, but I think a better way to look at
7 it.

8 CHAIRPERSON MOLDENHAUER: I think
9 that my statement was it's currently and it
10 could continue to be used as a church and a
11 flat. And then now, it would be that opposed
12 to the future use potentially, based on this
13 application's request, a four-unit apartment.
14 So that was my statement.

15 If there are no additional
16 questions, then -- oh, we do have one more
17 question.

18 VICE CHAIRMAN DETTMAN: Just one
19 simple question. Mr. Bonnet, have you ever
20 looked at the historical uses of the building?
21 What it was used as prior to a church or a
22 flat or why it was originally constructed?

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1 MR. BONNET: Yes, for apartment
2 complex. And when we were looking at the
3 building during the, I guess, purchase time,
4 you could see that the layout of the building
5 on each floor, every floor, had bathrooms and
6 kitchens. And the basement had kitchens, you
7 know, stub-outs, but they were removed, the
8 same as the first floor.

9 So at one point before the church
10 moved in in the 1950s, it was used as
11 apartment complex.

12 VICE CHAIRMAN DETTMAN: Is there
13 any remaining evidence where the upper, the
14 egress to the upper floors was provided? Like
15 where the stair was? Was it in the center of
16 the building? Originally, where was the stair
17 providing access to the upper floors?

18 MR. BONNET: Oh, on the left hand
19 side.

20 VICE CHAIRMAN DETTMAN: Okay.

21 MR. BONNET: Where it exists in
22 the plans as we show, so that doesn't change.

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1 VICE CHAIRMAN DETTMAN: Okay.

2 CHAIRPERSON MOLDENHAUER: At this
3 point in time, we will turn to the Office of
4 Planning for their report.

5 MR. JESICK: Thank you, Madam
6 Chair and Members of the Board. My name is
7 Matt Jesick.

8 As with any variance application,
9 we analyzed this application using the three
10 part test described in the Zoning Regulations.

11 The Office of Planning did find that the
12 property exhibits a number of unusual
13 features.

14 As has been described already, it
15 is unusually small for the neighborhood. The
16 building occupies 100 percent of the lot. And
17 it is also unusual in that it has two existing
18 Certificates of Occupancy, of course, for a
19 church and a flat.

20 However, none of the circumstances
21 listed above, in our view, lead to a practical
22 difficulty related to the relief being

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1 requested.

2 The written statement submitted by
3 the applicant focuses on two main arguments.
4 The first is that BZA relief would be needed
5 to put any use other than a church in the
6 cellar and first floor.

7 The Office of Planning disagrees
8 with that assessment. We feel that section
9 401.1 does not apply and that the existing
10 flat could be expanded as a matter-of-right.
11 And I confirmed that interpretation with the
12 Zoning Administrator just yesterday in a
13 conversation.

14 The other comment made by the
15 applicant in their written statement regarding
16 the practical difficulty is that a reasonable
17 return on investment would not be possible,
18 given the circumstances of the property. At
19 the time we issued our written report, we did
20 not have this economic evaluation.

21 So at that time, we felt that
22 there was not enough evidence to support that

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1 claim. We cannot evaluate this economic
2 assessment on the spot, so I'll have to rest
3 on that point for the time being.

4 On the third part of the test, of
5 course, redevelopment of a vacant structure
6 would be, in general, a benefit to the
7 neighborhood. However, we feel that the
8 conversion to a four-unit apartment building
9 would be -- would impair the intent of the
10 Zoning Regulations.

11 The R-4 Zone is not intended to be
12 an apartment zone, such as the R-5 District.
13 And, in fact, in 2007, the Zoning Commission
14 approved a text amendment to reinforce the 900
15 square foot minimum lot area per unit for any
16 conversion. And that amendment, again,
17 reinforced that projects such as this should
18 not be permitted.

19 Therefore, the Office of Planning
20 is recommending denial of the application.
21 But I would be happy to take any questions.

22 COMMISSIONER SCHLATER: Mr.

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1 Jesick, I just have a question. I guess on
2 the second prong, the economic analysis speaks
3 for itself, I think, with respect to that.
4 And I respect your withholding judgment until
5 further review.

6 I do have a question on the third
7 prong, the substantial detriment. OP is
8 making the argument that it would harm the
9 public good just because the use is
10 inconsistent with zoning. But isn't that the
11 purpose of coming here for a variance? I
12 mean, the variance process does allow you to
13 not conform to the strict zoning of the
14 property, does it not?

15 And, I guess, the second prong of
16 that question is does any time somebody comes
17 forward for a variance, does that mean they
18 are harming the public good, because they are
19 not consistent with zoning?

20 MR. JESICK: No. And perhaps I
21 didn't word it clearly in the report. I think
22 the R-4 Zone is intended to protect and

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1 promote single-family residences or flats or
2 associated uses, such as churches or schools.

3 And of course, if you vary
4 slightly from the area requirements of that
5 zone, there is probably not going to be a
6 major impact.

7 In this case, we see a major
8 variance from the 900 square foot lot area
9 requirement per unit.

10 COMMISSIONER SCHLATER: Yes.

11 MR. JESICK: In fact, they are
12 only at 224 square feet per unit, which is a
13 75 percent variance. You know, if it were a 5
14 percent variance or a 10 percent variance, we
15 might look at it differently on the public
16 good.

17 Now, the intent, of course, of the
18 R-4 Zone is to minimize the R-4 conversions.
19 So I think when you look at the third part of
20 the test, we looked at both not only the
21 public good, but also what is the intent of
22 the Zoning Regulations.

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1 COMMISSIONER SCHLATER: Do you
2 think the fact that the building was built, it
3 would appear, as an apartment building
4 whenever it was built in the 1920s as a
5 mitigating factor on that? It's not as if
6 they are building a new apartment building
7 from the ground up. It's an existing
8 structure and a nice looking one at that.

9 MR. JESICK: It is a very nice
10 looking structure. I think, you know, we took
11 that into account, but, in our opinion, that
12 didn't outweigh the existence currently of the
13 R-4 Zone on the property.

14 When it was built, it was not
15 zoned, you know, R-4, obviously. But that
16 zone is in place and it is intended to
17 maintain more of a single-family character
18 within the neighborhood.

19 COMMISSIONER SCHLATER: I guess my
20 last question is what is the specific harm of
21 having a four-unit apartment building there
22 relative to two flats? How is the community

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1 going to be harmed by that situation?

2 MR. JESICK: Well, I don't think
3 the harm would be something like traffic
4 impacts or anything like that. I think it
5 gets more to, again, the intent of the R-4
6 Zone to promote more single-family dwellings
7 and, of course, the policy of the District to
8 attract single-family, you know, uses to our
9 neighborhoods. And this is an erosion of the
10 intent of the R-4 Zone.

11 COMMISSIONER SCHLATER: Okay. To
12 me, that seems like just standing on
13 principle, but that's just my own personal
14 opinion.

15 MEMBER SORG: I just have one
16 follow-up question to the last response in
17 which you sort of referenced the idea of
18 trying to attract single-family homes and
19 residences into the District. But it seems
20 that it already is a two flat dwelling. You
21 know, it doesn't seem terribly relevant. Is
22 that incorrect?

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1 MR. JESICK: I think the way we
2 looked at it is they have a flat right now
3 that could be expanded as a matter-of-right to
4 provide a reasonable use for the property.
5 Those units would be larger as the applicant
6 has, of course, demonstrated.

7 Larger units tend to attract more
8 of a family-type tenant. And in the R-4 Zone,
9 you know, that is the intent of the R-4 Zone
10 to have either a single-family residence or
11 slightly smaller flats.

12 So I think that was our intent in
13 analyzing it in that fashion.

14 CHAIRPERSON MOLDENHAUER: Thank
15 you very much, Mr. Jesick, for your report.
16 And, at this point in time, we would turn to
17 the ANC. Is the ANC present?

18 Not seeing the ANC present, then
19 we will reference our Exhibit No. 24, which is
20 a letter from the ANC that is dated March 31st
21 referencing ANC-5C. They met on March 16th
22 and had a regularly scheduled meeting that was

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1 duly noticed and there was a quorum present of
2 ten Commissioners.

3 And they voted to support the
4 application. And this letter satisfies all of
5 our requirements and would be given great
6 weight.

7 At this point in time, we will
8 turn to any parties in support or in
9 opposition. And seeing none in the audience,
10 then we will go to any closing remarks by the
11 applicant.

12 MR. FREEMAN: Thank you, Madam
13 Chair. I just had a couple of points I wanted
14 to follow-up on in response to some of the
15 issues raised in the Office of Planning
16 report.

17 After getting the report and in
18 preparing for the case, we looked through
19 previous section 401.3 cases that the Board
20 considered and how the Board dealt with those
21 cases.

22 I mentioned one and Mr. Sher is

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1 handing out a copy of those cases. It's not
2 as bad as it looks really, because I flagged
3 the pages and I will show you what I'm going
4 to talk about.

5 The point is very simple. In
6 three of those cases, all of which were after
7 2007, we had the same exact issue in which the
8 Office of Planning, as a policy perspective,
9 opposed those variances.

10 And the Board still kind of
11 granted those upon proof, which we believe we
12 have met that proof in this case.

13 One of those cases it's
14 interesting to note is in the same exact
15 square as the subject property. And another
16 case it's also interesting to note that the
17 Board raised, Commissioner Schlater, the same
18 exact issue that you raised with respect to
19 the third prong of the variance test.

20 I tried to excerpt the point, the
21 portions which I think are most relevant here,
22 so I will go through quickly in

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1 acknowledgement of the time here.

2 Application 17879, that just shows
3 that the case was approved. Attached to that
4 is an excerpt of the transcript. On page 65
5 of the transcript, there should be an arrow
6 next to a portion in which the applicant says
7 it's not -- and of course, the facts are
8 different in each case. I'm not suggesting
9 that our facts are exactly the same as the
10 facts in any of these cases.

11 But the applicant did say, first,
12 again, "It's not financially viable without
13 the third unit." There were some
14 affordability requirements in that case, which
15 are not applicable here.

16 And then once you get into the
17 Board's deliberation beginning on page 113 of
18 the transcript, the Board says "With respect
19 to practical difficulty, we have testimony
20 from the applicant that this property would,
21 in all likelihood, remain vacant if relief
22 were not to be granted and they would have to

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1 abandon the project," which again is the exact
2 case here.

3 On page 116, again, from the Board
4 they state "And even if we don't have a
5 proforma, I'm convinced that the information
6 that we do have in the record is sufficient to
7 conclude that if we deny the relief, it
8 wouldn't be economically feasible to restore
9 the property."

10 Again, that's I think pretty much
11 the same thing Mr. Bonnet just said.

12 With respect to Application No.
13 17873, again, you will see it was a variance
14 from section 401.3 to convert a building from
15 a two-unit dwelling to a three-unit dwelling.

16 The Office of Planning submitted a
17 report in opposition to the application. The
18 Board approved the application. On page 98 of
19 the transcript, and this is the case I was
20 referring to, the Office of Planning,
21 basically, takes the same position that a
22 variance is inconsistent with the zone from

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1 this requirement and inconsistent with the
2 Zone Plan.

3 Page 99 of that transcript, the
4 Chairperson says "Okay. Again, I mean, it
5 seems that in any case then a variance would
6 be detrimental to the Zone Plan," which is
7 what you just said, Mr. Schlater. And then on
8 page 101, Commissioner Turnbull, who sat on
9 the case amending the Zoning Regulations,
10 says, basically, "Just because we changed the
11 regulations don't mean we cannot continue to
12 proceed with the variance from that section."

13 I'm not going to go through them
14 all. I think you have them in front of you.
15 But I would just like to make sure you see
16 Application 17298, which, again, partial
17 support from the Office of Planning, same
18 exact square, but was still approved for the
19 same exact relief.

20 So I think in just conclusion, I
21 think, we have -- definitely appreciate the
22 Office of Planning's review and comments to

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1 our application. We try to work with them and
2 Matt has been good at reviewing the
3 information we provided.

4 So it has been great working with
5 them, as always, but we fundamentally
6 disagree. I think as you have heard today, we
7 have presented substantial evidence on each
8 prong of the variance test. We think we meet
9 the burden as has been applied by the Board
10 and confirmed in a number of other cases that
11 you have considered.

12 And we would respectfully urge or
13 ask the Board to approve this case as well.
14 Thank you.

15 CHAIRPERSON MOLDENHAUER: Thank
16 you very much. At this point in time, the
17 hearing portion of this case has then been
18 concluded. Let me thank the applicant and let
19 me thank the Office of Planning for providing
20 their testimony.

21 I believe that the Board Members
22 feel that the record has been sufficient and

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1 is full and we can move forward to a
2 deliberation in this case.

3 I believe that Vice Chair Dettman
4 will start us off in the deliberation.

5 VICE CHAIRMAN DETTMAN: Thank you,
6 Madam Chair. I'll quickly summarize that this
7 is a request to establish a four-unit
8 apartment building located at 304 Q Street,
9 N.W., which is located in the R-4 Zone.

10 The requirement in order to
11 establish an apartment building in the R-4
12 Zone, as the regs lay out for us, the building
13 has to be a pre-1958 structure and then there
14 has to be 900 square feet of land area
15 provided per unit, which is the reason why the
16 applicant is here before us to request a
17 variance.

18 The lot area of the subject
19 property is 896 square feet. And so it is
20 improved with an existing structure that is
21 circa 1900 that occupies 100 percent of the
22 lot.

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1 As you stated, Madam Chair, the
2 standard with which we are going to review
3 this case is the area variance. And so the
4 applicant has to demonstrate a practical
5 difficulty.

6 And just simply referring to Mr.
7 Sher's outline here where he has laid out the
8 three prongs of the variance test, I do think
9 that the property does demonstrate some
10 exceptional conditions. The lot, as I stated,
11 is very, very small. It is improved with 100
12 percent lot occupancy.

13 And the building in and of itself,
14 you know, the exceptional situation doesn't
15 specifically have to go to the land. It can
16 go to the improvements on the land. And just
17 simply looking at this building, it was
18 originally constructed, per the testimony of
19 Mr. Bonnet, as an apartment building and
20 through the years has been used as a flat and
21 a church and has lain vacant for quite some
22 time.

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1 So I think really the exceptional
2 situation comes from the fact that it is
3 extremely small and that the improvements on
4 the property occupying 100 percent of the lot
5 are of a scale and a size that do create an
6 exceptional situation.

7 If the regulations were strictly
8 applied to put this thing to a single-family
9 residential use or even a flat, an expanded
10 flat which would result in, I would probably
11 say, two units that would be somewhere between
12 1,600 and 1,800 square feet each, I think that
13 that would present a practical difficulty,
14 especially in light of the economic
15 feasibility analysis that was provided to us
16 today.

17 I think the economics of the
18 project is the real practical difficulty. I
19 think that it is not possible to increase the
20 lot area. The floor area of the building in
21 proportion to the lot area is
22 disproportionate.

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1 I think that those are reasons why
2 the applicant is actually here. I don't think
3 they are actually practical difficulties. And
4 so again, it's really the economics of the
5 project.

6 With respect to the third prong,
7 no substantial detriment to the public good
8 and would not compromise the intent, purpose
9 and integrity of the Zone Plan, I do tend to
10 agree with the Office of Planning that it is
11 important to protect the R-4 and that's why
12 the regulations were amended in 2007.

13 But I think that the true purpose
14 of the 900 square feet of lot area per unit is
15 really a substantial response to that
16 occurrence that was happening in the R-4 where
17 these row houses, these typical row houses
18 were being chopped up into multiple units and
19 then you were getting the pop-up scenario and
20 everything like that.

21 In this situation, you have a
22 building that simply by looking at it, it

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1 wants to be an apartment building. And, in
2 fact, it has been an apartment building. And
3 so I think given the scale and the density of
4 the surrounding neighborhood, I think
5 establishing an apartment building in this
6 area, in this particular property would not
7 have a substantial detriment to the public
8 good.

9 In fact, it would be an
10 improvement to the public good, because we are
11 actually putting a vacant property back to a
12 productive use.

13 And I think that there are enough
14 exceptional conditions on this property, in
15 particular, to the improvements on the
16 property that would differentiate this
17 particular request to, you know, any other
18 further requests for a variance of the same
19 nature.

20 So with that, Madam Chair, I'll
21 turn it back to you. I'm in support of the
22 project and prepared to make a motion.

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1 CHAIRPERSON MOLDENHAUER: Any
2 additional deliberations from any other Board
3 Members?

4 I would agree with Mr. Dettman. I
5 feel that you have provided a very thorough
6 analysis. I would just like to add that there
7 was, you know, no parties in opposition today.

8 We do have an ANC report which indicates that
9 they should receive great weight, our Exhibit
10 No. 24, and they are providing their support
11 for some of the same reasons that Mr. Dettman
12 articulated.

13 Mr. Freeman presented on behalf of
14 the applicant a number of different cases
15 that, I think, go to the second and third
16 prong. And while most of them are all summary
17 orders, so we can't dive into the details of
18 those cases in this short period of time in
19 order to review them, I do think that there
20 was one case in which it addresses most
21 importantly the issue that OP articulates in
22 their third prong, their reason for or one of

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1 the reasons that they felt that we should deny
2 it, which is Application 17873, where Mr.
3 Turnbull says that the, you know, change in
4 the regs did not actually require that any
5 such instance of this would be denied, but
6 rather that it was a concern of the rapid
7 change in that area and types of property.

8 And I think Mr. Dettman's comments
9 in that regard actually spell out that, you
10 know, we have to review each of these cases on
11 a case-by-case basis. And this application
12 does present very unique circumstances where
13 there was a building that, as you said, looks
14 like an apartment. It was previous used as an
15 apartment, from what the applicant indicated.

16 And I think it does meet all three prongs of
17 the variance test.

18 And at that point, I will open up
19 to the Board for any additional deliberations.

20 Seeing none, then if there is a motion?

21 VICE CHAIRMAN DETTMAN: Thank you,
22 Madam Chair. Just noting quickly that the

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1 application does have the support of the ANC,
2 that's ANC-5C, and that's our Exhibit No. 24.

3 And so with that, I would move for
4 approval of Application No. 18055 to permit a
5 four-unit apartment building in the R-4
6 District located at 304 Q Street, N.W.

7 COMMISSIONER SCHLATER: I'll
8 second that.

9 CHAIRPERSON MOLDENHAUER: The
10 motion has been made and seconded. Any
11 further deliberation?

12 All those in favor say aye.

13 ALL: Aye.

14 MS. BAILEY: Madam Chair, the vote
15 is recorded as 4-0-1 to grant the application.

16 Mr. Dettman made the motion, Mr. Schlater
17 seconded, Mrs. Sorg, Mrs. Moldenhauer support
18 the motion.

19 Is this a summary order, Madam
20 Chair?

21 CHAIRPERSON MOLDENHAUER: Yes, we
22 would like to waive the requirements and

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1 request a summary order.

2 MS. BAILEY: And also, Mr. Sher
3 will be providing his r  sum  ?

4 CHAIRPERSON MOLDENHAUER: Yes.

5 MS. BAILEY: Thank you.

6 CHAIRPERSON MOLDENHAUER: Thank
7 you. I believe we can call the last case for
8 the morning agenda.

9 MS. BAILEY: Thank you, Madam
10 Chair. It's Application 18056. This is the
11 Application of Michael L. Williams, and it's
12 pursuant to 11 DCMR ' 3104.1, for a special
13 exception to allow a free-standing rear
14 carport serving an existing one-family row
15 dwelling under subsection 2300.8. The
16 property is Zoned R-4. It is located at 637
17 Girard Street, N.E., Square 3641, Lot 63.

18 Just very quickly, Madam Chair,
19 the applicant did file the Affidavit of
20 Posting on this case. However, unfortunately,
21 the affidavit did not have the date when the
22 property was posted. So perhaps at some point

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1 the applicant can clarify.

2 CHAIRPERSON MOLDENHAUER: Thank
3 you very much. At this point in time, the
4 applicant can introduce himself.

5 MR. WILLIAMS: Good morning.

6 CHAIRPERSON MOLDENHAUER: Oh, you
7 need to turn your mike on.

8 MR. WILLIAMS: Good morning, Madam
9 Chair and ladies and gentlemen of the Board.
10 My name is Michael Williams and I reside at
11 637 Girard Street, N.E. And I am here today
12 to request your approval for special exception
13 relief for the construction of a free-standing
14 carport.

15 CHAIRPERSON MOLDENHAUER: Oh,
16 thank you very much, Mr. Williams. I believe
17 that the record is actually very full in this
18 case. So if you would like, you can either
19 provide a short summary or if you would like
20 to rest on the record, that's completely up to
21 you.

22 MR. WILLIAMS: Okay. Well, I can

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1 just clarify as far as the date that the sign
2 was posted.

3 CHAIRPERSON MOLDENHAUER: That
4 would be great. Thank you.

5 MR. WILLIAMS: The sign was posted
6 on Sunday, April 4th around 1:00 p.m. And the
7 application with the notary stamp and the
8 photos of the sign were submitted to the
9 Office of Planning or excuse me, the Zoning on
10 Monday, April 5th.

11 CHAIRPERSON MOLDENHAUER: Thank
12 you for that clarification. Then I believe
13 that confirms that the posting was done within
14 sufficient time and we can then move forward.

15 MR. WILLIAMS: Okay. Well, I
16 attended an ANC meeting on April 7th and on
17 April 7th the ANC, which is 5C, they had a
18 quorum and they had unanimous support for my
19 carport. It was not out of the ordinary.
20 There are several carports in my alley in
21 addition to garage structures that have been
22 there for, I guess, decades.

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1 Let's see, I have received a
2 document from the Board of Zoning Adjustment
3 that says that the Office of Planning
4 recommends approval for the special exception
5 for the free-standing carport.

6 As far as meeting many of the
7 tests, the -- as far as being attached to the
8 building, the case manager came out and he did
9 see that it would be impossible to attach the
10 structure to my home. It would require
11 destroying the land, the flagstone patio and
12 the access from the basement. So that's not
13 practical.

14 There is no problem with egress or
15 ingress from the 20 foot wide alley. I do
16 have an existing carport pad that is concrete
17 and the carport structure will be anchored to
18 that pad, so there will be no blocking or no
19 curb cuts or anything necessary.

20 There is no requirement for
21 additional parking anywhere outside of my lot
22 and square. And I just ask that you support

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1 this carport being constructed on my property.

2 CHAIRPERSON MOLDENHAUER: Thank
3 you very much. Are there any questions for
4 the applicant?

5 Seeing none, then, at this time,
6 what we will do is we will proceed on to the
7 Office of Planning for their report.

8 MR. JACKSON: Thank you, Madam
9 Chair and Members. I would just like to
10 briefly summarize the Office of Planning's
11 report by saying we stand on the record. We
12 recommend approval and we don't see that there
13 are any negative impacts with regard to this
14 application.

15 We noted in the report that we did
16 ask for clarification from the Office of
17 Zoning from the Zoning Administrator, about
18 whether this can be considered in another --
19 as an allowable use as a matter-of-right.
20 However, it is stated clearly in the
21 regulations that a carport separate from the
22 building is subject to special exception

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1 approval. And we do support approval of that
2 special exception.

3 CHAIRPERSON MOLDENHAUER: Thank
4 you very much. Are there any questions for
5 the Office of Planning from any Board Members?
6 Seeing none, oh, there may be one.

7 VICE CHAIRMAN DETTMAN: Actually,
8 it's a question for the applicant, Madam
9 Chair.

10 CHAIRPERSON MOLDENHAUER: Yes.

11 VICE CHAIRMAN DETTMAN: Did you
12 discuss the application with your adjacent
13 neighbors? And did you go before the ANC?

14 MR. WILLIAMS: Yes. I did go
15 before the ANC. And I spoke to my neighbors
16 directly on either side of me. My ANC Single
17 District Member, Mr. Silas Grant, actually put
18 together a survey and walked around and got
19 signatures. There were no dissents. No one
20 was against it.

21 There were -- I think he sent out
22 25 surveys and he received 18 back all in

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1 support. And he was -- they were supposed to
2 -- this thing keeps fading out. They were
3 supposed to submit a document in support on
4 April 9th, I believe, which would have been a
5 Friday after we met on April 7th.

6 CHAIRPERSON MOLDENHAUER: I don't
7 believe that we have that. Did the Office of
8 Planning receive any communication from the
9 ANC?

10 MR. JACKSON: No, we did not.

11 CHAIRPERSON MOLDENHAUER: Okay.
12 Yes, I mean, we will just take your testimony
13 that you did go and meet with the ANC and that
14 they were in support.

15 MR. WILLIAMS: Okay. In fact, I
16 was in one meeting with the prior witness here
17 and we are in the same ANC-5C. And so we have
18 the same representatives and Chairman, but we
19 have different Single Member District
20 individuals.

21 CHAIRPERSON MOLDENHAUER: Okay.
22 Thank you for that clarification.

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1 At this point in time, we will go
2 to any members in support or opposition in the
3 audience.

4 And seeing that there are none, we
5 would then turn back to the applicant, if he
6 chooses to make any closing statements.

7 MR. WILLIAMS: Please, support the
8 approval of the carport.

9 CHAIRPERSON MOLDENHAUER: Thank
10 you very much. Are there any final questions
11 for the applicant from Board Members?

12 Seeing none, then, at this point
13 in time, we will conclude the hearing portion
14 of this testimony of this case and I believe
15 that we are able to move onto deliberations.
16 And I believe that Ms. Sorg will start us off
17 on the deliberations.

18 MEMBER SORG: Okay. Thank you.

19 CHAIRPERSON MOLDENHAUER:
20 Actually, I will start us off on the
21 deliberations. We are deliberating the Case
22 of 18056, which is a special exception under

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1 2300.8, to allow the erection of a carport
2 over an existing parking pad in the rear of
3 the subject property at 637 Girard Street,
4 N.E.

5 And the application has gone
6 through all of the requirements under section
7 3104.1 and 2116.5, and this articulates
8 whether or not the carport could be located
9 adjacent to the property and the applicant has
10 articulated the fact that that would not be
11 reasonable, that the lack of alley or the lack
12 of appropriate ingress and egress to the
13 existing proper alley and that's not
14 applicable to this case.

15 But what is applicable to this
16 case is subsection (d), which states that
17 locating a parking space somewhere else on the
18 lot or on another lot would result in a more
19 effective use of or better design and
20 landscaping. And that is the case here in
21 which providing a carport at the rear of the
22 alley versus closer in on the property would

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1 be more efficient and would provide less
2 adverse impact to the neighborhood.

3 And the applicant has gone through
4 all of the other prongs of the test. And for
5 purposes of the deliberation, I would
6 incorporate the Office of Planning's very full
7 report in this, which is Exhibit No. 24.

8 In addition to that, the applicant
9 has testified that he had met with his
10 neighbors and that he had attended an ANC
11 meeting where they had presented a survey and
12 most of the neighbors, were in support of
13 that, who filled out the survey. And that the
14 current carport would conform with the
15 requirements under the section and that it
16 would simply provide him coverage on his
17 current parking pad and would not require him
18 to demo or take out a form of egress or his
19 grass area that he currently has.

20 For the above reasons, I would
21 support this application. And I'll open up
22 the deliberation to any additional Board

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1 Members.

2 Seeing no additional Board
3 Members, at this time, I'll make a motion to
4 approve Application 18056, for a special
5 exception under 2300.8, to allow the erection
6 of a carport on an existing parking pad. Do I
7 have a second?

8 MEMBER SORG: Second.

9 CHAIRPERSON MOLDENHAUER: A motion
10 has been made and seconded.

11 All those in favor say aye.

12 ALL: Aye.

13 CHAIRPERSON MOLDENHAUER: Can you,
14 please, back the record?

15 MS. BAILEY: With pleasure, Madam
16 Chair. The vote is recorded as 4-0-1 to grant
17 the application. Mrs. Moldenhauer made the
18 motion, Ms. Sorg seconded, Mr. Dettman and
19 Schlater support the motion. A third Mayoral
20 Appointee is not sitting at this time.

21 CHAIRPERSON MOLDENHAUER: Thank
22 you very much. We would like to waive our

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1 requirements and have a summary order.

2 MS. BAILEY: Summary order it is,
3 Madam Chair.

4 CHAIRPERSON MOLDENHAUER: Thank
5 you very much. Thank you very much. And
6 congratulations.

7 MR. WILLIAMS: All right. Thank
8 you.

9 CHAIRPERSON MOLDENHAUER: I
10 believe that concludes our morning agenda.
11 And so we will end our morning session until
12 1:00 this afternoon. Thank you.

13 (Whereupon, the Public Hearing was
14 recessed at 12:06 p.m. to reconvene at 1:50
15 p.m. this same day.)

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

2 1:50 p.m.

3 CHAIRPERSON MOLDENHAUER: This
4 hearing will, please, come to order. Good
5 afternoon, ladies and gentlemen. This is the
6 April 20, 2010 Public Hearing of the Board of
7 Zoning Adjustment for the District of
8 Columbia.

9 My name is Meridith Moldenhauer,
10 Chairperson. Joining me to my right is Vice
11 Chair Shane Dettman, a representative of the
12 National Capital Planning Commission. To my
13 left is Nicole Sorg, Mayoral Appointee.

14 Copies of today's hearing agenda
15 are available to you and are located to my
16 left in the wall bin near the door. Please,
17 be aware that this proceeding is being
18 recorded by a Court Reporter and is also
19 webcast live. Accordingly, we must ask you to
20 refrain from any disruptive noises or actions
21 in the hearing room.

22 When presenting information to the

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1 Board, please, turn on and speak into your
2 microphone, first, stating your name and home
3 address. When you are finished speaking,
4 please, turn off your microphone, so that your
5 microphone is no longer picking up any sound
6 or background noise.

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

15 The order of procedure for special
16 exceptions and variances is: Statement and
17 witnesses of the applicant; Government
18 reports, including the Office of Planning and
19 Department of Public Works; Report from the
20 ANC; Parties and persons in support; Parties
21 and persons in opposition; and then closing
22 remarks by the applicant.

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1 The order of procedure for an
2 appeal application will be as follows: One,
3 statement and witnesses of the appellant; Two,
4 the Zoning Administrator or the Government
5 official's case; Three, cases of the owner,
6 lessee or operator of the property involved,
7 if not the appellant; Four, the ANC within
8 which the property is located; Five,
9 intervenors in the case, if permitted by the
10 Board; and then, six, rebuttal and closing
11 statements by the appellant.

12 Pursuant to Sections 3117.4 and
13 3117.5, the following time constraints will be
14 maintained: The appellant, applicant, persons
15 and parties, except an ANC, in support,
16 including witnesses will have 60 minutes
17 collectively. Appellees, persons and parties,
18 except an ANC, in opposition, including
19 witnesses will have 60 minutes collectively.
20 Individuals will have 3 minutes.

21 These time restrictions do not
22 include cross-examination or questions from

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1 the Board. Cross-examination of witnesses is
2 permitted by the applicant or parties. The
3 ANC within which the property is located is
4 automatically a party to a special exception
5 or variance case.

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

10 The record will be closed at the
11 conclusion of each case, except for any
12 material specified by the Board. The Board
13 and the staff will specify at the end of each
14 hearing exactly what is expected and the date
15 when the persons must submit the additional
16 evidence to the Office of Zoning. After the
17 record is closed, no other information will be
18 accepted by the Board.

19 The Sunshine Act requires that the
20 Public Hearing on each case be held in the
21 open before the public. The Board may,
22 consistent with it's Rules of Procedure and

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1 the Sunshine Act, enter Executive Session
2 during or after the Public Hearing on a case
3 for purposes of reviewing the record and
4 deliberating on the case.

5 The decision of the Board in these
6 contested cases must be based exclusively on
7 the public record. To avoid any appearance to
8 the contrary, the Board requests that persons
9 present do not engage the Members of the Board
10 in conversation.

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

14 The Board will make all efforts to
15 conclude the Public Hearing as near to as
16 possible to 6:00 p.m. If the afternoon cases
17 are not completed by 6:00 p.m., the Board will
18 assess whether it can complete the pending
19 case or cases that are remaining in the
20 agenda.

21 At this time, the Board will
22 consider any preliminary matters. Preliminary

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1 matters are those that relate to whether a
2 case will or should be heard today, such as
3 requests for postponement, continuance or
4 withdrawal or whether the proper and adequate
5 notice for the hearing was given. If you are
6 not prepared to go forward with a case today
7 or if you believe that the case should not
8 proceed, now is the time to raise such
9 matters.

10 Does the staff have any
11 preliminary matters?

12 MS. BAILEY: Madam Chair, good
13 afternoon.

14 CHAIRPERSON MOLDENHAUER: Good
15 afternoon.

16 MS. BAILEY: No, Madam Chair, we
17 do not.

18 CHAIRPERSON MOLDENHAUER: Okay.
19 Then all those in the audience who will be
20 testifying, please, stand to take the oath.

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

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1 (Whereupon, the witnesses were
2 sworn.)

3 MS. BAILEY: Thank you.

4 CHAIRPERSON MOLDENHAUER: And
5 those who are testifying for the Royle case,
6 can you stand just so I can see who it is?
7 Okay. I know that we told Friends of Francis
8 that you guys were going to go first, but I
9 think the prior case is going to be able to go
10 through very quickly. So we can have that
11 application called and those parties can come
12 forward, please.

13 MS. BAILEY: Madam Chair, we're
14 calling the Royle case?

15 CHAIRPERSON MOLDENHAUER: Yes,
16 please.

17 MS. BAILEY: Okay. Application
18 18040, David and Cornelia Royle, pursuant to
19 11 DCMR ' 3104.1, for a special exception for
20 a rear addition to an existing one-family
21 detached dwelling under section 223, not
22 meeting the side yard requirements, that's

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1 section 405. The property is Zoned R-1-B. It
2 is located at 5415 Potomac Avenue, N.W.,
3 Square 1443, Lot 822.

4 CHAIRPERSON MOLDENHAUER: Thank
5 you. Will the parties introduce themselves?

6 MS. RODDY: Hi, my name is
7 Christine Roddy and I'm an attorney with
8 Goulston & Storrs.

9 MS. ROYLE: My name is Lia Royle
10 and my husband and I own the house that is the
11 subject of this application.

12 MR. GORMAN: My name is Joseph
13 Gorman. I'm an architect working on the
14 project.

15 CHAIRPERSON MOLDENHAUER: Thank
16 you. And as I said earlier, I think that the
17 record is very full on this case. So if you
18 would like, you can either rest on the record
19 or if you would like to present your case.

20 MS. RODDY: We are comfortable
21 resting on the record. If you have any
22 questions, we are happy to take them, but we

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1 do believe that we have put everything into
2 the record that you would require for your
3 analysis.

4 CHAIRPERSON MOLDENHAUER: Thank
5 you. I mean, this is a 223, so, you know, we
6 have gone through all the different elements.
7 Do any Board Members have any specific
8 questions for the applicant? No. Then thank
9 you.

10 At this point in time, we will
11 move on to the Office of Planning's report.

12 MS. CIDLOWSKI: Good afternoon,
13 Madam Chair and Members of the Board. My name
14 is Laine Cidlowksi. I'm a Development Review
15 Specialist with the Office of Planning.

16 Likewise, I am happy to rest on
17 the record, if you find that the report is
18 complete enough for your necessary analysis.

19 I would just like to note that
20 since the writing of my report, there was
21 additionally a letter submitted from the ANC
22 recommending support of the application.

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1 CHAIRPERSON MOLDENHAUER: Thank
2 you. Does the applicant have any questions
3 for the Office of Planning?

4 And next, we would go to the ANC.
5 Is ANC-3D present? OP just referenced, and
6 it's our Exhibit No. 27, which is a letter of
7 support from the ANC, and it indicates that
8 they had a regularly scheduled and noticed
9 meeting on April 7, 2009.

10 Is 2009 correct? Does the
11 applicant know or is that an error?

12 MS. RODDY: That's an error. It
13 was 2010.

14 CHAIRPERSON MOLDENHAUER: Okay.
15 So then let's just reference that for our
16 record that there was an error. It was
17 actually 2010. And that they state that a
18 quorum was present and there was a vote of 6-
19 0-1 to approve Application 18040 submitted by
20 David and Ms. Royle.

21 And so then, at this point in
22 time, we would move on to any parties in the

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1 audience that are in support or in opposition.

2 And seeing none, let me go back to the
3 applicant for any closing statements.

4 MS. RODDY: Well, given the
5 support that this application has, it has the
6 support of the Office of Planning as well as
7 the ANC and the neighboring property owner to
8 the north, which would be most affected by
9 this application, we would request that if the
10 Board is comfortable, that they issue a Bench
11 decision today granting the requested relief
12 and hopefully a summary order as well.

13 CHAIRPERSON MOLDENHAUER: Thank
14 you very much. At this time then, the hearing
15 is concluded and we will go into
16 deliberations. And as we said earlier, I
17 believe that we will just rest on the record
18 and incorporate the Office of Planning's
19 report, which is our No. 26 Exhibit and their
20 full analysis on the 223 relief.

21 And I believe they have, the
22 applicant, satisfied all of the requirements.

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1 As stated at the hearing, they have support
2 by their neighbors and they also have support
3 from the ANC, Exhibit No. 27.

4 Do any of the other Board Members
5 want to provide any additional comments for
6 deliberation? No.

7 Then I will submit a motion, a
8 motion to approve Application 18040 for
9 special exception relief under 223 to
10 construct an addition to an existing single-
11 family detached dwelling at 5415 Potomac
12 Avenue, N.W.

13 If there is no additional
14 deliberation, is there a second?

15 VICE CHAIRMAN DETTMAN: Second.

16 CHAIRPERSON MOLDENHAUER: The
17 motion has been made and seconded.

18 All those in favor say aye.

19 ALL: Aye.

20 CHAIRPERSON MOLDENHAUER: Ms.
21 Bailey, would you read back the vote?

22 MS. BAILEY: Madam Chair, the vote

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1 is recorded as 3-0-2 to grant the application.
2 Mrs. Moldenhauer made the motion, Mr. Dettman
3 seconded, Ms. Sorg supports the motion.
4 Again, it's 3-0-2, two Board Members not
5 hearing the case and not voting.

6 CHAIRPERSON MOLDENHAUER: And with
7 no opposition and no other parties, then I
8 would request that we waive our rules and have
9 a summary order.

10 MS. BAILEY: Thank you.

11 CHAIRPERSON MOLDENHAUER: Thank
12 you. Thank you.

13 MS. BAILEY: Madam Chair, are you
14 read for the next case?

15 CHAIRPERSON MOLDENHAUER: Yes, we
16 are.

17 MS. BAILEY: And that is Appeal of
18 Friends of Francis Field, No. 18029, it's
19 pursuant to 11 DCMR ' 3100 and 3101, from a
20 September 25, 2009 decision of the Zoning
21 Administrator, Department of Consumer and
22 Regulatory Affairs, to issue Certificate of

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1 Occupancy No. C0903586, allegedly in violation
2 of Zoning Commission Order No. 06-35. The
3 property is Zoned CR. It is located at 1255
4 25th Street, N.W., Square 24, Lot 883.

5 CHAIRPERSON MOLDENHAUER: Once all
6 the parties are at the table, we will go
7 through for introductions. Okay. We will
8 start off from my left and we can introduce
9 all the parties at the table.

10 MS. CODER: Good afternoon. My
11 name is Rebecca Coder. I'm Chair of ANC-2A.
12 I'm also the representative for the Single
13 Member District of ANC-2A02 in which Francis
14 Field is located.

15 CHAIRPERSON MOLDENHAUER: Yes.

16 MS. MILLER: Constance Miller,
17 counsel to the ANC-2A.

18 MR. GRIFFITH: I'm Gary Griffith,
19 Secretary of Friends of Francis Field.

20 MR. AVITABILE: David Avitabile
21 with the Law Firm of Goulston & Storrs,
22 counsel for Vornado, Charles E. Smith, the

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1 owner.

2 ZONING ADMIN. Le GRANT: Good
3 afternoon, Matthew Le Grant. I'm the Zoning
4 Administrator.

5 MR. SURABIAN: Good afternoon,
6 Assistant Attorney General Jay Surabian for
7 DCRA.

8 MS. BOLLING: Good afternoon.
9 Melinda Bolling, General Counsel for DCRA.

10 CHAIRPERSON MOLDENHAUER: Okay.
11 This is, I think, our take three on this case.
12 And we have the entire afternoon, I'm not
13 saying we need that, but we do have the entire
14 afternoon for this case.

15 And the last time, we had tried to
16 provide some focus and now we have gotten some
17 additional supplemental materials from, I
18 believe, all of the parties. And we have gone
19 through that in great detail, all of the Board
20 Members.

21 And we have gotten some additional
22 kind of comments and feedback, most

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1 importantly from our Zoning Commissioner
2 representative on the Board, and that's one of
3 the reasons why we have a rotating Member to
4 provide us with that guidance, especially on
5 cases such as this.

6 And based on that, I'm going to
7 provide all the parties some additional focus
8 that may be a little different from last time,
9 but I just want to provide it now, so that
10 everyone kind of understands where we want to
11 go initially as an initial threshold question
12 for this case.

13 I think that what we are going to
14 do is we're going to first address the issue
15 of whether or not the ZA has the authority to
16 issue an escrow agreement or to grant an
17 escrow agreement as a condition or as to
18 whether or not to satisfy conditions of a
19 Zoning Order.

20 Now, obviously, there are certain
21 cases that we have seen referenced in the
22 different supplemental documentation to date.

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1 And I think, you know, we can go on those and
2 address those, whether or not that is
3 applicable or not applicable in this case,
4 whether or not that it's a case-by-case basis
5 or whether there are other issues that are
6 relevant to that, but that should, I think, be
7 our first threshold issue that we address
8 today.

9 So that being said, we will open
10 up the floor to the appellant to start off.

11 MR. GRIFFITH: Thank you very
12 much, Madam Chair. We are very happy with
13 that way of proceeding. We do think that is
14 the key issue to begin with.

15 We have a PowerPoint with some
16 photographs and maps and so on to show you
17 where this is, but I think I'll hold off on
18 that until we argue this threshold issue.

19 We think that the law is quite
20 clear on this matter. As we have said in our
21 pleading, that first of all, we think there is
22 no doubt that this is a PUD case. This isn't

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1 -- this doesn't have to do with Pizza Kitchen
2 or anything like that.

3 In a PUD case, there is a set of
4 regulations as to the authority that the
5 Zoning Commissioner has -- the Zoning
6 Administrator has. And these are fairly
7 unequivocal in 11 DCMR 2409, which I'm happy
8 to go into the law or the regulations, but I
9 would assume that -- do I assume correctly
10 that the Board has a copy of the regulation
11 and knows it or should I --

12 CHAIRPERSON MOLDENHAUER: We are
13 aware of the reg. If you feel that it's
14 something that you want to articulate
15 additionally, that's your choice.

16 MR. GRIFFITH: Okay. Basically,
17 that regulation states that in a PUD case, the
18 Zoning Administrator is limited to minor
19 modifications of the plans. In other words,
20 he can increase the number of parking spaces.

21 He can actually move the building 5 feet, but
22 he can't change the order itself and he can't

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1 change the conditions in the order.

2 We also want to stress that in the
3 pre-hearing statements submitted by both the
4 Attorney General for DCRA and the owner, in
5 neither of these can they state any law that
6 gives the Zoning Administrator any statutory
7 authority to do what he did, and that is
8 change the conditions of an order or
9 substitute an escrow for a zoning order.

10 We, obviously, think this is the
11 key to this case and very important because
12 without -- if the Zoning Administrator can
13 change your orders or the Zoning Commission's
14 orders, then there is no point in making
15 conditions in orders, because the Zoning
16 Administrator can change them if they are
17 inconvenient to the owner or the client or the
18 developer.

19 So we want to stress again that
20 neither of the opponents in this case, the
21 appellee or the owner, can state any law or
22 municipal regulation that gives the Zoning

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1 Administrator the authority to do this.

2 And we state the regulation that
3 states that he cannot do this and does not
4 have this authority.

5 The fact that they don't have the
6 -- any basis in statutory law or regulation,
7 they are hanging their entire authority on one
8 case and they want to say that there is case
9 precedence. And the Attorney General's pre-
10 hearing statement, if I can quote it, says "It
11 is consistent with prior decisions of the
12 Board of Zoning Adjustment," that's you.

13 However, we hope this is a typo,
14 because there are not decisions plural. They
15 have only stated one possible decision in 48
16 years of PUD Law. They can find one case that
17 even comes close as being a precedent and
18 that's the George Washington University case,
19 which is 16950, which both the Attorney
20 General for DCRA and owner list.

21 In this case as both of them state
22 in their pre-hearing statements, the -- it was

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1 -- first of all, there were multiple issues in
2 that case for your Board to decide.

3 The issue of the non-delivery of
4 an amenity was only one of them. But in that
5 particular case, the amenity was the
6 simultaneous donation of an amount of money to
7 a charity and simultaneous on the day that the
8 Certificate of Occupancy was to be issued.

9 So it was not a pre-condition of
10 issuance and it wasn't doing anything other
11 than making a deposit of money.

12 But let me read you from both
13 their statements. The Attorney General
14 states, and this is in our pleadings, "In that
15 case, the university was required by a Zoning
16 Commission Order to make a contribution to a
17 feeding program. However, when the university
18 was ready to apply for its CO, the feeding
19 program had not yet been established."

20 Similarly, the owner states in his
21 explanation of this case "In that case, the
22 Board concluded that when the intended

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1 recipient of the amenity money had not yet
2 been established, it was reasonable for the
3 university to place the amenity in an escrow
4 account."

5 Now, in that case, in BZA 16950,
6 the only case that either owner or the
7 Attorney General can cite, the applicant in
8 that case was faced with an impossibility.
9 There was no possible way that they could make
10 a deposit to a charity that had not -- that
11 did not exist. There was no possible way to
12 comply.

13 In our case, first of all, we
14 think it's not a comparable case on its face,
15 Francis Field and 25th Street existed at the
16 beginning of the case, in the middle of the
17 case and at the end of the case.

18 Also, in BZA 16950, the precedent
19 that they want to establish, that they want to
20 use, the materials were served. The case --
21 the materials in the case in this situation
22 was served on the parties. The other side was

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1 informed about what was going on.

2 In this case, this escrow
3 agreement that we say that they substituted
4 and they say they substituted was done
5 completely ex parte. It wasn't sent to the
6 Zoning Commission. It wasn't given to the
7 parties. It wasn't given to us. It wasn't
8 given to the ANC.

9 And the only way that we found it
10 was basically by investigative reporting and
11 filing a Freedom of Information Request.

12 Furthermore, on the issue of
13 accepting this narrow precedent, this skinny
14 thin precedent, the statute itself has
15 regulations to the contrary.

16 In other words, the regulation
17 says that if you can't -- that if you want to
18 change an order or the conditions in an order,
19 here is what you do. And you do it according
20 to 11 DCMR 2409.9, which really says you go
21 back to the Zoning Commission and tell them
22 about it and tell them why you need a change

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1 or you do it pursuant to 11 DCMR 3030, which
2 is basically the consent calendar.

3 Now, there was nothing to stop the
4 owner or DCRA, and particularly the owner,
5 from going back to the Commission and saying
6 we have had a delay. We've got a problem.
7 Here is what we want to do, sending it to the
8 Commission, sending it to us and the ANC. And
9 it is likely that this case could have been
10 done on the Zoning Commission's consent
11 calendar.

12 Instead, the owner submitted an
13 escrow that in itself has a ton of problems.
14 Did not file the escrow with the Zoning
15 Commission and did not show it to the parties.
16 And I guess our argument on this particular
17 aspect of this case is that if you -- this
18 would be a terrible precedent, we think.

19 In our opinion, this would be a
20 terrible precedent for this Board to make,
21 particularly for the Zoning Commission,
22 because every time the Zoning Commission wants

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1 to put teeth in an order, the D.C. Zoning
2 Administrator can simply change the conditions
3 or change the order.

4 Now, in this particular case, and
5 we hope we can get to these, there were -- we
6 understand there were delays and we understand
7 that the Zoning Administrator was more or less
8 pressured to do this, because there were
9 people in the building at the time and he felt
10 he had to issue some kind of certificate or
11 they had to evacuate the building. But we
12 will get to that.

13 But on the law, on the Municipal
14 Regulations, the regulations are very clear.
15 The regulations state here is what the powers
16 of authority of the Zoning Administrator are.

17 He has these narrow defined things that have
18 only to do with changing the plans themselves,
19 not the order, not the conditions of the
20 order.

21 Anything else goes back to the
22 Zoning Commission. They are informed about

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1 it. And it is served on the parties. So
2 that's why I guess I don't need to go on
3 further on that, because you have only asked
4 about that part of the case.

5 Is that correct? Do I understand
6 that, Chair?

7 CHAIRPERSON MOLDENHAUER: Yes,
8 that's correct. So if you --

9 MR. GRIFFITH: So I'll stop there.

10 CHAIRPERSON MOLDENHAUER: -- have
11 concluded on that argument, then we can move
12 forward. We would then move to the ZA's
13 argument.

14 MR. SURABIAN: Thank you.
15 Essentially, the actions of the Zoning
16 Administrator aren't designed to undermine the
17 Zoning Commission or to permit the property
18 owner from escaping their responsibilities
19 under the order.

20 Our argument is, essentially, that
21 as the West End Citizens' case that Mr.
22 Griffith referred to, essentially says that

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1 where there is unforeseen circumstances, delay
2 or frustration of the purpose of what the
3 Zoning Commission required, that strict
4 compliance with the order is unnecessary.

5 And the Zoning Administrator,
6 therefore, under that case has the authority
7 where those types of circumstances exist to
8 issue a Certificate of Occupancy. And that's
9 what he did here. And he did so in a very
10 reasonable way.

11 First, he issued a conditional
12 Certificate of Occupancy which is conditioned
13 on the completion of all of the conditions.
14 And so no final Certificate of Occupancy would
15 be issued until everything is done.

16 The C of O that is on the property
17 now has an expiration date. And if all of the
18 work isn't complete, that C of O will, you
19 know, expire.

20 And second, in making that
21 decision, you know, the Zoning Administrator
22 followed the analysis of the West End

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1 Citizens' case and that he considered a number
2 of factors which would be the different delays
3 that were experienced, most all of which were
4 unforeseen.

5 He accepted an escrow agreement,
6 which was done between the property owner and
7 the Department of Parks and Recreation that
8 provided funds for the completion of the field
9 work. And also, at that time, some of the
10 work had been completed and the ZA believed
11 that they are moving in good faith.

12 So he considered a number of
13 factors and so he felt as though he acted
14 reasonably at that time.

15 And as things stand now, he still
16 has oversight over the completion of the work.

17 And if it's not done, then, per the order,
18 the final C of O won't be issued.

19 And as to some of the distinctions
20 that were just argued between the West End
21 Citizens' case and here, I don't think that
22 those distinctions are really meaningful,

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1 whether or not it was a contribution to a
2 feeding program or money for the completion of
3 a park. I don't see a real distinction.

4 And second, the fact that here was
5 the -- it was a pre-condition of the CO and in
6 the other case it said that the CO would be
7 issued simultaneous with the deposit of the
8 money -- with the payment of the funds for the
9 feeding program.

10 I think those are really
11 functionally the same thing. If it's a
12 condition or whether it is simultaneous, it's
13 functionally exactly the same.

14 So that's, essentially, our
15 argument in a nutshell. So thank you.

16 CHAIRPERSON MOLDENHAUER: Now, we
17 would move to the property owner. And what we
18 will do, I think, is if Board Members are
19 going to wait until the final argument and
20 then the Board will be able to ask questions
21 to all of the parties.

22 So we will move then to the

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1 property owner's argument.

2 MR. AVITABILE: Great. Thank you.

3 I think mostly echoing the points from Mr.
4 Surabian made, but I think the first point I
5 would make is that in this case, if you look
6 at the Zoning Administrator's authority
7 pursuant to the regulations, the Zoning
8 Administrator is required to follow the
9 language and the conditions of the Zoning
10 Commission Order.

11 And you just don't have to look
12 any further than the language of the Zoning
13 Commission Order, which talks about in
14 Condition 10(b) contribution of design
15 materials and labor for improvements to
16 Francis Field valued at \$150,000.

17 And that language focuses on the
18 word contribution. It focuses on the dollar
19 amount at the end. And at a minimum, there is
20 enough room within that language for the
21 Zoning Administrator to have reasonably
22 determined that while actual delivery of the

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1 amenities was certainly one way to fulfill
2 that condition, it could also be reasonably
3 fulfilled by putting it -- now, let's be clear
4 here.

5 The owner didn't just write a
6 check to DPR and drop it in their mailbox.
7 They executed a detailed escrow agreement that
8 dedicated the money to be spent specifically
9 on certain improvements. The same
10 improvements that were detailed in the Zoning
11 Commission Order.

12 And also provided within the
13 escrow agreement for a mechanism for the owner
14 to actually go through and construct those
15 improvements when circumstances would allow
16 them to do so, because we thought we would be
17 in the best position to do that in a
18 reasonable manner and at a reasonable price to
19 make sure everything was provided.

20 And I think when you read those
21 two together, you can very clearly see that
22 the escrow agreement wasn't just a cast off

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1 that's inconsistent with the language of the
2 order, rather it is, indeed, consistent with
3 the requirement of the order.

4 I think the second point would be
5 regarding the prior precedent that was cited
6 by us as well as DCRA. You know, Mr. Griffith
7 focuses on the importance of an impossibility
8 and that, the feeding program, contribution
9 couldn't be made, because it was impossible to
10 do so because the feeding program hadn't yet
11 been created.

12 Well, I think here impossibility
13 was paramount as well. There was no way we
14 could construct those park improvements until
15 the plan had been approved by DPR and arguably
16 by CFA as well. And that was a point that, I
17 think, many of the parties involved repeated
18 all along that we needed CFA to review and
19 approve the final plan.

20 And of course, we certainly
21 couldn't construct anything on DPR's property
22 until they approved it. And until they had

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1 approved something, it was impossible for us
2 to construct it. And the owner certainly
3 expended significant resources in terms of
4 time and money and getting a design approved
5 and moving the process along.

6 I think there has been some unfair
7 characterizations of our efforts.

8 MR. GRIFFITH: Point of order --

9 MR. AVITABILE: Excuse me.

10 MR. GRIFFITH: -- Madam Chair?

11 MR. AVITABILE: I'm sorry. You
12 don't have the --

13 MR. GRIFFITH: I'm addressing the
14 Chair.

15 CHAIRPERSON MOLDENHAUER:
16 Objection? Because otherwise we'll continue
17 on with the owner's statements.

18 MR. GRIFFITH: It's a point of
19 order that the owner's attorney is now getting
20 into the merits of the escrow agreement. And
21 it seems to me that the way that you have cast
22 this if there was no statutory authority for

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1 the Zoning Administrator to change the order
2 itself by submitting an escrow, then the --
3 then we -- I mean, we're trying -- he is
4 discussing the escrow before we are at that
5 point.

6 Because if there was no authority
7 to change the order, then he can't -- then he
8 doesn't have authority to put an escrow in to
9 begin with.

10 CHAIRPERSON MOLDENHAUER: I
11 believe that his argument is that the escrow
12 was in parallel with the order. Is that what
13 you are saying?

14 MR. AVITABILE: Yes.

15 CHAIRPERSON MOLDENHAUER: So, I
16 mean, as long as your argument stays on that
17 element and does not go into the details of
18 whether or not -- the merits of the escrow or
19 the actual elements. But I think that's his
20 argument. If you stay with that issue, then
21 I'm going to allow him to continue on that
22 limited issue of the escrow agreement.

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1 MR. AVITABILE: That helps me
2 clarify the point, which is that we don't
3 believe the Zoning Administrator changed the
4 order in any way, shape or form. Rather, he
5 was actually making a decision that was
6 consistent with a reasonable interpretation of
7 what that condition said, that's it.

8 At any rate, to continue along
9 with the point about Appeal No. 16950 and why
10 we are consistent. As I was saying, I think
11 here my point was simply that it was also
12 impossible for us to deliver the amenity
13 specifically called for and so, therefore, it
14 was reasonable for the Zoning Administrator to
15 approve the use of an escrow agreement, given
16 that impossibility.

17 And I think the last point, I
18 think that's all I would like to say for now
19 on the issue. I think that's sufficient for
20 now.

21 MR. MOY: Excuse me, Madam Chair,
22 I don't think your mike is on.

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1 CHAIRPERSON MOLDENHAUER: Oh, my
2 mike is not on. Thank you very much, Mr. Moy.

3 I was just indicating that at this point in
4 the procedure, if the ANC was a party, we
5 would turn to them, but I believe they are
6 simply joining with the appellant. So at that
7 time, if that's -- I'm seeing heads shake, so
8 you are agreeing with my statement?

9 MS. MILLER: Yes, we do,
10 essentially, agree with the Friends of Francis
11 Field, but we would like to also add that the
12 escrow agreement was a circumvention of the
13 regulations and the process.

14 And we have now spent several
15 hearings as a result of that process being
16 circumvented. And had the escrow agreement
17 involved all of the parties that were
18 interested, including Friends of Francis Field
19 and had been presented to the Zoning
20 Commission, Friends of Francis Field and the
21 ANC would very likely have felt as though
22 their concerns in ensuring that the amenities

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1 in kind be delivered, rather than an agreement
2 that in which they were completely left out,
3 were not informed of and had to go to great
4 lengths in order to obtain a copy of.

5 And this -- of course, because
6 Vornado had at least, at some point with
7 plenty of time to approach this body, informed
8 them of the problems that they were
9 encountering and proposed the escrow agreement
10 as a reasonable solution, I believe that the
11 parties would have had a completely different
12 take on how this process unfolded.

13 It is now been a great expense and
14 a lot of consternation and, obviously, some
15 distrust has arisen as a result of not having
16 followed the appropriate protocols.

17 CHAIRPERSON MOLDENHAUER: Thank
18 you. Before closing arguments, we are going
19 to open up the floor to questions from the
20 Board.

21 COMMISSIONER TURNBULL: Thank you,
22 Madam Chair. Mr. Surabian, let me ask you

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1 something. When this conditional Certificate
2 of Occupancy --

3 MR. SURABIAN: Right.

4 COMMISSIONER TURNBULL: -- was
5 issued, you focused on Items 10(b) and (c).

6 MR. SURABIAN: Correct.

7 COMMISSIONER TURNBULL: Did you
8 have information relating to 10(a)?

9 MR. SURABIAN: 10(a)? Let me
10 check the Commission Order. So what is your
11 question exactly?

12 COMMISSIONER TURNBULL: Did you
13 have evidence? Was there an escrow account
14 for that? Was there ever any evidence that
15 this was taken care of, completed, provided?

16 MR. SURABIAN: I would have to
17 rely on the Zoning Administrator for that.

18 ZONING ADMIN. Le GRANT: Good
19 afternoon. The question about 10(a) has never
20 been expressed to me as an issue. My
21 recollection is that the applicant represented
22 that that contribution had been made. The --

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1 COMMISSIONER TURNBULL: But you
2 saw no evidence of that?

3 ZONING ADMIN. Le GRANT: I don't
4 recall offhand.

5 COMMISSIONER TURNBULL: But you
6 know they are all, (a), (b) and (c), tied
7 together?

8 ZONING ADMIN. Le GRANT: They are
9 all requirements.

10 COMMISSIONER TURNBULL: All
11 requirements.

12 ZONING ADMIN. Le GRANT: I'm aware
13 of that. So no --

14 COMMISSIONER TURNBULL: You think
15 you were a little hasty in issuing a
16 conditional without proof?

17 ZONING ADMIN. Le GRANT: Well, my
18 comfort level is the fact that there is no
19 final Certificate of Occupancy issued and that
20 before a final certificate would be issued, I
21 would walk -- I always walk through all the
22 conditions to ensure that they are all taken

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1 care of before it is finalized.

2 COMMISSIONER TURNBULL: When you
3 issued your conditional C of O, did you review
4 Exhibits 25, 27, 31 and 40?

5 ZONING ADMIN. Le GRANT: I did. I
6 did.

7 COMMISSIONER TURNBULL: And you
8 had a full understanding of everything that
9 was included in those documents?

10 ZONING ADMIN. Le GRANT: I had the
11 best understanding that I think that I had of
12 reviewing those documents, what they entailed.

13 COMMISSIONER TURNBULL: Why did
14 you not include other parties in this escrow
15 that had an interest in this case?

16 ZONING ADMIN. Le GRANT: The
17 escrow agreement was between the DPR and the
18 property owner and was brought to me. Then
19 after that escrow agreement was created and I
20 had to make the decision as to whether it
21 represented a basis on which the Conditions
22 10(b) and (c) were going to be, in fact,

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1 fulfilled.

2 MR. SURABIAN: I think that's an
3 important point. Is that the escrow agreement
4 is, essentially, a private contract that the
5 DCRA was not involved in the creation of.
6 It's something that was given to Mr. Le Grant
7 as -- to look at and review as -- you know,
8 before granting the C of O. But that's not
9 something that DCRA is a party to.

10 COMMISSIONER TURNBULL: So you
11 have no idea whether that complies with the
12 order or not? The requirements in the order
13 under all the exhibits. If you are not a
14 party to it, then you don't fully understand
15 it.

16 MR. SURABIAN: Well, no. Before
17 granting a C of O, he, Mr. Le Grant, testified
18 that he reviews all the conditions of the
19 Zoning Commission Order and makes the decision
20 if they have been satisfied.

21 COMMISSIONER TURNBULL: Item 10
22 has pretty explicit language. "No Certificate

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1 of Occupancy for any building approved by this
2 order shall be issued until the following
3 amenities have been provided." Not provided
4 for. Provided. There is no implicit granting
5 of an escrow in that language.

6 Why did you not call the Zoning
7 Commission and find out their intent of what
8 that language meant, if you didn't understand
9 it?

10 ZONING ADMIN. Le GRANT: Well, I
11 assure you, I did not make the decision
12 lightly, but for approving a conditional
13 Certificate of Occupancy. I looked at the
14 evidence that was before me in terms of I
15 consulted with the appellant, the property
16 owner prior to making the decision.

17 I heard both sides of their
18 arguments. I listened to or I reviewed the
19 escrow agreement that was brought to me. I
20 took it to my counsel. I reviewed the BZA
21 case that has been mentioned as a precedent.

22 And I believed, at that point,

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1 that my general authority as Zoning
2 Administrator in interpreting the Zoning
3 Regulations and Zoning Commission orders and
4 BZA orders, that I had this authority to issue
5 a temporary conditional Certificate of
6 Occupancy for --

7 COMMISSIONER TURNBULL: Why didn't
8 you refer them -- you could have simply looked
9 at this and said you need to go back to the
10 Zoning Commission for a modification to the
11 order.

12 ZONING ADMIN. Le GRANT: I
13 considered that. I know that was a
14 possibility. I know also that the property
15 owner, you know, explained to me and I also --
16 and the appellant explained to me the history
17 of the delays. This gets into the merits, but
18 the delays of getting the Park Plan prepared,
19 getting the approval of the CFA, the National
20 Park Service and so forth.

21 And there was many, many delays in
22 which the construction of the subject building

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1 had gotten to the point that it was -- there
2 was no way that building could be occupied
3 until some decision was made regarding --

4 COMMISSIONER TURNBULL: So
5 basically, you felt pressured by the owner?

6 ZONING ADMIN. Le GRANT: I don't
7 think pressure is --

8 MR. SURABIAN: I don't believe he
9 has used the word pressure or characterized it
10 that way at all. I think what he is saying is
11 that he believed that there was precedent for
12 him to have authority to do so.

13 COMMISSIONER TURNBULL: I don't
14 agree with the precedent.

15 MR. SURABIAN: Well, I respect
16 that and, essentially, what you are saying is
17 that the West End case was wrongly decided.
18 If it was, if he did not have authority, then
19 the Board can make its decision and
20 instruction from the Board would be
21 appreciated.

22 But at the time, he, I think,

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1 reasonably concluded he had the authority to
2 do so. The West End case was --

3 COMMISSIONER TURNBULL: Let me
4 say, it's not that I don't agree with the
5 precedent. I don't agree with the precedent
6 as applies to this case.

7 MS. BOLLING: Board Member
8 Turnbull, one of the issues before DCRA, at
9 that time, Mr. Avitabile spoke about dealing
10 with the impossibility. Just some background.

11 There have been substantial
12 changes in the executive staffing of DPR. And
13 at that time, it was presented by the property
14 owner that because DPR had run into a problem
15 with CFA, that nothing could proceed. So it
16 was an impossibility caused by the Government.

17 So that was part of the analysis.

18 Not so much pressure from the property owner,
19 but an impossibility because of problems with
20 the Government deciding who owned a portion of
21 the land, who could review certain portions of
22 the project and who could give permission to

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1 approve the plan as submitted timely by the
2 property owner.

3 So the impossibility of the
4 Government being able to move was one of the
5 issues that was presented to the Government to
6 review.

7 COMMISSIONER TURNBULL: That's
8 even more of a case for sending it back and
9 going before the Zoning Commission to ask for
10 a modification to explain the difficulties on
11 this project. Instead, we spent what three to
12 four months here doing this and it could have
13 been all settled at a quick hearing on this.

14 MS. BOLLING: We respect your
15 decision, sir.

16 COMMISSIONER TURNBULL: Okay. Mr.
17 Avitabile, why didn't you come before the
18 Zoning Commission and ask for a modification
19 for your client?

20 MR. AVITABILE: There was a point,
21 I think it was, around March of 2009 last year
22 that was the point at which we had started

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1 unrolling the -- we had gotten agreement
2 basically between the community and DPR on the
3 basic Park Plan. We had presented to CFA. It
4 was about to go through CFA and get approved,
5 at which point there would have been enough
6 time to complete the improvements prior to
7 when we were expected to pull our CO.

8 And right around that time, that
9 was when CFA said hold on. We have got issues
10 with the National Park Service. They won't
11 let us go forward until we settle the issues
12 with them. And so the process was put on
13 hold. It was at that point that we met with
14 the Zoning Administrator and said look, we
15 have this issue, you know.

16 COMMISSIONER TURNBULL: Why didn't
17 you come to the Zoning Commission for a
18 modification?

19 MR. AVITABILE: Well, I think, we
20 thought the language in the order provided
21 enough flexibility combined with prior
22 precedent to allow for it.

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1 COMMISSIONER TURNBULL: No, it
2 doesn't.

3 MR. AVITABILE: Well, I understand
4 that that's the position, the clear direction
5 we are getting from the Zoning Commission
6 here, but our read of the order, at that time,
7 given all of the circumstances, was that you
8 could read it to allow for an escrow
9 agreement, particularly since the language
10 focused on condition. And we weren't able to
11 actually provide the amenities.

12 And we approached that question at
13 a point in March of 2009 where there was
14 enough time, if everyone said this doesn't
15 work, the language doesn't provide for that,
16 we could go -- we would have had enough time
17 to go to the Zoning Commission.

18 But we had decided, at that point,
19 based on the language in the order, that that
20 was -- we certainly felt that that was a
21 reasonable interpretation of what was there.
22 And we spoke with the Zoning Administrator

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1 about that and he listened to our position and
2 said it sounds like that based -- particularly
3 on the emphasis on the word contribution, that
4 that could work.

5 And at that point, we then went
6 and negotiated the escrow agreement with DPR
7 to fulfill the contribution.

8 COMMISSIONER TURNBULL: Mr. Le
9 Grant says that you had told him that you had
10 taken care of Item 10(a).

11 MR. AVITABILE: Yes. I don't
12 recollect definitively whether we did. I know
13 that at the time that the CO that is appealed
14 was at issue. By the time we went to go get
15 our CO, we had completed that contribution. I
16 don't know that I have evidence of that with
17 me here, but I know that we have a letter
18 from, I believe, the principal of the school
19 stating as such.

20 And we have representatives of
21 Vornado here, which might be able to testify
22 directly to that.

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1 COMMISSIONER TURNBULL: Why did
2 you not include other parties in setting up
3 the escrow from the community?

4 MR. AVITABILE: I think there is a
5 legal reason and the legal reason is the whole
6 amenity arose out of an MOU that was between
7 Vornado and DPR. That was an MOU. It was a
8 single page letter that was a part of the
9 Zoning Commission record.

10 I believe it was submitted as a
11 part of a post-hearing submission that said we
12 agree, Vornado, to give you, DPR, you know,
13 these contributions towards these following
14 improvements. We will give you the design,
15 you know, the money for the labor and the
16 construction and, you know, if possible, we'll
17 do it ourselves.

18 But that was an agreement between
19 us and DPR. It wasn't an agreement among
20 everyone. It was an amenity we were
21 providing, in large part, because Friends of
22 Francis Field said this is something that

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1 would be really great. Do you think that you
2 could provide it as an amenity of the PUD?
3 And we said sure.

4 And I think also the ANC, when
5 they reviewed the PUD and decided ultimately
6 to, I think they voted, approve the original
7 PUD, relied in part on that as an amenity that
8 was a key portion. But they were not, as I
9 look at it legally, parties to that actual
10 agreement.

11 COMMISSIONER TURNBULL: What part
12 of the sentence, that first sentence, in Item
13 10 tells you you can have an escrow?

14 MR. AVITABILE: What I would say
15 is it's not just the first sentence of 10, but
16 the wording after 10(b) where it says "Francis
17 Field contribution of design materials and
18 improvements and labor for improvements to
19 Francis Field." And then you read it to the
20 end "valued at \$150,000."

21 COMMISSIONER TURNBULL: The first
22 part of that first sentence says "No

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1 Certificate of Occupancy for any building
2 approved by this order shall be issued until
3 the following amenities have been provided."
4 Not provided for. Provided. It's very
5 explicit.

6 MR. AVITABILE: Well, I understand
7 it. I think the way that I read that is to
8 say the amenity that needs to be provided is
9 the contribution of design materials and labor
10 for improvements to Francis Field.

11 COMMISSIONER TURNBULL: And what
12 about the amount of money for Item (c)?

13 MR. AVITABILE: Well, I think,
14 first, in the escrow -- first, there is no
15 dollar value associated with it.

16 COMMISSIONER TURNBULL: Ah, but if
17 you go to one of the exhibits, you find it.
18 It's referenced in, I forget which exhibit, 27
19 or 31.

20 MR. AVITABILE: Well, I understand
21 that. Although, to be clear --

22 COMMISSIONER TURNBULL: It's

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1 referenced, it's part of the order.

2 MR. AVITABILE: It says plans.

3 Right, but --

4 COMMISSIONER TURNBULL: It's part
5 of the order.

6 MR. AVITABILE: I --

7 COMMISSIONER TURNBULL: That's all
8 the questions I have.

9 MR. AVITABILE: Okay.

10 CHAIRPERSON MOLDENHAUER: Do any
11 other Board Members have questions, at this
12 time? Well, I'll jump in. I actually have a
13 couple.

14 In looking at the escrow and
15 whether or not the escrow was valid, i.e.,
16 whether the ZA had authority to issue it, I
17 kind of go to one of the points that
18 Commissioner Turnbull mentions which is in
19 order to issue a C of O, Conditions 10(a), (b)
20 and (c) have to be satisfied.

21 And nowhere in the recitals does
22 the escrow agreement articulate that Condition

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1 10(a) had been satisfied.

2 Can you, Mr. Avitabile, explain to
3 me how this escrow agreement satisfies
4 Conditions 10(a), most importantly, (b) and
5 (c) if it doesn't even articulate that that
6 condition had been satisfied to date?

7 MR. AVITABILE: Sure. Well, first
8 of all, 10(a) doesn't have anything to do --
9 that was an agreement to provide an amenity to
10 the school. And there was no reason to enter
11 into an escrow agreement, because there was
12 nothing that prevented us from making that
13 contribution prior to the issuance of the CO.
14 We, in fact, did that.

15 And so it didn't need to be
16 provided for in an escrow agreement. We could
17 actually deliver it.

18 CHAIRPERSON MOLDENHAUER: So it
19 was, in fact, delivered?

20 MR. AVITABILE: Yes.

21 CHAIRPERSON MOLDENHAUER: Prior to
22 the C of O?

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1 MR. AVITABILE: Yes. And again, I
2 know I can't affirmatively testify to that as
3 counsel, but representatives from Vornado are
4 here and could testify to the fact that that
5 was, in fact, provided.

6 I think -- so it's just not a part
7 of it. Also, that was an amenity that was
8 supposed to be provided to the Francis Junior
9 High School. DPR had no authority to, you
10 know, accept that or determine that. It
11 wasn't agreed -- we didn't agree to -- with
12 DPR to provide the money to the school. We
13 agreed with the principal of the school to
14 provide it. And we fulfilled that promise.

15 CHAIRPERSON MOLDENHAUER: Okay.
16 Then you provided a rationale as to why. I
17 mean, I went to the first page of the order.
18 Well, actually, sorry, the second page of the
19 order, Page 2, Item No. 5. It articulates the
20 parties that were part of this PUD and it
21 states "The applicant, the ANC and Friends of
22 Francis Field."

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1 Now, you then said the reason why
2 the additional parties were not part of the
3 escrow agreement was because the MOU, the
4 Memorandum of Understanding, was directly
5 between the applicant and DPR. But that's for
6 10(b). Can you explain to me why 10(c), which
7 it's not contingent upon or related to a
8 Memorandum of Understanding, did not provide
9 for the other parties to be, I guess, in
10 agreement or kind of like a consent order why
11 they weren't part of the escrow?

12 MR. AVITABILE: Well, I think,
13 first, part of 10(c) is covered under the
14 escrow agreement, the fence around the field.
15 That money was provided for in the escrow
16 agreement. And so therefore that piece is
17 provided.

18 Regarding the rest of it, I think,
19 the way I look at the streetscape improvements
20 is, first of all, the streetscape improvements
21 are provided subject to ultimately whether or
22 not DDOT will approve them as improvements in

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1 public space.

2 So to the extent that we promised
3 to provide them, it's all contingent upon
4 whether or not DDOT will approve it.

5 Beyond that, I think, part of the
6 issue here is -- and mind you, we had done the
7 streetscape improvements on the east side of
8 25th Street, because there was nothing to
9 prevent us from doing those.

10 The reason why we hadn't yet
11 completed the streetscape improvements on the
12 west side of the street is because, I think,
13 when you look at the plan for the improvements
14 to Francis Field, the streetscape and the park
15 kind of are one in the same. It's all part of
16 the same basic design.

17 This was the idea from the
18 beginning going back to the Zoning Commission
19 hearing. The concept was to develop a linear
20 park along the west side of 25th Street that
21 would, essentially, integrate the streetscape
22 and the field.

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1 And so it didn't make sense for us
2 to go forward and do just the streetscape
3 portion without the park portion, since it was
4 all going to be tied together. There was
5 going to be -- there are two pathways that
6 lead from the sidewalk into the park, one at
7 the lower part to the circular loop, the other
8 to the second entrance.

9 And it was just all part of the
10 same integrated design. I think that's the
11 best answer I can provide there.

12 CHAIRPERSON MOLDENHAUER: Are
13 there any other questions from any other Board
14 Members while I review my notes? Just bear
15 with us for one moment.

16 COMMISSIONER TURNBULL: Mr.
17 Avitabile, what's the total dollar amount that
18 was in the escrow?

19 MR. AVITABILE: It was \$147,770,
20 which was the \$150,000 for the park
21 improvements less, I believe it was, the
22 amount that had already been expended on the

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1 design. So that's \$38,270. So that brings us
2 down to \$111,270 that was left to be spent on
3 the field.

4 We had already spent the money on
5 the design. We hadn't yet spent the money on
6 the materials and the labor. So we put the
7 remaining balance due for the park in and then
8 we put an additional \$36,000 for the fence
9 that was going to be constructed into the
10 escrow account as well, because we knew that
11 was a key part of the plan.

12 And regardless of whether it was
13 in the streetscape bucket of money or the park
14 bucket of money, it was a key element. And so
15 that's why we provided for it.

16 COMMISSIONER TURNBULL: Well, I
17 mean, if I looked at the proposed estimates
18 for both (b) and (c), we're looking at
19 \$350,000.

20 MR. AVITABILE: Okay. In total.

21 COMMISSIONER TURNBULL: Total.

22 MR. AVITABILE: Yes.

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1 COMMISSIONER TURNBULL: And you
2 are saying you had completed \$200,000 before
3 and so you got \$147,000 in here?

4 MR. AVITABILE: I don't know
5 exactly how much of the money we expended on
6 the streetscape was completed at that time. I
7 know we had completed --

8 COMMISSIONER TURNBULL: Well, what
9 kind of an escrow account is this if you can't
10 account for all the money?

11 MR. AVITABILE: Well, we could.

12 COMMISSIONER TURNBULL: And where
13 it is.

14 MR. AVITABILE: We could account
15 for everything that we put into it. We could
16 account for the fact that the money we hadn't
17 yet spent on the park, which is clearly --

18 COMMISSIONER TURNBULL: Well,
19 maybe Mr. Le Grant looked at this and could
20 understand. You could understand all the
21 money that had been put into this thing?

22 ZONING ADMIN. Le GRANT: Well --

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1 COMMISSIONER TURNBULL: And felt
2 comfortable?

3 ZONING ADMIN. Le GRANT: -- I felt
4 comfortable, because the escrow agreement --

5 COMMISSIONER TURNBULL: I won't
6 get you as my accountant. All right.

7 ZONING ADMIN. Le GRANT: The
8 escrow agreement was focused on 10(b) and the
9 park and the accounting that Mr. Avitabile
10 described in terms of the design amount
11 already expended less the -- for the actual
12 physical improvements of putting the fence
13 back in, was what was the -- that was the
14 amount that the escrow agreement was focused
15 on. And that's all that I relied on in my
16 decision on the conditional C of O.

17 COMMISSIONER TURNBULL: Thank you.

18 CHAIRPERSON MOLDENHAUER: Can I
19 ask Mr. Surabian a question? There has been
20 some distinctions made by Friends of Francis
21 in regard to the West End Civic Association
22 case. In that case, the escrow agreement, was

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1 that signed by all parties to the order? I
2 don't have a copy of the case in front of me.

3 Can you articulate some of the unique factors
4 in that?

5 Was that actually signed by all
6 the parties or was that a similar situation as
7 to what happened here?

8 MR. SURABIAN: Well, that's sort
9 of a tough question. I don't know if every
10 party who was involved in the Zoning
11 Commission case signed -- was signed off on
12 the escrow. Just speaking about escrow
13 agreements, generally, it wouldn't necessarily
14 make sense for them to do so, because that's
15 not what an escrow agreement really is.

16 It's a contract for the -- you
17 know, to hold money in escrow where there is
18 an escrow agent holding the money upon
19 something happening and when the funds are
20 released.

21 CHAIRPERSON MOLDENHAUER: But
22 isn't an escrow agreement to hold money for

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1 the benefit of certain goods or certain
2 services? And if that money is being held for
3 the benefit of somebody, wouldn't the benefit
4 be some of the parties that were part of the
5 zoning order initially?

6 MR. SURABIAN: I suppose. I'm not
7 sure what the difference would -- what the
8 practical difference would be. The funds
9 would still go to fund the completion of the
10 park improvements.

11 CHAIRPERSON MOLDENHAUER: So
12 you're saying that --

13 MR. SURABIAN: In the West End
14 case, the feeding program hadn't been
15 established, so I'm guessing that that feeding
16 organization was not part of the agreement at
17 the time.

18 MR. AVITABILE: I think I could
19 offer some clarification. From what I
20 understand from the facts that are in the
21 order, the way the order reads in its Finding
22 of Fact 13, the university sent both the ZA

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1 and Mr. Batham, who is the president of the
2 West End Citizens Association, at the time, a
3 letter indicating that on August 16th they had
4 deposited a contribution into the escrow
5 account.

6 The way I read that, I don't think
7 -- it doesn't appear to me from the order, at
8 least, that West End Citizens Association was
9 a party to that escrow account in this -- in
10 that case.

11 In our case --

12 CHAIRPERSON MOLDENHAUER: Wait.
13 But they did get a letter indicating that this
14 is what's happening. So I guess my question
15 then, I'm going to go back over to Mr.
16 Surabian, is if you are following the, you
17 know, West End Civic Association case as a
18 potential means for precedent or authority to
19 enter into an escrow agreement, why did you
20 not think that it was necessary in this case
21 to inform those people that were parties to
22 the initial zoning order?

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1 MR. SURABIAN: I'm not so sure if
2 the Zoning Administrator -- I know that he had
3 -- was, at the time, engaged in talking to the
4 different parties. Maybe he can remember what
5 he communicated and when.

6 ZONING ADMIN. Le GRANT: Well,
7 once the escrow agreement was presented to me
8 and once the milestone was -- one of the facts
9 was DPR's approval of the plan, the Park Plan.
10 And that was the milestone that I know had to
11 be satisfied before anything could be moved
12 ahead. And when that decision came, that's
13 the point in which I issued the conditional C
14 of Os.

15 In retrospect, I could have
16 probably reached out and did a little better
17 communication to the Friends of Francis Field
18 and the ANC, but in the course of the
19 discussions over the course of the summer, I
20 was in contact with those parties as to this
21 case.

22 And I think it was shown in the

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1 record there were some preliminary C of Os
2 issued in error by my office that I had to
3 revoke, because they were done prior to this
4 agreement. And those were revoked until I had
5 the Park Plan approved and I had an escrow
6 agreement in hand.

7 CHAIRPERSON MOLDENHAUER: Okay.
8 Just one last question and then I'll open it
9 up. I think some of the other Board Members
10 have some questions. Do you think, this is
11 again focused towards DCRA and the ZA, that
12 because you issued a temporary C of O that
13 that complied with the Zoning Order? Do you
14 think that the fact that it was a temporary
15 versus a permanent C of O, can you explain, I
16 guess, your opinion on or if you think that
17 makes a difference?

18 MR. SURABIAN: I think that makes
19 a difference, but it's not that factor alone.
20 I think, again, it's the -- that that was
21 sort of a safeguard that he took to ensure
22 that he would -- that in order to -- you know,

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1 that would be his hook to make sure that all
2 the conditions were eventually complied with.

3 His authority to issue any C of O
4 stems from the Board precedent case.

5 CHAIRPERSON MOLDENHAUER: Okay.
6 Thank you. I think we will open it up to
7 other Board questions.

8 MEMBER SORG: I just have one.

9 CHAIRPERSON MOLDENHAUER: Ms.
10 Sorg?

11 MEMBER SORG: Thank you, Madam
12 Chair. I just had one question to follow-up
13 on your second to last question, which is why
14 was the approval of the landscape design by
15 DPR a milestone with regard to the Zoning
16 Commission Order?

17 ZONING ADMIN. Le GRANT: Well,
18 there had to be a plan that was agreed to.
19 The reason the plan was delayed in part was it
20 was very -- some elements of what was going to
21 happen in the park are very controversial. In
22 other words, were there going to be park

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1 lights? If so, how and so forth.

2 So this delayed DPR's ability to
3 approve the plan. And in no way -- I don't
4 believe that I would rely on DPR's
5 representations until we had a plan in place.

6 And I think the condition --

7 MR. SURABIAN: And I'll just -- it
8 kind of goes back to what I was saying earlier
9 is that there was a number of factors he
10 considered. And one was that parts of the
11 conditions had already been satisfied. And
12 10(b) specifically calls out that there has to
13 be a plan approved by DPR.

14 And unbeknownst to, I think, all
15 parties, including the Zoning Commission at
16 the time, that that didn't contemplate that.
17 The Commission of Fine Arts had to review it,
18 that the United States Park Service had to
19 review it, because it's not spoken to in those
20 conditions.

21 So once he had -- once those
22 parties, everyone, had given their approval

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1 and DPR had given their approval, the Zoning
2 Administrator felt that they had come, you
3 know, enough to show that things were in
4 motion, that things were happening and that
5 the escrow agreement, if the money was in
6 place, that it was acceptable for him to issue
7 a conditional C of O.

8 VICE CHAIRMAN DETTMAN: Mr. Le
9 Grant, I want to look at 10(c) very quickly.
10 And I just want to make sure that I understand
11 it correctly. The issue of the replacement of
12 the chain link fence, you kind of tied into
13 the escrow agreement, right? So when you are
14 looking at that, you are saying, okay, the
15 escrow agreement fulfills Item (b) and the
16 replacement of the fence portion of (c)?

17 ZONING ADMIN. Le GRANT: Well, the
18 ornamental metal fence cost is included in the
19 escrow agreement.

20 VICE CHAIRMAN DETTMAN: Okay.
21 What assurances are there in the escrow
22 agreement to ensure that the streetscape

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1 improvements were going to be implemented?

2 ZONING ADMIN. Le GRANT: Well, the
3 -- I guess -- I believe I was asked the
4 question earlier, as well, is the concern that
5 was brought to my attention had to do,
6 basically, with the park in 10(b).

7 As Mr. Avitabile mentioned, the
8 streetscape side adjacent to the park that was
9 difficult to distinguish some of those
10 aspects, because, from a construction point of
11 view, it made sense to do them all at once.

12 My conversations with the Friends
13 of Francis Field, my recollection, it had to
14 do a lot with the concern about the park, not
15 so much the streetscape, at the time.

16 I felt when I issued the
17 conditional C of O that, well, the issues that
18 were brought to my attention, that's the focus
19 of -- you know, it drives my decision. But
20 because the conditional C of O exists, that in
21 the end I'm going to sit down, walk through
22 all the conditions and if there is something

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1 missing from the streetscape or there is an
2 amount of funds that were supposed to be
3 expended or there is something missing, I do
4 not have to issue a final Certificate of
5 Occupancy. That was my rationale.

6 VICE CHAIRMAN DETTMAN: The order
7 though, 10, the introductory language doesn't
8 distinguish between a conditional or a final C
9 of O. Is that correct?

10 ZONING ADMIN. Le GRANT: It does
11 not have that language.

12 VICE CHAIRMAN DETTMAN: And
13 although you said that, you know, you were
14 aware that the Friends of Francis Field were
15 more concerned about the improvements to the
16 park, the replacement of the fence, it really
17 was your job to make sure that Items (a), (b)
18 and (c) were satisfied in one way or another.

19 ZONING ADMIN. Le GRANT:
20 Ultimately.

21 VICE CHAIRMAN DETTMAN: Prior to
22 issuing any sort of C of O. Is that right?

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1 ZONING ADMIN. Le GRANT: Well, I
2 would say that before any final C of O, I have
3 to make sure that all the conditions of an
4 order are satisfied.

5 VICE CHAIRMAN DETTMAN: Have there
6 been -- is it often that you issue conditional
7 C of Os?

8 ZONING ADMIN. Le GRANT: Well --

9 VICE CHAIRMAN DETTMAN: Under what
10 circumstance? I guess I'm just trying to get
11 a sense of what a conditional C of O is really
12 meant to do.

13 ZONING ADMIN. Le GRANT: Okay.
14 I'll explain. They are not that often. I
15 would say maybe I have done about a half a
16 dozen in the last 12 months. I cannot recall
17 a case offhand of another case tied to either
18 a Zoning Commission or BZA Order. But many
19 applications come to me in which there may be
20 some outstanding issues that are not life
21 safety.

22 The first threshold is the

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1 District is not going to issue a conditional
2 Certificate of Occupancy for any building in
3 which there is a life safety issue. My
4 inspections division has to tell me that the
5 building is safe to occupy from a life safety
6 standpoint, fire egress and fire safety, for
7 example.

8 If there are outstanding issues,
9 such as, okay, there is a railing or there is
10 some aspect of that construction that is not
11 yet completed, but the applicant approaches us
12 with the desire to occupy the building, we can
13 and have issued a conditional Certificate of
14 Occupancy with both an expiration date and a
15 punch list or those conditions spelled out,
16 these must be satisfied prior to the issuance
17 of any final Certificate of Occupancy.

18 VICE CHAIRMAN DETTMAN: Did the
19 conditional C of O in this situation have that
20 punch list?

21 ZONING ADMIN. Le GRANT: It
22 mentions that the -- all the conditions of the

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1 PUD, all to be five, I think I call it
2 specifically 10(1)(b), must be satisfied.

3 VICE CHAIRMAN DETTMAN: Thank you.

4 CHAIRPERSON MOLDENHAUER: I've got
5 just some jumping back in here some questions
6 to Friends of Francis.

7 You and both the ANC made remarks
8 that the escrow agreement was done ex parte.
9 And I went back and I'm looking through your,
10 I think it is actually part of, initial
11 packet. I'm trying to see if we have an
12 exhibit number on this. It's, I think, part
13 of your slideshow presentation.

14 It's, I believe, our Exhibit No.
15 13. And, yes, the large binder document. And
16 I'm flipping through from pretty much May
17 2008, emails then going through until, you
18 know, May '08 again. And then there is some
19 additional information, you know, in through
20 '09.

21 There is correspondence where you
22 acknowledge or you articulate that DPR has or

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1 holds the authority to make certain approvals
2 and determinations regarding the order for
3 these improvements at the Francis Field and
4 that you were going to be working hand-in-
5 hand.

6 And actually in some of these
7 emails dated May 8, 2009, there were
8 correspondence with a Jane Wilner talking
9 about the fact that, you know, there are all
10 these different meetings between DPR and
11 people from Friends of Francis and that you
12 are going to be working with DPR and that you
13 would work together to finalize the amenities
14 package.

15 How is it that you now object that
16 DPR agreed to an escrow agreement or that you
17 didn't know about this escrow agreement, if
18 you had been working with them?

19 MR. GRIFFITH: First of all, just
20 so I know what you are talking about, and I
21 apologize for the organization of this, but
22 it's easier than we think.

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1 If you hold it horizontally, there
2 are numbers in the corner that related to the
3 slides. And then the information in there,
4 the documents were sort of backup for that.

5 So if you can give me the
6 horizontal number near what you are talking
7 to, but I believe --

8 CHAIRPERSON MOLDENHAUER: I don't
9 have any horizontal numbers on my --

10 MR. GRIFFITH: No?

11 CHAIRPERSON MOLDENHAUER: Hold on.
12 This is not -- yes.

13 MR. SURABIAN: Mr. Griffith, do
14 you have an extra copy of that? Because I
15 don't believe you served that on DCRA. Do you
16 have an extra copy of that for presentation?

17 MR. GRIFFITH: We probably did
18 not. We brought 10 copies here. But while
19 you are looking for this, perhaps I can
20 explain. That --

21 CHAIRPERSON MOLDENHAUER: I think
22 I'm going past 16. I think it is documents

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1 for Slide 16.

2 MR. GRIFFITH: Okay.

3 CHAIRPERSON MOLDENHAUER: I
4 believe, but, you know, and then I think there
5 are some documents that go past 17. I'm kind
6 of flipping through the whole thing, but I
7 believe it starts around like 15, 16 and 17
8 for all parties. I was following it
9 chronologically, I thought, but there are
10 email exchanges and then letters. So if you
11 can, I guess, address the question?

12 MR. GRIFFITH: Okay. These are
13 the ones in large type?

14 CHAIRPERSON MOLDENHAUER: There
15 are a couple. As I said, I'm referencing
16 multiple different ones.

17 MR. GRIFFITH: Okay. Right.

18 CHAIRPERSON MOLDENHAUER: That is
19 one of them, yes. Then there are direct
20 letters and things to that effect.

21 MR. GRIFFITH: I can explain this.
22 And this was going to be part of our -- this

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1 was put in there. These emails are between
2 Jane Wilner, who is sitting back here, and
3 Lauren Brandes, the architect from Oculus.

4 There was a confusion where the
5 Oculus architect met with Stoddert Soccer, not
6 us, under the impression that she was meeting
7 with us. And that's what this -- that's what
8 these emails refer to. Under the --

9 CHAIRPERSON MOLDENHAUER: Well, I
10 mean, I guess, I'm trying not to get too much
11 into the -- I guess, at a certain point
12 though, you started meeting. I guess, so
13 beyond that point, you did start to meet with
14 DPR --

15 MR. GRIFFITH: Absolutely.

16 CHAIRPERSON MOLDENHAUER: -- and
17 so at a certain point in time, and I'm looking
18 at this one document, as of December '07,
19 there was a meeting with DPR. No, as of March
20 '08, the fourth meeting, that's when there is
21 an identification that the attendees had
22 somebody from Friends of Francis.

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1 So if we can start from March of
2 '08 and move forward towards the date of the
3 escrow? If you can fill that gap in.

4 MR. GRIFFITH: Yes, I can. Can I
5 just refer to my slides? Do you mind?

6 CHAIRPERSON MOLDENHAUER: That
7 would be fine.

8 MR. GRIFFITH: Well, there were --
9 this shows -- this talks about the stakeholder
10 meetings. There was a meeting at the library.
11 There was an ANC meeting. The March 2008,
12 oh, we didn't meet with DPR until May 8, 2008,
13 that's the first time we met with DPR.

14 CHAIRPERSON MOLDENHAUER: Okay.

15 MR. GRIFFITH: There is no
16 question that we attended many meetings with
17 DPR. This was to develop the Landscape Plan
18 that was called for in the Zoning Order, in
19 the order, in Part 10(b). There had to be a
20 Landscape Plan.

21 We never had approval of this
22 plan. The plan had to be approved by DPR. DPR

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1 under the law had to have the plan reviewed by
2 the Commission of Fine Arts.

3 There was -- and the delay came in
4 when DPR made a big mistake that they didn't
5 own the land that they were trying to make the
6 improvements on. The land was owned by
7 National Park Service.

8 CHAIRPERSON MOLDENHAUER: But I
9 mean, I guess, you are answering my question
10 by saying that you had been in communication
11 and attending stakeholder meetings with DPR
12 since May of '08 through until the time when
13 they entered into the escrow agreement on June
14 18, 2009?

15 MR. GRIFFITH: Almost. The last
16 meeting that we had with DPR was in December
17 2008 and that was the ANC meeting when the ANC
18 approved a Landscape Plan but with no lights
19 on it.

20 DPR then submitted a plan with
21 lights to the Commission of Fine Arts, as it
22 needed to by law. In that process, the

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1 National Park Service said to DPR and the
2 Commission of Fine Arts they can't do this.
3 They don't own this land. That is what caused
4 the delay. But the delay was an error by DPR.

5 Then in April, Clark Ray, the
6 Director of DPR, at the time, was fired
7 overnight by the Mayor. And at that point,
8 the owner -- DPR was in some turmoil. There
9 is no question there was a delay here. The
10 owner then made no effort to contact DPR or to
11 contact National Park Service, Commission of
12 Fine Arts or anybody else it mentions in the
13 escrow.

14 The problem was turmoil, errors at
15 DPR, turmoil in DPR management, there was no
16 way that a plan could be approved until DPR
17 met with National Park Service to settle the
18 problem.

19 In no way was this an -- in no way
20 was there any error by National Park Service
21 or the Commission of Fine Arts or the Water
22 and Sewer Authority. The error was on the

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1 part of DPR. But, as I tried to say last
2 time, because the escrow agreement is signed
3 by DPR, they blame everyone else.

4 The escrow agreement is between
5 the owner and DPR, but the escrow agreement
6 doesn't mention anything about any errors by
7 DPR, Clark Ray being fired or any problems.
8 They want to blame everything on the National
9 Park Service and the Commission of Fine Arts
10 for discovering the unfortunate DPR error.

11 So we have not -- we do not argue
12 at all that there wasn't a delay. We think,
13 at the time of this delay, that the owner was
14 the one with the problem. He should have
15 contacted DPR, the other people who were
16 holding this up. And most to the point of
17 this hearing, he should have gone back to the
18 Zoning Commission, according to the laws that
19 we have cited, and said we have got a problem.
20 We're going to have a delay and so on.

21 They delivered -- they -- in
22 answer to your question about the escrow, we

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1 were never contacted about the escrow. We
2 never knew about the escrow. We have no
3 problem with DPR and the owner making
4 agreements. But once they try and inject them
5 into a zoning case, they have got to serve
6 them on the parties and show them to the
7 Zoning Commission.

8 MR. AVITABILE: Chairperson
9 Moldenhauer, I just need to insert for a
10 second some objections to some of the factual
11 representations that Mr. Griffith made
12 regarding what my client did or did not do.

13 I don't believe that they are all
14 completely accurate. Rather than detail them
15 and try -- I didn't think it made sense to try
16 to challenge him while he was presenting them,
17 but I just wanted to, for the record, make
18 that clear.

19 I think we have our own account of
20 what went on. It is Tab A of our pre-hearing
21 statement that is kind of a time line where we
22 provided the events, which kind of discusses

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1 what we tried to do to try to -- once these
2 issues arose, try to move the ball forward.

3 And I just wanted to make sure
4 that objection was on the record.

5 CHAIRPERSON MOLDENHAUER: Okay.
6 The objection is understood and, obviously, we
7 can compare Tab A to the statements that were
8 previously made. But thank you. I think you
9 have answered my question.

10 Are there any other questions from
11 the Board Members? It doesn't appear as such.

12 Then what we will do is if the appellant
13 wishes to make a closing remark about this
14 specific issue, and then we will enter into
15 deliberations.

16 MR. GRIFFITH: Thank you, Madam
17 Chair. Another point of order though. Is
18 there -- do I not have the opportunity to
19 cross-examine on the other statements?

20 CHAIRPERSON MOLDENHAUER: In --

21 MR. GRIFFITH: Okay.

22 CHAIRPERSON MOLDENHAUER: --

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1 appeals, no. There is no cross-examination,
2 because there has really been -- unless you
3 have --

4 MR. GRIFFITH: That's fine. I
5 understand. Thank you. I guess in closing, I
6 would like to say, I would like to point out a
7 couple of things that I don't think were
8 stated factually and should -- and to which I
9 would like the Board to take note.

10 First of all, Mr. Avitabile would
11 have you ignore that in 10(b) part of the
12 language here is not just a contribution, but
13 install. Part 2 of this is following approval
14 by DPR install the improvements consistent
15 with the Memorandum of Understanding so on and
16 so and so and forth.

17 He would have you believe that
18 this is just a -- that there is only a
19 contribution made and this word install does
20 not exist in there, but it does exist.
21 Installing was part of the order. It is part
22 of what the Zoning Commission meant and we can

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1 show that.

2 Next, the next largest thing is
3 this idea of the conditional C of O. Now, the
4 C of O that we are -- that is -- that we are
5 basing our case on, when we filed our case,
6 there was only one C of O that still existed.

7 And Mr. Le Grant is right, the owner managed
8 to get two previous C of Os under a different
9 address for the building, which were revoked,
10 as they should have been, and had tenants in
11 the building when this September C of O was
12 issued.

13 The September C of O to which we
14 are appealing was then after this, they put in
15 this conditional C of O, which is dated in
16 December. We filed our case in October. The
17 conditional C of O, Mr. Le Grant is talking
18 about, is dated in December.

19 However, the order doesn't say
20 that you can have conditional C of Os or pink
21 C of Os or extra special secret C of Os. It
22 says -- the order is "No Certificate of

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1 Occupancy for any building." No means no.

2 They weren't allowed to issue any
3 Certificates of Occupancy, conditional or
4 otherwise. And I think you need to look at
5 why they then, after we filed our case, felt
6 the need to make this conditional C of O. And
7 I think you can ask them, but we think they
8 realized that they had no authority to issue
9 the September C of O.

10 They then tried to put in this so-
11 called conditional C of O, which does not, in
12 fact, if you look at it, it's there, it's the
13 Attorney General's Exhibit B, but if you look
14 at it, they forgot to include Condition (c) in
15 it. It's only conditioned on 10(b). 10(c) is
16 missing on it, if you look at it.

17 Mr. Le Grant's -- there was -- in
18 closing here, I want to say that the issue of
19 the escrow was talked about to some extent
20 here. We think the escrow itself was not
21 allowable, because it wasn't -- the escrow
22 itself tries to make a substitution in the

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1 timing of the order and the order of itself.

2 However, we have got plenty else
3 to say about the escrow. The escrow tries to
4 deprive the neighborhood of \$200,000, the way
5 we read it. The escrow is based on completely
6 erroneous things and premises that the Zoning
7 Administrator did not check, did not look into
8 the truth of.

9 The owner might as well have said
10 that they couldn't do this because dinosaurs
11 were nesting on the field for all the checking
12 that was done by DCRA on this.

13 MR. SURABIAN: Objection. It
14 just --

15 MR. GRIFFITH: Well, Mr. Le Grant
16 can tell you whether he checked any of this or
17 not. He said that, Mr. Le Grant, he talked to
18 the ANC about this. He characterized that we
19 -- that Friends of Francis Field was only
20 interested in the field improvements, which
21 isn't true. We just never got to the 10(c)
22 things, because owner refused to meet with us

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1 and said if they wanted -- the owner said in a
2 letter to ZA when ZA suggested a meeting with
3 us, we have the letter, that if the Friends of
4 Francis Field want to talk to us, let them
5 come to the BZA.

6 Well, we are here. That's what
7 they said. Mr. Le Grant did not talk to the
8 ANC. And I think the ANC can establish that.

9 So I think that this -- we would
10 like to, when we put on our case in chief, go
11 into -- I think we can explain a lot of the
12 things that did happen much better than they
13 can explain what they were doing.

14 But we think -- and we would
15 remind --

16 CHAIRPERSON MOLDENHAUER: Okay.
17 This is the closing for that issue --

18 MR. GRIFFITH: I understand.

19 CHAIRPERSON MOLDENHAUER: --
20 specifically.

21 MR. GRIFFITH: I understand.

22 CHAIRPERSON MOLDENHAUER: So --

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1 MR. GRIFFITH: We would say in
2 closing that, as we said in our opening,
3 neither the owner nor the appellee has cited
4 one regulation that says they could do what
5 they needed to do or that they could do what
6 they did.

7 And the last thing I would like to
8 read from you in closing is the statement of
9 the owner in their pre-hearing statement about
10 what they did.

11 They say "Therefore, Vornado, DPR
12 and the Zoning Administrator discussed the
13 escrow agreement as an alternative solution
14 that would ensure the delivery of the amenity
15 prior to the issuance of the C of O for the
16 PUD and still permit Vornado to occupy the new
17 building upon its targeted completion date."

18 That's exactly what they did.
19 They came up with an alternative solution to
20 the Zoning Order. But they didn't tell the
21 Zoning Commission. They didn't tell us. And
22 they didn't tell the ANC.

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1 CHAIRPERSON MOLDENHAUER: Thank
2 you very much. I think, at this point, what
3 we are going to do is we're going to go back
4 prior to coming out and deliberating on this,
5 and just review the record, review some of the
6 different elements that we have heard.

7 And then so what we will do is we
8 will take probably a 25 minute break and come
9 back out at 3:45. So we will reconvene at
10 3:45.

11 (Whereupon, at 3:20 p.m. a recess
12 until 4:08 p.m.)

13 MR. EPTING: Madam Chair, John
14 Epting.

15 CHAIRPERSON MOLDENHAUER: Your
16 speaker.

17 MR. EPTING: John Epting. Would
18 the Board mind if we have a few more minutes
19 outside and then we would come back? We are
20 discussing some potential settlement issues.

21 CHAIRPERSON MOLDENHAUER: Okay.
22 Then why don't we give you another, let's just

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1 say, 10 minutes, so we will come back at 20
2 after.

3 MR. EPTING: Thank you. Thank
4 you. And I apologize, but it's something
5 going off in my head when I heard Gary talking
6 a while ago. So thanks.

7 CHAIRPERSON MOLDENHAUER: Not a
8 problem.

9 COMMISSIONER TURNBULL: We have no
10 objection.

11 (Whereupon, at 4:09 p.m. a recess
12 until 4:24 p.m.)

13 CHAIRPERSON MOLDENHAUER: Okay.
14 We're going to go back on the record now. And
15 what I will do, because there was, I believe,
16 a request previously to take a few minute
17 break to potentially come to some agreement,
18 before closing out the hearing or this portion
19 of the hearing and entering into a
20 deliberation, I will see if there is any
21 additional or new comments from any of the
22 parties.

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1 MR. EPTING: John Epting again. I
2 think what we would like you to do is rule on
3 the initial threshold question and before we
4 get to the merits of the case, we would
5 propose a compromise on the merits.

6 CHAIRPERSON MOLDENHAUER: Is that
7 nothing that you want to present now before we
8 go into our deliberation?

9 MR. EPTING: I'm sure we could.
10 What we would like to do on the merits, we
11 have reached a several point list of items
12 that we have agreed to do, including Dave can
13 read them into the record.

14 And we would ask that the merit's
15 hearing be postponed until we are complete
16 with those actions. And then we would ask the
17 Board to dismiss the remainder of the appeal.

18 CHAIRPERSON MOLDENHAUER: And have
19 the other parties had a chance to hear the
20 terms of this?

21 MR. EPTING: Yes. Yes. We think
22 we are very close on completing the field.

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1 And I think even our pictures that we showed
2 you, we had a site inspection today, but there
3 are issues about whether or not we should have
4 taken out the curb cuts, whether we should
5 have done treeboxes on the east side.

6 CHAIRPERSON MOLDENHAUER: Okay.

7 MR. EPTING: Instead of --

8 CHAIRPERSON MOLDENHAUER: Well,
9 before --

10 MR. EPTING: -- arguing about all
11 those things, we are just going to agree to do
12 them.

13 CHAIRPERSON MOLDENHAUER: Well, I
14 think that what we should do now is let us --
15 I mean, I hear where you are going on that.
16 But let's move forward and we will go into our
17 deliberation and articulate our thoughts on
18 the record for the first issue. And then at
19 the conclusion of that, I think we can address
20 some of the additional issues that are being
21 brought up now.

22 MR. EPTING: Thank you.

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1 CHAIRPERSON MOLDENHAUER: So at
2 this point in time, the hearing on this
3 preliminary issue that we identified is
4 concluded. And we will now enter into
5 deliberations on that.

6 I will start us off briefly. And
7 the issue that the appellant in their Exhibit
8 22 articulates as relief sought on Items 1, 2
9 and 3, which identify concerns regarding
10 whether the ZA has specific authority to enter
11 into an escrow agreement, whether the ZA had
12 authority to potentially or allegedly change
13 the Zoning Order by entering into an escrow
14 agreement.

15 And then (1) whether the ZA
16 required statutory authority to enter into the
17 escrow agreement and whether that actually
18 changed the Zoning Order.

19 In hearing the different
20 articulated points by both the applicant, the
21 District of Columbia and the ZA and the owner,
22 my opinion is that while an escrow agreement

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1 is not always permitted and it is only
2 permitted in certain instances and on a very
3 limited case-by-case basis and, obviously,
4 there are certain Members of the Board that
5 disagree with whether or not an escrow
6 agreement is even permitted at all, we are
7 looking currently just at whether or not the
8 ZA acted in good faith at the time to issue
9 this.

10 I don't personally, in my review
11 of the law and the cases and the regs, think
12 that the ZA has to have a specific statutory
13 authority for every single action that he
14 makes.

15 His general obligations and powers
16 are to interpret and to implement the
17 regulations. And I think that he took what he
18 deemed at the time and what I believe is
19 reasonable action to implement the regulations
20 and to implement the order.

21 He was following the West End
22 Civic Citizens' case. While I believe that

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1 some of the processes and some of the actions
2 he took could have been improved, and I'll go
3 through those in a bit, that, in general, what
4 he did was reasonable under the circumstances
5 and did conform with prior cases.

6 The issue of whether or not there
7 were unforeseen circumstances, I believe that
8 at the time the ZA was presented with, as he
9 stated, multiple different factors of
10 unforeseen circumstances and the strict
11 compliance was not completely, in his mind,
12 reasonable and, thus, needed to have some sort
13 of additional process in order to complete the
14 Zoning Order.

15 In addition to that, there were
16 some different views as to whether or not the
17 Zoning Order was being modified by providing
18 an escrow agreement.

19 And in my view, I don't see the
20 escrow agreement as modifying it. I feel
21 rather that it actually is just providing a
22 different form from which the conditions under

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1 Section 10 are being provided.

2 In addition to that, I think that
3 when the order states that the following
4 conditions are required for a C of O to be
5 issued, I see that as a final C of O being
6 issued. And that the ZA was taking what it
7 believed to be reasonable steps in granting
8 certain current temporary or conditional C of
9 Os.

10 In addition to that, there were
11 the -- and one of my major concerns, and this
12 came out in some of my questions, was the fact
13 that this appeared to be initially an ex parte
14 escrow agreement. And that really gave me
15 pause.

16 The fact that it was not between
17 all of the parties of the Zoning Order, in my
18 view, if this were to have been a perfect,
19 well, not perfect, because nothing would ever
20 be perfect, but rather a more appropriate
21 escrow agreement, it would have, specifically
22 in the recitals, identified the fact that

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1 Condition (a) had been satisfied, which on the
2 record currently today we understand that the
3 ZA had a reasonable understanding that it had
4 been satisfied.

5 And the owner has testified or the
6 owner's counsel has testified that it has been
7 satisfied prior to the issuance of this
8 conditional C of O. But in my view, an escrow
9 agreement should have stated that. It should
10 have then stated the additional conditions and
11 then how the escrow agreement was going to
12 deal with both (b) and (c).

13 I think that it does deal with
14 both (b) and (c). I don't believe that it is
15 as clear as I would like to see, but then
16 getting back to the issue of whether or not
17 all of the Zoning Order parties -- Zoning
18 Commission Order parties were party to this
19 escrow agreement, again, I would rather in the
20 future, you know, and whether or not these are
21 permitted in the future, see all parties being
22 noticed of this or rather being a party to the

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1 agreement.

2 But I think that, in this current
3 instance, trying to view whether the ZA erred
4 or whether the ZA was reasonable, I think that
5 because DPR had been working with the other
6 parties and with Friends of Francis for a
7 period of time, that, at the time, even
8 Friends of Francis confirmed that they had
9 actually approved at an ANC meeting the
10 current DPR's designs.

11 And then at that point, it was
12 moving forward for the Commission of Fine Arts
13 review and additional reviews, that they were
14 acting as an agency that was overseeing those
15 elements that Friends of Francis and the ANC
16 had already articulated or met with on those
17 points.

18 So that, to me, alleviates that
19 concern that they were not a specific party to
20 the escrow agreement.

21 Having said that, I think that in
22 the future, this conditional escrow agreement

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1 does terminate. And in my view, obviously,
2 the other Board Members can speak on this and
3 their views, but in my opinion, now at the
4 time that this terminates, the ZA is on notice
5 of some concerns and maybe that will be
6 addressed after this is over, but that no
7 further certificate could be issued without
8 all of the elements being, you know, all the
9 elements of the order having been satisfied
10 and the ZA being fully assured that all of the
11 parties know that the elements or believe that
12 the elements have been satisfied.

13 And I think that this proceeding
14 has put the ZA on a higher standard or a
15 higher notice element in regards to issuing
16 any further C of Os after the date, I believe
17 it is, June 30, 2010 when this expires.

18 Having put forth my opinions, I
19 think we can open it up for additional
20 discussions of other Board Members.

21 VICE CHAIRMAN DETTMAN: Madam
22 Chair, I'm in full agreement with your

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1 articulation of the issue that is at hand. I
2 think that with respect to whether or not the
3 ZA erred in accepting an escrow agreement for
4 purposes of satisfying 10(b) and a portion of
5 10(c), I think that I wouldn't say that the
6 Zoning Administrator has the overarching
7 authority to supplement, you know, a
8 particular Zoning Commission Order in the
9 future with an escrow account.

10 I just think the words on paper
11 here in 10(b) work. I think that I read it
12 just to say the developer is required to make
13 a contribution of design materials and labor
14 valued at \$150,000 for purposes of preparing a
15 plan and installing the elements of that plan.

16 And I think that that has been
17 done by setting aside this money in this
18 account. So I think the words work in this
19 particular case.

20 With respect to whether or not I
21 think that the Zoning Administrator has acted
22 reasonably, I think he was handed a very

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1 difficult situation here. The developer
2 pursued two C of Os and was able to acquire
3 them and then they were revoked.

4 But I think the Zoning
5 Administrator was handed a situation where you
6 have a building that is partially or fully
7 occupied, I'm not certain, and had to balance
8 whether or not we were going to require people
9 to move out of that building or find a way to
10 keep the project on track in order to make
11 sure that the community is afforded the
12 amenities that they were promised by way of
13 the Zoning Order. And I think that he did
14 that.

15 I fully agree with you with
16 respect to how the communications went. I
17 think that Friends of Francis Field, the ANC
18 should have been involved in the development
19 of the escrow account, perhaps parties to that
20 contract and perhaps there was going to be
21 opportunities going forward where they can be
22 included in any future communication.

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1 And with respect to your point
2 about future C of Os, either conditional or
3 the final, I would recommend that the Board
4 make a stipulation that any future C of O,
5 conditional or final, be required to fully
6 meet the conditions of the Zoning Order.

7 CHAIRPERSON MOLDENHAUER: Mr.
8 Turnbull, would you like to contribute to the
9 deliberations?

10 COMMISSIONER TURNBULL: I would be
11 delighted.

12 CHAIRPERSON MOLDENHAUER: Thank
13 you.

14 COMMISSIONER TURNBULL: Thank you.

15 Actually, I'm opposed to the C of O. And I
16 respect Mr. Le Grant extremely, much for his
17 diligent work that he does. But I think in
18 this instance, I'm a little bit concerned
19 about the escrow account.

20 I feel that the language that we
21 had written in the order is exactly what we
22 meant, that it was to be provided before you

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1 go further. And I'm not dismissing the
2 possibility that an escrow account could be a
3 vehicle in the future for doing this.

4 Unfortunately, there is no
5 definition or regulations on what an escrow
6 account is or does in the Zoning Regs. We
7 don't call it out in any of our orders. And
8 since this is only the second escrow account
9 that we have been dealing with, I'm troubled
10 by that. And I think the Zoning Commission
11 would be troubled that it is being used.

12 I think it needs to be reviewed
13 and I think that it could be a possible
14 vehicle, but I think that vehicle needs to be
15 described and enumerated as to how you go
16 about setting it up, the parties involved, as
17 Mr. Dettman said.

18 And as the Chair talked about ex
19 parte, that certain people not being involved,
20 I think that's the whole issue. I think that
21 in this -- when you have a PUD, you have
22 community interest. So you definitely have

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1 parties that want to be involved to make sure
2 that things are getting done.

3 And there is an administration
4 issue. I'm not really sure that the escrow
5 account is something, the way it is set up
6 right now describes everything, the way I
7 would like it or the way the Zoning Commission
8 might like it.

9 So I think that is an issue for me
10 that I'm a little uncertain that as the Zoning
11 Member that we are getting exactly what we
12 asked for. And I'm not saying that the
13 applicant is not going to do it. I'm just
14 saying that right now we can't really tell. I
15 can't tell anyways.

16 I think we have had some -- when I
17 look at 10(a), although Mr. Le Grant said he
18 was verbally told that (a) was done, I think
19 there should have been a very prescribed
20 process. I think that should have been
21 written, that he had something there from
22 someone.

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1 And I'm concerned that 10(c) is
2 not addressed, which is the \$200,000. And
3 again, I understand these are estimates. They
4 were estimates at the time. I don't think
5 anybody is going to hold anybody's feet to the
6 fire if it's \$198,000 or whatever. But it was
7 a threshold amount to cover the work that was
8 to be done.

9 And I'm not really sure that
10 Commissioner Le Grant has been given
11 everything that he could tell to really do
12 this. I'm not really sure that you have an
13 itemized list that explains everything that
14 has to be done.

15 But I guess I get back to the
16 escrow. I'm just concerned that this is,
17 again, only the second one that has shown up
18 for a PUD, and I'm concerned that we are
19 setting more precedent for more of these. And
20 I'm not trying to hinder the administration of
21 the Zoning Administrator.

22 I would like to make it clear. I

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1 think we need to address this in the Zoning
2 Regs somehow that clearly defines how an
3 escrow account should be used and what are the
4 guidelines to set it up, parties involved,
5 etcetera.

6 Does he have the authority? Well,
7 I guess you can read into that. He is
8 administering the PUD. He is trying to get it
9 done. So under that guise, yes, you could say
10 that.

11 My only concern is that when this
12 was written, when the Zoning Commission wrote
13 this, we didn't specifically say or you can
14 use an escrow account. So from that
15 standpoint, I'm a little tenuous on going
16 ahead with that. It just troubles me that I'm
17 setting up more for precedent in agreeing with
18 you folks.

19 So I will be opposed.

20 MEMBER SORG: I have been very
21 conflicted on the way that I have been
22 thinking about this case. And I think that

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1 I'm very sensitive to the concerns that Mr.
2 Turnbull has and the Zoning Commission,
3 because as he said, and I won't reiterate his
4 points for him, you know, I think escrow
5 accounts are something that, you know, the
6 Zoning Administrator may not be an expert in
7 meeting.

8 And once you get into these
9 different types of vehicles, they become, I
10 think, harder to judge whether they satisfy
11 the conditions of the orders or not.

12 And similarly, I also respect the
13 desire of the Zoning Commission to have their
14 orders fulfilled in the way that they are
15 written.

16 On the other hand, you know, we
17 are talking about development and the building
18 of buildings. And you know, from beginning to
19 end these efforts can take, definitely take,
20 years and can often take decades. And it is
21 all, you know, I think a game in time.

22 And so, you know, the order here

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1 and Stipulation No. 10 talks about time and it
2 says, you know, the Certificate of Occupancy
3 can't be -- won't be approved until these
4 following things can be provided.

5 But I think it is a difficult
6 thing to say that on Wednesday we are going to
7 delivery the building and on Wednesday we are
8 going to finish this park. So in that way, I
9 think that a lot of decisions and accords and
10 considerations that have to do with this type
11 of business get done based on shows of good
12 faith.

13 And I think, in this case, that
14 the Zoning Administrator when he made the
15 decision to issue the conditional C of O, was
16 seeing that the developer was making a show of
17 good faith. I don't necessarily agree with
18 Mr. Dettman's reading of 10(b). I do think
19 that it calls out, that the language of the
20 order, for the delivering of items, as in a
21 design or some furniture or some trees or
22 whatever it is, but I think that given the

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1 good faith effort that the Zoning
2 Administrator saw, in this case, I do agree
3 that you can see the reasonableness of that
4 action.

5 And I also would echo what my
6 three colleagues, you know, said, it really
7 seems that all of this could have been avoided
8 or potentially avoided with better
9 communication among all the parties. And I
10 think that, in these cases, the onus for that
11 communication really falls on the owner.

12 So hopefully in the future that
13 will be handled better, so that, you know, we
14 don't have to come to this type of forum.
15 Yes, I think that's it.

16 CHAIRPERSON MOLDENHAUER: Thank
17 you. I just wanted to kind of, I guess,
18 clarify some of my positions, for the record,
19 to make sure that everyone is in agreement.

20 But I think that in this
21 circumstance, the ZA had a very limited and I
22 think that it is not a common practice and I

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1 would not want to see multiple escrow
2 agreements being drafted in circumstances of
3 PUDs or different Zoning Orders, but I think
4 that there are certain factors here that are
5 very unique that the ZA took into
6 consideration.

7 (1) Unforeseeable circumstances
8 that were not within the control of the owner
9 and that were not known at the time of the
10 order.

11 (2) The impossibility of
12 completing some of the conditions, not all the
13 conditions, but some of the conditions at that
14 time.

15 And (3) the undue hardship of this
16 in regards to the fact that there were
17 conditions regarding, you know, the building
18 being completed, individuals being in the
19 building and then, you know, the fact that
20 there was -- the DPR was going through some
21 challenges, things to that effect.

22 And then (4) the fact that the

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1 owner was working in good faith to complete
2 some of these items. Some of the items had
3 been completed at the time. There were three
4 factors: 10(a), (b) and (c); (a) had been
5 completed from the representations to the ZA
6 at the time, part of (c) had been completed.

7 So based on those four factors, I
8 would state that the ZA had the authority and
9 took reasonable action and did not err in
10 granting or permitting an escrow agreement to
11 grant a temporary C of O.

12 After that articulation, is there
13 any additional deliberation?

14 COMMISSIONER TURNBULL: I would
15 just like to add that we could have had an
16 expedited hearing on a modification to the
17 order in a fairly short time, given our
18 calendar, what it has been. And I think that
19 that still would have been the more
20 appropriate action would be to for the Zoning
21 Administrator to simply say, I think, I'm
22 going to defer to the Zoning Commission.

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1 And I think we would have avoided
2 all of this. We could have had the parties
3 there and we could have got this thing
4 resolved fairly quickly.

5 CHAIRPERSON MOLDENHAUER: At this
6 time, I'll make a motion to deny the
7 appellant's review of the ZA's decision and to
8 confirm the ZA's decision to provide a
9 temporary C of O, based on an escrow
10 agreement. And in addition, that is Part 1 of
11 the motion.

12 Part 2 would be to not revoke the
13 temporary C of O, but rather to confirm that
14 no further C of O is issued until the Zoning
15 Administrator and all parties to the Zoning
16 Order can confirm and agree that all of the
17 elements of the Zoning Order have been
18 reached.

19 Do I have a second?

20 VICE CHAIRMAN DETTMAN: Second.

21 CHAIRPERSON MOLDENHAUER: The
22 motion has been made and seconded.

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1 All those in favor say aye.

2 VICE CHAIRMAN DETTMAN: Aye.

3 CHAIRPERSON MOLDENHAUER: Aye.

4 MEMBER SORG: Aye.

5 CHAIRPERSON MOLDENHAUER: All
6 those opposed?

7 COMMISSIONER TURNBULL: Opposed.

8 CHAIRPERSON MOLDENHAUER: Can we
9 read back the vote?

10 MS. BAILEY: Madam Chair, the vote
11 is recorded as 2-1-1.

12 CHAIRPERSON MOLDENHAUER: Ms.
13 Bailey, I don't --

14 MS. BAILEY: I'm sorry.

15 CHAIRPERSON MOLDENHAUER: -- think
16 that was correct. You would like us to redo
17 the vote?

18 MS. BAILEY: Well, Mrs.
19 Moldenhauer made the motion, Mr. Dettman
20 seconded. Ms. Sorg, how did you vote?

21 MEMBER SORG: In the affirmative.

22 MS. BAILEY: So, Madam Chair, the

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1 vote is 3-1, Mr. Turnbull is opposed, 1. Was
2 that not what I said?

3 CHAIRPERSON MOLDENHAUER: Yes.

4 MS. BAILEY: Okay. 3-1-1.

5 CHAIRPERSON MOLDENHAUER: Thank
6 you.

7 MS. BAILEY: Okay. There is a
8 two-part motion. The first part is to deny
9 appellant's review of the ZA decision. And
10 the second part is not to revoke the C of O.
11 And the motion was made by Mrs. Moldenhauer,
12 seconded by Mr. Dettman, Ms. Sorg supports the
13 motion. Mr. Turnbull is opposed to the
14 motion. And we don't have a third Mayoral
15 Appointee sitting at this time.

16 CHAIRPERSON MOLDENHAUER: Thank
17 you. I believe that the second portion had
18 some additional conditions, but that's part of
19 the record, so we don't need to read that in,
20 at this point in time.

21 Based on this decision, since we
22 already decided that we are not going to

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1 revoke the C of O, but we have put conditions
2 on any further issuance of a C of O following
3 the expiration of the temporary C of O on June
4 30th, if the parties would like to proffer as
5 to what they are going to be willing to do, I
6 think that this would be a great opportunity
7 to put that on the record, but we are not
8 going to have any further portions of the
9 hearing.

10 But I would open the floor up for
11 any proffers as to how you would be working
12 together.

13 MR. EPTING: Right. Basically,
14 consistent with the second portion of your
15 motion.

16 MR. AVITABILE: Yes, there would
17 be -- I think we discussed and listened a
18 little bit more to some of the additional
19 things that they would like to see and I --
20 these are -- this is the list. And I think
21 counsel will confirm if I miss something.

22 The first is on the issue of these

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1 curb cuts on the west side of 25th Street, we
2 will go ahead and get those curb cuts removed
3 and replaced with streetscape that is
4 consistent with everything else, so it will be
5 a consistent sidewalk, planting strip and
6 where one of the curb cuts is now, there is
7 space for an additional tree, so we will plant
8 that tree.

9 The second thing is the water
10 fountain, as we understand it, is hooked up,
11 but currently isn't working because the folks
12 at DPR are doing something. We are going to
13 make sure the water actually comes out of the
14 water fountain.

15 The third thing is on the east
16 side of 25th Street, we will make sure to put
17 in treeboxes. We are not going to put them on
18 the west side of 25th Street, because our
19 landscape architect tells us when you have a
20 green grass planting strip, it doesn't make
21 sense to have treeboxes. But on the east
22 side, where we have paving, it does make sense

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1 to have those treeboxes put in. So we are
2 going to do that.

3 And then the last thing is we're
4 going to make a \$5,000 contribution to Friends
5 of Francis Field for them to do as they see
6 fit in the future with regards to the field.

7 MR. EPTING: And we will also meet
8 all of the Zoning Administrator --

9 MR. AVITABILE: Of course.

10 MR. EPTING: -- conditions.

11 MR. SURABIAN: Yes, one thing I'm
12 concerned about, I just want to make the
13 Zoning Administrator's job as easy as possible
14 to understand, you know, what needs to be done
15 before he can issue the final C of O. Because
16 even if we hadn't gone through this hearing,
17 he still would have, you know, walked through
18 with the plans and matched up to make sure
19 everything was done before issuing that.

20 So if -- I just wanted maybe some
21 instruction from the Board of how the Zoning
22 Administrator should proceed at this point.

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1 CHAIRPERSON MOLDENHAUER: I think
2 that would be best coming from Mr. Turnbull,
3 as a Zoning Commissioner, and obviously
4 having, you know, articulated some of the
5 requirements what he sees fit from that
6 perspective, in general, as to what the ZA
7 should do when looking at conditions. Mr.
8 Turnbull?

9 COMMISSIONER TURNBULL: Well, I
10 just wanted to originally say that I'm
11 predisposed to bringing this before the Zoning
12 Commission for a sua sponte, unless there is
13 some reason why the applicant and the
14 appellant feel we shouldn't do that, overturn
15 this decision.

16 MR. EPTING: I understand, you
17 know, what you are talking about. And picking
18 up on some of the good faith efforts, I think
19 you should do that. If it was the situation
20 where we had just posted the escrow and walked
21 away and got our C of O.

22 In this case, you can disagree

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1 with what we did, but we always intended to do
2 the improvements. And we kept working the
3 whole time. And we have now done the
4 improvements, maybe there is a little bit more
5 to be adjusted, but we did everything that we
6 were supposed to do.

7 And the only further arguments
8 that we made about we couldn't complete, did
9 we not -- did we go that way? We did.
10 Otherwise, I think we would have had -- we
11 could have come back and try a minor
12 modification. At that time, we weren't
13 convinced that was going to be a successful
14 way to go.

15 MR. AVITABILE: The only other
16 thing I would add is, in my mind, I think
17 rather than addressing this issue of whether
18 escrow agreements are a proper way to deal
19 with conditions or not, and I think you raised
20 some excellent points, I think maybe the
21 better way for the Commission to approach that
22 might be rather than viewing it through the

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1 lens of a particular case where you might have
2 certain facts that influence it one way or
3 another, it might make more sense for the
4 Commission to tackle that kind of from a pure
5 policy regulatory standpoint.

6 All right. What makes sense going
7 forward? I think you could certainly be
8 guided by this, but it probably would make
9 more sense, from my own perspective, to do
10 that as a straight up, let's do a text
11 amendment either right now or through the
12 rewrite process this is something we should
13 address as a part of the PUD.

14 COMMISSIONER TURNBULL: I think we
15 will do that, yes.

16 MR. AVITABILE: Right.

17 MR. EPTING: And I guess the whole
18 thing, as part of that process, Condition 10
19 would have been better if there had been
20 something built into it that said if you can't
21 get the DPR and other approvals, you can do
22 this, something else.

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1 COMMISSIONER TURNBULL: No. I
2 would --

3 MR. EPTING: Because while we
4 understand the Zoning Commission wants us to
5 do something, if you can't get it approved,
6 you can't do it. So that's the obstacle with
7 proffers like that. If we just have to write
8 a check, we can always write a check. But if
9 we have to build something requiring
10 approvals, there has to be some best outlet
11 clause if we can't get it done.

12 COMMISSIONER TURNBULL: Yes, one
13 of my concerns is not having this, but it's a
14 precedent setting case where the ZA says now
15 there are two cases that talk about an escrow.

16 And I really don't want to see that. I think
17 we need to go through just like Mr. Avitabile
18 said and look at the whole process and look at
19 this as a vehicle and see what is good and
20 what isn't and what we can use it for and how
21 we should use it.

22 I'm not opposed to it. I just

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1 think we need some guidelines on it.

2 MR. GRIFFITH: Madam Chair, may we
3 be heard on this?

4 CHAIRPERSON MOLDENHAUER: Yes,
5 please. I think that Commissioner Turnbull is
6 asking both parties and we have only heard
7 from one, so, please.

8 MR. GRIFFITH: We would
9 wholeheartedly endorse that suggestion. We do
10 think that, in this particular case, the Chair
11 of the Zoning Commission specifically wanted
12 to put teeth in the order by stating that the
13 amenities had to be actually delivered and put
14 in place.

15 And we therefore chose amenities
16 that could easily be put in place. These were
17 trash cans and benches, you know, a drinking
18 fountain and trees. We weren't asking for,
19 you know, a theme park.

20 But we do think that this decision
21 will encourage -- will make it more difficult
22 for the Zoning Commission to put teeth in any

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1 other order if the Zoning Administrator can
2 always take those teeth out when it is
3 inconvenient for the developer.

4 So we would endorse
5 wholeheartedly. We think this is going to
6 make the -- we think that a decision here not
7 to allow the Zoning Administrator to do this
8 would also have eased the work of the BZA.
9 However, it is your decision, but we would
10 endorse wholeheartedly the Zoning Commission
11 taking this up.

12 And we do think that the Zoning
13 Commission ought to be able to put teeth in an
14 order and those teeth ought to stay in. Thank
15 you.

16 MR. AVITABILE: There might be one
17 other way to deal with this, admittedly, it's
18 a pretty thorny problem, which would be, and
19 this is something that we had preliminarily
20 discussed, that in exchange for doing the
21 things that we said that we would --
22 additional things we would do, Friends of

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1 Francis Field and the ANC were going to drop
2 the appeal.

3 Now, if they were to withdraw the
4 appeal, even after you have given an oral
5 deliberation, I don't think that there would
6 ever be a written order which, therefore,
7 means there wouldn't be any written record one
8 way or another of the way the BZA came down.
9 And then you don't have to worry about this
10 precedent being on the record as a written
11 order.

12 I suppose an intrepid young
13 associate could always pull the transcript,
14 but that wouldn't be binding. It wouldn't be
15 the actual decision of the Board on the
16 particular issue. That could be another way
17 to deal with this problem and not have to --
18 particularly since, I mean, while -- with all
19 due respect to Commissioner Turnbull, since
20 the improvements will have been provided, the
21 actual issue and controversy here will have
22 been handled.

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1 Really, all that is is the Zoning
2 Commission handling sua sponte a theoretical
3 question. And I don't know that that's a path
4 we want to go down. That's just my two cents.

5 MR. GRIFFITH: We have in our
6 neighborhood two other PUDs pending and a
7 third for the West End Library about to be
8 issued. And there is, by the way, a third
9 building in this PUD, which we haven't even
10 talked about, this PUD contains a third
11 building.

12 We don't want to go through this
13 every time the Zoning Commission makes an
14 order that we have to come here to get the
15 amenities put in.

16 CHAIRPERSON MOLDENHAUER: Well, I
17 mean, I think that there is an issue with an
18 escrow agreement as to -- you know, and I
19 think that the Zoning Commission if they feel
20 that it is necessary sua sponte to discussion
21 about when would an escrow agreement be
22 proper, how would one then be put into place,

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1 procedurally as a text amendment in maybe the
2 rewrite of the regs, I think that would be --
3 I think any additional guidance to the ZA and
4 to attorneys and to ANC's is always, I think,
5 the best course of action.

6 That would be my recommendation.
7 I think that, you know, this case is a unique
8 case. We have discussed the specific
9 instances that provided, in our opinion, to
10 permit this, but I think that any additional
11 guidance, regulatory guidance is always a
12 better avenue.

13 COMMISSIONER TURNBULL: No, I
14 would agree. And my only concern is that if
15 this does go before the Commission on sua
16 sponte and they do vote to overturn it, that
17 sort of undoes some of the things which are
18 being done here today.

19 CHAIRPERSON MOLDENHAUER: That's
20 why I was saying maybe it's something where
21 you bring it up as a Text Amendment as a
22 separate issue on the rewrite, but that's

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1 your --

2 COMMISSIONER TURNBULL: Yes.

3 CHAIRPERSON MOLDENHAUER: I mean,
4 how you feel doing that.

5 COMMISSIONER TURNBULL: Well, I
6 would bring it up, but the thrall of the
7 appeal was an interesting idea, too, that
8 would have solved one item.

9 Getting back to Mr. Le Grant's
10 original, I would think that at some point we
11 are going to need some buy-in from the Friends
12 of Francis Field, I mean, to make sure that
13 what you think is accomplished, unless there
14 is -- and Mr. Avitabile is preparing some kind
15 of a checklist or a punch list that you can
16 use and which would get distributed to Friends
17 of Francis Field, there ought to be some kind
18 of a master list that everybody agrees on, I
19 would think that you have that you feel
20 comfortable with.

21 MR. SURABIAN: That would be a
22 good idea. One of the issues with that is

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1 that there are now items that aren't part of
2 the Zoning Commission Order that are --

3 COMMISSIONER TURNBULL: That's
4 true.

5 MR. SURABIAN: And so, I mean, the
6 ZA can only enforce the law. And I don't
7 think he should be in a position to enforce a
8 private agreement.

9 COMMISSIONER TURNBULL: Well, I
10 think somehow the parties then have got to
11 agree on --

12 MR. GRIFFITH: I think the
13 majority --

14 MR. SURABIAN: They agreed to the
15 things we're talking about.

16 MR. GRIFFITH: Didn't they argue
17 during -- just argue that they were enforcing
18 a private agreement with the escrow? That the
19 escrow itself was a private agreement?

20 MR. SURABIAN: I'm just --

21 CHAIRPERSON MOLDENHAUER: I
22 disagree with that. I don't think we want to

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1 start -- I'm going to try to limit this
2 discussion right now, because I don't think
3 that this is being productive, at this point.

4 I think that Mr. Turnbull has
5 provided the D.C. Office and the ZA with
6 recommendations.

7 Now, obviously, that's all that we
8 can do. We can recommend that you work from
9 the order. You try to obtain confirmation
10 from all parties party to the Zoning Order
11 that everybody understands or agrees that
12 certain elements are satisfied.

13 If there are elements that are not
14 part of that order and that your parties
15 disagree, that's the ZA's determination, which
16 then eventually if it is appealed, would then
17 come before this Board to be appealed, things
18 to that effect.

19 But at this point in time, I think
20 that, obviously, we have made a determination.

21 There are elements that are hopefully going
22 to be worked upon by all parties, that this

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1 doesn't come back up, you know, that there is
2 no problem come June 30th. So our hope is
3 that they all work together.

4 And if there is no additional
5 comments, then this hearing is adjourned. And
6 thank you very much.

7 MR. AVITABILE: Yes, thank you.

8 (Whereupon, the Public Hearing was
9 concluded at 5:04 p.m.)
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