

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

FEBRUARY 10, 2015

+ + + + +

The Regular Public Meeting convened in the Jerrily R. Kress Memorial Hearing Room, Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:30 a.m., Lloyd Jordan, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

LLOYD JORDAN, Chairperson
MARNIQUE HEATH, Vice-Chairperson
JEFFREY HINKLE, Board Member (NCPC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
JOHN NYARKU, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

The transcript constitutes the minutes from the Public Meeting held on February 10, 2015.

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(9:44 a.m.)

CHAIRPERSON JORDAN: Good morning. We're located at Jerrily R. Kress Memorial Hearing Room at 441 4th Street, N.W., and today's date is February 10, 2015. We're here for the meeting and hearings of the Board of Zoning Adjustment.

My name is Lloyd Jordan, Chairperson. To my right is Jeffrey Hinkle, member of the Board. To my left is Vice Chair Marnique Heath, and to her left, Robert Miller, member of the Zoning Commission sitting in as a member of the Zoning, Board of Zoning Adjustment today.

Please be advised that today's proceedings are being web cast live and also being recorded by a court reporter. Therefore, I'm going to ask you to refrain from any disruptive noises here in the hearing room today.

So that's the signal making sure that you turn off your cell phones and ringing computers and laptops and everything else that we have and secret decoder rings.

If you're going to provide any statement or testimony to the Board, read a letter or address the Board in any manner, I'm going to need you to do two things prior to you addressing the Board.

Again, if you're going to address the Board in any manner, I'm going to need you to do two things today prior to

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addressing the Board, the first of which is to complete two witness cards per person.

That's two witness cards per person, and give them to the court reporter who's seated to my right prior to your testifying. So that's two witness cards per person, and give them to the court reporter to my right.

The second thing I'm going to need you to do is to now stand take the oath, which will be administered by Mr. Moy, secretary to the Board.

MR. MOY: Good morning.

(Witnesses sworn.)

MR. MOY: Ladies and gentlemen, you may consider yourselves under oath.

CHAIRPERSON JORDAN: All right, Mr. Moy are there any announcements that you need to make for today's docket or agenda?

MR. MOY: Yes, sir. Good morning, and good morning to members of the Board. I have a few announcements for the record of cases that were scheduled on the docket for today.

First is Application Number 18915 of Aminta. That has been rescheduled to April 7, 2015. The second application scheduled, Application Number 18895 of Hunt and Laudi. That has been rescheduled to March 24, 2015.

And finally, Mr. Chairman, administratively, the

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Application Number as advertised, 18919 of Hillwood Estate, is being renumbered as Application Number 17229.

(Off microphone comment)

CHAIRPERSON JORDAN: Okay. Good. So let's call the first decision case for today, please.

MR. MOY: Yes, sir. The first decision case is Application Number 18881 of Nando's of Woodley Park. As the Board will recall, this application was heard, testimony completed on December 16, 2014 and scheduled for a decision for today's hearing. And I believe, that will complete the status briefing, sir.

CHAIRPERSON JORDAN: Thank you, Mr. Moy. Is the Board ready to deliberate on 18881?

MALE PARTICIPANT: Yes.

CHAIRPERSON JORDAN: Okay. Then we will proceed with this case. Any thoughts on that anybody on the, okay. Well, this case is one which is, again, very troubling. We get a lot of troubling cases here at the Board of Zoning Adjustment where somebody wins and somebody loses.

But the whole issue is that we try to do what's best for the community and do what's best for the District as a whole. This is a case where, again, lines have been drawn in the community over whether or not the application should receive relief.

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The issue here is that we have to follow the regs, and the question is whether or not with exceptions, and what we do certainly sometimes, doesn't fall to be very popular or not, but in this case I would offer the following as facts in this matter.

A restaurant can go into the place as a matter of right. There are some type of restaurants that can. However, Nando's, the potential lessee for this property, has a first, has a pay-first operation, which is considered under the regulations, the present regulations, although I understand they're proposed to change under the new ZRR.

It's presently considered a fast food restaurant and therefore could not go into this property as a matter of right, although the operation of the testimony shows that the operation of this restaurant kind of resembles most sit down regular restaurants and not in the fast food kind of arena.

We all, I'm not going to recite what's required for special exceptions or variance relief. The evidence shows that due to the downsizing and the industry, the banking industry, this property previously was used by a bank, but no longer is of interest of banks to use the property.

The space is not suitable for another bank. It's too large for most retail shops in that spaces that others, a matter of right interest was not very high. And it's been vacant for

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a number of years.

There were two I believe. There was testimony that there were two types of matter of right potential tenants. One was a Sleepy's, and one was a 7-Eleven going to this property.

The Office of Planning supported the application as well as the ANC supported the application. The ANC supported it with conditions, and OP supported it with conditions.

One thing that was pretty compelling that there was testimony from the Office of Planning that the overlay was not intended to freeze businesses in time and that the special exception process allows for this whole level of discussion that we have.

Regarding the exceptional conditions resulting in a practical difficulty, the property has a slope downward from west to east, and it's approximately 10 feet. It has a 10 foot drop.

The building has an external stairway that, connecting the building to the ground level. It's kind of raised up from the first floor to where the ground comes in. There's an existing tress location and external stairs that provide access to the rear service area.

The property is located, and the alley back there is about 15, I think it's 15 feet wide where both commercial and residential users use that alley. And the property's 15 feet

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wide rear alley becomes the issue of maneuverability.

The building currently has a 15 foot, I believe 15 foot rear yard, which is effectively, the way it's operated kind of extends the alley, kind of makes the alley a little bit wider.

The rear wall of the alley, excuse me, rear wall of the building for loading and unloading purposes provides some obstruction and issues for commercial and residential vehicles. And there's an enclosed dumpster in the back of the building.

As I said, the space has been vacant for a number of years, and the applicant showed that it's been aggressively marketing for tenants in this building. And we've seen the testimony and evidence of their ability to try to market and not having great response in that regard to getting those applicants or potential lessees who are, to go in as a matter of right.

So I think the evidence show that the landlord has had some challenges, which financial challenge just to get a very, a viable tenant in the building, which would have some economic impact, an exceptional economic impact.

The present potential lessee, Nando's, has the financial ability and has a multi-year lease for this space. We're required under the law to give the ANC and OP great

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weight, which they both have supported this application with conditions.

Now, there was contrary testimony offered by the Woodley Park Association, which the Board takes very serious in regards to what went on and the discussions at Woodley Park and the other neighbors that are around.

But we have an association that has approximately, I guess, 400 members. However, during the meeting on this by the association, there was only about 40 people in attendance.

And of those 40 people, only 21 people actually voted in the vote on whether or not to support or endorse this document, this relief and a vote of 15 to six, which I do not find to be very representative of what the association, in general, would do.

And I know we usually, in most organizations you have a high number of membership, and everybody is not as active and usually you have around 20 percent of the membership of an association that participates on a regular basis.

Here we had less than that. To the contrary, which becomes also very interesting is the fact that we received, the Board has received and they're presented in evidence 120 letters of support.

Or there's 120 residents that are in support of this, including 15 or 12 businesses that are along right by this

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other, by this place where the potential lease is. And then there was a question, which I found also very compelling or very moving was that the president of the Woodley Park Association was asked was it preferred to have a Nando's over another business, such as 7-Eleven.

It was that they preferred to have a Nando's, so this whole thing is kind of mixed. But the strength of the community by what has been presented to this Board was that the strength of the community was in support of having this relief being granted.

With that, the Office of Planning and the ANC offered some conditions, which I believe that the Board should have some discussion so that we could try to do, if we do grant this relief as I would submit based upon what I've said that the evidence will show that the relief should be granted.

But we need to have the conditions so that we can try to mitigate any issues or impact on anybody that may be against this or any impact on the community, which I don't think is very strong.

However, I think there's some things that might be needed. The first of which, which was offered to the Board, was that all food and drinks consumed on the applicant's premises shall be served on or in non-disposable tableware with no exceptions.

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The second was that the applicant shall use the same waste collection company as the other eating establishments in the building in order to reduce the number of trash pickups and trucks in the alley, that the applicant shall require Nando's to use the existing trash compacter on site.

And the trash service should occur at least five times a week and that the property owner and the applicant shall communicate with the ANC and the Woodley Park Association on a quarterly basis and make a reasonable attempt to resolve any issues regarding trash removal, rodent control or assist in any way in the cleanliness of the alley.

I also believe that it's important that we support what the evidence shows and especially where the community was, that this does not, this relief that may be granted is not a relief that run should with any particular, any other restaurant that can come into that space.

So I think we need to be very limiting. I think one of the driving forces for our decision or my recommendation for a decision here is that this restaurant, Nando's, is not a typical what we call fast food.

And so I would be very cautious that we would grant relief that would run generally for any kind of fast food restaurant to come into this place. So I think that we need to limit the relief to some type of condition.

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Whether or not I don't think that we're able to say that it can only be, the relief can only be for a Nando's or this Nando operation, but I think that we do have the ability to limit the term, the time limit of this operation.

And so I would think that maybe a, and I don't know, and I don't have it in my record here what the term length of the lease was. But I would be willing to certainly put a speed bump for when the applicant has to come back to this body, making sure that they, one thing that we see.

When we put speed bumps in, it has a different tender on how relief is granted and how applicants act. A lot of times they don't start adhering to the conditions until they have to come back in front of this Board.

I mean that's, it's some of the things that we saw. So putting a speed bump here, I think, would be very helpful, and I'm suggesting maybe we do a speed bump of five years on any relief. But that's just my thoughts. And I think I've talked enough. Other thoughts?

MR. MILLER: Thank you, Mr. Chairman. I think that was a very comprehensive review of the record and is very persuasive as to why the relief should be granted in this case.

I think the Office of Planning and particularly the Advisory Neighborhood Commission support for the relief with these conditions. That's very important and has been

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demonstrated in this case.

So I'm prepared to support this, the relief that's requested. In particular, I think the special exception to the 25 percent cap, it is an exception. And I think the term limit that you've proposed is, I mean I hope it doesn't affect the potential lease for Nando's.

But it's a typical thing that we do on relief, especially when there's been controversy and concern. That way you can reevaluate whether there's been any concern after a certain number of years or just be able to dissuade everybody after that time that hey, it didn't, it did work out.

So I'm prepared to support the application today, and I thank you for your presentation.

CHAIRPERSON JORDAN: Any other discussion? Then I would move that the Board issue the relief as requested, with the conditions as I specified a moment ago.

MEMBER HINKLE: Second.

CHAIRPERSON JORDAN: Motion made and seconded. Additional discussion? All those favor of the motion, aye.

(Chorus of ayes.)

CHAIRPERSON JORDAN: Those opposed, nay. The motion carries. Mr. Moy?

MR. MOY: Staff would record the vote as four to zero, this on the motion of Chairman Jordan to approve the

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application for the relief requested, including a term of five years, I believe.

CHAIRPERSON JORDAN: That's correct.

MR. MOY: Second, the motion that Mr. Hinkle all support Mr. Rob Miller and Vice Chair Heath. And we have no other member participating on this application. So the motion carries, four to zero.

CHAIRPERSON JORDAN: Okay. Thank you, Mr. Moy.

MR. MOY: Okay.

CHAIRPERSON JORDAN: Our next item of business for the day?

VICE CHAIRPERSON HEATH: Yes, the next and final action for the Board is Appeal Number 18888. This is Adams Morgan for Reasonable Development. As the Board will recall, this appeal was heard on January 13, 2015.

The record was closed except for the Board requesting draft findings of fact and conclusions of law from parties. Mr. Chairman, that is in your exhibit folders from the property owner, the appellee and the appellant, all timely filed.

The appellant submitted on February 3rd an incomplete draft and filed on the next day a completed draft with a request to waive the time requirements.

CHAIRPERSON JORDAN: Okay. Is the Board ready to deliberate on this case? Seeing a head shake I believe that

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means yes. We would, I would grant, I will grant the leave for the late filing of the finding of fact.

I think there was substantial basis in this case. The request, the applicant's, the appellant's request for waiver of the time period due to illness, and I accept that.

Plus I give, I commend them for trying to work through the sickness, at least present something to the Board and not just ignore the request. So I will grant that if that's okay with the Board. All right, good.

All right, this is another case which is, well, it's not a difficult issue case. Procedurally on this case, there were several motions to dismiss filed by the opposing parties, one for, one was a motion to dismiss for timeliness.

And there was another motion to dismiss based on failure to state a claim upon which relief can be granted. On the motion to dismiss for timeliness, invoking 3112.2, the zoning regulations, requires that the appeal be filed within 60 days of the date the person filing the appeal first had notice or knowledge of a decision or knew or should have known of a decision being made that would invoke the ability to file an appeal before this Board.

The decision being appealed in this matter, in this case is not a decision that's the issuance of the building permit. That's the other thing that came up in this issue.

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There was a, the appellant tried to, was saying their appeal time ran from the time that the building permit was issued and not versus the zoning decision. And the zoning decision was done earlier than the building permit.

And so the building, the time period for appeal does not run from the building permit but actually ran from the point of the Zoning Administrator's decision, affirmative decision regarding this property.

The appellant, by appellant's own testimony and pleadings, indicated that they were constantly checking on this particular project and that as least as July 24, 2014, checked the DCRA website where the permits and the other approvals for all the processes that DCRA goes through, examined that website but said they did not know that the zoning decision had been made on July 14th.

And July 14th was actually the date that DCRA entered on the, excuse me, the Zoning Administrator entered on the public record that he had approved the zoning relief or the zoning of this particular application.

The appellant filed this appeal on September 24, 2014, which would make it outside the 60 day time period from the time running from July 14th of 2014. Therefore, the, it would be my recommendation that the motion to dismiss for failure for the appeal be granted, the timeliness of the appeal be

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granted.

Further, regarding there was also later on, there was a motion to dismiss the roof challenge as being untimely. That was not filed until just before the time which there was a hearing, which was well over 120-something, 161 days.

And so I would say that that was untimely additionally. That was not even in the first appeal document that was filed by the appellant. So the applicant did not appeal the Zoning Administrator's determination in regards to the roof structure timely.

I'm losing my train of thought here because there's so much going on in this case. For the reasons I stated, I would support the Board's, I would support the ZA's decision, affirm, sustain the ZA's decision.

Now the opposing party also filed a motion to dismiss for failure to state a claim, so alternatively I'm going to add into this particular record in this decision alternatively, further decision of this Board.

The opposing party filed a motion to dismiss for failure to state a claim above which relief can be granted. I would recommend this Board deny that motion.

Under the zoning regulations, all that is necessary to file an appeal with this Board is the allegation that a zoning violation had occurred, and the appellant clearly did that.

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And so it would not be subject to that particular motion to dismiss.

The appeal appellant filed on September 24th raised in its complaint though an issue with the rear yard and about the garage ramp and seeing there was a subterranean garage in violation of the zoning regulations.

But subsequently, although untimely, appellant claimed also roof violations. Although we've ruled in regards to the motion to dismiss, I wanted to add in the alternative, for the record, that the Board also took the substantive issues in at the same time.

We actually held a full hearing, and I think it would be remiss if we don't enter the record and would not provide proper economy of the Board's time and the District of Columbia's time since we took testimony on the merits of the allegations.

So I want to have on the record what we, what, a determination on the merits, just in case this goes to the Court of Appeals and so that they would have a form record to see that we examined it all.

On the authority of the Board under Section 3117, which allows the Board to regulate the course of the hearing. The Board took the opposition motion for failure to state a claim as a, what would be similar to a 12B6 motion under the D.C.

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Rules of Civil Procedure and basically held an evidentiary hearing on the issue and the evidence that was deduced.

The process that we used allowed the appellant to present evidence to this Board to substantiate the claims that the appellant made in its appeal.

During the process, the opposing, the appellant put on evidence and submitted documentation, several sets of documentation and diagrams to the Board in support of their contention that the Zoning Administrator's actions were in violation of zoning regulations.

During that process, the opposing parties are given the opportunity to cross examine the appellant's evidence. And then at the end which, both the appellant and the opposing parties were asked if we went further with the hearing, would they present anything different than what has been presented.

One of the appellant's responses, which I found slightly peculiar, but I think I understand why the appellant took this route is that the appellant thought that they were going to have the ability to get additional information about the Zoning Administrator's actions here by filing an appeal.

The appeal process is not here for discovery. That's not what the appeal process and the zoning regulations are for. When an appeal is filed, it's an allegation that the Zoning Administrator has done something incorrectly.

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I would hope that there's been conversations among the, with the appellant, excuse me, with the applicant, but anyone who needs to have information. And I would hope that applicants are having full and frank discussions with the communities regarding the status of projects and what relief was requested.

I mean, and it put something in the back of my mind that if, in this case, and I know it's something we have not thought about or talked about, that I had hoped that the appellant or any other appellant have the opportunity of getting information upfront before filing appeals here because it's just not what this body's for, to monitor, the arbitrate or to mediate discovery.

Again, so I would hope that applicants for seeking relief work with the community to provide that information and maybe what we might require, and maybe Mr. Miller under the new rewrite that we might want to add a provision like we do.

And our practice has been when we have party status requests on applications that there is some type of certification or discussion that the appellant and the application submit to the Board that prior to moving on to their hearing, that they at least met and confer, that they at least had some discussion.

You know, we've had some success on applications by

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forcing parties to have conversations that should have happened long before they walked into this room and so that everybody can at least be on the same page or at least have an understanding of where the project was.

Here we had an appellant who was not clear about the status of the project, had old plans that had been submitted, didn't have the updated plans, didn't know the status of why documents were, excuse me, why the project was not complete.

There was a challenge toward what was on the roof, but those things are just sitting on the roof. And they were not permanently affixed. And so we had a lot of that going on in this case. So that's just my commentary on it.

Regarding the rear yard, I would offer that the Board would sustain the decision of the Zoning Administrator. The definition of the rear yard requires that it be open to the sky from the ground up.

Neither the garage ramp, nor the garage ran afoul of this definition. There is no dispute that the garage ramp is located at grade and the garage is located below grade. Neither the ramp nor the garage occupied the rear yard.

The appellant made an argument that the generator and loos were located in the rear yard. However, after discussion, the appellant noted that the plans that he was using were old plans and that there was not a basis of it being

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in violation of the rear yard.

I'm going to ask you to refrain, or I'm going to ask you to be removed. I'm going to ask you not to interrupt the Board. I'm going to ask you to be removed. Can we have security out to remove him?

Mr. Moy, Mr. Moy, Mr. Moy, come here a second. No, I want security out to remove him. I'm not going to ask him to leave. I want security to remove him. Mr. Otten, I'm asking you again to refrain yourself.

(A member of the public caused an off-microphone disruption and was removed from the room.)

The appellant alleged that the, sir the rear yard is, of the decision of the zoning administration will be sustained. The restructure decision by the Zoning Administrator also should be sustained.

There is a trellis, may constitute connection between separate platforms of the structure that creates one building under the zoning regulation.

Appellant admitted on cross examination that the pictures he took, he was unaware of whether or not the final finishing of the construction of the property would contain the items that were located on the roof.

On cross examination, he was asked did he know what a trellis was and how high it could be. And he admitted that

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he did. In fact, he admitted on cross examination he looked at the plans and realized that there was no structure higher than the trellis on the roof.

He admitted that the pictures he took he was not aware of whether or not the final finishing construction of the property contained these items. He conceded the trellis was an acceptable part of the roof structure.

He testified that the mechanical equipment was less than four feet in height, which is allowable on a roof. Regarding the far, the roof far, he also admitted that the, as you measure, he was not certain as to the measurement of what the roof structures would be in regards to the ratio, the full ratio of the items of the roof.

In fact, he said he didn't have the ability to measure, but yet he filed a claim against the Zoning Administrator who had the plans, who looked at the plans, who had the property measurements, which were offered by the appellant well within the guidelines.

There was nothing to the contrary. So for those reasons, I would grant the motion to dismiss for timeliness of the rear yard and roof structure be granted.

I would recommend that the Board deny the motion to dismiss for failure to state a claim to denied. But alternatively, I would move that all the decisions of the

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Zoning Administrator challenged by this appeal be sustained.

VICE CHAIRPERSON HEATH: You've said enough, but I will second the motion.

CHAIRPERSON JORDAN: Let me add one other thing. Let me go back. Also for my decision, clearly everything I stated in the findings of this Board was based on the credible weight of the evidence.

I did not find the appellant to be credible in any shape, form or fashion. The direct questions from the Board he heed and hawed and became very evasive in regards to his responses and refused to be very direct in very direct questions, tried to be very creative with his answers.

So I would like to also offer that on the record that I did not find the testimony offered by the appellant to be credible. So with that on the motion, did we have a second?

VICE CHAIRPERSON HEATH: Yes.

CHAIRPERSON JORDAN: Motion made and second. All those, any further discussion?

MR. MILLER: Mr. Chairman, I just wanted to note for the record that I was not the Zoning Commissioner who participated in this case, as you know.

Chairman Anthony Hood, he represented the Zoning Commission. And I believe he has submitted an absentee ballot in this case.

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CHAIRPERSON JORDAN: All right, good. And you weren't part of --

MEMBER HINKLE: Mr. Chairman, I'm not participating in this case. I was not here for the hearing.

CHAIRPERSON JORDAN: And you, that's right. That's why you made the second. Okay. Anything you want to say about that?

VICE CHAIRPERSON HEATH: No.

CHAIRPERSON JORDAN: Okay. All right, with that, all those in favor of the motion, aye.

(Chorus of ayes.)

CHAIRPERSON JORDAN: Those opposed nay. Mr. Moy, we also have an absentee ballot.

MR. MOY: Yes, sir. You're correct. We have an absentee ballot from Mr. Hood, who participated. And his vote is to grant the motion to dismiss on untimeliness as well as your other motions that were made part of your total motion.

Second, the motion of Vice Chair Heath, so this would give a final vote of 3 to 0 to members not participating. The motion carries, sir.

CHAIRPERSON JORDAN: Very good. Thank you.

(Whereupon, the above-entitled matter went off the record at 10:17 a.m.)

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