

1 GOVERNMENT OF THE DISTRICT OF COLUMBIA
2 Office of Zoning
3 Board of Zoning Adjustment
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9 PUBLIC MEETING
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13 9:45 a.m. to 4:46 a.m.
14 Wednesday, November 30, 2016
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17

18 441 4th Street, N.W.
19 Jerrily R. Kress Memorial Room
20 Second Floor Hearing Room, Suite 220 South
21 Washington, D.C. 20001
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3 ANITA BUTANI-D'SOUZA, Vice-Chairperson

4 JEFFREY L. HINKLE, Board Member

5 ANTHONY HOOD, Zoning Commission

6 TRACEY ROSE, Board Secretary

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

2 CHAIRMAN HILL: Good morning, ladies and
3 gentlemen. We are located in the Jerrily R. Kress
4 Memorial Hearing Room at 441 4th Street Northwest.
5 This is the November 30th, 2016 public hearing of the
6 Board of Zoning adjustment of the District of
7 Columbia. My name is Fred Hill, Chairperson.
8 Joining me today is Anita Butani-D'Souza, Vice
9 Chairperson, Jeff Hinkle, Board Member, and
10 representing the Zoning Commission is Anthony Hood.

11 Copies of today's hearing agenda are
12 available to you and are located in the wall bin next
13 to the door. Please be advised that this proceeding
14 is being recorded by a court reporter and is also
15 webcast live. Accordingly, we must ask you to
16 refrain from any disruptive noises or actions in the
17 hearing room. When presenting information to the
18 Board please turn on and speak into the microphone,
19 first stating your name and home address. When
20 you're finished speaking, turn off the microphone so
21 that your microphone is no longer picking up sound or
22 background noise.

23 All persons planning to testify either in
24 favor or in opposition must have raised his or her
25 hand and been sworn in by the secretary. Also, each

1 witness must fill out two witness cards. These cards
2 are located on the table near the door and on the
3 witness tables.

4 Upon coming forward to speak to the Board,
5 please give both cards to the reporter sitting at the
6 table to my right. If you wish to file written
7 testimony or additional supporting documents today,
8 please submit one original and 12 copies to the
9 secretary for distribution. If you do not have the
10 requisite number of copies or can -- you can
11 reproduce copies in the office across the hall.

12 The order of procedures and special
13 exceptions and variances are located in the back
14 there as we're going to move forward. Also, appeals
15 on the agenda in the order that we will proceed is
16 also listed in the back of the room.

17 The record will be closed at the conclusion
18 of each case, except for any materials specifically
19 requested by the Board. The Board and staff will
20 specify at the end of the hearing exactly what is
21 expected and the date when the persons must submit
22 the evidence to the Office of Zoning.

23 After the record is closed no other
24 information will be accepted by the Board. The
25 District of Columbia Administrative Procedures Act

1 requires that the public hearing on each case be held
2 in the open before the public pursuant to Section
3 405(b) and 406 of that act. The Board may consistent
4 -- the Board may, consistent with its rules and
5 procedures of the act, enter into a closed meeting
6 for the purposes of seeking legal counsel on a case,
7 pursuant to D.C. Official Code, Section 2-575(b)(4),
8 and/or deliberating on a case pursuant to D.C.
9 Official Code, Section 2-575(b)(13), but only after
10 providing the necessary public notice.

11 And in the case of an emergency closed
12 meeting, after taking a roll call vote.

13 The decision of the Board in these contested
14 cases must be based exclusively on the public record
15 to avoid any appearance to the contrary. The Board
16 requests that persons present not engage the members
17 of the Board in conversation. Please turn off all
18 beepers and cell phones at this time so as not to
19 disrupt these proceedings.

20 Preliminary matters are those which relate to
21 whether a case will or should be heard today, such as
22 request for postponement, continuance, or withdrawal,
23 or whether proper and adequate notice of the hearing
24 has been given.

25 If you're not prepared to go forward with the

1 case today or if you believe that the Board should
2 not proceed, now is the time to raise such a matter.

3 Do we have any preliminary matters today?

4 MS. ROSE: Yes. Good morning, Mr. Chairman,
5 and Members of the Board. Staff has the following
6 preliminary matters. Two cases have been rescheduled
7 and will not be heard today. They are Application
8 No. 18915A of Amenta, and Application No. 192A0 of
9 Thomas Hardy.

10 The Amenta case has been postponed to
11 Wednesday, January 25th, 2017, and the Thomas Hardy
12 case has been rescheduled to December 7th, 2016.

13 CHAIRMAN HILL: Okay. Great. Thank you.
14 Let's see, Ms. Rose, would you -- would all those
15 please, planning on testifying, stand and take the
16 oath? And, Ms. Rose, if you wouldn't mind giving
17 that?

18 MS. ROSE: Please raise your right hand.

19 [Oath administered to the participants.]

20 CHAIRMAN HILL: Okay. Great. Let's see.
21 Before we start I guess I did want to make an
22 announcement or say something. This is Board Member
23 Hinkle's last day. And I have not had really --
24 well, I guess I've had the opportunity to be with you
25 here for about a year and a half and really have

1 enjoyed very much working with you and have enjoyed
2 your comments and what you've added to the
3 discussion. I know that I'll miss working with you,
4 and I understand you've been here for six plus years.
5 So, you obviously --

6 MR. HINKLE: Right.

7 CHAIRMAN HILL: -- have been here long
8 enough.

9 MR. HINKLE: Yeah.

10 CHAIRMAN HILL: So, but I just wanted to pass
11 on my congratulations and wish you the best.

12 MR. HINKLE: Well, thank you. I appreciate
13 it. It's been, certainly -- excuse me, I have a bit
14 of a cold. But it's been certainly a pleasure
15 working here. I've spent my entire professional
16 career in public service and I have to say that the
17 last six and a half years have been the best being on
18 this Board, working with not only you, Chairman Hill
19 and Ms. Butani, as well as Chairman Hood. But the --
20 as most of you may not know there's this incredible
21 machine called the Office of Zoning that works really
22 hard, have incredible talent, and they put these
23 meetings together for us every month and so I want to
24 say thank you to them as well.

25 And I think you'll be in good hands. My

1 colleagues and good friend, Carlton Hart from NCPC
2 will be sitting here, hopefully next week. And he
3 knows the city quite well and he knows the
4 regulations quite well, so I think he'll be an
5 excellent addition to the Board. So, thank you.

6 CHAIRMAN HILL: Thank you.

7 MS. BUTANI-D'SOUZA: I just want to add my
8 two cents on that. We will really miss you. I know
9 that I have personally have learned a tremendous
10 amount, especially when I was sitting next to you and
11 got to hear -- benefit directly from your comments.
12 It's been a real pleasure serving on the Board with
13 you and you know, six years, wow.

14 MR. HINKLE: That's a long time. And
15 certainly there's a number of previous board members
16 out the audience here today and I appreciate my
17 experience with them as well. It's been great. But
18 I appreciate the words. Thank you.

19 MR. HOOD: And, Jeff, I guess I'll speak on
20 behalf of the Zoning Commission. We appreciate the
21 opportunity to work with you. My personal experience
22 with you I notice that you don't say a whole lot a
23 lot of times, but when you say something it's of
24 great significance. And I think the decisions that
25 you've helped make in this city will make this city

1 even better as we move forward. I think you've left
2 a legacy that will stand the test of time and your
3 work here on this Board, and also NCPC and in the
4 city, will make this city better. So, it's a better
5 place since you've passed this way. So, we
6 appreciate everything you've done and good luck in
7 the future.

8 MR. HINKLE: Thank you, Chairman Hood.
9 Appreciate that.

10 CHAIRMAN HILL: Okay, great. Well, you still
11 have a whole day here so.

12 MR. HINKLE: I know.

13 CHAIRMAN HILL: And it's a full day. And
14 actually, I would like to just make a comment if I
15 could to kind of the attorneys and the witnesses that
16 are coming forward. I know that it's a very intense
17 situation being before the Board, but if we could
18 kind of try to remain even keeled and cordial with
19 one another in presenting our points, I know I would
20 appreciate it and I'm going to do my best to make
21 sure we kind of move forward in that fashion.

22 So, with that, Ms. Rose, could you call our
23 first case?

24 MS. ROSE: Yes. The first case is a motion
25 for postponement, and application No. 19153 of

1 Independence Avenue Investments, LLC, pursuant to 11-
2 DCMR, Subsection 3103.2, for a variance from the off-
3 street parking requirements under Subsection 2101.1
4 to commit parking spaces to a park sharing service in
5 the R-4 District, at premises, the rear of 1524
6 Independence Avenue Southeast, Square 1072, Lots 2025
7 and 2032.

8 CHAIRMAN HILL: Good morning. If you could
9 please just introduce yourself?

10 MR. CROWLEY: Thank you, Chairman Hill.
11 David Crowley, Independence Avenue Investments, LLC.
12 is the property ownership, but our general or parent
13 firm is Capital Properties Group.

14 CHAIRMAN HILL: Okay, great. And you've
15 asked for a postponement, correct?

16 MR. CROWLEY: Correct.

17 CHAIRMAN HILL: Is the party here that was
18 asking for party status here as well?

19 No? Okay.

20 Could you just tell us a little bit about why
21 you went -- I know that we've been postponing a lot
22 and I know that you've been trying to get this worked
23 out with the Office of Planning, and it seems as
24 though they're still requiring a lot of information
25 from you. Are you going to be able to give them that

1 information and when do you think you would like to
2 come back?

3 MR. CROWLEY: I have a fair amount of now.
4 I'm just at a bit of a disadvantage because my
5 architect, I self-certified the application. The
6 architect that's been with me since day one is on
7 maternity leave until tomorrow.

8 CHAIRMAN HILL: Okay.

9 MR. CROWLEY: So, I do have a lot of
10 additional information. I've been in touch with Ms.
11 Vitale frequently.

12 CHAIRMAN HILL: okay.

13 MR. CROWLEY: And I'm happy to share with it
14 right now.

15 CHAIRMAN HILL: That's okay. So, when do you
16 think you might be ready to come back?

17 MR. CROWLEY: I would say the -- and most
18 importantly, the condo association meets I think the
19 2nd or 3rd Wednesday of every December. They only
20 meet once a year. I attended last year. Their board
21 didn't allow me to speak before the entire
22 association, so I want to be able to do that in the
23 next two weeks.

24 CHAIRMAN HILL: Okay.

25 MR. CROWLEY: And present the case in its

1 entirety to everybody who lives in the building.

2 CHAIRMAN HILL: Okay.

3 MR. CROWLEY: As opposed to four people on
4 the board.

5 CHAIRMAN HILL: Okay. So, you're looking for
6 the end of December then?

7 MR. CROWLEY: Correct.

8 CHAIRMAN HILL: Okay.

9 MR. CROWLEY: And, of course I'll have my
10 architect with me by tomorrow, updating everything.

11 CHAIRMAN HILL: Okay. Could the Office of
12 Planning just -- I know that you've been pretty clear
13 as to the things that you have been asking for. Do
14 you want to go over that again or --

15 MS. VITALE: Good morning, Mr. Chair, Members
16 of the Board, Elisa Vitale with the Office of
17 Planning. No, I think it's all covered in the staff
18 report.

19 CHAIRMAN HILL: Okay. So, Mr. Crowley, I'm
20 going to go ahead and unless the Board has any other
21 questions, go ahead and grant the postponement. I
22 know that there is, as you know, there's someone
23 who's requested party status, we're going to be
24 working through that the next time. I know that
25 there is an issue about, you know, ownership. I hope

1 that you can get in front of a board. I can't do
2 anything about that. You know, I hope that you get
3 an opportunity to speak in front of them.

4 But I do want you to know that I know that a
5 few -- we're trying to work with you and get it done
6 as quickly as possible. It's been going on a pretty
7 long time. So, really, I hope that you're able to
8 come before us the next time and be ready to present.

9 MR. CROWLEY: Okay.

10 CHAIRMAN HILL: Okay.

11 MR. CROWLEY: I have updated some materials if
12 I can hand them to Ms. Vitale on my way out, it will
13 update her.

14 MS. VITALE: You can just enter that into the
15 record, in IZIS.

16 MR. CROWLEY: Okay.

17 CHAIRMAN HILL: Okay. All right, great. So,
18 Ms. Rose, when shall we reschedule this?

19 MS. ROSE: The end of December would be
20 December 21st.

21 MR. CROWLEY: Oh, I'm not even in the country
22 on the 21st.

23 MS. ROSE: And then the next one would be
24 January 11th. We have the holidays, so --

25 MR. CROWLEY: That's fine by me. January

1 11th.

2 CHAIRMAN HILL: Okay. January 11th. Wait,
3 wait, one more last thing. The people who are
4 looking for party status, you know, we haven't done
5 that process yet and decided one way or the other,
6 but I would like you to go ahead and give them
7 whatever information you are submitting. Okay?

8 MR. CROWLEY: I'll share everything with
9 them. She uploaded a letter at midnight last night.
10 It's just now in IZIS as of this morning.

11 CHAIRMAN HILL: Okay. Just let the parties
12 know. Okay?

13 MR. CROWLEY: Will do.

14 CHAIRMAN HILL: All right. Great. Thank
15 you.

16 MR. CROWLEY: Thank you.

17 CHAIRMAN HILL: We'll see you next year.

18 MS. ROSE: You ready?

19 CHAIRMAN HILL: Sure.

20 MS. ROSE: The first case to be heard today
21 is 19356, appeal of the Argonne, LLC., pursuant to
22 11-DCMR, Sections 3100 and 3101, from a June 8th,
23 2016 decision by the Zoning Administrator, Department
24 of Consumer and Regulatory Affairs to issue building
25 permit No. B1508236, requiring conformance with R-4

1 regulations at Premises 1630 through 1634, Argonne
2 Place Northwest, Square 2589, Lot 480.

3 CHAIRMAN HILL: Great. Thank you, Ms. Rose.
4 I'm going to let everybody get kind of settled in.

5 CHAIRMAN HILL: Okay. Are we ready? If we
6 could just introduce ourselves going from my left to
7 right, please?

8 MR. GAMBRELL: Sure. Alan Gambrell,
9 Commissioner ANC 1C-05.

10 MR. DETTMAN: Good morning, Shane Dettman,
11 Direct of Planning Services with the law firm,
12 Holland and Knight.

13 MR. VISSAT: Good morning, Beck Vissat. I
14 represent the developer, the Argonne, LLC.

15 MR. GLASGOW: Normal Glasgow, with the law
16 firm of Holland and Knight.

17 MR. LeGRANT: Matthew LeGrant. I'm the
18 Zoning Administrator at DCRA.

19 MR. TONDRO: And Maximillian Tondro on behalf
20 of DCRA.

21 CHAIRMAN HILL: Okay. Great. What I'd like
22 to do is start with the appellant, and have them have
23 an opportunity to go ahead and present their case.
24 Then I was going to move over to the office of -- or
25 to the Zoning Administrator and have those comments,

1 and then also hear from the ANC.

2 And so, I know that a lot of this seems to be
3 centered around, I guess hinges on this, you know --
4 at least what I'm sensing is, you know, how complete
5 the drawings were at the time when it's necessary.
6 So, but please, how long do you think you guys might
7 need?

8 MR. GLASGOW: What do we think? About 45
9 minutes?

10 CHAIRMAN HILL: Okay. Wow, that's longer
11 than I thought. Okay. So --

12 MR. GLASGOW: Well, what do you --

13 CHAIRMAN HILL: No, no, that's fine. No, no,
14 that's all right. So, go ahead. So, yeah, we'll see
15 how long it goes. Okay?

16 MR. GLASGOW: You know, what Mr. Chairman, I
17 only have two witnesses so --

18 CHAIRMAN HILL: Okay.

19 MR. GLASGOW: We can go a half hour.

20 CHAIRMAN HILL: Okay. Great. Thanks. We
21 got two more appeals after you guys.

22 MR. GLASGOW: I hear you. Okay.

23 CHAIRMAN HILL: Please?

24 MR. GLASGOW: Oh, thank you. Good morning,
25 Mr. Chairman and Members of the Board. For the

1 record, my name is Norman M. Glasgow, Jr., law firm
2 of Holland and Knight. You've had the other
3 witnesses addressed here. We also have Mr. Abut, Sir
4 Babel, and Ms. Austria, Sophia (phonetic) there in
5 the audience and part of the team.

6 I would like to present a brief opening
7 statement. We are appealing the decision of Ms.
8 Kathleen Beaton, dated June 8th, 2016, that the
9 applicant failed to vest under the R-5-B regulations
10 pursuant to Section 3202.5A because the plans were
11 not sufficiently complete and that there would be
12 substantial changes and deviation would be required
13 to address the excess FAR and structural review
14 comments.

15 I would say that, and I think the record will
16 show that the FAR issues were resolved by either
17 December or January, January of 2016, as December of
18 2015. And with respect to the plans that were
19 submitted, and I was talking with counsel for the
20 District, we have our original set of the stamped
21 drawings. What we would like to be able to do, we
22 can offer those for the record, but we will have to
23 have those back. We can submit a photocopy of them
24 later, but these have all the original stamps on them
25 and this is our set of drawings that were filed prior

1 to December 14th, 2015.

2 CHAIRMAN HILL: Let's see how it goes and see
3 whether we want to take a look at those and if you
4 need to make copies for us.

5 MR. GLASGOW: All right, because part of what
6 they have on them when you look at them, we have our
7 structural stamps. We were third party review. We
8 do have stamps that the -- that this D.C. Office of
9 Zoning Administrator complies with regulations,
10 requirements of the D.C. Zoning Regulations stamped
11 and signed right on this set of drawings, dated
12 October 5th, 2015. So, we believe that we have done,
13 and this obviously when you go through it, this is a
14 full set of drawings for this project.

15 And this was all filed prior to December of -
16 - December 14th of 2015. So, we think with respect
17 to the completeness of the drawings, I think that
18 they are a complete set of plans. They have stamps
19 all over from different review portions of the
20 District of Columbia. And so, I've proffered that
21 and then we can see whether or not we need it. But,
22 for example, this is the stamp and signature from
23 zoning. And I think you'll also see in our filings
24 that we had a copy of a Zoning Administrator's
25 letter, which said what it was that the applicant

1 needed to do to be in compliance with the regulations
2 that was subsequently revised by the Zoning
3 Administrator's office, I think about two weeks
4 later, and said, you've got some other issues you
5 have to address. We think that we've addressed
6 those.

7 So, there -- and there is more than one basis
8 upon which we are stating that there is errors. One,
9 we think that there are plans that are substantially
10 complete and can be processed without substantial
11 change of deviation. And some of those exhibits are
12 within our exhibits to Exhibit No. 56, particularly
13 where you look at the vesting guidance. And it talks
14 about what changes there should be with respect to
15 vesting guidance for properties that a set of plans
16 vest that talks about -- that does not propose on or
17 after September 6th, September 6th, 2016, any
18 substantial revision to include a change of use or
19 include increase in gross floor area, lot occupancy,
20 building height, penthouse height, number of stories,
21 or number of units.

22 I think that you will find that with respect
23 to the plans that were submitted prior to December
24 14th, 2015, there has been no change to any of that.
25 There has been no increase. The only things that we

1 have done were, respond to the structural comments
2 that the District provided in February of 2016, and
3 those comments and how -- and since this is self-
4 certified as to structural, that's part of the reason
5 why there's not some of the submissions that have
6 been mentioned in the pleadings by the District.

7 In Exhibit 56F, we have the reviewer's
8 comment and the applicant's response, one by one. I
9 know that it looks like there are a lot because there
10 are like 25 comments. But look at what some of these
11 comments are. They have to do with hand rails. They
12 have to do with landings. They have to do with shaft
13 sizes. Twenty-four and 25 says certificate of
14 structural design has been provided. Each sheet
15 certified under this section shall bear the original
16 seal and signature. Those are some of the kind of
17 comments they are. A lot of them are very -- and
18 those that process plans a lot with the District know
19 that you can get all kinds of comments and a number
20 of different things. And just the sheer number of
21 the comments is not the issue.

22 I think someone has to go through carefully
23 and look at what these comments are, what the
24 applicant's response is, and whether or not they
25 really have a significance with respect to the zoning

1 review of this project. We have things that talk
2 about, what is our -- fire wall shall have sufficient
3 structural stability. Well, that doesn't have
4 anything to do with the zoning relief.

5 And then we set -- then our comment is, there
6 are no fire walls being proposed in this project.
7 All exterior walls are rated where required.

8 And then they talk about stand pipes. This
9 is number 11. Standpipes are not required because
10 work area not more than 50 feet above lowest level.
11 So, we have a lot of comments that don't have
12 anything to do here on this structure report with the
13 zoning review of the regulations.

14 The other part that we think is very
15 important is Subtitle U, Section 301.1L, which
16 provides language very similar to the ZR vesting
17 guidance that we talked about. And that also is
18 contained in the Exhibit 56, and that's at 56B.

19 And in that provision, which is a provision
20 that specifically relates to this property and this
21 square, which is Square 2598, it says, multiple
22 dwelling in all of those squares, in existence as of
23 December 14th, 2015. And then they say, with a valid
24 C of O. Well, we're not an existing multiple
25 dwelling in that sense. Or a building permit

1 application for a multiple dwelling that was
2 officially accepted by DCRA as being complete prior
3 to December 14th, 2015.

4 I think you will see from the records that
5 our application was accepted as being complete. And
6 the way that we read the records for the District on
7 May 29th, 2015. It says, "Provided that the multiple
8 dwellings shall not be expanded." And this is
9 referring back to the plans that are filed.
10 "Provided that the multiple dwellings shall not be
11 expanded in gross floor area, lot occupancy, number
12 of stories, building height, penthouse height, or
13 number of stories, or number of units."

14 And we didn't do any of that. When you look
15 at the baseline of our plans, our units haven't
16 changed. We got rid of a penthouse because of some
17 of the structural comments that came back. And we
18 have not increased in gross floor area --

19 CHAIRMAN HILL: Excuse me, Mr. Glasgow.

20 MR. GLASGOW: Yes.

21 CHAIRMAN HILL: Which exhibit are you reading
22 from again?

23 MR. GLASGOW: This should be Exhibit 56B.
24 It's the Zoning Commission's order in 16-08.

25 CHAIRMAN HILL: Right. So, you're throwing

1 that date, the May 29th, 2015 out. That's when --
2 why are you giving me that date again?

3 MR. GLASGOW: That date is when we believe
4 that our plans we received are B number, we filed our
5 application with respect to -- and we filed this,
6 this set of plans.

7 CHAIRMAN HILL: Okay.

8 MR. GLASGOW: Now, there were subsequent
9 revisions to this set of plans, but this set of plans
10 is 99 percent of what it was that was filed that day.

11 CHAIRMAN HILL: Okay. And again, as far as
12 the dates, I mean, that -- those set of plans,
13 they're stamped 10/5/15, correct? Right?

14 MR. GLASGOW: That's when we -- that's when
15 we have a zoning stamp approval.

16 CHAIRMAN HILL: Okay. All right.

17 MR. GLASGOW: And that was subsequent
18 reversed by the Zoning Administrator's office. They
19 said, wait a minute, we've got some other issues and
20 that happens.

21 CHAIRMAN HILL: Okay. Sure.

22 MR. GLASGOW: I'm not saying that this is the
23 first time that's ever happened. You can get an
24 approval and then they can say, wait a minute, we
25 found something else. But what this is showing is

1 that we had a bona fide set of drawings that at least
2 on October 5th, somebody thought that they complied
3 with the zoning regs.

4 CHAIRMAN HILL: Okay. I understand. I
5 understand what you're saying. And then the other
6 date that you put out was 12/14/2015?

7 MR. GLASGOW: Yes, that is in the regulations
8 because that is used as a date that the Zoning
9 Commission set down the down zoning --

10 CHAIRMAN HILL: Okay.

11 MR. GLASGOW: -- in the Lanier Heights area.
12 And so as --

13 CHAIRMAN HILL: I got it. I understand. I'm
14 sorry. I didn't mean to interrupt you.

15 And then the February 2016, again, you
16 brought that up?

17 MR. GLASGOW: February 2016 was when we had
18 gotten the structural comments.

19 CHAIRMAN HILL: Back from?

20 MR. GLASGOW: Back from DCRA.

21 CHAIRMAN HILL: Okay.

22 MR. GLASGOW: And we did take some time to
23 respond to those but we did that within -- or we
24 responded -- we needed to respond with our appeal
25 because the date for that ran in early August. So,

1 we needed to file the appeal and then we've been
2 trying to resolve this matter since then, but we were
3 unable to resolve it with the Zoning Administrator's
4 office.

5 CHAIRMAN HILL: Mr. Chairman Hood, you have a
6 question?

7 MR. HOOD: Yeah, I have a question.

8 MR. GLASGOW: Yes, sir.

9 MR. HOOD: Glasgow, when was the -- okay,
10 what was the date that you have the stamp? I'm
11 trying to follow this.

12 MR. GLASGOW: Sure.

13 MR. HOOD: That you have the original stamps.
14 October 15th or whatever the date was?

15 MR. GLASGOW: October 5th is our original
16 stamp of --

17 MR. HOOD: October 5th.

18 MR. GLASGOW: -- 2015. And then --

19 MR. HOOD: Okay. So --

20 MR. GLASGOW: -- we were told a week and a
21 half later, I think it was October 16th.

22 MR. HOOD: And when was that -- when was that
23 reversed through the ZA said that he had some
24 additional issues that you needed to take care of?

25 MR. GLASGOW: October 15th. Or 16th.

1 October 16th.

2 MR. HOOD: So you had, so, on October the
3 16th you were made aware that you had additional
4 issues, zoning issues, that you needed to deal with.

5 MR. GLASGOW: Correct. And we dealt with
6 them in December and in January.

7 MR. HOOD: Okay.

8 MR. GLASGOW: On that particular issue with
9 respect to question as to the FAR.

10 MR. HOOD: Okay. Thank you.

11 MS. BUTANI-D'SOUZA: And December 14th was
12 the date that it needed to be accepted as complete?

13 MR. GLASGOW: Yes. Plans needed to be
14 accepted because what it says there in that part of
15 the regulations, the Zoning Regulations, that was
16 adopted later and it was adopted this year, was that
17 the building permit application for multiple dwelling
18 that was officially accepted by DCRA as being
19 complete prior to December 14th, 2015.

20 And our plans were logged in and May -- I'm
21 sorry, May 21st. And then I think that they were
22 accepted May 29th of 2015.

23 MS. BUTANI-D'SOUZA: So what, sorry, what's
24 the significance of the October 5th date?

25 MR. GLASGOW: That is when we got our zoning.

1 A zoning approval, but then afterwards. So, what I'm
2 showing there is that we had a set of plans that were
3 filed way, way in advance. A full complete set of
4 plans way in advance of the December 14th, cutoff
5 date. This wasn't something that was slapped
6 together in an instant and put it there and say, my
7 gosh, we believe we're going to have a deadline
8 coming up, we better beat it.

9 We were in there, we were in review for
10 several months where there was back and forth. There
11 were stamps and approvals by the District Government
12 that were obtained during that point in time. Yes,
13 we had a zoning approval. Yes, we had to come back
14 and work on that further. But we believe that we
15 resolved that in February of 2016.

16 MS. BUTANI-D'SOUZA: Can I just -- can you
17 just help me understand in your view, or just
18 explain, what were the changes that the Zoning
19 Administrator required on October 16th? And then my
20 second question is, what were the changes, the major
21 changes that were required for the structural review?
22 I believe it was something to do with the penthouse.

23 MR. GLASGOW: Yes. Let me start with the
24 penthouse. When we looked through these changes, or
25 through the comments of structure, we determined that

1 a lot of these had to do with a debate as to what the
2 number of stories were for building code purposes
3 with respect to the structure. And we determined
4 that, let's just make this very simple. We're going
5 to remove the penthouse. We're just going to remove
6 the penthouse and that's going to get rid of a lot of
7 the issues that were raised by structure. And you'll
8 see that when you see the response that we have to
9 the structural comments.

10 With respect to the far, we had a couple
11 different ways of addressing that. One is we
12 addressed it through establishing what the building
13 height measuring point was with the Zoning
14 Administrator's office. That was done in late
15 December and January, December of 2015, January of
16 2016. I think that was resolved by February,
17 January/February of 2016.

18 Then there was a question raised as we were
19 seeing how we would proceed with the Zoning
20 Administrator's office and seeing if we could resolve
21 the matter with the Zoning Administrator's office,
22 and Office of Attorney General. It was suggested
23 that we had -- we did create a plenum height which
24 was certainly permitted at that time, that was larger
25 than I would just say a normal plenum height that you

1 would need at the cellar basement level on that. It
2 was brought to our attention that the District would
3 feel more comfortable if there was a normal ceiling,
4 a normal plenum there.

5 And so that did change our FAR calculation
6 for the cellar level, and we adjusted by going to the
7 perimeter wall method as opposed to the grade plane
8 method. And there's BZA case law that says that the
9 applicant has the ability to do that. You know, has
10 the right to pick which method.

11 MS. BUTANI-D'SOUZA: Okay. I have more
12 questions but I want to let you finish.

13 MR. GLASGOW: Okay.

14 CHAIRMAN HILL: No, please. I appreciate the
15 questions because it's really kind of difficult to
16 follow the time and there's a lot of dates. And so -
17 -

18 MR. GLASGOW: Yes.

19 CHAIRMAN HILL: -- you know, I'm just making
20 sure I have my timeline straight so, but thank you.
21 Please continue.

22 MR. GLASGOW: Sure. So, that is one portion
23 of why we -- we do not believe that under the Zoning
24 Regulations that we had a substantial change or
25 deviation. And I think that there is a -- there's

1 not much with respect to in the record of the
2 Commission or the Board, any decisions on substantial
3 change or deviation. We'd love to have a lot of BZA
4 case law or other to show on that, but we didn't find
5 it. I don't know that you all found anything.

6 What we did find, though, was Zoning
7 Commission Order 562, which was issued in 1988. And
8 what the Commission talked about in that situation
9 was a clause of concern as part of the pre-emergency
10 text of 3202.5(a), which is at issue here. And what
11 we talked about, what the Commission talked about, is
12 that a concern was expressed in opposition. That was
13 opposition to the -- to dealing with the text
14 amendment that any alteration in a submitted
15 application would invite a charge that there is --
16 that the no substantial change or deviation clause
17 had been violated.

18 The Commission acknowledges that such a
19 charge may someday be forthcoming considering the
20 variety and even occasional absence of merit, which
21 characterized contentions and positions with service
22 around development issues.

23 But the clause of concern is part of the pre-
24 emergency text, meaning it's already in there. It is
25 not in itself proposed as a new amendment. Nor is

1 the clause proposed to apply to other than zoning
2 plans and information which the amendment would
3 require to be filled for purposes of vesting, so that
4 when the Zoning Administrator, the position there is,
5 well, we've got all these structural comments to deal
6 with. Our position is, is okay, there's a lot of --
7 there are structural comments to deal with. When you
8 go through them we don't think that they're of any
9 particular import. We got rid of them by deleting
10 the penthouse.

11 But in any event that's not the basis for
12 staying that -- addressing those structural comments
13 necessarily causes a substantial change or deviation,
14 particularly when that decision was made prior to
15 when we filed our change. That decision was -- it
16 was predetermined.

17 When you look at the dates of the decision of
18 Ms. Beaton, which is in June of 2016, and we
19 submitted our response of removing the penthouse in
20 August.

21 MS. BUTANI-D'SOUZA: Can we -- so let's talk
22 about that timeline for a second. I got a question
23 about it.

24 So, you received the comments from the
25 structural reviewer in February.

1 MR. GLASGOW: Correct.

2 MS. BUTANI-D'SOUZA: Correct? And then there
3 was a gap of several months.

4 MR. GLASGOW: There was.

5 MS. BUTANI-D'SOUZA: During which time there
6 was no response to DCRA regarding the comments?

7 MR. GLASGOW: There wasn't a response to
8 DCRA. We were looking at alternatives with our
9 structural engineer, and these were a certified set
10 of plans. This was third-party review for structure.
11 So that has a little bit different connotation,
12 obviously, when you're dealing with the District on
13 structural issues as to when you're doing third-party
14 review and when you're not.

15 MS. BUTANI-D'SOUZA: You were doing a third-
16 party permit review?

17 MR. GLASGOW: Yes.

18 MS. BUTANI-D'SOUZA: I see. So, you were
19 working with the District on that, or with the third-
20 party reviewer during that period? Or, no?

21 MR. GLASGOW: During the conversations with
22 the third-party reviewer and the architect as to how
23 we would address those foundations.

24 MS. BUTANI-D'SOUZA: Okay. So that's why
25 there was -- it wasn't that you just weren't doing

1 anything in those four months. It was there were on-
2 going discussions and then the decision was that it
3 could -- these couldn't be resolved unless you remove
4 the penthouse.

5 MR. GLASGOW: Right. Removing the penthouse
6 would be the simplest way to address the issues that
7 were -- it was the simplest way to resolve the
8 greatest number of points that were raised.

9 MS. BUTANI-D'SOUZA: And can you help me
10 understand, why is it that you believe that removing
11 the penthouse does not constitute a significant
12 change?

13 MR. GLASGOW: With respect to this regulation
14 and with respect to the ZR-16 guidance, when you read
15 those it says, provided that -- for instance, the
16 change in the regulation that directly applies to
17 this property, "Provided that the multiple dwelling
18 shall not be expanded in gross floor area, lot
19 occupancy, number of stories, building height,
20 penthouse height." We didn't expand the penthouse
21 height. We got rid of it. It's one sheet.

22 And then when you look at the ZR vesting
23 guidance, which is what the District put out with
24 respect to -- and that's another main part of our,
25 why we think there's an error, that there can't be

1 just one standard that the District is putting out
2 for its vesting guidance ZR-16 Zoning Regulations,
3 and then we have a completely different standard that
4 we're dealing with, with respect to these plans.

5 It says right there in the vesting guidance,
6 that does not propose on or after September 6th,
7 2016, any substantial revision to include a change of
8 use or increase in gross floor area, lot occupancy,
9 building height, penthouse height, number of stories,
10 or number of units. It's the same language.

11 MS. BUTANI-D'SOUZA: Which exhibit is the
12 vesting guidance?

13 MR. GLASGOW: The vesting guidance is Exhibit
14 50 -- hold on.

15 MS. BUTANI-D'SOUZA: Oh, 56C.

16 MR. GLASGOW: Yeah. 56C. It's the same
17 language that's in 56B. And this is the District's
18 publication on the vesting guidance.

19 CHAIRMAN HILL: Okay? Okay. Thank you.

20 MR. GLASGOW: All right. And then as an
21 independent basis, we submit that subtitle U, Section
22 3101 L, which provides -- and I just read part of it,
23 which has that same language, that we filed a set of
24 plans that were required to be filed. We had a full
25 set of plans months before the cut-off date. They

1 were logged in, given a B number, and when you look
2 at those plans and look at what it is that we
3 proposed with respect to this project, it says that -
4 - and this is under the use provisions. It's
5 subtitle U. So it's a use provision. And it's
6 saying that a multiple dwelling in the R-F-1 zone is
7 a permitted use.

8 When you look at the first part of the
9 regulation, it says, "The following uses shall be
10 permitted as a matter of right in an RF Zone, subject
11 to any applicable conditions. And then there are
12 some of those that have a lot of conditions if you go
13 through that entire section. Obviously, the
14 Commission didn't need to cite the whole thing here
15 in this text amendment, that have a bunch of
16 conditions to them.

17 Ours has certain criteria to it also. So, as
18 a permit, building permit application for a multiple
19 dwelling that was officially accepted, we believe
20 that there's no debate that our application was
21 accepted prior to December 14th, 2015. Otherwise,
22 you can't have all these reviews, all these comments,
23 all these stamps.

24 Provided that the multiple dwelling shall not
25 be expanded in gross floor area. With respect to our

1 building permit application, we didn't expand it in
2 gross floor area, didn't expand lot occupancy, no
3 expansion of number of stories, building height,
4 penthouse height. As we said, we reduced. Or number
5 of units, we didn't change. So we believe that we
6 are a matter of right use.

7 And then with respect to the notice of final
8 rulemaking, it says the -- and that is also in this
9 order. It says, the amendment identifies the
10 circumstances that a multiple dwelling in these
11 particular squares is deemed a matter of right use in
12 the RF Zone and the circumstances under which the
13 building may be expanded. So, we have all of that.

14 So, we believe that we have -- that on an
15 independent basis we comply with that provision of
16 the regulations, and that we have the -- we are a
17 matter of right use under that. I know the Zoning
18 Administrator's office takes the position that the
19 900 square foot rule applies.

20 The 900-square foot rule, there are a lot of
21 different things that you have to comply with, or not
22 do, in order to be that matter of right use. And
23 we've met all of those. I don't think that that's
24 going to be disputed, that we increased any of those
25 things.

1 What we -- so, what we believe there is with
2 respect to that provision, is that we have a matter
3 of right use, and when the District -- and I'm sorry,
4 when the Zoning Commission wanted the 900-square foot
5 rule to apply, it's put right in the use provisions.
6 You'll see it in the very next section of the
7 regulations right after this. And it's in another
8 provision within Subtitle U, so that you will see
9 that when the Zoning Commission wanted the 900-square
10 foot rule to be the limitation, it's specifically
11 provided in the regulations.

12 And, I believe that with that I have used
13 enough of my team's time and would like to -- I think
14 if there are any questions I will -- I'd like to have
15 Mr. Dettman testify. We can have Mr. Vissat here for
16 questions.

17 CHAIRMAN HILL: Okay. Please.

18 MR. DETTMAN: Good morning, Mr. Chair, Madam
19 Vice Chair. For the record again, my name is Shane
20 Dettman. I'm the Director of Planning Services with
21 the law firm, Holland and Knight.

22 If I could just take five seconds to just
23 congratulate Mr. Hinkle. I worked with Mr. Hinkle
24 for 13 years at NCPC and served on this board for
25 four years just prior to him. So, for him to sustain

1 the work that I know that you do, for six years, is
2 quite a feat. So, congratulations. I'm sure the
3 Board and NCPC is very proud of the work that you've
4 done.

5 With that, I'll start my testimony. On June
6 8th, as you already know, on June 8th, 2016 the ZA
7 issued a determination that the project failed to
8 vest under the R-5-B regulations pursuant to
9 3202.5(a) of ZR-58, because the plans submitted by --
10 plans submitted as of the Zoning Commission's
11 December 14th, 2015 set down of the Lanier Heights
12 downzoning from R-5-B to R-4, are not sufficiently
13 complete to allow processing to permit without
14 substantial change or deviation.

15 There's more to it than that. The ZA's
16 actual determination is in Exhibit 56A of the case
17 record. It's on the back of the page.

18 My testimony this morning will show that the
19 ZA erred in making this determination because the
20 appellant's multiple dwelling project is actually a
21 matter of right use, permitted by a virtue of the
22 text amendment adopted by the Commission in Case No.
23 16-08. And therefore, the vesting provisions of
24 Section 3202, on which the ZA is relying upon, are
25 irrelevant to the project and were improperly applied

1 by the ZA.

2 By way of background, pursuant to Order No.
3 15-09, which became effective on August 26th, 2016,
4 it's included in Exhibit 56D of this case, the
5 Commission approved a zoning map amendment to rezone
6 several squares in the Lanier Heights neighborhood
7 from R-5-B to R-4, one of which being Square 2589,
8 the square within which the appellant's multiple
9 dwelling project is located.

10 As discussed on page 3 of Order No. 1509,
11 during the proceedings of the map amendment case the
12 Commission expressed concern over the effect that the
13 rezoning would have on the conforming status of
14 existing apartment buildings located in the square
15 subject to the rezoning, as well as on proposed
16 apartment buildings that were well into the permit
17 process prior to the set down, such as the
18 appellant's project. We've discussed that a little
19 bit already.

20 To address these concerns as stated on page 3
21 of Order No. 15-09, concurrently with its final
22 action on the map amendment, the Commission set down
23 for a public hearing, Case No. 16-08, the text
24 amendment that would quote, "Designate any
25 multifamily dwelling within the rezoning area, or any

1 proposed multi-family dwelling in the permit process
2 as a conforming use, provided that the multiple
3 dwelling may not be expanded in floor area or number
4 of units.

5 Pursuant to Order No. 16-08, which is Exhibit
6 56B in the record, the Commission adopted the
7 aforementioned text amendment which as stated in the
8 final order, identifies the circumstances that a
9 multiple dwelling located in the squares that were
10 subject to the rezoning in Order No. 15-09, is deemed
11 a matter of right use in the RF zone. And the
12 circumstances under which the building may be
13 expanded.

14 Mr. Glasgow quoted directly what that text
15 amendment is in Subtitle U, 301.1L.

16 But just to paraphrase what that actual
17 subparagraph does say, it specifically permits within
18 the squares, subject to the rezoning, a multiple
19 dwelling in existence as of December 14th, 2015, we
20 are not a multiple dwelling unit in existence as of
21 that date. But we are a building permit application
22 for a multiple dwelling that was officially accepted
23 by DCRA and as we've testified, that occurred on May
24 29th, 2015 as being complete prior to December 14th,
25 2015. So, we were accepted as complete by DCRA well

1 in advance of the December 14th, 2015 set down of the
2 Commission's rezoning case.

3 CHAIRMAN HILL: And the date you're using for
4 that is which again? Is that the -- can you repeat
5 that date for me?

6 MR. DETTMAN: The building permit plans were
7 filed on May 21st, 2015. They were accepted by DCRA
8 as being complete on September 29th, 2015. And the
9 date in 301.1(1), which is the text amendment, the
10 date that is quoted in that provision is December
11 15th -- December 14th, 2015. So, essentially what
12 the Zoning Commission said is that if you're an
13 existing apartment building in these squares, only in
14 the rezoning area, if you're an existing apartment
15 building in those squares, or if you have a building
16 permit application that has been accepted as complete
17 prior to December 14, 2015, you're permitted as a
18 matter of right. Subtitle U, Section 301 is matter
19 of right use as allowed in the RF zone.

20 The changes that have been made to the plans
21 submitted with the building permit application and
22 response to comments from DCRA have not resulted in
23 an expansion of gross floor area, lot occupancy,
24 number of stories, building height, penthouse height,
25 or a number of units. That's the later part of

1 301.1(1) So, you have to have the building permit
2 application accepted as complete prior to December
3 14, 2015, and that multiple dwelling, in addition to
4 the existing multiple dwellings in those squares,
5 can't expand those particular area requirements that
6 are specifically stated in there.

7 So, the applicant's proposed multiple
8 dwelling project is permitted as a matter of right in
9 the R-F-1 zone, pursuant to Subtitle U, 301.1(1).
10 Thus, the ZA erred in determining that the project
11 failed to vest on the R-5-B regulations pursuant to
12 the vesting provisions of 3202 of ZR-58 because the
13 appellant's project is not dependent upon being
14 vested under the R-5-B regulations. Rather, the
15 applicant's project, the applicant's proposed
16 multiple dwelling project is permitted as a matter of
17 right use in the R-F-1 zone pursuant to Subtitle U,
18 301.1(1) of ZR-16.

19 We don't need to rely upon the vesting
20 guidance in 302.2 in order to vest the project under
21 the prior R-5-B. We're a matter of right under the
22 current -- or former R-4, current R-F-1.

23 Quickly, with respect to the ZA's
24 determination that the appellant's multiple dwelling
25 project is subject to the RF zone requirement of

1 having to provide 900-square feet of lot area per
2 dwelling unit, this is also in error. As is clearly
3 seen in the zoning regulations in those instances
4 where the Commission wanted to subject apartment
5 buildings in the R-F zone to the 900-square foot
6 requirement, it explicitly stated as such.

7 In Subtitle U, 301.2, a conversion of a non-
8 residential building to an apartment building is
9 permitted as a matter of right subject to several
10 conditions. One of which being the 900-square foot
11 requirement.

12 In Subtitle U, 320.2, a conversion of a
13 residential building, single family or flat, to an
14 apartment building in the R-F-1 is only permitted as
15 a special exception subject to several conditions,
16 one of them being the 900-square foot requirement.

17 And finally, in Subtitle E, 201.4, an
18 apartment house in the R-F-1, R-F-2, or R-F-3,
19 whether it's existing prior to '58, whether it was
20 converted under ZR-58, whether it was converted under
21 the ZR-16, it may not be expanded so as to increase
22 the number of dwelling units unless there's 900-
23 square feet of lot area per dwelling unit.

24 As is clearly shown, under the regulations
25 the 900-square foot dwelling unit requirement only

1 applies to conversions of pre 1958 nonresidential and
2 residential buildings under Subtitle U, and to
3 expansions of existing apartment buildings in the R-
4 F-1, 2, and 3 Zones per Subtitle E.

5 The appellant's project is not a conversion
6 project that is subject to the 900-square foot
7 dwelling unit requirement. It's not an expansion of
8 an existing apartment building. Rather again, by
9 virtue of the text amendment, it's a conforming
10 apartment building permitted as a matter of right,
11 subject to the conditions of Subtitle U, 301.1(1),
12 which is having to have the building permit
13 application accepted as complete and not increase
14 those specific area requirements that are listed at
15 the end of that provision.

16 To read Subtitle U, 301.1(1) differently, as
17 requiring apartment buildings within these specific
18 squares in the Lanier Heights neighborhood, either in
19 existence or proposed under a building permit
20 application that was accepted as complete by DCRA,
21 would likely render all of these apartment buildings
22 as nonconforming, which is exactly the issue the
23 Commission was seeking to address and prevent through
24 the adoption of the text amendment.

25 Specifically with respect to the applicant's

1 project, at the time the proposed apartment building
2 was designed, and the building permit application was
3 submitted in May of 2015, the property was zoned R-5-
4 B, which permits apartment buildings as a matter of
5 right without the 900-square foot per dwelling unit
6 requirement. The plans submitted with the building
7 permit applications show a 12-unit apartment building
8 on a site that is approximately 5,100 square feet.
9 This equates to 425 square foot per dwelling unit.

10 Thus, supplying the 900 square foot dwelling
11 unit requirement that is only applicable to
12 conversions of pre 1958 nonresidential and
13 residential structures, and to expansions of existing
14 apartment buildings, applying that requirement to the
15 plans for the appellant's proposed apartment
16 building, which is specifically permitted as a matter
17 of right under Subtitle U, 301.1(1), would result in
18 the project becoming nonconforming, which is again
19 contrary to the Commission's stated intent for
20 adopting the text amendment.

21 MS. BUTANI-D'SOUZA: I just want to make sure
22 I'm getting this clear in my mind. So, you're saying
23 that there was a proposed rulemaking that occurred
24 that included guidance on what should be vested. And
25 then subsequent to that there is the vesting guidance

1 for ZR-16. Are you saying that the ZR-16 vesting
2 guidance is not relevant here? Or it is?

3 MR. DETTMAN: The DCRA ZR-16 vesting guidance
4 is not relevant here.

5 MS. BUTANI-D'SOUZA: Because you're saying
6 that this was vested as per the proposed rulemaking
7 first?

8 MR. DETTMAN: Yeah, the vesting guidance lays
9 out the circumstances. If the Zoning Commission had
10 not passed that text amendment, we would be having a
11 very different discussion because we would be having
12 to solely rely upon our case that we vested under
13 3202.2, or the companion provisions in ZR-16 which is
14 Subtitle A, Section 401. We would have to make the
15 case that we vested under the prior R-5-B
16 regulations.

17 It just so happens that as a result of the
18 text amendment, the applicant's project was made a
19 matter of right use and existing apartment buildings
20 in those specific squares were made a matter of right
21 use because of the text amendment to 301.1(1).

22 MS. BUTANI-D'SOUZA: Okay.

23 CHAIRMAN HILL: Mr. Dettman, are you able to
24 wrap up a little bit now here, because I do want to
25 hear from the property owner?

1 MR. DETTMAN: That concludes my testimony.

2 CHAIRMAN HILL: Okay. Great. Thank you.

3 MR. DETTMAN: Thank you.

4 CHAIRMAN HILL: Could you walk me through
5 again -- it's Mr. -- could you pronounce your last
6 name again?

7 MR. VISSAT: Vissat.

8 CHAIRMAN HILL: Vissat?

9 MR. VISSAT: Vissat, correct.

10 CHAIRMAN HILL: Vissat. So, a lot of -- I
11 mean, you original bought the property. I mean,
12 you've been on this project the whole time. You are
13 the property owner, correct?

14 MR. VISSAT: Yes. Yes.

15 CHAIRMAN HILL: So, can you tell me when you
16 bought it, when -- you know, go through the dates
17 with me again and the key dates in your mind?

18 MR. VISSAT: Uh-huh. So, we purchased the
19 property in 2014.

20 CHAIRMAN HILL: When in 2014? Around?

21 MR. VISSAT: Some had June, I believe.

22 CHAIRMAN HILL: Okay.

23 MR. VISSAT: Yes. 2014. And then the real
24 key dates I'll run through.

25 CHAIRMAN HILL: Sure.

1 MR. VISSAT: You know, essentially summarize
2 what these two spoke about.

3 We filed a building permit application for
4 this project on May 21st, 2015. DCRA issued Building
5 Permit No. B1508236 on May 29th, 2015, following
6 payment of the application fee.

7 On the same day, may 29th, 2015, the status
8 of the application was set to begin review.

9 On September 15th, 2015, a PDRM meeting with
10 the architect of record, Michael Cross --

11 CHAIRMAN HILL: Say that one again? What's
12 the date?

13 MR. VISSAT: September 15th, 2015.

14 CHAIRMAN HILL: Uh-huh.

15 MR. VISSAT: At PDRM meeting with the
16 architect of record, Michael Cross and Mr. LeGrant,
17 was held to review the project for zoning compliance.

18 On October 2nd, 2015, an executed zoning
19 letter of determination by Mr. LeGrant was received.

20 On October 5th, 2015, zoning approval was
21 received by Mr. David Vollin of the Zoning
22 Administrator's office.

23 On October 16th, 2016, the zoning approval
24 was --

25 CHAIRMAN HILL: October what? Sorry.

1 MR. VISSAT: October 16th, 2016.

2 CHAIRMAN HILL: So, the first one you said
3 was October 25th?

4 MR. VISSAT: October 5th.

5 CHAIRMAN HILL: Oh, sorry. Fifth. Okay.

6 MR. VISSAT: And then on October 16th, 2016,
7 the zoning approval was reversed.

8 CHAIRMAN HILL: Say that one again?

9 MR. VISSAT: October 16th, 2016, the zoning
10 approval --

11 CHAIRMAN HILL: 2016.

12 MR. VISSAT: Oh, sorry, 2015.

13 CHAIRMAN HILL: Okay, sorry.

14 MR. VISSAT: 2015. Sorry about that.

15 CHAIRMAN HILL: I'm trying to stay straight.

16 MR. VISSAT: Yeah.

17 CHAIRMAN HILL: Okay? Because that's a whole
18 different year.

19 MR. VISSAT: Not a year. Yeah.

20 CHAIRMAN HILL: Okay.

21 MR. VISSAT: So, yeah, 2015 the zoning
22 approval was reversed.

23 Structural comments were posted by DCRA on
24 February 11th, 2016. While we were working on the
25 structural comments, on June 8th, 2016, prior to a

1 submission of plans, responded to the structural
2 comments, the deputy zoning administrator issued a
3 determination that the applicant failed to vest under
4 the R-5-B regulations.

5 CHAIRMAN HILL: Say that date again.

6 MR. VISSAT: June 8th, 2016.

7 CHAIRMAN HILL: Okay. That's when you found
8 out you have a problem.

9 MR. VISSAT: Exactly.

10 CHAIRMAN HILL: Okay.

11 MR. VISSAT: The determination was based on
12 an assumption that the plans submitted prior to
13 December 14th, 2015 were not sufficiently complete to
14 allow processing without a substantial change of
15 deviation. The determination asserted that
16 substantial changes would be required to address the
17 excess FAR and structure review comments.

18 We were able to address the structural
19 comments with making -- without making a substantial
20 change of deviation.

21 MS. BUTANI-D'SOUZA: Excuse me, Mr. Vissat.

22 MR. VISSAT: Yes.

23 MS. BUTANI-D'SOUZA: Did the deputy zoning
24 administrator have any communication with you prior
25 to issuing this determination?

1 MR. VISSAT: No, there was no communication.

2 MS. BUTANI-D'SOUZA: So, you receive the
3 structural comments in February after the period by
4 which you had to submit your completed application
5 was closed.

6 MR. VISSAT: Correct.

7 MS. BUTANI-D'SOUZA: So, as far as you knew
8 you had been complete and accepted, and the date
9 passed --

10 MR. VISSAT: Yes.

11 MS. BUTANI-D'SOUZA: -- and everything was
12 great.

13 MR. VISSAT: Uh-huh.

14 MS. BUTANI-D'SOUZA: Then in February you get
15 comments. And you've completed a number of reviews,
16 including the zoning review.

17 MR. VISSAT: Yes.

18 MS. BUTANI-D'SOUZA: Then in February you get
19 comments from the structural reviewer.

20 MR. VISSAT: Correct.

21 MS. BUTANI-D'SOUZA: Most of which, when I
22 looked at them didn't seem terribly --

23 MR. VISSAT: All minor relatively.

24 MS. BUTANI-D'SOUZA: -- like a big deal.

25 MR. VISSAT: Yes.

1 MS. BUTANI-D'SOUZA: But then there were some
2 that were pertaining to, I suppose, the penthouse or
3 --

4 MR. VISSAT: Correct. Number of stories.

5 MS. BUTANI-D'SOUZA: Okay. So, then -- and
6 this was the third party reviewer?

7 MR. VISSAT: This is DCRA's structural
8 reviewer.

9 MS. BUTANI-D'SOUZA: This is DCRA's
10 structural reviewer.

11 MR. VISSAT: Yes.

12 MS. BUTANI-D'SOUZA: Okay. So, how does the
13 third-party reviewer fit into this, then?

14 MR. VISSAT: It was a third-party review
15 project.

16 MS. BUTANI-D'SOUZA: Oh, so over all --

17 MR. VISSAT: Certified structural --

18 MS. BUTANI-D'SOUZA: Okay.

19 MR. VISSAT: Yeah. Yeah.

20 MS. BUTANI-D'SOUZA: So, you're working on
21 the comments, trying to come up with a way to address
22 them.

23 MR. VISSAT: Yes.

24 MS. BUTANI-D'SOUZA: In a way that does not
25 trigger kicking you out of the vested guidance.

1 MR. VISSAT: Right. No substantial changes
2 or deviations.

3 MS. BUTANI-D'SOUZA: Okay. So, then from
4 your perspective, you had no idea that the ZA was
5 reviewing whether or not this could be vested or not?

6 MR. VISSAT: Uh-huh, correct.

7 MS. BUTANI-D'SOUZA: That was not something
8 that you were aware could happen, that it could be
9 tossed out?

10 MR. VISSAT: Correct.

11 MS. BUTANI-D'SOUZA: Okay. So, then all of a
12 sudden you get a letter in June saying this is tossed
13 out.

14 MR. VISSAT: Yeah. And how did we find out?
15 I can't remember exactly how we found out, be we
16 checked online and comments were posted, I believe.

17 MS. BUTANI-D'SOUZA: Okay. And then -- okay.
18 So I think I interrupted the time line. Then what
19 happened?

20 MS. VITALE: Okay. Sorry. The determination
21 asserted that substantial changes would be required
22 to address the excess FAR and structure review
23 comments. We were able to address the structural
24 comments without making a substantial change or
25 deviation. Therefore, the June 8th decision was

1 premature and it was issued based on an assumption
2 that substantial revisions would be necessary to
3 address the comments.

4 MS. BUTANI-D'SOUZA: Can I ask one other
5 question?

6 MR. VISSAT: Yes.

7 MS. BUTANI-D'SOUZA: So, I know in the record
8 you submitted a single page that basically showed
9 penthouse crossed out.

10 MR. VISSAT: Yes.

11 MS. BUTANI-D'SOUZA: Were there any other
12 changes to the drawings?

13 MR. VISSAT: We're deleting the penthouse,
14 would just have to be reflected across like the MVP
15 drawing structural. We're literally just removing
16 that, though.

17 MS. BUTANI-D'SOUZA: Uh-huh.

18 MR. VISSAT: It's you know, we're not adding
19 anything, we're not increasing any area or anything
20 like that.

21 MS. BUTANI-D'SOUZA: So, you didn't change
22 any -- I'm assuming you removed some detailed -- some
23 details. You know, some changes to your --

24 MR. VISSAT: Yeah, so that, that one sheet --

25 MS. BUTANI-D'SOUZA: -- finish plan, there

1 were some changes to your door and window schedule
2 and things like that.

3 MR. VISSAT: Not even to that level, no.
4 It's literally just deleting that portion off of the
5 drawings, across all disciplines.

6 MR. GLASGOW: I think by the time you get --
7 when you get finished there will probably have to be
8 some minor clean-up on some of the drawings because
9 you have things like, well, what about your handrail.
10 Some of the things, there would be sheets that add
11 notes as to what the -- we had to do a calculation
12 for snow load, we had to do -- you know, when you go
13 through those comments, there are a number of
14 different things that just have nothing to do with
15 zoning, but would end up being reflected on the
16 plans.

17 MS. BUTANI-D'SOUZA: But as far as the
18 deletion of the penthouse and -- I'm just trying to
19 get an idea of --

20 MR. VISSAT: Right.

21 MS. BUTANI-D'SOUZA: -- how much the plans
22 were --

23 MR. VISSAT: We're really just lobbing it off
24 the top of the building. That's all, so --

25 MR. GLASGOW: Right.

1 MS. BUTANI-D'SOUZA: Okay. So, you've
2 overdesigned your structural, your bearing walls and
3 all that stuff to support the weight of the
4 penthouse. You didn't change any of that. You just
5 left it as is?

6 MR. VISSAT: Yeah. Yeah, we literally took
7 the most efficient easy route to resolve this, and
8 that was it.

9 MS. BUTANI-D'SOUZA: Okay.

10 MR. GLASGOW: Right, we wanted -- we were
11 intentionally having that be so that it was the -- we
12 addressed things with the least change to the
13 drawings and deleting the penthouse was it, and we
14 thought that that was safe, given where this ZR
15 guidance was going. We didn't have any understanding
16 that we would be said that suddenly, that that's a
17 substantial change in deviation when it doesn't
18 violate any other things.

19 MS. BUTANI-D'SOUZA: I understand. Thank
20 you.

21 CHAIRMAN HILL: Okay. So, Mr. Vissat, also,
22 when you bought the property were you aware of the
23 text amendment that was going through?

24 MR. VISSAT: No.

25 CHAIRMAN HILL: So, when did you become aware

1 of the community and what they were trying to do?

2 MR. VISSAT: I would say halfway through
3 2015, I believe, because I knew -- we knew that we
4 had the December 14th cut-off date to get everything
5 in. So.

6 CHAIRMAN HILL: Okay. All right. Okay. So,
7 you ended up with 45 minutes after all. And so, Mr.
8 Tondro, there's a lot for you to kind of walk
9 through. Definitely there's a lot of dates. And you
10 know, please I again encourage the Board to ask
11 questions to help me stay clear on the dates, or if
12 they have any questions kind of moving through.

13 I mean, the terminology of sufficiently
14 complete is the one that keeps getting kicked around.
15 And you obviously have disagreements. Meaning you
16 don't think you're wrong.

17 So, there's only one of you. So --

18 MR. HOOD: Mr. Chairman.

19 CHAIRMAN HILL: Yes.

20 MR. HOOD: Before you --

21 CHAIRMAN HILL: Sure, of course.

22 MR. HOOD: I wanted to ask Mr. Vessy, Vessy?
23 Did I get your name? Vissat?

24 MR. VISSAT: Vissat. Yes.

25 MR. HOOD: Vissat. Mr. Vissat, I'm just

1 curious. When the Zoning Commission took the
2 proposed rulemaking did you testify or did you offer
3 comments? I don't remember.

4 MR. VISSAT: No, we --

5 MR. HOOD: So you were silent.

6 CHAIRMAN HILL: Somebody is nodding in the
7 background.

8 MR. VISSAT: Yes. I personally did not.

9 MR. HOOD: Okay. So in other words, from
10 your standpoint you were silent?

11 MR. VISSAT: No.

12 MR. GLASGOW: I think, Mr. Chairman, we
13 reviewed what the proposed, what we thought the
14 proposed changes would be. And when we saw the
15 language that was to grandfather -- and I shouldn't
16 use the --

17 MR. HOOD: Yeah, let's not use grandfathered,
18 because that was not the intent.

19 MR. GLASGOW: It's not. It's not. No.

20 MR. HOOD: Right, that was not the intent.

21 MR. GLASGOW: No, you're correct. And that's
22 a big distinction.

23 MR. HOOD: I watched how -- Mr. Dettman, I
24 watch how we shift and move things. But believe me,
25 I sat there. So, I know what the intent was.

1 MR. GLASGOW: Right. And we looked at it at
2 least with the language that it was going to be a
3 matter of right use if we didn't -- if we filed, had
4 filed timely, which we had by months, and we didn't
5 do certain things with those set of plans afterwards,
6 that it would continue to be a matter of right use.

7 MR. HOOD: So, the removal of the penthouse
8 is not major to you?

9 MR. GLASGOW: That is correct because it says
10 in that text amendment, that you can't increase any
11 of those things. And it lists a whole series of
12 things you can't do. And we didn't -- and we made
13 sure to keep away from all of those. And so, when we
14 were looking at how to most efficiently address the
15 comments that had been made, then that's meaning the
16 structural comments that had been made. It appeared
17 to be removal of the penthouse was the most straight
18 forward easiest thing to do.

19 MR. HOOD: All right.

20 MR. GLASGOW: And end the issue.

21 MR. HOOD: All right. Thank you, Mr.
22 Chairman.

23 CHAIRMAN HILL: So, Mr. Vissat, just to --
24 this is going to go on for a while. To clear up,
25 when you started to become worried about this, right,

1 you're telling me again it's not until June 8th that
2 you were worried about anything. But yet you're
3 testifying at the Zoning Commission, concerned about
4 your project, correct?

5 MR. VISSAT: Not specifically about the
6 project, just the down zoning in general. Yeah, we
7 thought we were okay because like I said, we got
8 everything submitted by the set down date of December
9 14th. And it was, like I said, it was fully
10 accepted, it was --

11 CHAIRMAN HILL: Okay. So you were -- that's
12 okay. So, you were testifying just in general, you
13 didn't agree with the downzoning.

14 MR. VISSAT: Correct.

15 MR. GLASGOW: We're being shown that you were
16 -- comments were received.

17 MR. VISSAT: Okay. Yeah, I didn't testify.
18 I think I sent something in.

19 CHAIRMAN HILL: That's okay. You were
20 worried.

21 MR. VISSAT: Yeah. Yeah.

22 CHAIRMAN HILL: Yeah.

23 MR. HOOD: That was my question. I just
24 wanted to know did -- is there anything in the
25 record, did you comment on it?

1 MR. VISSAT: Yeah, I didn't testify, I
2 obviously sent something in.

3 MR. HOOD: So, there's something in the
4 record --

5 MR. VISSAT: Yeah.

6 MR. HOOD: -- from you. Okay.

7 CHAIRMAN HILL: Okay. All right, Mr. Tondro.
8 You're up.

9 MR. TONDRO: Good morning, Commissioner
10 Chair, Members of the Board.

11 CHAIRMAN HILL: If you'd like to say
12 something nice about Mr. Hinkle in the beginning,
13 then I won't take your time away there or anything,
14 if you'd like to do that.

15 MR. TONDRO: Thank you for the reminder,
16 Chairman Hill. I would like to say it's been -- I
17 have not been a participant in these hearings as long
18 as Board Member Hinkle has been, but I do appreciate
19 from our standpoint, from DCRA, the service that you
20 have done. So, thank you for that.

21 MR. HINKLE: Thank you. I appreciate that.

22 MR. LeGRANT: And I will use the opportunity
23 now to also comment Board Member Hinkle for his long
24 service. I've appeared before you more than anybody
25 else up here, I believe, and many, many times, and

1 appreciate all the work that you've done on behalf of
2 the District of Columbia.

3 MR. HINKLE: Thank you. I appreciate that as
4 well.

5 CHAIRMAN HILL: Thank you. Please go ahead.
6 I'm sorry.

7 MR. TONDRO: So, good morning, Mr. Chair,
8 Members of the Board. Thanks for hearing our case.

9 So, I'm going to try and keep this as simple
10 as possible given that I think this is obvious, as we
11 understand, this is a very complex case in some ways.

12 First of all I'll point out to you that the
13 appellants have raised two totally different
14 assertions here. Either we're proceeding under 1958,
15 in which case we're dealing with 3202.4, 3202.5(a),
16 which I'll explain more, or we're doing as Mr.
17 Dettman says, we're proceeding under ZR-16, which
18 this application is not currently filed under.

19 So, if we're going to proceed under ZR-16,
20 and Mr. Dettman I believe, just testified that 32 --
21 everything else is irrelevant because it's permitted
22 as a matter of right use, that has not been submitted
23 to the Zoning Administrator as an application under
24 ZR-16.

25 What the appeal is about currently is the

1 allegation that the ZA erred under 1958 regulations
2 in June, long before the Board adopted, let alone
3 made effective, the provision in ZR-16 that is the
4 Subtitle U, 301. That only became effective in
5 October. It does not apply retroactively to ZR-58.
6 It only applies to ZR-16.

7 So, there's a bifurcation here, sort of
8 trying to deal -- you as the Board are dealing with
9 two different arguments. But I would point out that
10 the alleged error here by the ZA occurred in June,
11 some five -- sorry, four months before the actual
12 effective date of the ZR-16.

13 Separate from that, what the ZR-16 did dealt
14 with ZR-16 only, not with ZR-58.

15 And in terms of the importance of that, the
16 importance is that while Mr. Dettman is correct, that
17 under ZR-16 the 900-square foot rule was moved from
18 the development standards for the R-F-1 zone, which
19 is the R-4 zone. It's moved from there to the use
20 that is not the case in the 1958 regulations.

21 Under the 1958 regulations that 900-square
22 foot rule is in the development standards, not in the
23 uses. Okay? So, we're dealing with there's a change
24 that happened between the Zoning Regulations of '58
25 and the Zoning Regulations of '16.

1 Having said all that, the appeal is of the
2 Zoning Administrator's determination in June, which
3 is under the 1958 regulations. Okay? So, I just
4 want to be very, very clear about that. Therefore,
5 amongst other things the guidance that DCRA put out
6 was not yet finalized in June. The guidance that
7 they're referring to, Exhibit C of 56C, there's a
8 number of issues that will probably at a later
9 appeal, will return to this document. This document
10 was put out as guidance, administrative guidance by
11 the Zoning Administrator to guide applications
12 seeking to vest under '58 and retain their vesting
13 under '58 prior to the September 6th effective date
14 of the new ZR-16.

15 To be perfectly fair although it's convenient
16 to refer to that, this is not guidance established by
17 the Zoning Commission, this is the Zoning
18 Administrator's guidance trying to be proactive for
19 the purposes of allowing people to vest under '58
20 versus '16. That's a totally different set of
21 regulations than what we're dealing right here.

22 What we're dealing with instead is completely
23 under 1958. Okay?

24 MS. BUTANI-D'SOUZA: Okay. So, this was my
25 question. So the let's set aside ZR-16 for a second.

1 So the guidance that we're looking at then is 56B,
2 correct?

3 MR. TONDRO: I think it's 56C, wasn't it?

4 MS. BUTANI-D'SOUZA: That's the ZR-16 one.
5 But you're saying the one that's relevant is the
6 1958, the proposed rulemaking under 1958.

7 MR. TONDRO: No, I'm sorry. Two different
8 issues. Thank you for asking.

9 MS. BUTANI-D'SOUZA: Okay.

10 MR. TONDRO: Exhibit B.

11 MS. BUTANI-D'SOUZA: 56B.

12 MR. TONDRO: 56B, which is the Zoning
13 Commission order in Case No. 16-08.

14 MS. BUTANI-D'SOUZA: Yes.

15 MR. TONDRO: That one only became effective
16 on October 7th, 2016, and only applies to the 2016
17 regulations.

18 MS. BUTANI-D'SOUZA: So, that applies to ZR-
19 16?

20 MR. TONDRO: Only. It does not apply to
21 1958. If you look down there, it talks -- see, it's
22 Subtitle U, Chapter -- Section 301. And it refers to
23 the RF Zone. RF didn't exist under the 1958
24 regulations.

25 And to explain -- I think the Zoning

1 Commission was in a little bit of a quandary. My
2 sense here, because the fact was that by the time the
3 Zoning Commission took action, I believe that they
4 actually voted on the notice of proposed rulemaking,
5 I believe was at the end of July. But by the time
6 the 30-day period ended as it was calculated, that
7 happened after the effective date of the ZR-16. So,
8 I guess there was a decision that the Zoning
9 Commission made as far as I understand, to only put
10 it into ZR-16 because by the time it became effective
11 ZR-58 would no longer exist.

12 MS. BUTANI-D'SOUZA: Okay. Mr. Tondro, I am
13 a little confused. So, setting aside whether --
14 which guidance we're looking at here.

15 It seems to me that the central issue here is
16 whether or not this was a substantial change, right?
17 Because you had something filed prior to December
18 14th, 2015, under whatever rules were in effect.

19 MR. TONDRO: Yeah, if I can respond to that
20 because --

21 MS. BUTANI-D'SOUZA: Yeah.

22 MR. TONDRO: -- that is the crux of the
23 situation but it's a little more complex than that.
24 So I just want to sort of separate things out first
25 of all by saying, this whole issue of Subtitle U,

1 Section 301, that is only applicable under the 2016
2 Rules, A. B., it was not adopted until some four to
3 five months after the ZA's decision that was made --
4 that about which this appeal is about. So, I don't
5 believe that 301, Subtitle U, 301 applies to this
6 appeal. That's my point about that. Therefore,
7 Exhibit B is largely irrelevant to this appeal, which
8 is of the zoning -- okay, for the -- okay. My only
9 point about Exhibit 56C, which they brought up, if
10 you look in the bottom right-hand corner it also says
11 revised on September 6th, 2016. This is again
12 something that was looking forward. It's about the
13 transition to ZR-16. I don't think that's
14 applicable.

15 So, having said that I'm going to back up
16 now. I appreciate your patience. I'm going to try
17 to make this as easy as possible, which is to
18 describe what was the rules in existence as of the
19 time that the ZA made the decision in June of -- June
20 8th of 2016. Okay? And at that time, which is
21 before any of these changes happened, okay, at that
22 time you had the blanket vesting rule, which is
23 3202.4. And you can -- it may be easiest if you want
24 to look at page 2 of the DCRA. A prehearing
25 statement because I include the entire provision in

1 there.

2 So, as you see, I first I deal with 3202.5
3 and then I add in 3202.4 below for the purposes of
4 that argument. But if we start with 3202.4, this is
5 the blanket rule and the -- I'm sorry, do you see --

6 So, this is again, 11-DCMR under 1958,
7 3202.4. The blanket rule establishes that permits
8 must comply with the regulations on the date of
9 issuance. There is no vesting unless you get your
10 permit issued prior to the change in rules. That's
11 the blanket rule. Everything happened, that's the
12 way it happens across the board.

13 An exception was made, however, under 3202.5.
14 In that circumstances the Zoning Commission said,
15 where it's a situation where the Zoning Commission
16 has set down, in other words, has given public notice
17 that it's considering a change to the Zoning
18 Regulations, then that blanket rule is actually
19 further limited because if you file an application
20 after the Zoning Commission has set down that
21 proposed change, even if you get it issued prior to
22 the effective date of that change, you're not allowed
23 to use that, use the old. You're subject still to
24 the new rules.

25 But there was a carveout, so, there's an

1 exception that further limits, and then there's a
2 carveout to that to say, if however, you are as a
3 bona fide application, this is 3202.5(a), if what you
4 are is what I would describe a bona fide application,
5 you are provisionally vested if you have submitted
6 your application prior to Zoning Commission set down
7 and you meet two additional prongs.

8 Prong one is this issue that you have
9 submitted as of that date, a complete set of plans
10 that allow for processing without substantial change
11 or deviation. But the other one that is crucial is
12 that they're still subject to 3202.4, for permit
13 processing and issuance.

14 MS. BUTANI-D'SOUZA: Hang on a --

15 MR. TONDRO: Yes.

16 MS. BUTANI-D'SOUZA: Can you just hang on one
17 second? I just want to see if I can --

18 MR. TONDRO: It's complicated. Yes.

19 MS. BUTANI-D'SOUZA: -- follow this.

20 [Pause.]

21 MS. BUTANI-D'SOUZA: I'm just not following
22 the argument at all.

23 MR. TONDRO: Okay. That's fine. Thank you
24 for telling me. No, and again, I'm trying to make
25 this as painless as possible.

1 The start off is 3202.4. The general rule.
2 You have to comply with the regulations on the date
3 of permit issuance. In other words, doesn't matter
4 how long it takes for you to go and get the permit --
5 the permit application process. Doesn't matter
6 whether DCRA slow-walked it or whatever. The rule is
7 and has been forever and a day, that the rules that
8 you have to comply with are on the date of permit
9 issuance.

10 If you get your permit issued the day before
11 the rules change, you're golden. You do it the day
12 after, you're out of luck. Doesn't matter how long,
13 when you had it, applied for it, or anything like
14 that. That's the golden rule.

15 MS. BUTANI-D'SOUZA: And in this case the
16 rules that they applied under were what?

17 MR. TONDRO: In this case it was they applied
18 -- well, they applied under the R-5-B. But before
19 they got it issued, okay, the Zoning Commission set
20 down the change, the downzoning from R-5-B to R-4.
21 That triggered 3202.5. So it's separate. It pulls
22 it out of the general into this even more restricted.
23 And that more restricted says, even if you manage to
24 get your permit issued prior to that down zoning,
25 none the less, you still don't qualify to be

1 grandfathered. You qualified under the old rules
2 unless -- if you submitted your application after the
3 Zoning Commission set it down.

4 That's a pretty fair rule. The Zoning
5 Commission tells everybody, we are in the process of
6 changing the rules. No one can come in once the
7 Zoning Commission has alerted them, and go under the
8 old rules and just get a very quick permit through.
9 Once the Zoning Commission --

10 MS. BUTANI-D'SOUZA: But they were -- they
11 applied before the rules were announced, correct?

12 MR. TONDRO: And that was what -- that's the
13 third -- right. So there's the general, then the
14 exception, then the carveout to the exception. If,
15 however, that -- you applied prior, then you are
16 under A of 3202.5. And in that particular case, and
17 I should be very clear we're willing to stipulate in
18 agreement with appellants that they met the first
19 prong, which is they had to be accepted as complete
20 by -- because they were, as of May 29th, 2015.

21 And to be clear, what accepted as complete
22 means, is just simply you submitted all the necessary
23 documents. Doesn't mean they're right, doesn't mean
24 their accurate, doesn't mean they've been reviewed.
25 It's just simply, did you submit your five copies of

1 the plans? Did you have a plat? Did you have the
2 zoning information? Yes, you did. Yes, you didn't.
3 That's all. That's what accepted as complete means.
4 That one was done for this particular application on
5 May 29th of 2015. Okay?

6 So, they clearly met the first prong to fall
7 under 3202.5A.

8 CHAIRMAN HILL: Yeah, that's okay. And
9 again, you said May 29th, 2015. May 29th, 2015 is
10 what you had said as complete.

11 MR. TONDRO: Yes.

12 CHAIRMAN HILL: Accepted as complete.

13 MR. TONDRO: Exactly. Yes.

14 CHAIRMAN HILL: Okay. I understand the
15 clarification as to what -- that's okay. I
16 understand the clarification as to what complete is,
17 but I'm just getting that date.

18 MR. TONDRO: Yes.

19 CHAIRMAN HILL: Okay. Thank you.

20 MR. TONDRO: And therefore I think we agree
21 with the appellants on that one thing.

22 CHAIRMAN HILL: That's nice.

23 MR. TONDRO: To make it a little bit easier.

24 MR. HOOD: Mr. Tondro, let me ask you
25 question. In your submission you mention

1 provisionally vested. Is that a Zoning Commission --

2 MR. TONDRO: That was what I was going to get
3 to right quick.

4 MR. HOOD: Okay. Okay. Okay. let me let
5 you --

6 MR. TONDRO: No, thank you, Commissioner, for
7 -- so, the effective 3202.5(a), okay, if you were to
8 carve out within the exception, then you are
9 provisionally vested as in this case. You're
10 provisionally vested in this sense that you first
11 have met that requirement that you're accepted as
12 complete prior to the date of set down.

13 Second, you are provisionally vested provided
14 that you -- the plans you submit at that time prior
15 to the set down are sufficiently complete to allow
16 process and issuance, permit processing and issuance,
17 without substantial change or deviation. That's the
18 second prong.

19 And the third prong is that you still,
20 however, have to satisfy 3202.4, which is that basic
21 rule that says you must get it issued prior to the
22 change in the rules. That's why I say provisionally
23 vested. And you can see that under 3202 point --

24 MS. BUTANI-D'SOUZA: And when did the rules
25 change?

1 MR. TONDRO: The rules changed in August
2 26th, I believe.

3 MS. BUTANI-D'SOUZA: So, DCRA said, before
4 the rules changed, before they had the opportunity to
5 get their permit issued, prior to the rule change,
6 that they couldn't be considered under this rule?
7 Because I thought in June of 2016 they got a letter
8 from the deputy Zoning Administrator saying, you're
9 not -- you haven't responded to us in four months,
10 therefore we consider the substantial --

11 MR. TONDRO: Yes. Yes, you're accurate.

12 MS. BUTANI-D'SOUZA: Okay.

13 MR. TONDRO: Again, just there are two
14 different prongs, both of which are involved in this
15 one. So, you have to meet the first one, which is
16 that the change is sufficiently complete to allow
17 processing without any substantial change or
18 deviation. And, not or --

19 MS. BUTANI-D'SOUZA: But you agree with the
20 applicant that they were? Or no?

21 MR. TONDRO: No. No, I'm sorry.

22 MS. BUTANI-D'SOUZA: You don't. Okay.

23 MR. TONDRO: No. To be clear.

24 MS. BUTANI-D'SOUZA: Well, let's go to the
25 third --

1 MR. TONDRO: Accepted as -- the distinction
2 is accepted as complete, which is just simply you
3 submitted everything. That's the first prong.

4 MS. BUTANI-D'SOUZA: Okay.

5 MR. TONDRO: That was done in May. Then you
6 have to, prior to Zoning Commission set down, you
7 have to submit a set of plans, a complete set of
8 plans. Those plans have to be sufficiently complete
9 to allow permit processing and issuance without any
10 substantial change of deviation. Again, because the
11 Zoning Commission carved this exception out, they
12 didn't want to give it to a placeholder that could
13 get vested under, you know, some, you know, very
14 little, let's say a two-story building, and then take
15 advantage of that vesting and expand it into
16 something bigger or make substantial changes. This
17 was always a provisional vesting issue. So, that was
18 why I believe there was that issue of the substantial
19 change or deviation. Without substantial change or
20 deviation.

21 But in addition, even if they met that you
22 also still had to get your permit issued under the
23 third prong by the time of the effective date. So,
24 what happened here is sort of two different issues.
25 You are correct, Board Member D'Souza, that the

1 Zoning Administrator's decision that is challenged
2 here, was based on the second prong, whether they
3 were substantially complete.

4 At that time the Zoning Administrator had
5 only the information of what the structural reviewers
6 were. There was nothing submitted officially to DCRA
7 at that time that indicated that the structural
8 reviews had been addressed. Nor, was there anything
9 in terms of the zoning issues addressed, the FAR. In
10 fact, you just heard that they've proposed these
11 changes which were submitted as Attachment A, which
12 involve removing the penthouse and making changes to
13 the basement. Those issues still had to be
14 addressed. But the plans that I'm providing, that I
15 submitted, those are 11 of November. The plans that
16 were -- the review of comments that were submitted
17 here, those were in September of 2016. Both of those
18 were well after --

19 MS. BUTANI-D'SOUZA: Before we move off of
20 this point, on the substantial completion, I just
21 want to rewind a little bit.

22 So, the second prong is that it must -- the
23 plans must be substantially complete to allow
24 processing and issuance without any substantial
25 change. So, effectively what the deputy zoning

1 administrator did was he looked at the comments and
2 made a determination that to address these comments
3 would require a substantial change.

4 Now, let me ask you, how do you define a
5 substantial change? And where is it stated that an
6 applicant can look at that and understand?

7 MR. TONDRO: Unfortunately, there is no such
8 definition. The Zoning Commission did not -- I'm
9 sorry, Chairman Hood, has not ruled on this or
10 provided a definition. This has not been tried as
11 appellant's counsel indicated, as far as I know.
12 This has not been tried or addressed in front of --
13 before the Board until now. So it's a --

14 MS. BUTANI-D'SOUZA: So, hang on. So, the
15 appellant is arguing that the substantial change
16 qualifies -- would be defined, you know, in whatever
17 rules we're looking at, as an increase. So, help me
18 understand why you disagree with them that a
19 substantial change can only be defined as an
20 increase.

21 MR. TONDRO: Yes. The text that they're
22 using to support the issue of increase, came after
23 the Zoning Administrator's determination.

24 MS. BUTANI-D'SOUZA: Okay. So it's your --

25 MR. TONDRO: They are --

1 MS. BUTANI-D'SOUZA: So, you're saying
2 there's nothing relevant.

3 MR. TONDRO: At the time of the Zoning
4 Administrator's decision, that was not there. Those
5 were afterwards. They're both, the guidance going
6 forward for ZR-16 and by the Zoning Administrator
7 that was issued later on that summer, as well as then
8 --

9 MS. BUTANI-D'SOUZA: Here's what I don't
10 understand.

11 MR. TONDRO: Uh-huh.

12 MS. BUTANI-D'SOUZA: So, in the rules that
13 we're talking about, 3202.5, and 3202.4, it
14 references that if the Zoning Commission takes action
15 and notifies the public that they're going to be
16 making a rule, so, you know, in my view it actually
17 references what the Zoning Commission did, then why
18 would we not look at the language in what the Zoning
19 Commission had proposed to do and use that here to
20 define substantial change?

21 MR. TONDRO: Yes, because -- and that's fine.
22 The issue is that that was not in the zoning -- that
23 was not the -- so, the set down -- we're talking
24 about actually two different zoning cases, 15-09 and
25 16-08.

1 MS. BUTANI-D'SOUZA: Okay.

2 MR. TONDRO: 16-08 is the one that's the
3 matter of right use. That was effectively pulled out
4 of 15-09. That was separate from 15-09. It was sort
5 of related, but it was pulled out at 15-09. 15-09 is
6 the downzoning. 15-09 does not have any vesting
7 provisions in 15-09.

8 MS. BUTANI-D'SOUZA: So, 16-08, which is what
9 is 56B, was not published at the time --

10 MR. TONDRO: That was --

11 MS. BUTANI-D'SOUZA: That's not the basis.
12 That's not the basis of what kicks us into 3202.4?

13 MR. TONDRO: No. 3202.4, again, is that
14 general blanket rule. 3202.5 and 3202.5(a), that
15 provisional vesting, that is triggered by 15-09,
16 which is the downzoning.

17 MS. BUTANI-D'SOUZA: So, previously you said
18 that we were governed by 3202.5(a), which then
19 mentions that if the Zoning Commission does set down,
20 it triggers 3202.4. And you're saying that 15-09 is
21 what is what triggered the 3202.4. Is that -- I'm
22 just trying to follow to make sure I'm --

23 MR. TONDRO: No, I'm sorry. Yes. No, so
24 3202.4 is the blanket rule. That's, you have to get
25 it issued. You have to comply with the regulations

1 in effect on the date of issuance. That's the
2 blanket rule period, to all cases.

3 The exception to that was triggered by 15-09,
4 and that then puts them under 3202.5, the next
5 provision. 3202.5 is when the Zoning Commission is
6 considering a rule change. Okay? The project -- the
7 property subject to that proposed rule change are
8 then subject to a more restricted ability to get --
9 to comply with the regulations.

10 MS. BUTANI-D'SOUZA: Okay. And 15-09 is the
11 rule change that we're talking about.

12 MR. TONDRO: Yes.

13 MS. BUTANI-D'SOUZA: So 16-08, at the time
14 that this was happening, was not published, was not
15 in effect?

16 MR. TONDRO: No, 16-08 came out of 15-09.
17 There was a discussion.

18 MS. BUTANI-D'SOUZA: When?

19 MR. TONDRO: I don't have the exact dates on
20 me as to when.

21 MS. BUTANI-D'SOUZA: Again, I'm trying to get
22 to what the definition of a substantial change is,
23 and why we can't reference what the appellant has
24 requested us to reference, which is -- and assuming
25 that we cannot, then my next questions are going to

1 be about Merriam Webster, because I know you guys go
2 to the dictionary after, right? If there's no
3 definition?

4 So, first I'm trying to understand the first
5 question, which is why can we not use the language
6 that Mr. Glasgow and Mr. Dettman have suggested that
7 we use?

8 MR. TONDRO: That was not voted upon by the
9 Zoning Commission until July of 2016. It was not
10 made final. And then when it was voted upon it was a
11 notice of proposed rulemaking and it was not -- did
12 not become effective until October of 2016.

13 MS. BUTANI-D'SOUZA: So, the rules, though,
14 state that the applicant is -- application is
15 considered differently if there is a notice of
16 proposed rulemaking. But, we cannot use whatever is
17 included in the notice of proposed rulemaking to
18 determine whether or not a substantial change -- to
19 define a substantial change.

20 MR. TONDRO: In this case again, the notice
21 of proposed rulemaking occurred almost two months
22 after the decision that is being appealed. So, in
23 other words to the extent we're trying to go and
24 bootstrap something --

25 MS. BUTANI-D'SOUZA: okay.

1 MR. TONDRO: -- that happened afterwards --

2 MS. BUTANI-D'SOUZA: Thank you.

3 MR. TONDRO: -- and forward at the -- we're
4 working with what it was that the Zoning
5 Administrator had at that particular time.

6 MS. BUTANI-D'SOUZA: Is 15-09 in the record?

7 MR. TONDRO: I'm not sure. We did not submit
8 it, but I think --

9 MR. GLASGOW: We submitted it.

10 MS. BUTANI-D'SOUZA: Do you know which
11 exhibit it is?

12 MR. GLASGOW: It's Exhibit D.

13 MR. TONDRO: Exhibit D. 56D.

14 MS. BUTANI-D'SOUZA: And since this is a 12-
15 page document, is there a section that we should look
16 at in 15-09?

17 MR. TONDRO: Well, you can see that the final
18 action, if you look on page 4, that the Commission
19 took final action on June 27th, to approve the map
20 amendment.

21 MS. BUTANI-D'SOUZA: Well, basically you're
22 arguing that there's nothing in 15-09 that would
23 define a substantial change, I suppose?

24 MR. TONDRO: No.

25 MS. BUTANI-D'SOUZA: Okay.

1 MR. TONDRO: No, there was no guidance given
2 at that time subsequent to which I think partially
3 based on the discussions and based on what happened
4 in 16-08, there have been proposals and working
5 between the Zoning Administrator along with the
6 Office of Planning, and I believe there is a text
7 amendment that is on its way to address this very
8 issue under ZR-16. But that has not, as far as I
9 understand, that has not taken place yet.

10 MS. BUTANI-D'SOUZA: Okay. So, let's go back
11 to this question of what is a substantial change.

12 MR. TONDRO: Uh-huh.

13 MS. BUTANI-D'SOUZA: So, there is nothing in
14 the regulations that state what a substantial change
15 is. So, how is the ZA defining it?

16 MR. TONDRO: A substantial change or
17 deviation, again, to be I think a couple things to
18 remember that the burden of proof here is on the
19 applicant alleging that there was an error. I just
20 want to be very clear about that.

21 In this case the language is substantial
22 change or deviation. The structural -- there were
23 two outstanding issues that were identified in the
24 ZA's -- or the deputy ZA's decision. One was the
25 structural comments, that those would require

1 changes. We're talking about changes that involved
2 removing an entire upper story.

3 I think most people would view that as a
4 substantial change or a deviation if you're removing
5 the third story.

6 CHAIRMAN HILL: Any, Mr. Tondro, so this is
7 now -- or, Mr. LeGrant, obviously you can also speak
8 to this. But so, I'm trying to also get back to the
9 timeline in terms of when you were reviewing, or the
10 Zoning Administrator was reviewing what is
11 substantially complete. I mean, I just want to get
12 back down to, again, the timeline in terms of when
13 you were reviewing this, when the applicant then
14 knew, and then again to Vice Chair D'Souza's point,
15 how were you defining substantially complete?

16 MR. LeGRANT: Well, so, okay. So, again as
17 Mr. Tondro noted, the restructural comments back in
18 February 2016 that said there's many things that have
19 to be addressed by the applicant, and although some
20 of those are handrails, or building details, some of
21 them have to do with what is the number of stories in
22 the building, from a building code perspective
23 because that drove certain fire proofing requirements
24 and so forth.

25 CHAIRMAN HILL: May I interrupt just one

1 moment? So, the -- again, the applicant was
2 considered complete on May 29th, 2015. Okay, in
3 terms of all the paperwork was in. That's what we
4 were hearing about right yet.

5 MR. LeGRANT: Yeah, there's no dispute as --

6 CHAIRMAN HILL: That's just all the paperwork
7 stuff. And then the set down, the text amendment was
8 on -- in December 14th, 2015.

9 MR. LeGRANT: Correct.

10 CHAIRMAN HILL: Okay. And then now you got
11 me in February. So, now we're February, 2016. Okay?

12 MR. LeGRANT: Yeah.

13 CHAIRMAN HILL: And that's when you're taking
14 a look at this again?

15 MR. LeGRANT: No, no. Just remember, the
16 structural discipline of DCRA then gave the applicant
17 comments saying, there's all these --

18 CHAIRMAN HILL: Right. That was back in
19 October of 2015.

20 MR. LeGRANT: No, no, no, this is February --
21 the structural discipline. The plans are going
22 through the system. In February 11th, 2016, in
23 reaction to the submission by the applicant, the
24 structural discipline said, hey, here's you know,
25 several comments on your applicant. There's issues

1 with the building code submission or the
2 applicability of building code provisions to your
3 plans.

4 Okay. And so, we also, as was noted from the
5 zoning point of view, happened October 16th, 2015, we
6 raised concerns about the FAR. Okay? So, we're
7 waiting for the applicant to respond and even after
8 February, four months go by, and so at that point --

9 CHAIRMAN HILL: They hadn't responded until
10 then.

11 MR. LeGRANT: They did not respond.

12 CHAIRMAN HILL: Okay.

13 MR. LeGRANT: So --

14 MS. BUTANI-D'SOUZA: That's to the zoning
15 comments? To any comments?

16 MR. LeGRANT: To either. To either the
17 zoning or the structural comments.

18 CHAIRMAN HILL: Right. So, October, we're in
19 October. You send out comments and then you don't
20 get stuff back and have an opportunity to look at
21 them until February.

22 MR. LeGRANT: Well --

23 MS. BUTANI-D'SOUZA: No.

24 MR. LeGRANT: No, no, February is the
25 structural. The structural folks are looking at in

1 February.

2 CHAIRMAN HILL: Okay.

3 MR. LeGRANT: Okay. And so --

4 MS. BUTANI-D'SOUZA: But the permit was being
5 processed.

6 MR. LeGRANT: The permit is being processed.

7 MS. BUTANI-D'SOUZA: And the last set of
8 comments was received in February, or were there
9 further comments to be received?

10 MR. LeGRANT: For the structural discipline's
11 comments were in February. Zoning's comments were in
12 October --

13 MS. BUTANI-D'SOUZA: I understand that, but
14 I'm asking about when you got MEP, you have --

15 MR. TONDRO: To answer that one, and it may
16 be helpful to look at --

17 MS. BUTANI-D'SOUZA: Historic --

18 MR. TONDRO: -- Attachment B, which is to the
19 prehearing statement by DCRA, which is the workflow.
20 I apologize. I could only do a screen shot. Sorry.

21 Starting from the newest, or up above. It's
22 the ones at the bottom are --

23 MS. BUTANI-D'SOUZA: What's HFC?

24 MR. TONDRO: HFC means hold for comment.

25 That's when in a permit, when a permit application is

1 submitted it goes through the various different
2 disciplines. The disciplines respond. If they have
3 a problem --

4 MS. BUTANI-D'SOUZA: okay.

5 MR. TONDRO: -- they say HFC, and they give
6 specific reasons. If they don't have a problem, they
7 just say, approved.

8 MS. BUTANI-D'SOUZA: So, can I just ask, why
9 was the deputy zoning administrator looking at this
10 in June? I mean, I'm assuming that we knew at that
11 time that the rule was going to go into effect in
12 August. So, why were they looking at it at June?
13 Why not give them a chance to try to get in before
14 the date?

15 MR. LeGRANT: Well, frankly, I think we were
16 seeing the clock moving and we're not seeing the
17 response, and we thought it behooves us to be
18 proactive and put the applicant on notice that based
19 on the FAR issues that were originally identified,
20 the structural comments, that there is was going to
21 be a substantial change in deviation to have to
22 comply with those comments if the application moved
23 forward. Let me finish.

24 And then, so, we're saying, you're no longer
25 going to be treated as R-5-B. You're going to be

1 subject to the R-4 because we foresee a substantial
2 change for you to be able to work and respond to
3 those comments.

4 MS. BUTANI-D'SOUZA: So, I guess my -- why
5 not let them -- you said you put them on notice, but
6 this is actually a decision that was made.

7 MR. TONDRO: No, I think that's exactly what
8 I was I was trying to clarify. Please remember, the
9 hold for comments are when there's a reviewer makes a
10 comment. It doesn't mean that that is the absolute
11 final decision. The applicant always has the
12 opportunity to propose rebutting evidence, and in
13 fact all you have to do is to look at --

14 MS. BUTANI-D'SOUZA: So, June 26th, you said
15 you're on notice. You have an opportunity to propose
16 rebutting evidence. And then what happened?

17 MR. TONDRO: Silence. Crickets.

18 MS. BUTANI-D'SOUZA: Okay. So, and then we
19 passed August, when everything went into effect. And
20 then we didn't hear back until September.

21 MR. TONDRO: So, you can see from the hold
22 for comments that the plans were picked up at the
23 very top there. The plans were picked up at August
24 24th, okay, since we're dealing with paper plans, not
25 electronic submissions. That's when the applicant

1 will pick up the plans to be able to revise -- revise
2 them and then bring them back but --

3 MS. BUTANI-D'SOUZA: Can I just ask, so
4 because, and I'm looking at the screen chart here.
5 It says, the applicant failed to vest. To me that
6 doesn't sound like putting them on notice. That
7 sounds like a decision.

8 So, it seems a little confusing to me that
9 you would expect to hear a response because that
10 doesn't seem to invite a response. That seems to
11 suggest that it just failed to vest, and sorry,
12 you're out of luck.

13 MR. LeGRANT: The applicant, as Mr. Tondro
14 noted, certainly could rebut that. They could say,
15 wait a second, we're going to commit plans, we're
16 going to demonstrate that we're going to be able to
17 proceed without substantial change and deviation.
18 The ball was in their court.

19 MS. BUTANI-D'SOUZA: Isn't that what this
20 appeal is about? Isn't that what they're doing now?

21 MR. LeGRANT: Well, that's why it's before
22 you. Yes.

23 MR. TONDRO: The point here, and if you just
24 look at how the specific exhibit -- one sec. From
25 the applicant's Exhibit F, 56F, you'll see just as an

1 example, what happens with structural comments,
2 right? And you can see on the left-hand side of the
3 reviewer's comments and in a comment by the
4 applicant. If you look through those reviewer's
5 comments, some of them are framed in very much the
6 same way and they can be rebutted by the applicant.

7 MS. BUTANI-D'SOUZA: Which exhibit is it?

8 MR. TONDRO: I'm sorry. 56F. It's just an
9 example of the process that's going on. Part of the
10 problem here is that the decision to challenge is not
11 a final decision in the way that a permit issuance
12 is. What happened here was that the applicant,
13 appellant, wanted to -- when they realized there was
14 a problem, I believe at that time, and counsel for
15 appellant can indicate otherwise, but the counsel for
16 the appellant became involved in August. And it was
17 at that time that there was a concern and there were
18 meetings that were started to be had to address these
19 issues with the Zoning Administrator, and I believe
20 also structural views and other.

21 However, the appellant's counsel, reasonably
22 so, wanted to preserve the appeal window; did not
23 want to lose the appeal rights. And therefore filed
24 this appeal in August, even as there were
25 conversations going on. The problem is that there

1 were none of these -- the attempts to address the
2 issues, either the structural or the long-term, the
3 other, the zoning issues were not addressed prior to
4 that time. And I'll point out there were two other
5 outstanding hold for comments, you can see also,
6 which are green and DOEE, which have still not been
7 resolved either. Those may not be substantial
8 changes.

9 In this particular case the last received
10 plans officially submitted to DCRA for the Zoning
11 Administrator to look at, were over by -- over FAR by
12 .35, I believe. Which is fairly substantial, 2.15
13 instead of 1.8, which is the maximum. So it was a
14 substantial change under the FAR. The Zoning
15 Regulations, as well as potential substantial changes
16 for structural.

17 But the point about this from the ZA's
18 standpoint was this was while permit process was
19 still going on. Now, perhaps, you know, do we really
20 want to be in a situation where the ZA, knowing that
21 there is this impending rule change, sits on their
22 hands and just waits until it shuts and then says,
23 oops? Or is the ZA trying to have a responsibility
24 to the public to say, hey folks, be aware, this is
25 coming up so that you can deal with this issue. And

1 that was what this was attempting to do.

2 MS. BUTANI-D'SOUZA: Okay.

3 MR. TONDRO: Again, I understand the concern,
4 but about the language and the statement of the
5 language. But please keep in mind the context within
6 which this is occurring. This is the context of a
7 back and forth over permit applications. Permit
8 applicants aren't -- they're changeable. They can
9 change this way or that way. There was no response
10 that said, until in August when the appellant's
11 counsel became involved, was there a discussion
12 trying to see was there a way to address this issue?
13 And the problem was that at that point it was so late
14 in the game that we ended up in a situation where
15 then by August 26th, 15-09 took affect and the
16 provisional vesting closed, which is what the ZA had
17 been worried in the first place.

18 MS. BUTANI-D'SOUZA: And I'm going to ask the
19 applicant questions as well, but I just want to
20 understand. There were no other pending DCRA reviews
21 after February 12th. The reason I ask is because, as
22 somebody that's submitted many permits I know -- and
23 understands how making revisions to designs work,
24 often times you want to wait to revise until you have
25 all of your comments so you don't have to rerevise.

1 So, I'm just trying to make sure that I understand
2 whether there was anything else pending for DCRA to
3 do after the 12th of February.

4 MR. TONDRO: Right. And you're absolutely
5 right, and that's one of the concerns that the ZA had
6 in issuing this was precisely the fact that there's
7 going to be changes required not only for the zoning
8 compliance, but also for structural that may lead to
9 substantial -- that look like they're likely to lead
10 to substantial change or deviation, and therefore
11 under that basis they said, you're going to have to
12 comply with the R-4.

13 There was an opportunity, again, to rebut
14 that. They chose not to rebut it. They chose not to
15 do anything. Okay? Worst case --

16 MS. BUTANI-D'SOUZA: How about you just
17 submit some, you know, exchange some e-mails and you
18 would have cleared all of this up ahead of time.

19 MR. TONDRO: So, then the other question to
20 be asked, okay, back from that one is, what's
21 assuming the worst case scenario? The worst case
22 scenario is that the ZA's hold for comments wasn't
23 issued, wasn't known. Right? It wasn't made know,
24 that the appellants didn't realize about this. They
25 didn't realize it until August.

1 If they didn't realize until August what's
2 available on a public website, okay, but if they
3 didn't know it's on notice, then in two days they
4 would have to have gotten their entire permit
5 processed because as of October the 26th, right, the
6 timeline for the provisional vesting shut. And the
7 problem was that they picked up the plans on August
8 the 24th. So certainly, as of the date of August the
9 24th, they were apprised. In fact they filed this
10 appeal, I believe, on the 8th. So they already were
11 apprised of it as of the 8th.

12 But let's just say, for argument's sake, that
13 they only realized it in August the 8th, they only
14 would have had two weeks to be able to get everything
15 done, submitted, and as I said, there were
16 outstanding views, not just the structural which we
17 see the responses were given only in September, but
18 also to zoning and then to DOEE and to Green.

19 And any of those, no matter how
20 insignificant, the fact is had DOEE taken 30 day,
21 that -- it still triggers 322.4, which is this idea
22 that it just -- you have to be complied at that time
23 that the permit is issued. Regardless of what it was
24 that led to that issue.

25 CHAIRMAN HILL: Okay.

1 MR. TONDRO: And I'll say just one other
2 response too, another response that the applicants,
3 that the appellants could have taken in this
4 particular case would have been, instead, to ask and
5 to file to take up what Mr. Dettman indicated, and to
6 file under ZR-16 to switch the application from '58
7 to ZR-16, at which point had they transformed it from
8 '58 to '16, then we would evaluate it on the basis of
9 '16 regulations. But right now it's under 1958. And
10 that was what the appeal was, and that was what the
11 applicant was. Is that --

12 CHAIRMAN HILL: Okay. Okay. So,
13 substantially complete, again, if you wouldn't mind,
14 Mr. LeGrant, can you help me understand substantially
15 complete?

16 MR. LeGRANT: It's not -- I believe you mean
17 the substantial deviation.

18 CHAIRMAN HILL: Sorry. Thank you.
19 Substantial deviation.

20 MR. LeGRANT: So, right. The -- as Max
21 noted, there is no guidance in the '58 code on what
22 constitutes substantial change and deviation. So,
23 the standard that my office applies is, is the use
24 changing? Is the building changing in terms of size,
25 either an increase or a decrease in the volume? Is

1 the number of stories changing? Is floor area
2 changing? Is the parking amount being provided,
3 changing? So, those is -- are the items that I have
4 used to evaluate whether a plan during this
5 provisional vesting period is constituted a
6 substantial change in deviation.

7 And I will say that you know, in this
8 instance as the appellant noted, it's, they've taken
9 off a penthouse, they've reconfigured the lower level
10 ceiling, they've changed the FAR allocation for that
11 lower level from perimeter wall to grade plane. All
12 those things were occurring and so that requires a
13 different -- that requires a new zoning analysis,
14 when I see that level of changes occurring.

15 So, that resulted in the decision or the
16 February 8th comment to, again, put the applicant on
17 notice. Hey, now with these types of changes it
18 appears that these changes that would be, again, the
19 response to the structural comments would constitute
20 a substantial change of deviation.

21 CHAIRMAN HILL: Okay. And that, again, is
22 the way that you've always done it in the past,
23 that's the way that your staff has always looked at
24 things in terms of a deviation?

25 MR. LeGRANT: I would say, we don't get many

1 of these, right? It's not a common issue for us.
2 But it has, on occasion, come up and then I've had to
3 apply the standards that I've just, that I've
4 enumerated.

5 CHAIRMAN HILL: Okay. And so, I'll see if
6 the Board has any other questions. I do want to turn
7 to the ANC, and ANC if you'd like -- you'd like 45
8 minutes also? No? No. Okay.

9 So, let's see, would you guys like to kind of
10 wrap up a little bit or if -- Ms. Vice Chair D'Souza
11 has a question for you.

12 MS. BUTANI-D'SOUZA: Yes, Chairman Hill, I
13 just want to pick up on that point.

14 So, you said that a substantial change is
15 defined as use changing size, or volume changing,
16 number of stories changing, floor area changing,
17 parking changing. When and where -- when have you
18 applied that definition in the past? Where can a
19 permit applicant find that information? Because I
20 know that in the past we've heard testimony that if
21 something is not defined in the regulations, that the
22 Zoning Administrator uses Merriam Webster's
23 Dictionary.

24 So, I also want to understand why in this
25 case you did not use the dictionary definition.

1 MR. LeGRANT: Okay.

2 MS. BUTANI-D'SOUZA: Of substantial.

3 MR. LeGRANT: In looking at development
4 proposal which involves use in a building, I believe
5 that the word substantial in Merriam Webster probably
6 doesn't give me enough guidance as to looking at the
7 entire proposal. So, I sort of rely on the different
8 aspects or development standards that the Zoning
9 Regulations regulate. And that's why I've tried to
10 enumerate those. Gee, what aspects of the building
11 could trigger a zoning issue, and you know, changes
12 to the use, changes to the building envelope and so
13 forth, would present, as I noted, the need for a
14 zoning analysis, whether it's an FAR analysis,
15 whether it's a lot occupancy, height, setbacks.
16 Those would all come to play once if there was a
17 change in those aspects of the building.

18 So, that's frankly the way I've approached
19 it. Now, in terms of are there precedents? I cannot
20 -- I might have interpretations. I'd have to go back
21 and look at it. I keep a list of interpretations,
22 but because this is not a very common occurrence,
23 it's something that I don't believe I've issued a
24 determination letter on, nor put out in a, like a
25 letter or something like that.

1 MR. TONDRO: And if I might just add two
2 brief comments to that? First of all, again, I want
3 to point out that -- remind the Board respectfully
4 that it's the appellants who bear the burden of proof
5 to challenge that -- to assert that the ZA erred.
6 And I have not seen any alternative definition of
7 substantial change or deviation. If so, we could
8 have addressed that.

9 CHAIRMAN HILL: Okay, Mr. Tondro, that's
10 okay.

11 MR. TONDRO: Okay.

12 CHAIRMAN HILL: So, we're good. I appreciate
13 you making the comment.

14 So, okay, I'm going to move on. We've been
15 here for a long time now. So, and I'm letting
16 everybody know in the audience, we're going to take a
17 break after this. So, not if you all want to get up
18 at one time, but we are going to take a break after
19 this. And, so let's see.

20 Commissioner Gambrell, I know that you're in
21 support of the Zoning Administrator, which actually
22 is confusing me because normally that's not the case.
23 You know. And so, please go ahead and make your
24 presentation or whatever you'd like to talk about.
25 Obviously we've looked at everything that's in the

1 record there, but I do want to hear from the ANC and
2 also, you know, your thoughts, I suppose.

3 Oh, wow, we've got PowerPoint. Okay.

4 So, your thoughts about the timing or
5 whatever issues you'd like to address. Do you know
6 around how much time you might need?

7 MR. GAMBRELL: Ten minutes, probably.

8 CHAIRMAN HILL: Okay. Great. We'll do that.
9 Ten minutes on the clock, Ms. Rose.

10 MR. GAMBRELL: Okay, sure. My name is Alan
11 Gambrell and I'm ANC 1C-05 Commissioner in Lanier
12 Heights. And --

13 CHAIRMAN HILL: May I interrupt just real
14 quick. Is this project in your SMD?

15 MR. GAMBRELL: Yes, it is.

16 CHAIRMAN HILL: Okay.

17 MR. GAMBRELL: It's actually -- that was the
18 second soundbite I was going to give you.

19 CHAIRMAN HILL: Oh, okay.

20 MR. GAMBRELL: Which is I actually also live
21 on Argonne Place and have some pretty unique first-
22 hand experience with this project that I want to
23 share with the Board.

24 CHAIRMAN HILL: Okay. Thank you.

25 MR. GAMBRELL: Although frankly your comment

1 that I'm on the same side as DCRA ought to say, might
2 make my case, you know, case closed. But, I'll go
3 ahead.

4 The overall message that I want to share is
5 as following. And I'll explain what this is based
6 upon in a second. It's our feeling that the vesting
7 language is clear. And the second point being the
8 developer simply failed to follow the rules over the
9 past two years to get this development project
10 completed. And that coming to you now to seek
11 redress simply does not make sense.

12 So, let me kind of explain that for you. So,
13 the first thing I want to do is to go into the ANC's
14 position, our great weight position, and we did pass
15 a resolution in November of 2016 unanimously
16 supporting DCRA's R-4 determination. And the basis
17 for that is pretty robust. Over the last several
18 years the ANC and community members have been
19 involved in the R-4 rezoning project. So, we've been
20 to numerous Zoning Commission meetings.

21 We were involved with the Zoning Commission,
22 and the Office of Planning, when they spoke about the
23 vesting language, we were in the room when they
24 discussed the vesting language. We gave feedback on
25 the vesting language. And actually, I'd like to read

1 to you an April 11 memo that I co-wrote with Dennis
2 Suski, who was one of the community leaders on the R-
3 4 rezoning, because when we saw the original vesting
4 language in 15-09, our response was, why is there new
5 language being proposed here? There's already
6 vesting language in the regulations. And that's
7 already been discussed. 3202.5 and 3202.4. So why
8 is additional language put in here?

9 And we actually wrote to the Office of
10 Planning and made a following comments, that we
11 thought the provisions of 3202.5(a) appeared to be
12 clear as written, that any revisions to 3202.5(a),
13 which these seem to be, should really be undertaking
14 -- should not be undertaken under emergency order,
15 but rather under established procedures as outlined
16 in Section 3010.

17 And we also made the comment that the
18 proposed OP language appeared to conflict with the
19 DCRA interpretation of 3202.5(a). So you've had a
20 pretty extensive discussion here about what applies.
21 I think the bottom line conclusion we were pursuing
22 with the Zoning Commission, and we believed this was
23 part of their discussion is yesterday, today,
24 3202.5(a) is there. Nothing has changed. That's
25 been the consistent regulation that applies across

1 the Board.

2 And I actually took the trouble of going
3 through the timeline that we've just discussed, and
4 looked at the various provisions. And in my
5 estimation, the one that's always there is 3202.5.
6 It's A. It's always there. So, that's the guiding
7 thing. I think Mr. Tondro has made that case
8 already.

9 What I'd like to do now is actually also
10 speak about not just the ANC and our great way, but
11 also the community. And we actually put the word out
12 to community members and asked them their feelings
13 about this case. And 39 -- 79 individuals submitted
14 a petition response urging that the Board of Zoning
15 Adjustment uphold DCRA's R-4 determination.

16 Only two community members expressed a desire
17 to see a reversal of that decision. So, again, it's
18 not just ANC 1C and the membership, but it's also the
19 community at large, and it's an informed community.
20 And like I said, we've been involved in the R-4
21 rezoning for several years. We're not just doing
22 this and making these statements because we think
23 that would be a good thing for the neighborhood. We
24 know these regulations.

25 I'd like to move next to -- given a bit of a

1 context about this particular property and there
2 actually are three particular properties that have
3 been combined. They're 1630, 32, and 34 Argonne
4 Place. And there has been quite a history with these
5 projects that, that should give you pause. They've
6 had multiple permits and plans over the last two
7 years. There's been a pattern here. There's been a
8 lot of incorrect information.

9 And the information that has been incorrect
10 has been pretty fundamental in terms of things like
11 incorrect representation of the numbers of kitchens
12 and bathrooms, the location of doors, the scope of
13 work being undertaken. For example, the permits were
14 initially proposed to be a renovation when it was a
15 full project. The FAR has been misrepresented,
16 parking conditions have been misrepresented. In
17 fact, at one point in time, an earlier permit, not
18 the one we're talking about here, but an earlier
19 permit actually described this as an R-4 District.
20 So there have been a lot of problems with this
21 project and there have also been multiple stop work
22 orders and permits that have been canceled.

23 I just wanted to give you some visuals to
24 show you that there have been a lot of challenges
25 with that. And perhaps this is one of the reasons

1 DCRA is given heightened attention to this project,
2 because there have been so many challenges.

3 At the top of this -- this is the -- what's
4 called the cellar level. For example, it depicts two
5 bedrooms in each unit. Well, one of these bedrooms
6 is a garage. It still is a garage. The drawing
7 depicts there being two bathrooms in each unit on the
8 cellar level. There aren't. There's one bathroom
9 maybe, an old slop seek perhaps. That shows front
10 access which does not exist because there's are below
11 grade and there's no stair access.

12 Here's the same set of plans from 2014/15.
13 Again, nothing --

14 MR. TONDRO: Mr. Chairman, can I object to
15 this? Unless he can establish that these drawings,
16 which only show two units and -- two and not three,
17 and are reflected in these plans, I'm going to object
18 to the relevancy of all of that because we're
19 discussing these set of plans right now. Not a set
20 that has just two row dwelling structures, which is
21 what this is. This doesn't even show the three row
22 dwelling.

23 CHAIRMAN HILL: Okay, Mr. Gambrell --

24 MR. GAMBRELL: That's fine. I'll --

25 CHAIRMAN HILL: That's fine.

1 MR. GAMBRELL: -- stop the discussion.

2 CHAIRMAN HILL: Okay.

3 MR. GAMBRELL: I mean, my point, I think, has
4 been made that there's been a situation here with a
5 developer who's had a pattern of submitting incorrect
6 information.

7 I think it would be safe, however, if I went
8 in to show you --

9 CHAIRMAN HILL: I'm curious of these
10 pictures. Are these the ones that are -- is that the
11 current condition now?

12 MR. GAMBRELL: Yes, this is current
13 condition.

14 CHAIRMAN HILL: Okay.

15 MR. GAMBRELL: And --

16 MR. HOOD: Mr. Chairman, let me just say, I
17 was in line with what he was doing. I would
18 appreciate it if he's allowed to be able to finish
19 his presentation like everyone else was.

20 CHAIRMAN HILL: Okay. Thank you, Mr.
21 Commissioner.

22 MR. GAMBRELL: Yeah, you know, I'm okay about
23 --

24 CHAIRMAN HILL: No, please. You don't have
25 to get --

1 MR. GAMBRELL: That's fine.

2 CHAIRMAN HILL: -- out of whack here, I
3 should say. Just please, go ahead and take your
4 time.

5 MR. GAMBRELL: Okay. No problem. I'll go
6 ahead and skip the other floors. This has been the
7 same sort of problems on each floor.

8 What I wanted to move to next would be
9 current conditions. And this is the rear of the
10 property. And of course I realize they're not
11 developed now, but this is 1630. It's open to the
12 elements in the rear. Unsafe conditions. Rodent
13 issues. Trash collection at 1632. Trash and open
14 windows in 1634.

15 Moving to the front of the property DCRA
16 issued a violation on November 7, 2016 for a solid
17 waste not properly stored, et cetera, rodent
18 conditions. This is the front of 1630, open windows.
19 1634, a dangerous tree. There's a permit to remove
20 it but no action has been taken. And there's been a
21 pattern of problems with the developer in Lanier
22 Heights. And this is a property on 18th Street that
23 remains without a roof. Last year during a snow
24 storm the roof collapsed. The property owner was
25 left homeless for 46 days. The situation still

1 exists.

2 I realize this is not the permits we're
3 looking at on this table. But I think it's important
4 for you to know that there's context here for DCRA to
5 taking a very careful look at this permit and at
6 these plans, and try to be as careful and cautious
7 and fair as they could, and can. And I think they
8 did the job.

9 And then here's just a summary of the permits
10 and the cancellations that have occurred on this
11 property over time.

12 Just in conclusion, I'd like to comment that
13 DCRA was in a position not just to look at the single
14 property for purposes of whether they fall under R-5-
15 B or R-4. There were actually six total properties
16 in Lanier Heights that were sort of in the pipeline.
17 DCRA ruled all six had to be R-4, that they were not
18 substantially complete.

19 So, anyway, unless you think that DCRA is
20 somehow picking on 1630 Argonne Place, I mean, I
21 think that DCRA has been doing this across the Board
22 in Lanier Heights and has been consistent in its
23 application of the standards.

24 So, just to wrap it up --

25 CHAIRMAN HILL: Mr. Gambrell, can I interrupt

1 just one --

2 MR. GAMBRELL: Sure.

3 CHAIRMAN HILL: Mr. Tondro, is that accurate?
4 Do you know about other properties that were in the
5 pipeline and that the ZA has been consistent in how
6 they've applied?

7 MR. TONDRO: Yes. Two, for example, are 1838
8 and 1835 Ontario, two others I think 2910, 2920 18th
9 Street are also. I'm not sure what the other sixth
10 one is at.

11 MR. GAMBRELL: 2810, 2820.

12 CHAIRMAN HILL: So you went back to those
13 developers?

14 MR. TONDRO: As well, yes.

15 CHAIRMAN HILL: I see. Okay. All right.
16 Thank you. Mr. Gambrell, go ahead.

17 MR. GAMBRELL: Yeah. I just want to really
18 be very clear about this final comment. I
19 personally, and the ANC members individually, and
20 many community members don't have a problem with
21 conversions of row houses. We realize the city is
22 changing. But we do think it's important for
23 developers to follow the rules and regulations as
24 written. And it's that simple.

25 And it's our conclusion and estimation which

1 is the basis for our ANC resolution in the community
2 spirit and the evidence is provided, that that simply
3 has not happened here.

4 CHAIRMAN HILL: Okay, great. Thank you. All
5 right. So, what I'd like to do, I suppose, is I am
6 going to ask the Board if they have any further
7 questions. And I also am curious as to what the
8 Board thinks in general.

9 I guess everyone is finished, correct?

10 MR. GLASGOW: I do have --

11 CHAIRMAN HILL: Oh, that's right, the
12 appellant can provide a summary.

13 MR. GLASGOW: Yes, I can provide a summary,
14 but there's also one very important point here that
15 has confused us with respect to the pleading from the
16 District. And as how we presented part of our case,
17 a significant part of our case. And that's at --
18 that's footnote 4, page 4, because --

19 MS. BUTANI-D'SOUZA: Which exhibit?

20 MR. GLASGOW: Pardon me? This is the
21 District's -- DCRA's prehearing statement. Because
22 they have gone to great lengths to distinguish
23 between ZR-58 and ZR-16 and say that the very
24 favorable things that occurred for us after the
25 making of the decision, were things that they didn't

1 take into account.

2 But footnote four says, and I think there
3 might be one slight typo here, all the ZC -- this is
4 the District's pleading. Although ZC 16-09, I
5 believe they mean 16-08 --

6 CHAIRMAN HILL: What page are you on? I'm
7 sorry.

8 MR. GLASGOW: Page 4, footnote 4.

9 CHAIRMAN HILL: Okay. Great.

10 MR. GLASGOW: Of the District's --

11 CHAIRMAN HILL: I see it. Thank you.

12 MR. GLASGOW: -- DC pre are -- it says,
13 although ZC 16-09. I believe that's '08, only
14 revised the 2016 Zoning Regulations. The ZA
15 interpreted the intent of the commission, the Zoning
16 Commission, to apply to projects vested under ZR --
17 under the 1958 regulations as the provision clearly
18 applied to applications vested under the 1958
19 regulations.

20 I mean, that is completely opposite of the
21 position that was taken today, and is the reason why
22 we delved into -- it was part of our case in any
23 event, but that we spent that time going through
24 Subtitle U. We always thought Subtitle U applied.

25 And also, with respect to that as a tenant of

1 administrative law, you apply the law as to the date
2 of the trial. So, it would be all -- they're
3 essentially taking the position that if there was a -
4 - that if there was some adoption of some regulation
5 by the Commission, which we think directly applies,
6 directly applies to this case, this square, and gives
7 guidance as to how rights are to be determined,
8 they're saying it just doesn't apply. If it doesn't
9 exist. Well, we're having the hearing today, and
10 there are regulations in place today.

11 What if there was a subsequent rezoning and
12 this site were R-A-4, and that went into effect a
13 couple of weeks ago? That wouldn't have any bearing
14 on this? Of course it would. So --

15 CHAIRMAN HILL: Okay. Okay. Mr. Tondro,
16 would you have anything you'd like to respond?

17 MR. TONDRO: So, first of all let's remember
18 that the decision that's being challenged, that's
19 what sets the time period and that's occurred in June
20 8, 2016. Not today. We're not under the ZR-16.
21 We're under '58 as the vested project. Under '58 the
22 challenge that they're asserting relies and derives
23 from 1958.

24 In terms of that footnote, that is accurate.
25 I want to clarify again, however, that that goes back

1 to that issue that I raised. It's clear that the
2 Zoning Commission intended to address projects that
3 were vested under '58, right? Because they talked
4 about projects that were accepted as complete prior.
5 That's one of those issues.

6 But the problem was what they did not do, was
7 this issue of the 900 square feet. Under 1958, the
8 900 square feet is in the development standards.
9 What this -- what we made it clear to the appellant
10 as one of the reasons why we asked for a continuance
11 two weeks ago, was because we were in active
12 discussions with appellants on this issue. Again,
13 going to that fact that I indicated earlier that this
14 was a review process. There's still a back and
15 forth. The Zoning Administrator is not necessarily
16 the final, final decision. There's an opportunity
17 for applicants to rebut their comments.

18 But that this was an issue that we agreed
19 that the use permission, in other words, the idea
20 that the multiple dwellings are allowed, that was
21 very clear. But the issue of the 900 square feet,
22 that was not clear in that statement. In other
23 words, the change separate from this, which was under
24 '16 regulations, which moved the 900 square feet from
25 being a development standard, which is about the area

1 of the lot, to instead moving it to be an aspect of
2 use, that was separate.

3 What this footnotes is referring to is the
4 idea that the -- the idea of having the use of
5 multiple dwelling units, that was clearly intended by
6 the Zoning Commission and therefore the ZA can
7 presumably look to that as guidance for indicating
8 that would be allowed. But the development
9 standards, and this was what the reason why there was
10 that motion to continue at the very end, because this
11 was the fundamental sticking point on that issue, was
12 this 900 square foot issue.

13 The alternative could have been, for the
14 applicants to go and file under ZR-16, and then they
15 would have all the benefits and so forth. But that
16 would require a change and let the Zoning
17 Administrator respond at that time. Thank you.

18 CHAIRMAN HILL: Okay. Mr. Dettman. Dettman,
19 is that correct? I'm sorry. Sorry.

20 MR. DETTMAN: Thank you, Mr. Chairman. I
21 just wanted to --

22 MR. GLASGOW: Well, before that I want to
23 have, before a rebuttal from Mr. Dettman, I'd like to
24 have a brief response with respect to the property.

25 MR. VISSAT: Yeah, the slideshow.

1 MR. GLASGOW: And with respect to the notice
2 of violation, which wasn't -- which was addressed to
3 a property three blocks away.

4 MR. VISSAT: So I just want to quickly zip
5 through these. These two-unit floorplans, this is
6 forever ago. An opportunity arose for us to acquire
7 that third property, so at that point in time this
8 was scrapped and that's when we moved in this
9 direction.

10 CHAIRMAN HILL: Okay.

11 MR. VISSAT: So, these are kind of relevant.

12 Open to the elements, windows, all that
13 stuff, that's actually allowable and I've talked to
14 Garret Westcarver about this on other projects. It's
15 allowable for ventilation as long as someone cannot
16 just -- a door on the ground floor, that is not.
17 Property has to be secured.

18 CHAIRMAN HILL: It's okay.

19 MR. VISSAT: The trash here, that's actually
20 legal dumping. I was not aware it's there. So, it
21 will be taken care of.

22 This notice of violation is actually sent to
23 675 F Street. Our office is 975, so this is the
24 first time I'm seeing this.

25 The weeds in the front, I am in constant

1 contact with the owner of 1628 Argonne Place, who is
2 Nathaniel Mead, and he constantly tells me -- not
3 constantly. He keeps me updated when the front needs
4 to be taken care of. Usually within three days I get
5 it all knocked down.

6 The tree here, so on three separate occasions
7 I've had to try to have this removed. No parking
8 signs were posted. And actually the neighbors just
9 completely disregard them and park there. So, that's
10 been an issue.

11 And then the collapse, that was due to
12 honestly a freak situation during that snow storm
13 where we got three feet and there was too much
14 weight, tarp collapsed, came down. It has actually
15 been resolved. It's currently completely
16 structurally sound, and that's been agreed upon
17 forever so.

18 CHAIRMAN HILL: Okay. That's fine.

19 MR. VISSAT: Like I said, I just wanted to
20 touch on these things, kind of clarify a lot of them.

21 CHAIRMAN HILL: Appreciate that.

22 MR. VISSAT: Thanks.

23 CHAIRMAN HILL: Mr. Dettman, did you have --

24 MR. DETTMAN: Thank you, Mr. Chairman. I
25 wanted to just respond to a couple of the points that

1 Mr. Tondro made. Just to add to Mr. Glasgow's
2 response to DCRA's footnote, stating that 16-09 --
3 16-08 only revised ZR-16, they ZA interpreted the
4 intent of the Zoning Commission to apply to projects
5 vested under '58, that would be consistent with the
6 Office of Planning's reports that were submitted in
7 15-08 -- 15-09, and 16-08.

8 In its report for 15-09, dated April 4th, the
9 proposed text amendment submitted by the Office of
10 Planning is phrased in ZR-15 language. And then at
11 the end of the report it says, zone under the 2016
12 Zoning Regulations, "In order for the proposed R-4
13 zone to carry forward past September 6th, 2016, when
14 ZR-16 takes effect, the Commission must propose a map
15 amendment to ZR-16 map, which has already been
16 adopted.

17 In their report for case 16-08, which is the
18 text amendment, they make the same comment. And at
19 the final action for the text amendment and the map
20 amendment, the need for a companion or a parallel
21 text amendment wasn't discussed at all with the
22 Zoning Commission. So, and but the parallel text
23 amendments being done to both sets of regs, in
24 advance of the effective date of ZR-16 is consistent
25 with what the Zoning Commission was doing all along.

1 So, unless there was an internal discussion and a
2 specific decision to just modify ZR-16, when the
3 final rulemaking came out for 16-08, the text
4 amendment, we're not aware of that but it would seem
5 that it was on everyone's radar and perhaps it was an
6 oversight and perhaps the text amendment to ZR-58
7 should have happened. We know that through the
8 footnote the Zoning Administrator certainly has
9 interpreted it that way.

10 Mr. Tondro's comment about the 900 square
11 foot regulation being moved from the development
12 standards to the use standards in the transition to
13 ZR-16 is just not accurate. If we compare the two,
14 under ZR-16 there's a 900-square foot requirement for
15 a conversion of a non-residential building. That's
16 located in Subtitle U, Section 301.2. It's the use
17 category subtitle.

18 This same exact 900 square foot requirement
19 exists in ZR-58. It's in Section 337, which is the
20 use requirements for the lower R zones.

21 There's a 900 square foot dwelling unit
22 requirement for the conversion of a residential
23 building in ZR-16. That's in Subtitle U, 320.2. The
24 same exact requirement as in ZR-58. That's in
25 Section 336. Again, the use chapter for the lower R

1 zones.

2 Then, for the development standards. There's
3 a 900 square foot requirement in Subtitle E, Section
4 201.4. That's the development standards for the RF
5 Zones. The same exact 900 square foot requirement
6 exists in Chapter 401, the table and 401.3, which is
7 the minute lot development standards for the R-4 Zone
8 when it comes to conversions. They're parallel. So,
9 there really wasn't a change, a change made.

10 Finally, the -- Mr. Tondro talks about
11 applying the regulations that are in effect at the
12 time of the building permit application. If the
13 Board finds that we just simply missed the boat under
14 the vesting regulations in 3202, and we've already
15 established that, the same exact regulations, the
16 text amendment, 301.1(1), in ZR-16, the ZA has
17 interpreted that the same text amendment is in ZR-58,
18 even though the final rulemaking didn't say that.

19 If we apply -- if a month down the road our
20 building permit is issued, and we apply the
21 regulations in effect at the time that the building
22 permit is issued, so ZR-16, under 301.1(1), the
23 appellant would be able to say that they are in a
24 particular square that's listed, Square 2589, we're
25 in it. Are we a multiple dwelling unit that has a

1 building permit application that was accepted as
2 complete by DCRA prior to December 14th, 2015? The
3 answer is yes.

4 Have the plans been modified such that it
5 increases those areas, FAR, number of stories, number
6 of units, height, lot occupancy, there might be one
7 more. Have the plans been changed since then in
8 order to increase those particular areas? The answer
9 is, no.

10 We meet the requirement under 301.1(1) if the
11 regulations were applied two months from now when the
12 building permit issue -- when the building permit was
13 issued. We are a matter of right use.

14 MS. BUTANI-D'SOUZA: So, then why are you
15 appealing this? Why not just go under ZR-16?

16 MR. DETTMAN: Well, because we're -- go
17 ahead, if you want to

18 MR. GLASGOW: Well, we received a
19 determination and we didn't want to be in a position
20 where if someone says, well, you're applying now, I
21 can see the train wreck coming. Okay, well, now
22 you've applied under the new regulations. Unless the
23 Board directs us that that's how to cure this issue,
24 we're happy to do that. But we did not want to be in
25 a position where no matter how we turned, oh, got

1 you, got you, got you. Because we filed. We have a
2 set of plans. We have a bunch of stamps. We were
3 processing the application, and if you go back
4 through the -- all the exhibits that we have, we have
5 a lot of back and forth with the Zoning Administrator
6 in November and December and whatever after the
7 October 5th sign off, and after October 16th.
8 There's a lot of e-mails back in here that are in
9 this record.

10 CHAIRMAN HILL: Okay, Mr. Glasgow, thanks.

11 MR. DETTMAN: I just need to add something
12 really quick.

13 CHAIRMAN HILL: Sure. Go ahead.

14 MR. DETTMAN: So, we're also appealing the
15 determination of the Zoning Administrator because the
16 determination is that you missed the boat on the R-5-
17 B, so now you're subject to R-4. They're also saying
18 that you're subject -- and part of that being subject
19 to the R-4, you're subject to the 900 square foot
20 requirement. We can't meet that. We have a building
21 permit application accepted as complete, showing a
22 12-unit multiple dwelling on a lot that's 5,100
23 square feet. We have to appeal that determination
24 and support our stance that we are a matter of right
25 use not subject to the 900 square foot requirement

1 under 301.1(1).

2 CHAIRMAN HILL: Okay. Mr. Tondro, I would
3 like to hear your response, and then we're going to
4 stop. And so, Mr. Glasgow, if you want to do a
5 summary at the end here, if you do, fine. If not,
6 that's also fine. I have some questions. I don't
7 think we're going to be able -- I'm not going to be
8 able to deliberate on this today, unfortunately. I
9 would like to but I'm not going to be able to. I
10 have some things that I'd like to hear back from you
11 guys.

12 This has been a very long hearing, actually.
13 It's been the longest one I've ever been involved in,
14 and hopefully the other two appeals don't go the same
15 way. But if they do, that's okay. That's the way
16 that is.

17 So, Mr. Tondro, if you'd like to respond,
18 please, to Mr. Dettman?

19 MR. TONDRO: Yes, so there's a bifurcation.
20 The Zoning Commission establishes a bifurcation
21 between 1958 and 2016. I'd call your attention to
22 Subtitle A, 102.6. I'll read it.

23 "A project that utilizes vested rights under
24 the 1958 regulations shall be subject only to the
25 provisions of the 1958 regulations." Therefore, you

1 go under 16 or you go under 58. It's one or the
2 other.

3 As Mr. Dettman just indicated, there is a
4 development standard. Yes, it is accurate, the 900
5 square feet does appear under 336. But it also
6 appears, and this is what's key, in 401.3, which is a
7 development standard minimum lot dimensions. And
8 therefore, that is the crux of the situation. I
9 think Mr. Dettman just indicated that it's -- if they
10 believe that they can go under ZR-16 to use the 301,
11 then go under ZR-16, but then it will be in the R-F-1
12 zone, which was the former R-A zone, because that's
13 already been changed.

14 If instead they want to go under the R-5-B,
15 they would had to have met all these vesting, and I
16 believe that's what this appeal is about, right. And
17 that was the point. In other words, to retain the
18 ability -- they have two options. The R-4 in general
19 does not allow multiple dwellings. Okay? Whether
20 the old R-4 or the new R-F-1, generally. Generally.

21 The new R-F-1 allows for multiple dwellings
22 under certain circumstances if you go under ZR-16.
23 You can go under ZR-16, in which case this appeal is
24 moot because they should file an applicant or revise
25 it to come under '16, and we'll deal with it at that

1 point.

2 Alternatively, if it's under '58, then under
3 the R-4 it's not allowed. The only way they would be
4 able to have multiple units without the 900 square
5 feet is by retaining the R-5-B status. That's where
6 we get into the whole issue of both the substantial
7 change -- without any substantial change revision, as
8 well as also the fundamental issue that they had to
9 have made -- got the permit issued prior to the date
10 of the effective order, which is on August 26th.
11 Then again, there's no provision in 3202.4 that says,
12 well, if it's a minor change then that's the reason
13 why DOEE just wanted to have another label and they
14 didn't have that. That's not sufficient under
15 3202.4.

16 So, there are four outstanding reviews.
17 Again, going back to that fact that the structural
18 comments were in February, there's no official
19 response to that that the ZA saw, and again you can
20 look at the workflow, Attachment B to the DCRA
21 prehearing statement, that indicates what has
22 officially been received by DCRA. There's no
23 official comment. There may be back and forth by the
24 Zoning Administrator back in January and December,
25 but nothing about the actual approval of that.

1 And, I'll rest there. Thank you.

2 CHAIRMAN HILL: Okay. Thank you. Mr.
3 Glasgow, would you like to sum up?

4 MR. GLASGOW: Should we do that or do you
5 want us to do it in writing?

6 CHAIRMAN HILL: Well, a couple of things. I
7 suppose if you are -- if we can go back to ZR-16, I'd
8 just like to point out again, they're going to be
9 back to Mr. Gambrell there, or Commissioner at some
10 point, if that ends up being the case. So, I say
11 that just because we'll all get to be friends again.

12 What I'd like to -- well, I guess I'd like to
13 hear findings of fact and conclusions of law for the
14 ability to have this as a meeting case the next time
15 we come forward in order to deliberate and come to
16 decision.

17 I'm glad to see that Mr. Hart, who is
18 replacing Mr. Hinkle, has actually been here
19 throughout this whole thing, so now he doesn't have
20 to watch the tape. And I do mean that. And so, what
21 I'd like to hear, and I guess whatever, if there's
22 anybody here on the Board and it's fantastic that we
23 have the Chairman here, who was so involved with the
24 text amendment here, if he has any -- if anyone has
25 anything they'd like to see. Through this whole two

1 hours, again what I'd like to see is -- and I'm going
2 to go back to 62B to take a detailed look.

3 Mr. Tondro, if you could somehow just
4 summarize the dates for me, the important key dates
5 and when you got what you got, when you sent it back
6 to the applicant, the gap in time that was there,
7 when you made the determination or when the Zoning
8 Administrator made the determination, if you'd like
9 to summarize again how he came to that determination,
10 that's fine. That's what I'd like to see. Okay?

11 And from the applicant, the same thing. If
12 you'd like -- it's the dates that -- there's so many
13 dates that have been thrown around. And I understand
14 all the arguments, and I understand everything you
15 guys are talking about in terms of ZR-58, ZR-16, and
16 all the different nuances that are being thrown
17 around. And I say that in a good way because
18 obviously the applicant wants to present a good case
19 and wants to win, and your attorneys are doing their
20 best to allow that to happen.

21 So, but clarity is something that I'd like to
22 see. You know, just very clear dates, when things
23 happened, when you were waiting for stuff, and when
24 they got it back. And that will also show when you
25 were concerned about your permit. Okay? Or when you

1 were concerned about your project. And so that would
2 be an easier thing for me to kind of take a look at.

3 Does anyone else want anything?

4 MR. HOOD: I would concur with your analysis
5 because I have to refresh my memory as well, because
6 everybody is telling me what the Zoning Commission
7 did and I necessarily may not agree with everything
8 we did. Some of that was a compromise, and I have to
9 take that part out of this equation. But I was glad
10 to hear that the Zoning Administrator, how he looks
11 at substantial change. I want you to know that I
12 appreciate that.

13 From a Zoning Commission standpoint, from my
14 standpoint, those are exactly in line of what we
15 decided, what we set down, and we decided whether we
16 should have a hearing or whether we should deal with
17 a minor modification. Those are some of the issues
18 that I hear coming out in this case. But some of the
19 time frames, some of the discussion I've heard, what
20 the Zoning Commission said what we did, I need to
21 revisit some of that because actually all of it,
22 everybody, that's everyone's interpretation of what
23 you thought that the Zoning Commission, or what you
24 might believe that the Zoning Commission was
25 interpreting, because actually I'm up there with us.

1 And five of us, and nobody can read any of our minds.
2 But we try to put clear language in place.

3 And we knew going into this from the '58
4 regulations to the ZR-16, we knew that there were
5 going to be some trial and error and some issues.
6 There's a period which we, I think, set aside to
7 begin with. But I think this case here is just one
8 of the many that we may have to deal with, not
9 necessarily on the BZA but the Zoning Commission as
10 well, as we do that transformation from the '58
11 regulations to the ZR-16.

12 So, I mean, this is nothing unusual. We did
13 not -- we expected and I'm just looking forward. But
14 I think, Mr. Chairman, your time frame will help us
15 to go ahead and make the best informed decision.

16 MS. BUTANI-D'SOUZA: So, you know, I did take
17 Mr. Tondro's point that the onus is on the appellant
18 to prove that, I guess this was not -- that this was
19 not a substantial change. I guess where I'm coming
20 out here is I think there's a fairness issue.

21 So, from the point of view of the applicant
22 for a permit, having an understanding of what
23 constitutes a substantial change is really critical.
24 And having an understanding of when decisions are
25 being made, to me seems very critical. So, I agree

1 that the timeline is important here.

2 From the ZA, you know, I would just like to
3 understand the response to the applicant's argument
4 that there is a single-page change here. We're
5 crossing out a penthouse. From the point of view of,
6 you know, people who submit permit applications who
7 do design all the time, right, that is actually a
8 very simple, elegant, straight-forward change to make
9 in a set of plans. We're going to remove this.

10 So, if you're arguing that that constitutes a
11 substantial change, I'd just like to understand a
12 little bit more the basis of why that constitutes a
13 substantial change and how someone is supposed to
14 know that it does, because from the point of view of
15 building a building, those are the kind of changes
16 that happen -- sorry, designing a building. Those
17 are the kind of changes that happen all the time with
18 the flick of a pen.

19 So, to me I look at that and I say, this is
20 not a substantial change. This is a quick -- this is
21 an easy way to respond to comments.

22 You know, I look at this and I also say, I'd
23 really like to understand why the ZA sort of -- I
24 want to be careful with the words I'm using here.
25 But the words that are coming to my mind are,

1 "inserted this decision prior to the August date."

2 So, you know, everyone in the room is a grown
3 up. Everyone has the ability to go on to the
4 websites and read the rules. And you know, the ZA
5 made an assumption here that -- made an assumption on
6 the solutions.

7 So, you have comments that have identified
8 problems, and the onus is on the applicant to
9 determine what the resolutions are. And then I would
10 look at it and say that the onus is then on the ZA to
11 determine whether those resolutions constitute a
12 substantial change or not. And in this case it seems
13 to me that perhaps the ZA jumped the gun a little
14 bit. And prior to seeing whether the resolution was,
15 determined that there was no way to solve this
16 without creating a substantial change.

17 So, I'd just like to understand a little bit
18 more what was happening there and why, because that
19 sort of gets to this whole fairness question of,
20 these are folks who submitted an application,
21 believed it to be complete, saw that it was being
22 processed, and were acting and kind of going down the
23 path of trying to follow the regulations as, you
24 know, as they understood them, and then all of a
25 sudden they were kind of presented with something

1 that they didn't expect.

2 So, I'd like to just sort of understand that
3 from the ZA's perspective because I can see it very
4 clearly from the applicant's perspective.

5 And, let me see. And then I think also just
6 clarifying these arguments pertaining to '58 versus
7 '16, I think that that would be extremely helpful to
8 the Chair's suggestion of the finding of facts from
9 both parties would be extraordinarily helpful in
10 teasing out the, you know, very fine points that
11 we're making here about how these regulations are
12 written.

13 CHAIRMAN HILL: Mr. Hinkle, would you like to
14 throw anything out there before you leave?

15 MR. HINKLE: No, I think that's sufficient.

16 CHAIRMAN HILL: Okay. Commissioner Gambrell,
17 you looked like you were interested in saying
18 something. I'm going to allow you to have 30
19 seconds.

20 MR. GAMBRELL: Very little. I'm not a lawyer
21 so I'm going to keep this real simple. Having worked
22 on zoning issues for a couple of years with DCRA and
23 the BZA, I have never seen DCRA serve as an
24 obstructionist to any applicant coming in to look for
25 a building permit. As you know, I probably have

1 taken a bit of the opposite position.

2 But more importantly, and I think this is
3 really fundamental to your deliberations, is the
4 language that was offered in 15-09, and 16-08, it
5 supplemented the vesting language. It did not
6 supplant it. And I think that case has been made
7 really clearly and I just urge you to really keep
8 that in mind as you review all the materials and the
9 dates and the information. Again, it's supplemented.
10 Do not supplant.

11 CHAIRMAN HILL: Okay. Thank you. I'm going
12 to give the applicant the last word. But just before
13 you do, Mr. Tondro again, and I appreciate everything
14 that the Vice Chair had asked for, while you're
15 answering all these things, if you can give me the
16 dates of when things happened, okay, and I really
17 want to be able to follow that in a way that's not
18 going to complicate my ability to look at what's
19 happening, okay? Mr. Glasgow, please, have the last
20 word.

21 MR. GLASGOW: Okay. And this will be very
22 short. We certainly believe as a matter of statutory
23 construction that each provision of the regulations
24 has to be read so that it has meaning, force, and
25 effect. And we think that 3202.5 and 3202.4 are

1 being read in a context and in effect eviscerates
2 Subtitle U 301.1(1), which is as we all know, is a
3 statute specific to this property and the down zoning
4 case. And we have submitted that it provides the
5 guidance that's necessary here.

6 And with that, I conclude my comments and
7 will submit everything else in writing.

8 CHAIRMAN HILL: Thank you. Let's see. So,
9 Ms. Rose, when is a good time -- when would
10 Commissioner Hood, or Chairman Hood be back with us?
11 Is that possible? Or --

12 MS. ROSE: Well, the first time he'll be back
13 is December 21st, but that's so soon. We need to
14 give time for the transcript to come out. And then
15 the next time --

16 CHAIRMAN HILL: Is the January 11th?

17 MS. ROSE: -- is January 25th.

18 CHAIRMAN HILL: Oh, January 25th?

19 MS. ROSE: Yes.

20 CHAIRMAN HILL: I thought there was an 11th?
21 Oh, no, that -- Chairman Hood. Okay.

22 Is the 25th okay with you guys?

23 MR. TONDRO: Well, what is the deadline based
24 on? Twenty-fifth would be the basis for the decision
25 by the Board, right? So, when would they have to be

1 received? I'll be out of the country until the --
2 through the 13th, of January.

3 MS. ROSE: Are you only requesting findings
4 of fact?

5 CHAIRMAN HILL: Yes.

6 MS. ROSE: Okay. Then they would be due on
7 January 19th.

8 MR. GLASGOW: That's when findings of fact
9 are due, but we also -- I'm going to be submitting a
10 closing argument. Max has got a time line to do.
11 We've got a time line to do. When is all that due,
12 Tracey? On those notes?

13 MS. ROSE: That would be January 12th.

14 MR. TONDRO: If we could move it back just, I
15 will be out of the country for three weeks.

16 CHAIRMAN HILL: That's fine. So, we're
17 looking at what? Oh, then right, Chairman Hood is
18 not --

19 [Discussion off the record.]

20 MR. HOOD: Mr. Chairman, my colleagues don't
21 like when I come in on their day, so I don't want to
22 interfere with their day. Figured I'd put it on
23 them. They're probably watching.

24 MS. ROSE: You want a date in December for
25 the submissions? Is that what you're saying?

1 CHAIRMAN HILL: I'm trying to see when Mr.
2 Hood is coming back because I would like Mr. Hood to
3 be back here. So then now we're in February and I'm
4 being aware of the applicant and what's going on, and
5 how long this has taken already. They've had the
6 property since the 14th, so you know.

7 MR. HOOD: I can come back. I'll come back.
8 Just let me know what date.

9 CHAIRMAN HILL: Okay. So, if that's the --
10 we'll do you first thing in the morning.

11 MR. HOOD: Yeah. Okay.

12 CHAIRMAN HILL: And then I think that --

13 MR. HOOD: Because I'm here on the 25th, Mr.
14 Chairman, so if it doesn't have to -- either the week
15 before or -- well, I guess it has to be the week
16 after, or something after that. Sometime in
17 February.

18 MS. ROSE: February 1st?

19 MR. TONDRO: That would be fine.

20 CHAIRMAN HILL: February 1st?

21 MR. HOOD: Can I ask, when do I come back?

22 CHAIRMAN HILL: Yes.

23 MR. HOOD: Do I come back in February?

24 MS. ROSE: Oh, let's see. On the 15th.

25 MR. HOOD: Mr. Chairman, I come back on the

1 15th, so is that a problem?

2 CHAIRMAN HILL: Will the 15th matter so much
3 for you?

4 MR. VISSAT: That's fine if that's the
5 earliest.

6 CHAIRMAN HILL: Okay. All right. So, then
7 we'll do the 15th.

8 MR. TONDRO: And just to clarify, that's the
9 hearing so when would you like to have the
10 submissions due by?

11 CHAIRMAN HILL: No. Yeah, sure. Ms. Rose?

12 MS. ROSE: The documents would be due by
13 February the 2nd, and any responses would be due by
14 February the 9th, if you're requesting responses.

15 MR. TONDRO: Thank you.

16 CHAIRMAN HILL: Okay. Other than that, I'm
17 going to close the record. Okay?

18 All right. It is an important hearing and
19 we've taken, I think, a tremendous amount of time to
20 get to where we are going to be able to deliberate.
21 We're going take a break. We might take lunch. I'm
22 not sure yet. But I'll get back to you if we're
23 going to take lunch. Thank you.

24 Actually, we're going to take a 10-minute
25 break. So, we'll be back here in 10 minutes.

1 [Recess from 12:17 p.m. to 12:21 p.m.]

2 CHAIRMAN HILL: Okay. Can we get started
3 again here? Ms. Rose, could you call the next case?

4 MS. ROSE: Yes. The next case is 19369,
5 Appeal of Capitol Hill Partners One, LLC. pursuant to
6 11-DCMR, Sections 3100 and 30101, from a July 15th,
7 2016 decision by the Zoning Administrator, DCRA, to
8 not issue a stop work order on building permit
9 numbers B1512726 and B1605810 in the R-4 District at
10 premises 521 11th Street Southeast, Square 973, lot
11 69.

12 CHAIRMAN HILL: Okay. Great. Thank you.
13 Good afternoon. Could you please introduce
14 yourselves from left to right; my left to right.

15 MS. MOLDENHAUER: Good afternoon, Meredith
16 Moldenhauer on behalf of the appellant, Capitol Hill
17 Partners.

18 CHAIRMAN HILL: If you could just push the
19 green light there?

20 MR. RENARD: My name is Bernard Renard. I'm
21 the property owner at 521 11th Street Southeast.

22 CHAIRMAN HILL: And then just turn it off
23 again. Thank you.

24 MR. LeGRANT: Matt LeGrant, the Zoning
25 Administrator, DCRA.

1 MR. TONDRO: And Maximillian Tondro on behalf
2 of DCRA.

3 CHAIRMAN HILL: Okay. Great. So, we've all
4 read the record, obviously, and there's a motion
5 before us in terms of timeliness. I was going to
6 maybe deal with that on its own, but so much of what
7 we're going to be talking about in the same way that
8 also was talked about in the previous case, is a lot
9 of issues concerning time and dates, and when things
10 happened. So, I'd rather just go ahead and hear
11 everything and put the timeliness issue in abeyance
12 until afterwards.

13 And so, Ms. Moldenhauer, do you know how much
14 -- how long you'll need for your portion? One
15 second.

16 MR. RENARD: Sorry. I would like to
17 introduce a preliminary motion. In fact two separate
18 motions which are filed because we received the
19 supplemental prehearing statement from the appellant
20 on Wednesday the 23rd, just the day before
21 Thanksgiving, and therefore that motion is
22 substantial and did not have time to address all the
23 issues in that motion.

24 And therefore, I've prepared a statement
25 which addressed the issue which we raised in that

1 motion, other motions. And the -- I have focus the
2 argument in filing two motions. One stating that the
3 appellant does not have standing because they are not
4 an aggrieved person, and they are not directly
5 affected by the consequences of this zoning policy
6 type of regulation.

7 And the second motion will be a follow up of
8 DCRA, Mr. Tondro, motion to dismiss the case on the
9 basis of timeliness.

10 And I will add in this motion for dismissal
11 of the case on the basis of timeliness. One aspect,
12 which is called the "under the roof" provision. And
13 the building is under the roof and is subject to
14 different time limit, only 10 days. And the other
15 aspect in this motion is that if the Board did not
16 recognize that the time limit was 60 days as stated
17 by DCRA, from the time of the issuance of the
18 building permit, I submit that the latest date will
19 be 60 days from the posting of the building permit.

20 This is a building under construction which
21 is a --

22 CHAIRMAN HILL: Mr. Renard, just give me a
23 second here, okay? You have now -- so, Ms.
24 Nagelhout, I'm just not sure how to deal with this
25 now.

1 MS. NAGELHOUT: Since his motions are not
2 even in the record yet, they are only oral motions, I
3 think you could stick to your original plan and just
4 give each party a certain amount of time to make
5 their motions, make their case on the appeal, respond
6 to the other party's motions. Just let them say what
7 they want to say for the allotted time.

8 CHAIRMAN HILL: Okay. So, that's a lot of
9 documents.

10 MR. RENARD: No. It's a copy for each.

11 CHAIRMAN HILL: Oh. Oh, okay. Could you
12 give those to the secretary?

13 MS. MOLDENHAUER: The appellant also does not
14 have a copy and has not seen anything.

15 CHAIRMAN HILL: Okay.

16 MS. MOLDENHAUER: So. Just for the record,
17 the appellant is fine responding to these new motions
18 that we've just now heard orally. And, you know,
19 we'll be able to read this submission at a later
20 date.

21 CHAIRMAN HILL: Okay. Okay. So, Ms.
22 Nagelhout, if you can clarify for me also, do we need
23 to have a vote about holding the timeliness issue in
24 abeyance? Or, I can just go ahead and do that?
25 Okay. All right.

1 MR. TONDRO: Chairman.

2 CHAIRMAN HILL: Yes?

3 MR. TONDRO: I just had a quick question
4 about that.

5 CHAIRMAN HILL: Yes.

6 MR. TONDRO: Just to be clear, because the
7 issue of timeliness is not just for us. Of course
8 there's a way to prevail in this particular case.
9 It's also something that's a very important aspect of
10 policy for DCRA. So, I just want to make sure that
11 we have the opportunity to actually address that. I
12 don't know. Are we in a position -- are what you're
13 asking us to do is to have the appellant address both
14 of those issues of timeliness first and then
15 something on the merits. And then we respond in that
16 same way? I just want to be clear. I'm sorry.

17 CHAIRMAN HILL: Yeah, I'll let the applicant
18 speak. Just hold on one second.

19 The whole timeliness issue is all kind of
20 caught up in the argument. I thought it was. And
21 so, okay, then how would the applicant like to
22 address -- I'm going to throw it back to you, then.

23 MS. MOLDENHAUER: No, and I apologize. I
24 just, I think that the timeliness issue is wholly
25 separate from the merits of the argument. And I

1 think that either the Board finds this case, I mean,
2 timely, and then moves forward to the merits of the
3 case, which is a time based, evidentiary based issue.
4 But the timeliness issue is a question of what are we
5 appealing? And we are appealing a decision and the
6 question is, is that specific decision appealable, or
7 is the only item that can be appealed a permit?

8 And I think *Baskins* specifically speaks to
9 that issue and we can go through that. But I think
10 it might be easier for the Board to have us argue
11 these preliminary questions of timeliness now, and
12 then allow Mr. Tondro to respond to those.

13 CHAIRMAN HILL: Okay. Okay. Just give me
14 one second.

15 Okay. So, we're going to do this, then. Mr.
16 Tondro, if you could go ahead and speak to the
17 timeliness issue. And then, Ms. Moldenhauer, if you
18 could speak to that? We're going to do that first,
19 okay? And whether or not we end up holding that
20 decision in abeyance or not, we'll see what happens.
21 Okay?

22 So, Mr. Tondro, again, a time line. Thank
23 you.

24 MR. TONDRO: Yes, thank you. Good afternoon,
25 Mr. Chair, Madam Vice Chair, Members of the Board.

1 Thank you for your patience again. I'll try to keep
2 this as quickly as possible.

3 I did try to deal with the time line in the
4 first page of my hearing statement. And so the
5 fundamental issue, and then following on in my pages
6 2 and pages 3, there are two different issues that
7 are raised. Both of them, I believe, are time
8 barred. Because the moment of the decision of the
9 Zoning Administrator that should be challenged is not
10 what the appellant asserts, which is the moment that
11 the e-mail was spent -- was sent to her. But rather
12 was the actual decision to which that referred back
13 to. And that's the issuance of permits.

14 So, the first issue is this allegation under
15 Section 3130.2 about a permit requiring to be issued
16 within six months of the application. Okay. We will
17 inevitably go back over this again under the merits,
18 but under the timeliness argument this -- that issue,
19 the question is, from our standpoint, DCRA's
20 standpoint, is when is it that that decision is a
21 final decision.

22 And our belief in that one is that the final
23 decision was when that permit was actually issued.
24 In other words, the allegation is that the permit
25 failed to comply with 3130.2 because it was issued

1 not within six months after the application date.

2 Okay?

3 And that was the date of the original permit
4 is November the 12th, of 2014, almost two years prior
5 to the appeal. Our belief is at that point, that was
6 public notice. I believe that the permit holder may
7 have a further statement in terms of what was done,
8 in terms of posting at that time, but it's been well
9 documented that for a ruling of timeliness under
10 311.2, that the public -- that the issuance of the
11 permit constitutes the decision to be appealed,
12 unless the appellant can show exceptional
13 circumstances. All right?

14 So, the original permit, again the original
15 permit is that one defined as B1107802. That one was
16 issued on November the 12th, 2014. It was actually
17 filed, they applied for back in 2011, but it was only
18 issued then, later on. And that's the central
19 allegation is that there's this failure to comply
20 with 3130.2, the sixth month deadline, because it
21 went on so long. Well, DCRA would hold that when the
22 permit was actually issued, that was when that
23 violation existed, and the appellants were on notice
24 as of that time. Okay? Because they are, again, the
25 next door property owner. The permit was posted.

1 The permit is public notice, and there is no evidence
2 of exceptional circumstances that are outside the
3 appellant's control, and also that do not prejudice
4 DCRA and the permit holder. And I think in this case
5 there will -- but I'll address that later on in terms
6 of the prejudice. That's 3130.2.

7 The other issue is 3130.3, which is the
8 requirement of starting work within six months of the
9 permit issuance. So, forgetting about that first --

10 CHAIRMAN HILL: Once again, the permit is
11 issued November 12th, 2014?

12 MR. TONDRO: Yes.

13 CHAIRMAN HILL: Was it 2014?

14 MR. TONDRO: Yes.

15 CHAIRMAN HILL: Yeah.

16 MR. TONDRO: Right. I'm sorry, September.
17 Sorry, September 12th. Apologies. 2014. Sorry,
18 September.

19 MS. MOLDENHAUER: We have a printed out time
20 line that we can pass up to the Board that outlines
21 all the permits and the dates, if the Board would
22 like that.

23 CHAIRMAN HILL: Okay. Sure.

24 MS. MOLDENHAUER: It's also part of the
25 record.

1 CHAIRMAN HILL: Could you give one to the
2 Zoning Administrator?

3 MS. MOLDENHAUER: It's part of the record,
4 but we have it. We have extra copies.

5 CHAIRMAN HILL: So, Mr. Tondro, if you could
6 just point to this and tell me which date you were
7 first talking about again. September 12th?

8 MR. TONDRO: Yes, I'm sorry. September 12th,
9 2014. My apologies.

10 CHAIRMAN HILL: Oh, I got it. Okay.

11 MR. TONDRO: Sorry.

12 CHAIRMAN HILL: I'm sorry.

13 MR. TONDRO: Yes, that is the same permit,
14 B1107802. I apologize. I incorrectly said that it
15 was issued on November the 12th, 2014, not September
16 the 12th.

17 CHAIRMAN HILL: Okay.

18 MR. TONDRO: Okay. So it's September the
19 12th. But the point is that that point in September
20 of 2014, that was the moment when the violation
21 occurred. That was the final decision of the Zoning
22 Administrator. That was when the appeal period
23 should start for 60 days. It's clear that there was
24 notice because the permit was posted on the property.
25 This is the next door -- the appellant is a next-door

1 neighbor and in addition there's a publicly issued
2 permit which has been established as due process for
3 notice.

4 In addition to challenge that the appellant
5 has to show exceptional circumstances outside the
6 control, and also that even if they have that, if
7 they're able to show that, that is the situation
8 where it will not prejudice either the permit holder,
9 which it obviously would, or DCRA, which it will and
10 I'll go into that in further detail. But it will
11 have an impact on us, not only in terms of this
12 particular case, but in terms of going forward, how
13 we deal with permit issuances, because this is a
14 situation where if it's -- if this appeal is allowed
15 it ends up calling into question, permits that have
16 been issued years past. And there is no finality
17 that therefore is the intent of 3112.2 of the Zoning
18 Regulations.

19 The second allegation is a violation of
20 3130.3. 3130.3 is the provision that work has to
21 start within six months of issuance of the permit.
22 In that particular case we assert that the moment
23 when that should have been triggered was the issuance
24 of the first extension of the permit. Okay?

25 And the first extension of the permit was

1 issued on September the 15th, 2015. That's B1512726.
2 And that corresponds to what appellant has provided
3 and their timeline.

4 As of the date of that extension that
5 extension was issued well after six months. It was
6 issued a year after the first permit. So, to the
7 extent that there was no work started, that should
8 have been the trigger, the public stated trigger, the
9 fact that they wanted to extend the permit. Because
10 they applied for and received, there was issued an
11 extension. The extension of the permit allows that
12 permit to continue. But the implication of that is
13 that there's no work necessarily started. But the
14 fact that they applied for that first extension
15 establishes a de facto violation per appellant's
16 allegations of the requirement that work start within
17 six months. That should have put the appellants on
18 notice that work did not start under that time.

19 Therefore, that was September 2015. Again,
20 the appeal was not done until almost a year later,
21 well outside of the 60-day window. And again, the
22 only way that the requirement to appeal within 60
23 days can be overcome by the appellant is on the
24 showing of exceptional circumstances that are outside
25 the control of the applicant, and that do not

1 prejudice the parties. Including, obviously the
2 permit holder, but from DCRA.

3 And the fundamental problem that we're having
4 here is a situation where appellants are very aware
5 they're the next door neighbors. They're very aware
6 of the fact that this is an ongoing construction
7 site. In fact, the entire circumstances, they've
8 been on notice. They're complaining about the fact
9 that this has been such an ongoing process, I think
10 the first decision by the Board was back in '07. So,
11 this has been an ongoing process. If they want --
12 they're on notice that something is happening. And
13 it's not that they can say they have no idea that any
14 building was proposed or anything was constructed at
15 that time.

16 What they want to do is in a situation where
17 they've missed the appeal window, they then fire an
18 e-mail or they fire a request off to the Zoning
19 Administrator and say, hey, Zoning Administrator, do
20 you still agree with what you said? And if the
21 Zoning Administrator says yes, we issued that permit,
22 that's the reason why, then all of a sudden it
23 becomes a situation where, bam, there's a brand new
24 appeal period to go to and appeal that -- the permit.

25 And I would point out that one of the crucial

1 indications here is the fact that the relief they're
2 requesting is the revocation of the permits. So, if
3 they're attacking the permits facially, the time to
4 attack the permits was when they were issued. Not
5 the subsequent extensions, the second, the third, the
6 fourth. Those extensions don't change anything
7 because the original issuance already occurred with
8 the challenge to be issued within six months. That
9 occurred all the way in the beginning. After two
10 years, when it was issued, two years after the
11 application was filed. And then also the first
12 extension was the first time that there was this
13 issue of whether or not construction had started.

14 So, I just -- it's a real potential, real
15 problem for DCRA, and I believe for the development
16 community if this is going to enable any person who
17 sits there and misses, they sat on their rights, and
18 then they're going to come back and just write an e-
19 mail to DCRA and say, hey, we think there's a
20 problem. You should go and enforce this. What they
21 want, then, is to go and attack the permit. They've
22 already missed that opportunity. They sat on their
23 rights.

24 I'll just, I'll leave it there. Thank you.

25 CHAIRMAN HILL: Okay. Ms. Moldenhauer?

1 MS. MOLDENHAUER: Thank you very much. So,
2 one, to clarify in our more recent submission we have
3 indicated that we are no longer pursuing 3130.2. So,
4 to truncate the discussion, that 3130.2 has to do
5 with when DCRA issues the permit. We are not arguing
6 that issue. We are focusing on the question of
7 3130.3, which requires that the owner start work six
8 months from the date of the permit issuance.

9 And we respectfully disagree with DCRA and as
10 counsel. We believe that *Baskins* specifically
11 identifies with *Baskins* and *Banham* (phonetic) are two
12 Court of Appeals cases which talk about timeliness.

13 Both of those cases are situations in which
14 there were subsequent or concurrent letters or other
15 events where in *Baskins*, a building permit was not
16 clear as to what was occurring, and there has been
17 other cases in which building permits, and this Board
18 has found that a building permit on its face does not
19 provide adequate notice to a property owner.

20 There is BZA case 1904.7, where this Board
21 evaluated a building permit and a parking space. And
22 it was a question of, well, did the community, did
23 the public have notice of the zoning decision that
24 was being appealed at the time of the permit
25 issuance. And in those cases, when the Board has

1 found that timeliness had not yet run, which is what
2 we argued today, that timeliness had not yet run
3 until the time that we, as an abutting property
4 owner, had notice of a specific administrative action
5 or decision.

6 In *Banham* there are -- in *Baskins* it
7 indicates that there may be a time in which an appeal
8 may wait until DCRA takes official action. The
9 question here that DCRA is arguing is arguing that we
10 should have taken an appeal based on inaction. That
11 is not what the regulations require.

12 The regulations require that an aggrieved
13 party has to take action 60 days after DCRA, or one
14 of its officials, makes a decision, takes an
15 affirmative action. Here, the six-month lag from the
16 first building permit, or then the renewal of that
17 building permit, was not a specific action to not
18 enforce 3130.3.

19 What we are appealing is DCRA's verbal
20 statement in their decision in the e-mail, that says,
21 we will not enforce 3130.3, even though you have
22 provided us with evidence that that time frame has
23 not been complied with.

24 There was no notice, and kind of from the
25 prior conversation about crickets, even though we

1 have e-mail exchanges, the extension permit on March
2 2016, there was no communication by the property
3 owner until April of 2016, after that second
4 extension was provided. And that's clear in the
5 record. So, as a property owner, as abutting owner,
6 there was no knowledge that maybe our abutting owner
7 has given up. There's plenty of cases and I think
8 this Board has seen them, where people go and get BZA
9 orders and then five, 10 years later they're back
10 before the Board because they didn't act on that
11 order, or they didn't act on that permit. It doesn't
12 happen that often, but it does happen.

13 And so, there was no knowledge by my client
14 that they were not simply either walking away from
15 the permit, not doing anything, maybe deciding to go
16 as a matter of right, not build. There was no
17 physical construction that was occurring to have
18 given them knowledge that work was being started, or
19 that they were pursuing the BZA order or the relief
20 that they had sought. Nor did we have any knowledge
21 that DCRA was not going to enforce the regulations.

22 The appeal here is on the failure for DCRA to
23 enforce the regulations as they are required under
24 3130.3. DCRA did not make that decision until July
25 of 2016, when they were informed of new facts. They

1 were said, here are facts from an abutting property
2 owner. The same way in other cases where the ANC
3 informs them of different situations. Here are new
4 facts. We are showing you facts that there has been
5 no construction. We wish you to now enforce the
6 clear language of the law.

7 And when they made the decision, no we will
8 not enforce that, that was the first time in which we
9 had knowledge that there was an appealable decision.
10 And we filed timely within 60 days from that date.

11 CHAIRMAN HILL: Okay. Does anyone have any
12 questions for the applicant or DCRA concerning the
13 timeliness issue? I have one, which is just to the
14 applicant again, as far as like you know, again the
15 appeal. Why didn't the applicant appeal the
16 September 12th, 2014 decision again?

17 MS. MOLDENHAUER: So, the permit -- I mean,
18 there is, if you look at the timeline that we gave
19 you.

20 CHAIRMAN HILL: Yeah. No, I appreciate it by
21 the way.

22 MS. MOLDENHAUER: No, no, I think it's
23 helpful because these aren't very factual issues.
24 There was the application, there was the building
25 permit, there was the extension. None of those are

1 currently being challenged today.

2 And even the building permit itself, on its
3 face, is not being challenged. It is the decision of
4 the Zoning Administrator and the language that when
5 you talk about an aggrieved opportunity to appeal,
6 you can appeal a decision or an action of an
7 administrative body. Here, the decision was of the
8 Zoning Administrator's office to not enforce 3130.3,
9 and that is what is being challenged.

10 And we had no ability to know that the Office
11 of Zoning was not going to enforce that provision,
12 until we received the e-mail in July.

13 CHAIRMAN HILL: Okay. Does anyone have
14 questions? Mr. Tondro, you seem like you want to say
15 something?

16 MR. TONDRO: If I might? So, just to
17 respond, again, I think that I would respectfully
18 disagree on this issue, that the decision was made,
19 the action that was taken by the Zoning Administrator
20 was the issuance of the first extension. At that
21 point, that extension allowed for the permit to be
22 extended. That nominally should have triggered if
23 there was any questions about whether or not the work
24 had started. That was the time when it would have
25 been attacked. They chose not to do it.

1 Instead, what they're arguing is that it is
2 the second extension, which is what -- what they're
3 arguing is that the second extension is what did it,
4 or the third extension. Or the fact that the e-mail
5 responded. But the decision was already based with
6 the Zoning Administrator when they issued that first
7 extension. And that first extension was in September
8 of 2015.

9 CHAIRMAN HILL: Okay. I'm back to where I
10 was, I guess, earlier. So, we're going to have to go
11 ahead and we're going to go through and hold -- oh,
12 thank you so much. So, we've dealt with the
13 timeliness issue. I'm going to hold the decision
14 again in abeyance until afterwards.

15 Does anyone have any questions? Do you have
16 any questions? Okay.

17 So, then we're going to go ahead and -- yes.
18 Sure. Can you go ahead and push that button there?

19 I understand you're the property owner and we
20 know it's addressing an issue of timeliness, so if
21 you would like to address the issue of that the
22 motion is to dismiss due to timeliness, because we're
23 going to get into the case now, after this.

24 MR. RENARD: But there's several aspect which
25 have not been discussed as of now is that in my

1 motion I introduce the timeliness based on the fact
2 that the property is under the roof. And that's in
3 3112.2.

4 And if the decision complaint of involved the
5 erection construction, reconstruction, alteration of
6 a structure or part thereof, falling -- is under the
7 roof, for purpose of this setback (garbled speech)
8 means that the stage of completion of a structural
9 part thereof is under the roof.

10 And so basically the building is under roof
11 and no appeal should be filed later than 10 day after
12 the date on which the structure or part thereof in
13 question is under the roof.

14 CHAIRMAN HILL: Now again, though, sir, that
15 was now -- that's not -- you're not speaking to
16 something that happened -- in September 12th, 2014,
17 nothing happened for some time, correct?

18 MR. RENARD: Yes, indeed. Yes.

19 CHAIRMAN HILL: Okay. So that's all I'm kind
20 of concerned with right now. So, thank you.

21 I'm sorry, sure.

22 MR. TONDRO: Just to complicate things
23 slightly and just to be -- but also to be up front,
24 I'm sorry about this. For the purposes of
25 timeliness, right, DCRA at the very least is not

1 admitting or stipulating that work was not completed
2 and that 3130.3 was not met. That's a separate
3 argument under the merits.

4 What we are asserting is simply that the
5 challenge to assert that fact should have been
6 triggered. The latest time when that should have
7 been triggered would have been at the issuance of the
8 first extension, because that indicated that the
9 Zoning Administrator gave yet again another
10 permission that should have triggered people to say,
11 hey wait, you're extending the permit. Why are you
12 extending the permit? Are you doing any work? Oh
13 wait, that's a year later, you only had six months to
14 start work.

15 So, the issue is -- so, it's a slightly
16 different issue, but the issue is, when is it that
17 appellants are on notice that they have to make sure
18 to challenge the alleged violation.

19 So, in other words, if there had been no
20 first extension, no second extension, no third
21 extension, if there's just a permit out there, that
22 might be a different situation. But the fact of the
23 matter here is that DCRA did respond, and did respond
24 in a public way making a decision that it could be
25 extended and therefore there was no violation. That

1 was not appealed at that time, and that was what we
2 are raising.

3 MS. BUTANI-D'SOUZA: Okay. So just, so that
4 I understand what you're saying, you're saying that
5 the building permit was issued. There is a
6 requirement under the law that you start construction
7 within six months. They did not start construction.

8 Then, they applied for an extension after a
9 year and DCRA, looking at the fact that they didn't
10 start construction, extended the permit. And at that
11 moment, that's when the decision was made that
12 started the timeline for appeal. Is that the
13 argument?

14 MR. TONDRO: Sort of, but not quite.

15 MS. BUTANI-D'SOUZA: Okay.

16 MR. TONDRO: It is the fact that we are not
17 recognizing that no work was done. We issue permits
18 in response and extensions in response to what
19 applicants give us.

20 It's rather the question is, when should
21 appellant have known that there was a decision made
22 by the Zoning Administrator. In other words, when
23 was it, in theory -- when was this provision
24 violated? And it was violated in theory, six months
25 after permit issuance. And again, had there been no

1 other extensions, no other actions by DCRA, then that
2 would be one thing.

3 But the issue is since we did receive a
4 request and we extended that, that is a public
5 notice, the first and the second, but it goes back to
6 that first one, that there was no violation at that
7 particular time.

8 If they felt there was a violation, that was
9 the moment of the final decision of the Zoning
10 Administrator, that that particular chapter had been
11 closed. The appeal period was over because it hadn't
12 been challenged within that time period. That was
13 the time to challenge it.

14 MS. BUTANI-D'SOUZA: Okay. So you're saying
15 that the ZA extended the permit for -- there was --
16 it wasn't that no construction had occurred in the
17 ZA's view. Something had happened that gave you
18 basis to extend the permit.

19 But if you were following the applicant's
20 argument, the argument would be that no work had
21 occurred after six months, and then when it was
22 extended, that's when -- because --

23 MR. TONDRO: Because the challenges to the
24 ZA's determination of compliance with the Zoning
25 Regulations and when that first extension was issued,

1 that was actually six -- that was a year after the
2 permit issuance, so it was six months after the
3 requirement would have had to have been met. And
4 that was the final decision by the Zoning
5 Administrator. That aspect of the code, 3130, was
6 required to be addressed. If that had been raised,
7 that would be the time. Not years later.

8 MS. MOLDENHAUER: Can I raise a point because
9 I think this goes to Commissioner D'Souza's point. I
10 don't believe it's been put on the record that the ZA
11 actually made a decision at that time. I think that
12 the likelihood is higher and maybe the Zoning
13 Administrator or Mr. Tondro can speak to this, that
14 it was administratively processed. There was no
15 decision affirmatively or omitted as to whether work
16 had been made or not. It was just simply requested,
17 it was processed, it was, you can have three
18 extensions, and another extension was issued. Not
19 until a time in which we presented evidence to the
20 Zoning Administrator, about the fact that no work had
21 ever been done, was this rule reviewed, interpreted,
22 and then deemed to not enforce based on the e-mail in
23 July.

24 MR. TONDRO: And just to clarify that one
25 issue, that the crucial issue is, did the appellant

1 sit on their rights? When should they have filed
2 their appeal? And that is the issue, regardless of
3 whether the ZA made a decision, was actively involved
4 in the decision or not, there was a public act given
5 by DCRA on which the Zoning Administrator signed off.
6 And if there was a challenge, that's what the 60-day
7 period is. The 60-day period is much more extensive
8 for zoning -- alleged zoning violations than it is
9 for construction code violations, and that is to
10 allow neighbors or other aggrieved parties to
11 challenge a decision.

12 The time to challenge the decision was then.
13 That was a fact. That was a statement. That was a
14 decision at that moment in time. It did not change
15 afterwards. Pardon me.

16 CHAIRMAN HILL: Okay. That's all right. I
17 was only smiling because I'm still back to the same
18 place.

19 So, we're going to move forward, and Mr.
20 Tondro, you're going to be here a really long time
21 today, okay? So, just, you might want to conserve
22 your energy. You know.

23 So, let's see. Ms. Moldenhauer, if you can
24 tell me how much time you might need?

25 MS. MOLDENHAUER: Twenty minutes. Probably

1 not even that much.

2 CHAIRMAN HILL: Okay. That would be great.
3 And then we're going to go with the Zoning
4 Administrator. And, sir, you as the building owner
5 will also have an opportunity to speak.

6 MR. RENARD: Thank you.

7 CHAIRMAN HILL: Okay. You can turn off your
8 microphone. I think it's on.

9 Ms. Moldenhauer, whenever you're ready.

10 MS. MOLDENHAUER: To just start off, we are
11 appealing a decision that was made in July of 2016.
12 That was made under ZR-58. This appeal was filed
13 before September 6th, 2016, so this appeal was even
14 filed under the old regulations. I just want to be
15 heard.

16 CHAIRMAN HILL: No, no, that's okay. I just
17 want to interrupt you again because I'm looking at
18 your time line, which I need to be helpful. Where
19 are you on the time line? You said -- I thought you
20 said --

21 MS. MOLDENHAUER: This actually includes all
22 of the permits. We don't actually have when we filed
23 on here. I apologize.

24 CHAIRMAN HILL: Okay.

25 MS. MOLDENHAUER: But July --

1 CHAIRMAN HILL: July 2016. That's what
2 you're saying.

3 MS. MOLDENHAUER: July 15th, 2016 is when the
4 decision was made. We applied and filed this appeal
5 prior to ZR-16 taking affect. So, I just wanted to
6 be very clear from a timing perspective that we are
7 under a ZR-58, from what I heard, under Mr. Tondro's
8 arguments previously. I think that we're all in
9 agreement on that. And so I think that that's
10 important because of some of the changes. But its'
11 important to focus on what issues we heard from the
12 property owner that he had some preliminary elements
13 or arguments that there is no standing. We are not
14 an aggrieved party.

15 My client is the property owner next door,
16 abutting Mr. Bernard Renard's property. And so in
17 that regard they are specifically an aggrieved
18 property owner that would be impacted by the either
19 failure of the Zoning Administrator to enforce the
20 regulations, or this Board to enforce those as well.

21 The reason why we are here today is because
22 Mr. Bernard obtained zoning relief. If this was a
23 matter of right project we would not be here. Mr.
24 Bernard obtained zoning relief for his property to
25 build a rear addition that's two times larger than

1 the existing structure that appears today.

2 So, if you look at -- I'm just going to give
3 you some perspective. If you look at Exhibit 22B --
4 sorry. We have another copy of this because the
5 record is quite voluminous. 22B, page 28. It shows
6 that the -- we'll pass out a copy of it because --

7 CHAIRMAN HILL: You said 22B?

8 MS. MOLDENHAUER: 22B, page 28. It's a copy
9 of the permit plans. It shows the existing structure
10 and the fact that the addition, which was only
11 approved because it's 66 percent lot occupancy, that
12 addition is really what we are talking about today.
13 Not the existing structure, but the addition, the
14 rear addition that was approved by the Board.

15 Section 3130 is titled, time limits on board
16 orders. It literally spells it out in the section.
17 It has to do with only in situations where you have a
18 board order and these are time limits to determine
19 when a board order is valid, or then becomes invalid.

20 CHAIRMAN HILL: May I interrupt you for just
21 one moment?

22 MS. MOLDENHAUER: Sure.

23 CHAIRMAN HILL: Mr. Tondro, again, if you
24 could just keep track of all the little points that
25 you could address. I want to keep -- I want to go A

1 to B, A to B, A to B. Okay. Thank you.

2 MS. MOLDENHAUER: We are not challenging the
3 order or the issuance of the permit on its face.
4 What we are challenging, rather, is the affirmative
5 action and decision of the Zoning Administrator's
6 office to not enforce the specific and clear sections
7 of the Zoning Regulations, Section 3130.3, which
8 require that an owner take prudent and efficient
9 manners to move forward on a board order that is
10 issued within six months from the date of the
11 issuance.

12 In the e-mail from the Zoning Administrator's
13 office, DCRA refused to apply this section, which
14 clearly indicates a time period within which
15 construction towards the relief granted in an order
16 must begin.

17 CHAIRMAN HILL: Ms. Moldenhauer. I'm sorry,
18 the date you're speaking of again is which date that
19 you're taking from the six months?

20 MS. MOLDENHAUER: It is July 15th, 2016.

21 CHAIRMAN HILL: Okay. Thank you.

22 MS. MOLDENHAUER: Just as the Zoning
23 Administrator should have upheld or replied to the
24 Zoning Regulations, so must the Board. Section --
25 when select sections of 58 apply, and the office does

1 not specifically apply those as they're clearly
2 provided, it creates questions and doubt on the
3 zoning process and on the validity of all sections of
4 the Zoning Regulations. The appellants have
5 demonstrated a clear public interest through letters
6 of support from neighboring property owners who are
7 within the 200-foot radius, a letter from the ANC
8 receiving great weight, also in support of this
9 appeal, and the policy of upholding and properly
10 enforcing the Zoning Regulations as they are written.

11 It is the Board's responsibility to not pick
12 and choose selections of the Zoning Regulations to
13 enforce, but rather to be a blind enforcer of justice
14 and to enforce the regulations as they are stated in
15 regards to regulations.

16 Here, we feel as though the regulations are
17 clear and under Section 3130.3, it requires that the
18 erection or alteration approved in the permit shall
19 be started within six months after the date of
20 issuance of the permit, and shall proceed to
21 completion in accordance with those terms.

22 If the work is not started, as is in the case
23 here, within that period, the permit shall expire and
24 not be renewed.

25 The six month period established is not

1 ambiguous. It is clear and precise and the Zoning
2 Regulations do not provide the Zoning Administrator
3 the authority to refuse to enforce that section.
4 Doing so directly is contrary to the rules of
5 statutory construction.

6 The Zoning Administrator, in his letter of
7 July 15th, indicated that this was a section that had
8 not been enforced in the past, and thus would not be
9 enforced moving forward. We point the Board to
10 multiple BZA cases and Zoning Commission cases in
11 which the Board recognizes, acknowledges, and even
12 points out Section 3130.3, acknowledging its
13 significance.

14 In BZA Case 17562A, the Board noted that
15 although the applicant in that case had obtained a
16 building permit within the required period, 3130.3
17 further required that construction of the project for
18 which the permit were obtained must begin within six
19 months of the issuance. And that is a quote from the
20 order of that decision.

21 In Zoning Commission Case 06-43A the
22 Commission also acknowledged this section as well and
23 those requirements. This is a section that the Board
24 has, through time, acknowledged. And there's a
25 reason for that. The reason is that it is important

1 to ensure that the regulations that are -- and I
2 think this kind of goes to what was happening this
3 morning, when regulations -- regulations are changed.
4 Commissioner Hood, there are text amendments that
5 occur throughout the course of time, and there is
6 also obviously in this case, almost 40 percent of the
7 200-footers have changed around this property.

8 There is a time requirement for owners to
9 move forward when they are seeking relief because
10 zoning changes, zoning regulation changes, and the
11 ability to just allow a permit to go on in perpetuity
12 is not the intention of the regulations. And that
13 was specifically addressed in this section.

14 MS. BUTANI-D'SOUZA: Can I ask a question,
15 Ms. Moldenhauer. In the record, previously you had
16 argued that the granting of the demolition permit did
17 not toll the expiration of the BZA relief. Are you
18 still pursuing that argument, or is that the argument
19 that you said at the start of the hearing you were no
20 longer pursuing?

21 MS. MOLDENHAUER: I'm still pursuing that
22 argument. What I'm not pursuing is Section .2, which
23 talks about how much time DCRA has to issue a permit.

24 MS. BUTANI-D'SOUZA: Okay. So, you're no
25 longer arguing that the 15 months that it took them

1 to issue a permit -- okay.

2 MS. MOLDENHAUER: I'm not arguing that, yeah.
3 So, I'm saying, because of a timeliness issue we are
4 conceding the fact that we should have known that
5 they issued the permit 15 months, not six months
6 after. And so we're not arguing that point. We're
7 focusing on the fact that once DCRA knew that no work
8 had started within the six month period, and we told
9 them of that pursuant to our e-mails, that they
10 should have then enforced that requirement, but they
11 decided not to on July 15th.

12 MS. BUTANI-D'SOUZA: So then you don't
13 disagree with DCRA's --

14 MS. MOLDENHAUER: We still disagree --

15 MS. BUTANI-D'SOUZA: -- argument that it is -
16 - what is the term that they used? What was it?
17 Inequitable and --

18 MS. MOLDENHAUER: So, we disagree that a demo
19 permit vests. If you actually go to Section 3130.1,
20 this is the section which talks about no order
21 authorizing the erection or the alteration of a
22 structure shall be valid for a period of no longer
23 than two years, from the erection or alterations are
24 filed for the purposes of securing a building permit.
25 I think DCRA and this Board have been very clear in

1 distinguishing between building permits and
2 demolition permits.

3 In this situation the regulations
4 specifically say, securing a building permit. And
5 there are cases I can reference where this Board has
6 found that a demolition permit -- there was a case,
7 actually just a couple of months ago that came before
8 this Board where an applicant had obtained a board
9 order, a BZA order, and they had obtained a demo
10 permit. This was where there was a multi-story
11 apartment building with a restaurant on the lower
12 level. I don't know if you recall this case from a
13 couple months ago. And they had obtained a demo
14 permit. They had actually started on the renovation
15 of some of the units but they had not yet vested
16 under the commercial space.

17 And so, that's a situation where a demolition
18 permit does not in and of itself vest at a factor,
19 and we are still under that opinion and still arguing
20 that point.

21 So, going back to the record. And I want to
22 make sure that one, this is a situation in which the
23 Board has found that it is important to enforce this
24 section in the past, and that two, the facts are very
25 clear. The owner had obtained a building permit and

1 had obtained a demolition permit. However, they had
2 not taken the effective steps to vest their original
3 order. That original order directly relates to a 66
4 percent lot occupancy.

5 Work had to start in order to address that
6 element. In the record we have the fact that they
7 applied for a building permit and six months would
8 have expired on March 12th, 2015. We have two
9 affidavits from two tenants who lived in Mr. Bernard
10 Renard's property. He has two properties, 521 and
11 523. We have two tenants that lived in Mr. Bernard
12 Renard's property at 523, which share a wall. And
13 they both said that no -- had no evidence of
14 construction as of November 2015.

15 So, he would have had to, pursuant to the
16 regs, started work by March 2015. We have two
17 affidavits saying that no work, and there was no
18 signs of work as of November 2015.

19 Additionally, even from the owners own
20 filings that are in the record, Exhibit 31, pages 35
21 -- 33 to 35, he indicates that, "I had to postpone my
22 construction and my masonry and my carpentry
23 contractors. My carpenters -- my contractors are
24 ready to start."

25 In multiple submissions that he filed he

1 acknowledges that he did not start work. Even in
2 Exhibit -- sorry. Exhibit 24, on page 5, he
3 acknowledges that in early 2016 he will begin his
4 interior work and the remaining section of the house.
5 There is no question based on not only our
6 affidavits, our client's assertions that no work had
7 started, but the fact that Mr. Renard even
8 acknowledges that no work had started, that this
9 section of the regulations has failed to be
10 satisfied.

11 So, then the question is, you know, there is
12 other elements that he may have done minor work. But
13 nothing is evidence that he actually did work prior
14 to March 12th, 2015.

15 There's nothing in the record that shows
16 that, and there are affirmative statements to the
17 contrary in regards to when work possibly commenced.

18 The order thus has not vested. Mr. Tondro
19 made a comment earlier about how, well -- and I know
20 in his filings he makes statements that the order
21 vested at the time that the permit was issued. Well,
22 I would say that it was actually a provisionally
23 vested order that had to satisfy, still, all of the
24 requirements under 3130. That while yes, he filed an
25 application. He obtained a building permit, he

1 obtained all of his extensions. It was provisionally
2 vested unless he failed to comply with 3130.3, which
3 he did. Six months filing that permit he did not
4 start work.

5 And so based on that, once the owners, our
6 client, had knowledge that Mr. Bernard Renard was
7 actually still intending to move forward, we had --
8 there was no communication for three years. There
9 was no knowledge that he was going to continue down
10 the course of pursuing this board order. Rather, he
11 could have built as a matter of right, abandoned the
12 project. Until we actually were aware of that in
13 April, had communications been asked the Zoning
14 Administrator to enforce the regulations did an error
15 occur, which we are now asking this Board to step
16 into the shoes and resolve.

17 We would ask that this Board grant the appeal
18 and permit the property to -- the property should
19 immediately -- the permit should immediately expire,
20 not be renewed. The owner has every right to return
21 to the Board and seek a new zoning relief. There
22 have been cases in which property owners come back
23 and seek relief from this Board.

24 Given the fact that this property has been so
25 delayed, any additional delay would not have any

1 prejudice, but rather would lead to the intended
2 purpose of providing notice to the community, notice
3 to the 200-footers, including as I said, individuals
4 who have changed. There has been 40 percent of
5 change in all the 200-footers for this property. And
6 then also comply with some of the new regulations.
7 This property provides a two-story and mezzanine,
8 which is no longer permitted under the zoning regs.
9 The property provides penthouse regulations which may
10 not be compliant with the new penthouse setbacks.
11 There is a reason, a policy reason why we have these
12 timelines put in place, because if there are not
13 these timelines put in place, then an owner can sit
14 and sit on a stale application where there is no
15 ability for the new regulations to then take effect.
16 And that is clearly not the intention when the
17 regulation specifically states that under 3130, this
18 is a section that deals with the validity of a board
19 order and that you must start construction within six
20 months of that section.

21 At this point in time I will conclude with
22 three minutes. I'll ask for additional time to rebut
23 additional points that are brought up by the other
24 members.

25 CHAIRMAN HILL: Okay, great. Mr. Tondro,

1 would you like to have your 20 minutes?

2 MR. TONDRO: Yes. I'll try to make it
3 shorter if I can do. Thank you.

4 CHAIRMAN HILL: Efficient is good. Clear is
5 nice. Thanks.

6 MR. TONDRO: I agree. Yes, I'll try.

7 As to the merits, I think again the position
8 of DCRA is as stated in the brief that the
9 requirement of 3130.1, which is to have a -- and I'll
10 just read that again. I just want to call your
11 attention to the specifics there, that no order
12 authorizing the erection or alteration of a structure
13 shall be valid for a period longer than two years,
14 unless within such period the plans for the erection
15 alteration are filed for the purposes of securing a
16 building permit.

17 And the emphasis there on the word, "a
18 building permit." In this particular case, this is
19 similar to what's required to, as it were, vest a PUD
20 order as well. In both cases the Zoning
21 Administrator's practice has been that it's a single
22 permit is what's required in order to do that, as
23 long as it's something that has a relationship to the
24 work that's authorized by the Board or the
25 Commission. That has, and I guess again I'll let the

1 Zoning Administrator speak directly to that, but that
2 has been a longstanding practice that that has
3 included a demolition permit. To the extent the
4 demolition is related to the project that's going to
5 be done.

6 In this particular case, the relief that was
7 requested included the subdivision. It was --
8 overall it was for a subdivision of one lot into two
9 lots, as well as the addition. And as part of that
10 requirement they're also required, as I stated in the
11 brief, it required the removal of a shed and part of
12 a garage that were already there.

13 And so I, in the statement, the prehearing
14 statement, pointed out the two permits that DCRA
15 believes vested the permit holder in this case,
16 vested the Board's order and satisfied 3130. And
17 those are permit number D1100170. D, for demolition.
18 Okay? Demo rear shed. But then also, and again,
19 remember that this is for what was at the time of the
20 board application, a subdivision of a larger partial
21 into two, into lots 68 and 69. So, that the
22 demolition permit that I just cited was for 69, which
23 is 521 11 Street. That's what the subject of the
24 appeal is.

25 The adjacent property also, and by the permit

1 holder, was allowed by that Board order that allowed
2 that subdivision, that's lot 69. And at the same
3 time as he applied for the demolition permit on lot
4 69, he applied on lot 68 for another permit to do the
5 partial demolition of the rear garage. Again, both
6 in direct compliance with the Board order. These
7 were the requirements for the board in order to grant
8 the lot occupancy relief that was requested was that
9 they had to remove, demolish some of the structures.

10 And that one is building permit. And again,
11 I emphasize the word, building permit. B, as in boy,
12 1104462. Both of those were issued on March the 18th
13 of 2011. And DCRA believes that those two permits,
14 the work was also done within the six months. Those
15 were completed. That those then vested the project
16 and met 3130.1. Therefore, we don't even need to get
17 to the issue of what's called the, what I refer to as
18 the original permit that is being -- that is the
19 subject of the overall alteration raised by the
20 appellant.

21 So, that -- we'll rest on that. We believe,
22 therefore that that establishes the compliance with
23 3130.1, and because there was work that was undergone
24 in order to satisfy the Board's requirements and that
25 as a result that was taken care of.

1 I will refer to, by the building permit, the
2 demolition permit, as well as the subdivision, those
3 were all done in 2011. Long before we're dealing
4 with any of these other issues.

5 We're going to refer to the Zoning
6 Administrator if I may, just to briefly address the
7 issue of a demolition permit vesting. Thank you.

8 MR. LeGRANT: Right. So, as Mr. Tondro
9 noted, demolition permit is a type of building
10 permit. And I'll distinguish it from a raze permit.
11 A raze permit is a separate permit and category, and
12 a raze is a complete removal of a building, or a
13 principle building on a lot.

14 But, here these garages and sheds which a
15 demolition permit was applied for, were relevant,
16 integral to the lot occupancy question that was
17 addressed by the Board in the board order. You have
18 to get -- the Board is granting so much lot
19 occupancy, you've got those approved plans show that
20 these preexisting structures were removed, then they
21 must be removed with a building permit in order to
22 set the stage for the construction that would be
23 occurred for the addition.

24 So, I don't think there's much more to say
25 about that, other than these permits were applied for

1 within the time frame, and as was prescribed.

2 CHAIRMAN HILL: Okay. Mr. Renard, so as the
3 building owner, you have an opportunity to speak.
4 I'm trying to think how I'd like to do this. I
5 suppose I'll let you speak and then the applicant can
6 respond to both of you at the same time, I suppose,
7 if that works out all right.

8 So, please go ahead and begin. Yeah, you
9 need to turn that green light on, thank you.

10 MR. RENARD: The scope of the work
11 discussion, there's this two permit, the demolition
12 and the building permit, which are part of the work
13 that was required to meet the lot occupancy, is shown
14 in exhibit of the second memorandum. They're a
15 photograph that shows that we created a parking spot
16 which basically creating -- was the creation of a
17 parking space. And then the reduction of the garage,
18 which was to reduce the --

19 CHAIRMAN HILL: Just give me one second.
20 Just let me get to which exhibit you're on.

21 MR. RENARD: We're talking about the exhibit,
22 second memorandum, Tab A photographs.

23 CHAIRMAN HILL: You don't know which exhibit
24 number it is, though, do you?

25 MS. MOLDENHAUER: Exhibit 31.

1 CHAIRMAN HILL: Thank you.

2 MS. BUTANI-D'SOUZA: Which page?

3 CHAIRMAN HILL: Okay. Go ahead. Thank you.

4 MR. RENARD: Yeah. So, this photograph show
5 that we had to cut off a section of about 10 feet or
6 12 feet of the garage at the 523 11th Street. And
7 then to remove the planters, and then create the
8 parking space. And all this work is shown on the
9 drawings which is Tab B.

10 CHAIRMAN HILL: And when did all this work
11 happen?

12 MR. RENARD: Huh?

13 CHAIRMAN HILL: When did all this work
14 happen?

15 MR. RENARD: Oh, this work happened at the
16 time of the -- before the extension of the last order
17 B. And the -- I would like to show Exhibit 7B, which
18 is a fax to which I sent to Mr. Richard Nero, which
19 was the acting director then. Those permits.
20 Exhibit 7 of my --

21 CHAIRMAN HILL: Okay. I see where you're at.
22 Thank you.

23 MR. RENARD: Yeah. So, basically if I may
24 read from my statement, I have page 11 and 12 of this
25 statement, a very detailed explanation on how I

1 relied on this permit to have executed that time of
2 vested -- vested the order.

3 Precisely in reason of -- because I sent them
4 to Mr. Richard Nero, and then the Board did not
5 communicate with me to say that this was not
6 sufficient to vest the order. In fact there -- I
7 took the permit on the advice of Mr. Richard Nero,
8 precisely to vest the order and to satisfy those
9 requirement under 3130.3. And that was on his
10 advice. I was acting pro se. I pro se processed the
11 application by myself. And that was the advice that
12 I received to make sure that the order had vested.

13 CHAIRMAN HILL: Who did you receive that
14 advice from, again? I'm sorry, can you clarify?

15 MR. RENARD: Huh?

16 CHAIRMAN HILL: Who did you receive that
17 advice from?

18 MR. RENARD: Mr. Richard Nero. It was --
19 this is -- the fax was -- it was then --

20 CHAIRMAN HILL: Oh, he retired.

21 MR. RENARD: Is retired now. Yes. Yes.

22 CHAIRMAN HILL: Okay. Okay.

23 MR. RENARD: Yes.

24 CHAIRMAN HILL: Thank you.

25 MR. RENARD: He was basically --

1 CHAIRMAN HILL: It was a long time ago.

2 MS. MOLDENHAUER: Sarah Barden.

3 CHAIRMAN HILL: Right. Oh.

4 MS. MOLDENHAUER: Sarah Barden (simultaneous
5 speech).

6 CHAIRMAN HILL: Right. Got it. I got it.
7 Thank you so much.

8 MR. RENARD: Yes. And so, by the fact of
9 sending them and upon his advice and conversation
10 that we see, to me as a property owner and not as an
11 attorney, I believed that the order was executed
12 because I did that on his advice, and therefore after
13 that I saw that there was nothing really necessary to
14 do; that the order was executed.

15 And I would say that precisely the
16 requirement to, under 3130.3, to build, was not
17 included in the order because the order before did
18 not have any requirement. But the requirement was
19 not included in the last order. And so, therefore,
20 since that requirement was not included in the order,
21 I believe that there was no requirement to do any
22 more construction within that six months delay.

23 So, I set a case, number 0643A, in which the
24 Zoning Commission specifically required compliance to
25 11-DCMR 30.2, and 3130.3, to extend the validity of

1 the order. In that case the Zoning Commission
2 specifically required and added to the order, those
3 requirement under 3130.3. But in that case the order
4 did not include that provision. And since that
5 already done this work and secured this permit, I was
6 convinced that the order had been executed and
7 vested.

8 So, I would say that, not being familiar with
9 the complication of the regulation, if the BZA at
10 that time had told me, your order is not vested,
11 which I did not know what it meant then, I would have
12 of course been aware of that provision and I would
13 have complied with six months. I would not risk all
14 my investment by not complying to the regulation. I
15 was in good faith and I was thanking Mr. Nero for
16 helping me to proceed the application.

17 And so, this provision was not included in my
18 order, and I was not notified that the work that I
19 did was not sufficient to execute the order or to
20 vest the order. So, until now I'm -- and I hope that
21 I'm right because I -- for all this reason, I
22 believed that the order had been executed and there
23 was no specific requirement to do the work.

24 MS. BUTANI-D'SOUZA: Mr. Renard, I just have
25 a couple of questions for you, just so I can

1 understand the timeline here.

2 So, there are some pictures in your exhibit
3 that you submitted that show framing, plywood floor,
4 and roof beam. Basically, they show a shell of a
5 space where you have some framing that's been done.
6 When was that work done?

7 MR. RENARD: Most of the work and the -- on
8 the remaining section of the house, and part of the
9 addition has been done in 2016 from January, before I
10 was doing preliminary work, some tests, some other
11 stuff. But, you know, the project was active. I had
12 invested so much effort, time, and money into the
13 project. I was not going to let the project be
14 destroyed by a violation of the law because I
15 complied to all the regulations that I understood,
16 and which were required in the order.

17 MS. BUTANI-D'SOUZA: Okay.

18 MR. RENARD: I took the permit just before
19 the extension, because I was aware of that
20 requirement.

21 MS. BUTANI-D'SOUZA: Okay. So, you secured
22 the demolition permit, which in your view tolled the
23 expiration of the BZA order. You demolished the
24 garage, and then you continued doing other work on
25 the property, or did it -- did you stop doing work?

1 MR. RENARD: No, at that time I was applying
2 for a second application. So, at that time no more
3 work could be done because the purpose of the
4 application for a second application was that during
5 the recession I could not obtain financing and the
6 market condition was so bad that basically the board
7 granted me an extension because of the difficulty of
8 building at that time, or developing.

9 And so, I did all the work which was
10 required. I sent it to Mr. Nero, and I believed and
11 I understood that the order was executed. There was
12 no other requirement except that to apply for
13 building permit.

14 MS. BUTANI-D'SOUZA: Okay. So, you began
15 work under the relief that was granted. You split up
16 your permitting to go faster, I guess. You get the
17 demolition permit first and then you apply later for
18 the building permit? Or is --

19 MR. RENARD: Sorry.

20 MS. BUTANI-D'SOUZA: I guess what I'm trying
21 to understand is, there is a second set of permits
22 that you applied for.

23 MR. RENARD: Yeah. Uh-huh. Uh-huh.

24 MS. BUTANI-D'SOUZA: So, that's --

25 MR. RENARD: Yes.

1 MS. BUTANI-D'SOUZA: So, you began
2 construction under the first set of permits. You
3 completed that and then the second set of permits
4 were applied for. And when did you start that
5 construction?

6 MR. RENARD: For the demolition done in 2011
7 to extend the order. There was no design, no
8 drawing. There were just the drawing, which was
9 submitted to the board. And after that, before the
10 expiration of the last order, B, then I applied for
11 the building permit. I satisfied the order. There
12 was no other requirement.

13 MS. BUTANI-D'SOUZA: Okay. So, then you
14 applied for the building permit in time, before --

15 MR. RENARD: Which took a year and a half
16 because --

17 MS. BUTANI-D'SOUZA: Okay.

18 MR. RENARD: -- permit were lost in the file
19 room and there was revisions and complication. It's
20 a structurally complicated project so they took a
21 long time for review and --

22 MS. BUTANI-D'SOUZA: Okay. So, you received
23 the building permit after 15 months and then you, did
24 you begin work right away or what then happened?

25 MR. RENARD: No. At this point, in 2014, and

1 that I have introduced this with this memorandum, I
2 was extremely sick.

3 MS. BUTANI-D'SOUZA: Uh-huh.

4 MR. RENARD: And then the medical chronology
5 that I've shown here is the real reason why I could
6 not start the project. I develop a -- excuse me. I
7 develop a very serious case of rheumatoid arthritis
8 and I was completely impaired. I was in bed. I was
9 on the pain killer and I was in awful condition. And
10 nobody could find out what it was. I went through
11 four orthopedic surgeon. I had three MRI --

12 CHAIRMAN HILL: Okay. That's okay, Mr. -- I
13 --

14 MR. RENARD: I know. Sorry.

15 CHAIRMAN HILL: That's okay. You don't have
16 to go into that much detail, but I do see what you --

17 MR. RENARD: Yeah. But that's what the
18 reason.

19 CHAIRMAN HILL: -- wrote here. But thank
20 you.

21 MR. RENARD: That was the reason why I could
22 not start exactly the project at that time. And in
23 the timeline of my --

24 MS. BUTANI-D'SOUZA: Okay. So, then you
25 appealed and you -- that's when you extended the

1 permit.

2 MR. RENARD: Huh?

3 MS. BUTANI-D'SOUZA: That's when you appealed
4 -- that's when you applied to have the permit
5 extended.

6 MR. RENARD: That's when I had the permit
7 extended, yes.

8 MS. BUTANI-D'SOUZA: Okay.

9 MR. RENARD: Around that time, yes. Uh-huh.

10 MS. BUTANI-D'SOUZA: I don't have any more
11 questions.

12 CHAIRMAN HILL: Okay. Just real quick from
13 me. I mean, so is all your financing in place now?

14 MR. RENARD: Oh, yeah. Indeed. Yes.

15 CHAIRMAN HILL: You're ready to go? You're
16 ready to work on all this?

17 MR. RENARD: The reason I stop is that the
18 appellant had some obstacle on the party wall,
19 including a gutter that they put inside without
20 permit in my property, which I ask them to remove.
21 And then there's a railing on top of the party wall.

22 CHAIRMAN HILL: Yeah, I saw the picture of
23 the gutter and the railing. I mean, I was a little
24 confused as to how that gutter was actually somehow
25 an issue for you. It doesn't seem like it would be

1 an issue whatsoever with you.

2 MR. RENARD: Well, you know, knowing them
3 they could have sued me for destruction of property.
4 That's why we didn't want to do it.

5 CHAIRMAN HILL: Okay.

6 MR. RENARD: It's from their property. I
7 mean, it's this section I could have removed, but I
8 did not want to (garbled speech) of like the railing,
9 which is the --

10 CHAIRMAN HILL: Okay. But, so you're ready
11 to move forward now? I'm just curious, you're ready
12 to move forward now.

13 MR. RENARD: I am.

14 CHAIRMAN HILL: You don't need to do this --
15 the gutter and the railing issue is not of concern
16 now, correct?

17 MR. RENARD: No, I hope it will not with
18 them. I hope they will remove it or give me
19 permission to remove it.

20 CHAIRMAN HILL: Mr. Tondro, you have
21 something to say?

22 MR. TONDRO: If I can just say, the building
23 permit itself was extended but under the construction
24 codes, I know that's not relevant here per se, but
25 there is a limited number of extensions allowed under

1 a building permit. So, if that work does not get
2 done within that time period then that permit will
3 not be extended any more.

4 CHAIRMAN HILL: Okay. All right.

5 MR. TONDRO: I believe it's four --

6 MR. RENARD: We can limit now.

7 CHAIRMAN HILL: Okay, thanks. Okay. That's
8 alright. Do you have anything else, Mr. Renard?

9 MR. RENARD: Well, I have a lot of things
10 that I've explained in this memorandum which -- in
11 which I basically have filed these two motions. One
12 of them is that I don't believe that they are an
13 aggrieved party because they do not suffer any
14 damages as a direct consequences of the applicant, or
15 non-application of this law. This is not a
16 regulation that grant zoning right or affect zoning
17 right. It's a zoning policy type of regulation,
18 basically by which the BZA and the Zoning
19 Administrator have a policy to basically contain the
20 -- but the appellant himself is not a party to this
21 case. They don't have any -- they're not affected in
22 any way. Not by being an adjacent property.

23 If I was building above the FAR, then they
24 will have an argument because I will affect their
25 right, their zoning right. But this zoning

1 regulation that I start six months, or six months and
2 one day, I will be in violation, but they will not be
3 affected. If I start six months or a year after, it
4 does not affect --

5 CHAIRMAN HILL: Okay. I understand. I
6 understand.

7 MR. RENARD: -- anything. (Garbled speech)
8 the zoning right, the similar -- the project was
9 approved after a long process, and the appellant was
10 the neighbor, and I was in good relationship with one
11 of the partner. And I went over and over and
12 explained them the project. I showed the drawing. I
13 wanted to do that because I did not want to have to
14 redesign the project.

15 So, I went out of my way to basically present
16 the project, did you have any objection, this and
17 that. He was buddy-buddy with me, the Jim (garbled
18 speech). And so, I relied on Jim (garbled speech) to
19 basically continue the project, to design.

20 After that we send them the building permit.
21 Before filing for a building permit we have to send
22 by registered mail, all the permits. They had all
23 the opportunity. They were next door neighbor. They
24 had every opportunity to go to the BZA to oppose the
25 project. They had all opportunity to, during the ANC

1 meeting, during my communication with them, during
2 the application for a building permit. They had all
3 the opportunity to modify the project if it was not
4 to their liking.

5 Now, they use the potential violation of the
6 law to their own benefit, to their own enrichment.
7 And I want to point out --

8 CHAIRMAN HILL: Well, I don't know. Just one
9 second. I don't know whether it's to their own
10 enrichment or to their own benefit. They're
11 presenting a case. And so, you know, they're doing
12 what they can. They are your next door neighbor.

13 MR. RENARD: Show that the intent is not for
14 the public good. They should not be the enforcer of
15 the law. I would say that if the Zoning
16 Administrator or if the BZA had told me, you are in
17 violation of the regulation, then I would understand.
18 But in this case, they are not aggrieved, and I show
19 that in detail in my motion here to dismiss on the
20 basis that they don't have standing.

21 They are not aggrieved in any way. There's
22 no change in any right, in the zoning stuff. All the
23 complaint about the mezzanine stuff should have been
24 addressed during the hearing at the BZA to which they
25 did not want to participate. The next door building,

1 they knew about my project in detail except that they
2 were negligent. They did not care.

3 CHAIRMAN HILL: Well, I don't know whether
4 they were negligent or not, but I understand what
5 you're saying. I understand what you're saying. I
6 hear everything you have to say.

7 Okay. Are you done? I have all the
8 paperwork as well, and now we're going to have
9 questions from the attorney for the appellant here.
10 Okay. Thank you.

11 Ms. Moldenhauer, do you have questions for
12 either the property owner or Mr. Tondro?

13 MS. MOLDENHAUER: So, to the property owner,
14 to this day have you done any work on the addition,
15 which is actually the 66 percent lot occupancy, at
16 521?

17 MR. RENARD: Indeed. When you start a
18 project --

19 MS. MOLDENHAUER: I think it's yes, have you
20 laid a single piece of wood, have you done any
21 foundation work?

22 MR. RENARD: Yes.

23 MS. MOLDENHAUER: What have you done?

24 MR. RENARD: I did the wall between the main
25 structure and the addition, which is basically the

1 wall that connect the old section to the addition.
2 And this is part of the addition. I redid the
3 foundation of the wall, and then all the framing to
4 level of story.

5 And then I have a plumbing permit by which I
6 have an excavation, a plumbing excavation which is
7 about 10 feet long by five feet deep, which is
8 getting damaged now because of the delay of the
9 staff. I was ready to go.

10 MS. MOLDENHAUER: You're talking about the
11 wall between the existing structure and the addition.
12 But the existing structure is only 20 feet deep.
13 There is a 44-foot addition which is more than double
14 the existing structure, which is actually, to Mr.
15 Tondro's point, what is the relationship to the
16 relief approved? Have you done any work on the 44
17 feet which goes to the 66 percent lot occupancy?

18 MR. RENARD: Well, as I said, I have done
19 this petition which has come to the addition and to
20 the main structure, and I have, inside the addition,
21 an excavation, a plumbing excavation which is as I
22 said, 10 feet long by five feet wide, and five feet
23 deep, which is all the plumbing cut connecting the
24 plumbing for the new addition.

25 So, when I build I have got to start from the

1 beginning, not from the end. And so all the work had
2 to be started from the remaining structure of the
3 building before building the addition. I'm sorry,
4 but that's --

5 CHAIRMAN HILL: Okay. Ms. Moldenhauer,
6 that's okay. His answer is yes. Okay?

7 MS. MOLDENHAUER: I know.

8 CHAIRMAN HILL: And so, right. Okay.

9 MS. MOLDENHAUER: So, my question is a little
10 -- using Exhibit 22B-36, I've drawn a line. This is
11 -- is this the existing structure?

12 MR. RENARD: Yes.

13 MS. MOLDENHAUER: Okay. Past the line that I
14 drew here --

15 CHAIRMAN HILL: Whoa, slow down, slow down.

16 MS. MOLDENHAUER: Sorry.

17 CHAIRMAN HILL: Where are you?

18 MS. MOLDENHAUER: I'm on 22B.

19 CHAIRMAN HILL: Oh, okay.

20 MS. MOLDENHAUER: Exhibit 36.

21 CHAIRMAN HILL: Okay.

22 MS. MOLDENHAUER: Page 36.

23 CHAIRMAN HILL: Okay.

24 MS. MOLDENHAUER: The plans.

25 CHAIRMAN HILL: Okay. I'm with you.

1 MS. MOLDENHAUER: So --

2 CHAIRMAN HILL: Let's all relax, by the way.
3 Okay. Okay.

4 MS. MOLDENHAUER: I'm just -- so, this is the
5 existing structure. I drew a black line here. Can
6 you -- have you done any of the work for the
7 addition, past that line?

8 MR. RENARD: Past that line, I have done this
9 line. I've done the line.

10 MS. MOLDENHAUER: But, so you have not done
11 anything to build the rear addition?

12 MR. RENARD: No, because as I said, there was
13 obstacle by the appellant they didn't want to remove.
14 That was my problem. I have all the contractor lined
15 up to build the addition.

16 CHAIRMAN HILL: Okay. That's fine. That's
17 all right. Okay. I got it.

18 MS. MOLDENHAUER: Have you got the
19 contractors lined up pursuant to your e-mails in May
20 of 2016, is when you confirmed with your contractors
21 and got a proposal?

22 MR. RENARD: Yeah, I received the proposal
23 but before receiving the proposal it had been months
24 before which I had been dealing with the
25 subcontractors. So, the contractor didn't want to

1 start with this -- with the problems on the party
2 wall.

3 MS. MOLDENHAUER: And, in your filing you
4 even asked this Board for more time to continue the
5 construction or to complete or start the
6 construction?

7 MR. RENARD: No, no, this is not a -- as a
8 forced part in this statement and in my previous
9 statement in the second, so I included a part by
10 which I would ask, respectfully ask the Board, to
11 grant an extension of time if it was deemed necessary
12 because in fact I believe that I may not need it
13 because the order is valid and I have valid building
14 permit.

15 But as a precaution I sought that I would ask
16 the Board to grant me additional time if the Board
17 deem it was necessary because of this legal
18 confusion.

19 CHAIRMAN HILL: Okay.

20 MR. RENARD: But, I'm not asking for any more
21 time. I basically --

22 CHAIRMAN HILL: Okay. It's all right. It's
23 all right. It's okay.

24 MR. RENARD: -- (simultaneous speech) violate
25 on the building permit --

1 CHAIRMAN HILL: Ms. Moldenhauer.

2 MS. MOLDENHAUER: Did you have tenants in the
3 building up until December of 2015?

4 MR. RENARD: Until December 2015. That's the
5 time I was extremely sick; sick for over a year with
6 two major illness. And so what I did was to review
7 the permit. I never intended to let all the work
8 that I had done to go back. So I thought at that
9 time that the order was valid without any specific
10 requirement to comply to that 3130.3. And being so
11 sick, I just could not start a demanding project like
12 that. I'm not going to say that I started.

13 What I did, I reviewed the drawings. Those
14 drawings are -- I did some construction --

15 CHAIRMAN HILL: Thanks. It's okay.

16 MS. MOLDENHAUER: The question is answered.

17 CHAIRMAN HILL: It's okay. It's okay. So,
18 you did have tenants in the building at that time.

19 MR. RENARD: Yes, I --

20 CHAIRMAN HILL: That's okay.

21 MR. RENARD: Yes, because I could not start
22 the project.

23 CHAIRMAN HILL: Mr. Renard, she knows the
24 answers to the questions. So, you know, you can just
25 go ahead and it's --

1 MR. RENARD: [Speaking off mic.]

2 CHAIRMAN HILL: Yeah. Okay. All right. Ms.
3 Moldenhauer, are you done with the --

4 MS. MOLDENHAUER: No other questions.

5 CHAIRMAN HILL: Okay. Would you like to move
6 on to Mr. Tondro?

7 MS. MOLDENHAUER: I have no questions of Mr.
8 Tondro or the Zoning Administrator.

9 CHAIRMAN HILL: Okay. Do we have any
10 questions here as the Board for anyone else at this
11 point? Okay.

12 Let's see. So, as the appellant, would you
13 like to sum up before we move to -- I guess we're
14 going to move to, I guess we're going to move to
15 deliberations or figure out what we're going to do
16 next.

17 MS. MOLDENHAUER: So, just to respond to Mr.
18 Tondro's comments in regards to 3130.1 and the need
19 to start, it says alterations or erection. And
20 that's one of the reasons why I asked Mr. Renard
21 those specific questions. It does not go to
22 demolition. Section 3130 specifically says,
23 alterations or erections and as Mr. Tondro said, it
24 has to relate to the work of the zoning relief
25 granted. In this situation 66 percent lot occupancy

1 was granted 10 years ago. That 66 percent lot
2 occupancy specifically does impact and aggrieve the
3 abutting property owner, and is something that even
4 the ANC should get great weight. They indicated,
5 they are concerned about this as well and that they
6 would like to see this case, you know, reprocessed.

7 That work has not started. Mr. Bernard sat
8 here right now and admitted that there is no specific
9 erection or construction of the area past the
10 existing structure which actually is -- goes to that
11 66 percent lot occupancy. It is a situation where
12 we're not talking about, you know, a small issue.
13 We're talking about, the existing structure is only
14 20 feet deep. The addition is 44 feet deep.

15 So, there is no opportunity for the abutting
16 property owner to know that he was pursuing the
17 construction of this work, because no work had
18 started. And even to this day no work has even begun
19 on that exterior portion. He has not laid
20 foundation, he has not dug the ground. He hasn't
21 even thrown down a piece of wood to frame out where
22 it is. And that's very clear from the pictures.

23 You can see the back blue tarp along the back
24 of the existing structure, and then the rest of the
25 property is open and is -- nothing is happening

1 there.

2 MS. BUTANI-D'SOUZA: So, you're arguing that
3 demolishing the back wall of the building doesn't
4 constitute construction work towards the addition?

5 MS. MOLDENHAUER: It has to say -- it says,
6 erection or, sorry, erection or construction. So, he
7 would have had to actually start --

8 MS. BUTANI-D'SOUZA: I believe it says
9 erection or alteration.

10 MS. MOLDENHAUER: -- doing work towards that
11 66 percent lot occupancy.

12 MS. BUTANI-D'SOUZA: So, you're saying that
13 taking out the back side of the house doesn't count
14 as an alteration towards the construction of an
15 addition? I'm just trying to understand what your
16 argument is.

17 MS. MOLDENHAUER: Even if it did, he didn't
18 do that until January 2016. He would have had to do
19 that in March 2015. No work was done between March
20 2015, the six-month time frame, and January of 2015.
21 He admitted -- he admits that right now on the
22 record. So, the real issue here is the law says, and
23 the regulations say, six weeks. Six months.

24 The six months would have had to be apparent
25 that he had done some work as of March. He even just

1 said that he had tenants in the building as of
2 December. So, it's clear that none of that work was
3 done.

4 So, I mean, we can go through. I was using
5 it more as a -- to the degree of violation that no
6 work is even started to this day. But, when we were
7 looking at the timeframe, we're really talking about
8 the fact that as of March 12th, 2015, 2015, he had
9 not done any of this work. And thus, he had not --
10 to the point, even if he had vested the order under
11 the initial building permit, he had violated Section
12 3130.3, which clearly required that he had started --
13 started work. Thus, that preliminary or that, you
14 know, preliminary vested order has then been violated
15 and the Zoning Administrator was not aware of that
16 until the abutting property owner, as a public
17 individual, informed them of that through e-mails.
18 And the appeal before us today is that the Zoning
19 Administrator did not say I have got new information
20 that is in front of me. I'm going to enforce this
21 regulation.

22 Mr. Tondro indicated that well, we should
23 have known that back in March of 2016. I'm sorry, in
24 2015. However, the rationale for their office to not
25 enforce this is that they don't enforce this and that

1 they're not going to enforce it. So, that -- the
2 rationale behind their decision to not enforce it,
3 would not have been any different. If we had even
4 filed it back then. We're not saying that we were
5 supposed to. We believe that the time in which the
6 aggrieved error that runs and tolls the timeframe.
7 But to say that we should have known and we should
8 have filed back then, it's counter-intuitive because
9 the Office of Zoning said, we're not going to enforce
10 it because we just, we don't believe that it's an
11 enforceable section.

12 We are here before the Board today to say
13 that if the office finds that there is a challenge,
14 which I think that there are sometimes, challenges in
15 enforcing zoning regulations. They should have gone
16 through the proper channels of informing Office of
17 Planning that there was a challenge, communicating
18 with the Zoning Commission to change the regulation,
19 but not just to simply, on its face say, we are not
20 going to enforce this, and that it's this Board's
21 duty to take the language as it is written. Here it
22 says six weeks -- six months. I keep on saying
23 weeks. I'm sorry. Six months. That would have been
24 March 2016.

25 It is clear that no work had started at that

1 time, and so thus, it's a question of asking for the
2 Board to affirm this appeal, determine that the
3 permit has then expired, cannot be renewed, and that
4 the owner has every right to come back before this
5 Board and ask for the same relief again. Thank you.

6 CHAIRMAN HILL: Okay. Thank you. All right.

7 MR. TONDRO: Chairman.

8 CHAIRMAN HILL: Oh, sorry.

9 MR. TONDRO: Yeah. Sorry. Chairman, I do
10 believe that under Subtitle Y, 507.1, that we as well
11 as the permit holder have also the right to give a
12 summary statement.

13 CHAIRMAN HILL: Okay. Then I'm going to let
14 the appellant go last, though.

15 MS. MOLDENHAUER: I think why --

16 CHAIRMAN HILL: That's not what the provision
17 says.

18 MS. MOLDENHAUER: Why are you referencing --

19 CHAIRMAN HILL: Oh, is that not what the --

20 MS. MOLDENHAUER: Are you referencing 2016
21 regs?

22 CHAIRMAN HILL: Where did I lose --

23 MR. TONDRO: I'm, yes, I'm referencing --

24 MS. MOLDENHAUER: So, and we're under --

25 CHAIRMAN HILL: Give me a second. Give me a

1 second. I'm not going to get your answer from either
2 one of you two, okay?

3 MR. TONDRO: Thank you.

4 CHAIRMAN HILL: Ms. Nagelhout, can you help
5 me out here? Who gets to go last?

6 MS. NAGELHOUT: Typically the appellant goes
7 last.

8 MR. TONDRO: Can I just call your attention
9 to Subtitle Y, 507.1? I believe it's E which
10 establishes the order and establish that the summary
11 shall be allowed. I believe 2016 is relevant for
12 procedural matters.

13 MR. HOOD: And you are absolutely correct.
14 Procedurally we are in ZR-16.

15 MR. TONDRO: Thank you, Chairman Hood. So,
16 it's G --

17 CHAIRMAN HILL: So, Chairman Hood, you're --

18 MR. HOOD: Procedurally we go by ZR-16, and I
19 think Mr. Tondro is exactly correct.

20 CHAIRMAN HILL: So, Mr. Tondro, you're going
21 to get the last word. Is that how this is going, Mr.
22 Hood, Chairman Hood?

23 MR. HOOD: You can go with what Ms. Nagelhout
24 says, but I know procedurally we go by ZR-16
25 regulations and whatever that says. That's what we

1 need to be going by, procedurally.

2 MS. NAGELHOUT: Did you say Section 507?

3 MR. TONDRO: Yes, Subtitle Y, 507.1G, closing
4 arguments in the order established in Subparagraphs B
5 through --

6 MS. MOLDENHAUER: We are fine with that if
7 the Board is fine with that.

8 MS. NAGELHOUT: Yes, if you go by E, then the
9 owner, it's the owner or the affected ANC, other
10 party permitted to intervene, is what it says in E.

11 CHAIRMAN HILL: So here on, moving forward,
12 they're going to get the last word.

13 MR. TONDRO: I believe it's the appellant and
14 then DCRA, and then if there's an affected party, the
15 permit holder, ANC. I believe, is that correct?

16 MS. NAGELHOUT: That sounds good, yes.

17 CHAIRMAN HILL: Okay. All right. Well, it
18 helps me out for later, so that's why. Mr. Tondro,
19 please, go ahead.

20 MR. TONDRO: Thank you. I promise I'll keep
21 this short. Again, just with reference to the
22 letter, or the e-mail that was sent that was
23 appealed, the reason we were referring to inequitable
24 was about the alleged violation of 3130.2, which is
25 the issue that the permit had to be issued within six

1 months as we've heard based on the prior appeal as
2 well. That is largely within the -- there is a lot
3 of back and forth and it's also responsibility
4 partially of DCRA. That's the reason we are
5 addressing that since appellant has dropped that
6 charge. We believe that that issue doesn't address
7 that.

8 In terms of timeliness, again, I would just
9 point out that if it is so clear that no work was
10 done at all in any way to the next door neighbor who
11 was in extended conversations and notices, and who
12 had an additional notice because of the permits and
13 the extensions that were posted, I'm struggling to
14 understand why they didn't have notice to say, hey
15 wait a second, they're supposed to have started work
16 within six months and they've failed to have done it.
17 And they sat on it for well over a year. So, I just
18 want to call your attention to that.

19 But finally, as I said, just to -- even if on
20 the merits itself apart from the timeliness issue,
21 that we believe that the permit was vested under the
22 demolition permit and the building permit, which were
23 issued back in 2011. That started it.

24 As regards to lot occupancy, the original
25 permit was filed and then it was extended. In 3130.3

1 this one allows, it requires that work start, but
2 then it allows that it can be completed under the
3 normal procedure of the permit itself. The exact is,
4 shall proceed to completion in accordance with its
5 terms, the terms of the permit. The permit was
6 valid. He extended three times. There's one more
7 extension, I believe, that's allowed under the
8 construction codes. And at that point that permit
9 ceases to exist.

10 So, I'll rest. So, in other words, I think
11 that addresses the issue that's raised by the
12 appellant about how do you finally get some close-
13 out? There is that close-out that's required to be
14 done at that time. You can only extend it four
15 times. Thank you.

16 CHAIRMAN HILL: Okay, Mr. Renard, would you
17 like to take 30 seconds just to sum up?

18 MR. RENARD: Well, most of the thing that I
19 wanted to say are in that statement. I just want to
20 say that I specifically started work on the addition,
21 the plumbing permit, plumbing excavation, the
22 petition, and I want to point out that that all these
23 complicated delays and so forth and time limits from
24 a builder point of view for homeowner point of view,
25 is highly complex.

1 But, basically when a building -- when a
2 project is started, you know, the process of
3 investing and constructing and so forth, is started.
4 And so, therefore there is a protection, I believe
5 under the roof regulations, 3112.2, which basically
6 prevent litigation when a construction project is
7 started, not to disrupt the construction project.

8 I stopped construction because of the
9 litigation, because I don't know. I'm at risk if I
10 lose, then all my investment is going. The project
11 is too advanced now to change anything. It will have
12 to be -- basically the whole thing will have to be
13 demolished.

14 And so, I believe that the under the roof
15 situation, that I took a specific permit for that
16 which was request by DCRA to basically secure the
17 roof of the property. So there should be only a 10-
18 day delay from that time period.

19 And I also believe as a compliment to this
20 motion is that the time limit for the appeal should
21 not be passed. The posting of the building permit in
22 January, when I started work there, at work they were
23 next door. So, it should not extend to the decision
24 of the Zoning Administrator, which is not subject to
25 any time limit. Somebody can file for a

1 determination or a complaint with the Zoning
2 Administrator any time. That means the appeal could
3 take any time, like me, at the end of the project.
4 And so I will be extremely damaged and aggrieved by -
5 - if the time limit for the appeal was based on the
6 decision of the Zoning Administrator, because they
7 could wait one day or a week before the end of the
8 permit, the construction project, and it will create
9 a complete disruption to the investment of the
10 builders.

11 CHAIRMAN HILL: Okay. Okay. Thank you. All
12 right. With that I'm going to close the hearing. Is
13 the Board ready to deliberate?

14 Okay. So, the first thing, I guess we could
15 deliberate on is the timeliness issue. I've had all
16 the fun talking all day today, if somebody would like
17 to begin you're welcome to.

18 Well, okay. I can start. I can start. So,
19 I mean, I'm kind of -- I was very interested in
20 hearing from the applicant or the appellant in terms
21 of their case, just so I could kind of get to whether
22 I thought again there was a timeliness issue.

23 I am actually of the opinion that it was, you
24 know, after reading through again, Mr. Tondro's
25 filings that, you know, that the appeal should have

1 come 60 days after the original permit, which was,
2 you know, September 12th, 2014, or showing of
3 exceptional circumstances. So, I'm not past that. I
4 can get to the point where discussing the merits of
5 the case, and I also have opinions about those. But
6 that's where I am with the timeliness thing.

7 I'm not making a motion. I want to hear what
8 somebody has to say.

9 MR. HOOD: I believe, Mr. Chairman, that
10 you're saying that you believe the assertion that it
11 was filed untimely, which DCRA is presenting. I
12 believe that's what you're saying. If that's what
13 you're -- if you and I are on the same page.

14 CHAIRMAN HILL: Yes, I'm sorry. That's what
15 I'm saying.

16 MR. HOOD: Okay. Well, I believe it was
17 filed --

18 CHAIRMAN HILL: I'm sorry.

19 MR. HOOD: I believe it's untimely also.

20 CHAIRMAN HILL: Okay.

21 MR. HOOD: From everything I've heard and
22 also in their pleadings I think that this was
23 untimely.

24 CHAIRMAN HILL: Okay. Anyone else --

25 MR. HOOD: So, if it was -- I probably would

1 have never got to the merits because I think from
2 what I've discussed, what we discussed in the first
3 part, I think it was untimely to begin with, so.

4 MR. HINKLE: I'm actually having difficulty
5 with this, Mr. Chairman. I think 3130.3 is a bit
6 ambiguous and I'm trying to figure out how -- without
7 taking the approach that the applicant has taken, how
8 it could ever be applied, because how would you know
9 that the Zoning Administrator is not taking an action
10 unless you ask, is my issue. And that's what the
11 applicant has done in this case, and got a response
12 that they're not taking an action and thus they've
13 filed the appeal.

14 CHAIRMAN HILL: Well, they did the
15 construction. They did the work and --

16 MS. BUTANI-D'SOUZA: I tend to agree with Mr.
17 Hinkle on this. I'm really struggling here because I
18 agree with the Zoning Administrator that you can't
19 have a situation where anyone can send an e-mail and
20 then essentially reopen an appeal window. But I'm
21 heartened by the fact that the Zoning Regulations
22 have changed, such that this time limit is no longer
23 going to be an issue. But I tend to agree that, how
24 do you -- how would one know that the Zoning
25 Administrator is not enforcing a time limit on this,

1 and then, you know, they start construction and then
2 the neighbor says, hey, hang on, I thought this
3 expired. And then they find out that it's not being
4 enforced. It doesn't seem reasonable.

5 But, and I assume we can deliberate on the
6 whole thing at this point. I tend to agree with the
7 Zoning Administrator on the merits. So even if it is
8 -- even if we were to find that this was timely
9 filed, I don't think that the Zoning Administrator
10 kind of erred on the merits of the case.

11 CHAIRMAN HILL: Okay. So, I need my fifth
12 person here at some point, but I don't have them yet.
13 So, I'm going to go ahead -- I guess we can get to
14 the -- you guys are split on the timeliness, or we're
15 split on the timeliness issue. And so --

16 [Discussion off the record.]

17 CHAIRMAN HILL: Okay. No, no, no. So --

18 [Discussion off the record.]

19 CHAIRMAN HILL: So, I'm going to make a
20 motion which is going to fail, but I'm going to make
21 a motion to dismiss. Or, I'm sorry, to approve the
22 motion that this is untimely.

23 MR. HOOD: I'll second it.

24 CHAIRMAN HILL: Motion been made and
25 seconded.

1 [Vote taken.]

2 CHAIRMAN HILL: Okay. So, that doesn't go
3 anywhere. So, would somebody else like to make a
4 motion?

5 MR. HINKLE: I'll make a motion to deny the
6 motion; make a motion to -- no, we want to deny the
7 motion to dismiss the appeal as untimely.

8 MS. BUTANI-D'SOUZA: Second.

9 CHAIRMAN HILL: Motion has been made and
10 seconded.

11 [Vote taken.]

12 CHAIRMAN HILL: So, that fails. So now, as I
13 understand from the Office of Attorney General we can
14 put this off and now get to the merits of the case,
15 correct? Okay. All right. So, the motion fails.

16 So, now we're on to the merits of the case.
17 So, would anyone -- well, you started already I
18 suppose. I also am of the opinion that I didn't
19 think that the appellant made their case in terms of
20 the, that the Zoning Administrator did anything
21 different in terms of the rational basis for a
22 decision, and I would be on the opinion to deny the
23 appeal. Does anyone have any other comments they'd
24 like to make?

25 MS. BUTANI-D'SOUZA: Did you make a motion?

1 CHAIRMAN HILL: No, I didn't make a motion.

2 MR. HINKLE: No, I'm still struggling with
3 this. The ambiguity of the regulation is really
4 bothering me. Again, I don't know how it would be
5 enforced except for the approach that the applicant
6 has taken, and I'm stuck there.

7 CHAIRMAN HILL: Okay. So, we'll see how this
8 goes. So, I'm going to make a motion to deny the
9 appeal, and I ask for a second.

10 MS. BUTANI-D'SOUZA: Second.

11 CHAIRMAN HILL: Motion has been made and
12 seconded.

13 [Vote taken.]

14 MR. HINKLE: I abstain.

15 CHAIRMAN HILL: Abstain.

16 MR. HINKLE: It's my last day. I can't.

17 CHAIRMAN HILL: The motion passes. Ms. Rose.

18 MS. ROSE: Let me first record --

19 CHAIRMAN HILL: Sure, the vote. Yeah, sure.

20 MS. ROSE: -- this one. Okay.

21 There is a motion to deny the appeal, so it's
22 three to zero to two, with Mr. Hill making the
23 motion, Ms. Butani seconding the motion, in agreement
24 is Mr. Hood. Mr. Hinkle is abstaining and one board
25 seat vacant. And so the appeal is denied.

1 CHAIRMAN HILL: Yes, that's correct.

2 MS. ROSE: Okay.

3 CHAIRMAN HILL: Okay? So, we're going to
4 take another break here, and I'm a little surprised
5 that it took six hours to get to a motion. All
6 right. Thank you.

7 We're going to take like five, five minutes.

8 [Recess from 2:11 p.m. to 2:28 p.m.]

9 CHAIRMAN HILL: All right, everybody. We're
10 going to get started again but I have a little bit of
11 an announcement to make first. I don't know who is
12 here, or hopefully they are. It's the last -- so,
13 we're in a bit of a bind because there has to be --
14 two of the board members have a hard stop at 5:30.
15 So, I'm not terribly sure we're going to get to the
16 last two cases. So, who is here with Application
17 19344? Can you raise your hand? They're gone? What
18 about 19358? Okay, great.

19 So, we're going to reschedule 19358. I do
20 apologize. I didn't realize this was going to go on
21 this long, but we're going to have to reschedule it
22 for another date. And so, Ms. Rose, I guess if we
23 can kind of go ahead and do that. And I suppose that
24 the other applicant is -- they weren't expecting to
25 go yet so I'll keep making announcement every time I

1 have an opportunity to break.

2 But 19344 is not here right now, correct?

3 UNIDENTIFIED SPEAKER: [Speaking off mic.]

4 CHAIRMAN HILL: The name of the case is 136 -
5 - oh, sorry. 1336 H Street Northeast, LLC. Okay.
6 All right.

7 So, if I can ask Ms. Rose there, and I guess
8 Chairman Hood is very kind enough to help us with the
9 scheduling.

10 MS. ROSE: We're just going to check the
11 schedule for appeals to kind of avoid those. So,
12 just a moment.

13 CHAIRMAN HILL: Okay, yeah. And we'll put
14 you guys at the front of the line, also, on the day
15 of the rescheduling.

16 [Pause.]

17 MS. ROSE: So, what's the number?

18 CHAIRMAN HILL: The first one was Application
19 19358 of Beard and Arts.

20 MS. ROSE: So, that one would be on December
21 21st.

22 CHAIRMAN HILL: December 21st?

23 MS. ROSE: Yes.

24 CHAIRMAN HILL: Okay. I appreciate it. Let
25 me take a look because the other thing is I want to

1 make sure you don't get bumped again. That's what
2 we're trying to be aware of.

3 MS. ROSE: There's an appeal on the 14th.

4 MR. HOOD: Actually, on the 21st, Mr.
5 Chairman, you don't have any appeals. So, straight
6 cases. That shouldn't be an issue.

7 MS. ROSE: On the 14th we have --

8 MR. HOOD: And I'll be here on the 21st.

9 MS. ROSE: -- three appeals.

10 CHAIRMAN HILL: Yeah. I think you're best
11 off with the 21st. So, we'll go ahead and move it to
12 the 21st. And then also we're also going to then
13 move 19344 of 1336 H Street also to that same day.
14 Okay?

15 Can you tell me the day again? It was the
16 21st of --

17 MS. ROSE: December 21st.

18 CHAIRMAN HILL: December 21st. So, if you're
19 here for 19344? Okay. Someone did come in. Okay.
20 So, we're going to move you guys to the 21st. No,
21 no, you don't need to cover it. And again, this
22 just, you know, we're on our second case, and so we
23 still have one more appeal. And so it's going on.
24 And we want to give everyone the time that is
25 necessary, and so -- okay.

1 So, with that I'm going to go ahead and -- I
2 guess, Ms. Rose, do you need another moment?

3 MS. ROSE: So the next case will be the --

4 CHAIRMAN HILL: One second. One second. Go
5 ahead, Ms. Rose.

6 MS. ROSE: The next case would be the appeal.

7 CHAIRMAN HILL: Okay.

8 MS. ROSE: Okay.

9 CHAIRMAN HILL: One second now. Now, you're
10 with 19358? Could you come forward and just identify
11 yourself?

12 If you could also just state your name for
13 the record.

14 MR. SMITH: Norman Smith.

15 CHAIRMAN HILL: Okay. Now, what did you have
16 to say, Mr. Smith.

17 MR. SMITH: Thank you. I just wanted to
18 confirm that we're rescheduled for the 21st of
19 December. But I also wanted to know what sequence we
20 would be in. Would we be the first, second, third?

21 CHAIRMAN HILL: Well, you would be the first.

22 MR. SMITH: First. Okay.

23 MS. ROSE: First hearing case.

24 CHAIRMAN HILL: Yeah. Yeah.

25 MS. ROSE: Their meeting, their decision

1 meeting is that day.

2 CHAIRMAN HILL: Okay. So, we'll do the
3 meeting cases first, which we have deliberations.
4 Those tend to go pretty quickly. And then you would
5 be the first up. And then the person that would
6 follow you is the other case that we're bumping,
7 which is 19344.

8 MR. SMITH: Okay.

9 CHAIRMAN HILL: Okay.

10 MR. SMITH: And the start date -- the start
11 time would be 9:30 as usual?

12 CHAIRMAN HILL: Yes.

13 MR. SMITH: Thank you.

14 CHAIRMAN HILL: Thank you. So, Ms. Rose, do
15 you need to announce that or call the case, please?

16 MS. ROSE: Case No. 19370, appeal of Historic
17 Mount Pleasant pursuant to 11-DCMR, Sections 3100 and
18 3101, from an August 3rd, 2016 decision by the Zoning
19 Administrator, DCRA, to issue Building Permit No.
20 B1605094, for a four-unit apartment house in the R-4
21 District at premises 1833 Lamont Street Northwest,
22 Square 2606, Lot 95.

23 CHAIRMAN HILL: Okay. Great. Thank you.
24 Good afternoon. If you could just please introduce
25 yourselves from left to right.

1 MR. HAYDEN: My name is Dustan Hayden. I
2 live at 1827 Lamont Street.

3 MS. ARMSTRONG: Fay Armstrong. I live at
4 1725 Lamont and I'm President of Historic Mount
5 Pleasant.

6 CHAIRMAN HILL: Can you tell me your address
7 again? I'm sorry.

8 MS. ARMSTRONG: I live at 1725 Lamont.

9 CHAIRMAN HILL: Okay. Great. Thank you.

10 MS. HEMMINGS: My name is Grace Hemmings.
11 I'm the owner.

12 CHAIRMAN HILL: Can you say your name again?
13 I'm sorry.

14 MS. HEMMINGS: Grace Hemmings.

15 CHAIRMAN HILL: Okay.

16 MS. HEMMINGS: I'm the owner. I live at 3319
17 16th Street Northwest.

18 MR. LeGRANT: Matthew LeGrant, Zoning
19 Administrator, DCRA.

20 MR. TONDRO: And Maximilian Tondro on behalf
21 of DCRA.

22 CHAIRMAN HILL: Okay. Great. So, Mr. Hayden
23 or Ms. Armstrong, you're going to speak on behalf?
24 Okay, that's great. How much time do you think you
25 need?

1 MS. ARMSTRONG: Not 60 minutes.

2 CHAIRMAN HILL: Okay.

3 MS. ARMSTRONG: I'll try to be as brief as
4 possible and --

5 CHAIRMAN HILL: Okay.

6 MS. ARMSTRONG: -- hopefully not even 20.

7 CHAIRMAN HILL: Okay. All right. Well,
8 we'll go ahead and put 20 on the clock there and see
9 what happens. Okay? But I mean, take your time.
10 You know, do what you need to do. Okay?

11 MS. ARMSTRONG: Thank you very much.

12 CHAIRMAN HILL: All right.

13 MS. ARMSTRONG: Chairman Hill and other
14 members of the Board, my name again is Fay Armstrong
15 and pleased to be before you today.

16 You have had, for several months, my -- the
17 application which has the documents laying out my
18 conversations, previous conversations with DCRA, and
19 the arguments. My initial arguments in this case, we
20 received late on Wednesday evening, the owner's
21 statement and we will try to respond to those new
22 issues today.

23 In comparison with the prior cases, prior
24 appeals, this I believe is a much simpler matter.
25 There's basic factual question as to whether this

1 particular house had four units or three units at the
2 time of sale in October 2015. And then what the
3 legal status was, given that there was no current
4 accepted certificate of occupancy.

5 The issue presented by this case, and I've
6 given my statement in advance to Ms. Rose, and maybe
7 you have it. The issue presented by this case is one
8 of potentially broad applicability within this Mount
9 Pleasant Historic District.

10 It is whether a single-family house that was
11 converted to rooming house or apartment use many
12 years ago, may rely today on a decades old
13 certificate of occupancy to completely renovate that
14 house as a multiunit dwelling with more units than
15 allowed under the 1958 conversion rules.

16 The row house at 1833 Lamont is situated on a
17 lot measuring 2,530 square feet, which would permit
18 no more than two units. However, under the
19 grandfathering provisions of the 1958 code an
20 existing nonconforming use of three, four, or even
21 more units could be allowed to continue if that use
22 had been maintained without interruption.

23 Historic Mount Pleasant, we believe, has
24 demonstrated that the use was interrupted; that at
25 the time of sale last year there were three units,

1 not four, and that the house lacked a valid
2 certificate of occupancy.

3 In the absence of a certificate of occupancy
4 for other than a single-family residence, we believe
5 that that is what the legal status of the house was
6 at the time of sale last year, with the understanding
7 that all houses zoned R-4 may in principle create a
8 second unit and receive a certificate of occupancy as
9 a flat.

10 Historically, most such second units in Mount
11 Pleasant have been basement apartments, but that is
12 not the only configuration that is allowed. The
13 applicant's claim that there were four units when
14 they bought the house in October, 2015. So support
15 this contention they offer photographs of each floor
16 as purchased. Let us focus on the second floor where
17 they say a kitchen was at the rear.

18 On page 8 of the architect's statement
19 submitted by the owners, we see a man with what
20 appears to be a cell phone, standing in the back room
21 on the left or west side of the house. The door out
22 to the second floor back porch is visible at the
23 rear. We also see the back wall of the room directly
24 in front, and the doors from that room to both the
25 back room and the main hallway. The caption reads,

1 "Existing second-floor unit, unit entry and kitchen
2 beyond."

3 However, there's no visible evidence of a
4 kitchen in that back room.

5 CHAIRMAN HILL: Ms. Armstrong, I'm sorry to
6 interrupt.

7 MS. ARMSTRONG: I'm sorry.

8 CHAIRMAN HILL: That's okay. I'm just trying
9 to find where you are in the exhibits. Do you happen
10 to know which exhibit number you're at?

11 MS. ARMSTRONG: Yes. It's a page that looks
12 like this. So, it's the owner's statement which
13 looks like this. There's a great -- a brief
14 statement by Ms. Hemmings on the first page.

15 CHAIRMAN HILL: Okay.

16 MS. ARMSTRONG: And attached to that is a
17 package from Studio Crowley Hall, which is a two-page
18 memorandum from the architect. And then followed by
19 a series of pages of photographs and then drawings.

20 CHAIRMAN HILL: Okay. Thank you. Because
21 just for --

22 MS. ARMSTRONG: Fair enough.

23 CHAIRMAN HILL: -- the record here, we have
24 the owner's statement in Exhibit 24, but the other
25 attachments didn't come through.

1 MS. ARMSTRONG: Oh, well -- the photographs?

2 MR. TONDRO: Yes. If I can address since I
3 was the one who submitted them? I did submit them to
4 the Office of Zoning, the official site, with a link
5 to a Dropbox account that had that all, and I believe
6 for whatever reason, I think there was just a
7 miscommunication that as a result they were not able
8 to be downloaded. And I subsequent resent them. And
9 I was speaking with Ms. Meyers about that. So, this
10 was all contained. It was sent out to all of the
11 parties last week, and it was supplied to BZA
12 submissions. Just for whatever reason it couldn't be
13 converted or uploaded.

14 CHAIRMAN HILL: Okay. Can you make sure the
15 record is updated later at some point?

16 ALLISON: We'll make sure this gets into the
17 record.

18 CHAIRMAN HILL: Okay. Okay. Great.

19 ALLISON: We were having technical issues
20 uploading the document.

21 CHAIRMAN HILL: Okay. I'm sorry to interrupt
22 you.

23 MS. ARMSTRONG: No, no, no. Not at all. I
24 mean, it's important that you --

25 CHAIRMAN HILL: Please, so go ahead. Right.

1 So that's great. So, all right, now --

2 MS. ARMSTRONG: -- that you can look at those
3 photographs.

4 CHAIRMAN HILL: Yeah.

5 MS. ARMSTRONG: Do you not have the
6 photographs?

7 CHAIRMAN HILL: You said something that --
8 no, we have the photographs now. You said there was
9 a man standing somewhere?

10 MS. ARMSTRONG: Here. Well, here is a --

11 CHAIRMAN HILL: Oh, I see him. Okay.

12 MS. ARMSTRONG: Okay?

13 CHAIRMAN HILL: Okay. I got you.

14 MS. ARMSTRONG: Okay. So, here he's there
15 standing. You can see the back porch door is what
16 you see diagonally behind him. And the claim is that
17 there's a kitchen beyond, and not just -- not stating
18 exactly beyond what point, but beyond towards the
19 back of the house.

20 So, I'm saying that there's no visible
21 evidence in the room that he's standing of anything
22 suggesting a kitchen, no cabinets, no marks on the
23 wall where a cabinet might have been, might have been
24 removed. So, we're going to go, instead, to the
25 multi -- so, I will continue with my statement.

1 If you go instead to the Multiple Listing
2 Service, MLS advertisement for the house with 30
3 photographs that are still available on the internet,
4 it is evident that the same back room is where the
5 prior owner had his office. And I've submitted with
6 my statement at the back, several of those
7 photographs from the MLS listing, the one that I'm
8 going to refer to now.

9 What is beyond the man in the photograph is
10 not a kitchen --

11 CHAIRMAN HILL: Which number is that?

12 MS. ARMSTRONG: -- but a wall separating that
13 back room, probably originally a small bedroom, from
14 the bathroom on the other side of the wall. It is
15 the bathroom with the old white subway tiles and the
16 shell motif along the top that's pictured in both the
17 architect's and the MLS photos. They match and I
18 have copies here which I hope you're able to follow.

19 MS. BUTANI-D'SOUZA: I'm sorry, ma'am. Are
20 the pictures that you're referencing from the listing
21 available in the record, or are they just online?

22 MS. ARMSTRONG: No, I've put it back -- Ms.
23 Rose, did you distribute my -- at the back of my, of
24 my statement that you have in printed copy --

25 MS. BUTANI-D'SOUZA: Oh, oh.

1 MS. ARMSTRONG: -- there are several, there
2 are four of those 30 photographs that I have printed
3 out and then put the MLS listing where those can be
4 accessed online.

5 MR. TONDRO: Pardon me.

6 MS. ARMSTRONG: I've identified them by the
7 number in that 30 series photograph series for the
8 MLS listing.

9 CHAIRMAN HILL: Okay. One second. Let's let
10 everybody get on the same page.

11 MR. TONDRO: Yeah, I just had a quick
12 question. Did you provide that to us as well?

13 MS. ARMSTRONG: I just gave her all of my
14 copies.

15 MR. TONDRO: Oh, okay. Okay.

16 CHAIRMAN HILL: One second. Ms. Rose, if you
17 can make sure then Mr. Tondro has a copy there? Just
18 one second.

19 MS. ARMSTRONG: This is easier than the last
20 case, though. Don't you think?

21 MS. BUTANI-D'SOUZA: We'll see.

22 CHAIRMAN HILL: I hope that's the case. I
23 do.

24 Okay. Continue, please. Thank you.

25 MS. ARMSTRONG: Okay. So, we've got the back

1 room and we've got the back hallway. So, I'm on page
2 2 of my statement now.

3 As Historic Mount Pleasant pointed out in its
4 initial statement, there were in fact only three
5 units in the house at the time of sale last year.
6 The MLS advertisement and photographs capture
7 situation at the point of sale. They tell a
8 different story than the purchasers and their agents
9 present today.

10 The architect's statement observes, and this
11 is on the second page of the architect's statement
12 that you have now in your hand, quote, "We appreciate
13 the noted listing agent description, but as
14 architects we do find listing information to be
15 incorrect or unresearched at times." Close quote.

16 However, this is not a mere statement on the
17 MLS listing, but a series of photographs. Their
18 photographs show the very room that the architect's
19 photos fail to show. Why would the MLS fail to
20 mention a fourth kitchen when such an asset and the
21 potential for keeping four units could have commanded
22 a higher sales price?

23 No, it is evident that the MLS listing was
24 accurate and the architect's later statement is not.

25 MS. BUTANI-D'SOUZA: Ms. Armstrong.

1 MS. ARMSTRONG: Yes.

2 MS. BUTANI-D'SOUZA: Which picture of the
3 ones that you've submitted to us is the one that
4 you're saying shows no kitchen?

5 MS. ARMSTRONG: The one that I was saying
6 shows the study where they're saying was the kitchen,
7 is this one here, shows the study. And then the
8 thing behind the wall, so if you look behind the man,
9 and you go to the back porch door, you can see in
10 this photograph, in the study photograph that right
11 behind the door there's a wall. And that wall is the
12 other side of this bathroom, with the shell motif and
13 the fixtures lined up against one wall which happens
14 to be the other party wall.

15 CHAIRMAN HILL: Okay. Thank you.

16 MS. ARMSTRONG: And there's also included
17 there, I just put in a picture of the back of the
18 house so that you could see how the porch is
19 arranged. And there's also a photograph of how the
20 center bedroom, which they say was a living room, was
21 shown during the sale.

22 So, those are the four. All of my
23 photographs relate to the second floor, where they
24 say there was a kitchen and we are challenging that
25 assertion.

1 In addition, I'm submitting today a statement
2 from a long-time neighbor friend and frequent visitor
3 to the house, during the prior owner's tenure, Mr.
4 Dunstan Hayden, who lives at 1827 Lamont. He has
5 reviewed the architect's submission and identified
6 what appear to be deliberate misrepresentations.

7 What is labeled a bedroom on the first floor
8 in both the photograph on page 6, and demolition plan
9 on page 15 of the architect's statement, was in fact
10 the parlor. What is labeled the unit entry and
11 kitchen beyond was in fact the prior owner's study,
12 as is clearly shown in the MLS photograph we've just
13 discussed here. And the bathroom beyond.

14 Mr. Hayden states, and I quote, and he's here
15 to read his entire statement or answer other
16 questions should you wish, "There was no kitchen in
17 that or any other location on the second floor."
18 Close quote.

19 The plans submitted label the rooms not as
20 they were previously used, or were shown for sale,
21 but as the new owners, excuse me, propose to use
22 them. The prior owners did remove the kitchen that
23 had previously been there, and confirmed that fact
24 recently to Mr. Hayden.

25 The fact is alleged by DCRA, in Mr. Tondro's

1 legal memorandum, that this action was not
2 accompanied by the required building permit, merely
3 demonstrates that these property owners, like so many
4 others throughout the District of Columbia, did work
5 on their homes without involving DCRA. It remains a
6 common practice today.

7 Removing a kitchen from what was originally a
8 bedroom, however, is a relatively simple task. You
9 unplug and discard the appliances, remove the
10 cabinets, and then cap off the plumbing and patch the
11 wall. The only part of this process today that would
12 require a building permit is removing the sink.

13 Thus, notwithstanding the lack of a building
14 permit, the prior owners did indeed remove the
15 kitchen on the second floor. The presence or absence
16 of a building permit for this work is not something
17 to be considered today. It is not an issue within
18 the jurisdiction of BZA.

19 Other evidence of the failure to maintain
20 separate units on the first and second floors may be
21 found in the architect's photograph of the first
22 floor bath which is obviously a half bath or powder
23 room with a stacked washer/dryer in a closet
24 alongside. Is this where the shower was in the long
25 ago first floor unit? That seems likely.

1 And on page A04 of HMP Exhibit 1, which were
2 architectural plans dated February 1st, 2006, the
3 architect has indicated that the partition between
4 the stairwell and the proposed second floor unit is
5 to be rebuilt in one hour fire rated material. This
6 would not be necessary if, as he alleges, the house
7 as purchased had indeed been configured as four legal
8 apartments.

9 For these reasons Historic Mount Pleasant
10 submits that the prior owners of 1833 Lamont clearly
11 did abandon any earlier fourth unit. At some point
12 after their purchase of the house in 1987 they
13 removed the second floor kitchen and presumably made
14 other changes over the years to make the first and
15 second floors more comfortable as their own living
16 quarters. Once the kitchen was removed they never
17 intended, and as a practical matter could not have
18 resumed use of the second floor as a separate
19 apartment without installing a new kitchen.

20 They lived in the house for 26 years and sold
21 it last year as a three-unit dwelling. They never
22 applied for and did not receive a certificate of
23 occupancy in their name, or take other steps legally
24 required to rent out the other two units, which they
25 did do.

1 What is the penalty for failing to maintain a
2 proper certificate of occupancy as an apartment house
3 in an R-4 zone if not to be deprived of the ability
4 to convey the right to continue that nonconforming
5 use to a subsequent buyer. Historic Mount Pleasant
6 submits that the correct result in this case is to
7 limit the new owners to two units as a matter of
8 right.

9 As zoning regulations have changed over the
10 years, the Zoning Commission has sought to balance
11 the rights of existing property owners against the
12 need for evolving rules on land use through the so-
13 called nonconformity provisions. These rules were
14 simplified and consolidated in 1983 through Zoning
15 Commission Order No. 403.

16 It was at that time that the provision on
17 discontinuance, now contained or contained in the '58
18 regs, and this case is under the '58 regs, that the -
19 - contained in Section 2005.1, was added.

20 Order No. 403, however, also contained
21 general guidance on nonconformities that is highly
22 relevant to this case. And I quote, in formulating
23 the changes to the regulations to be adopted by this
24 order, the Commission operated with two general
25 principles in mind.

1 One, the regulation should be consolidated,
2 simplified, clarified, and rationalized. And then
3 they go on more about that.

4 Two, the general public interest in
5 eventually affecting the withering away of
6 nonconforming uses, should be the major policy
7 control, with result that the regulations should
8 strictly and rigidly control nonconforming uses and
9 structures to the maximum extent possible under the
10 zoning act.

11 The Commission recognized that it is
12 precluded by the Zoning Act from forcing the
13 termination of nonconforming uses. The Commission
14 believes that the regulation should limit the rights
15 associated with nonconformity to make it less
16 desirable for such uses and structures to continue,
17 and to increase the likelihood that such uses and
18 structures will be voluntarily eliminated in the
19 future.

20 Historic Mount Pleasant submits that the
21 prior owners of 1833 Lamont voluntarily gave up one
22 of the four units in their house. It would be
23 contrary to the stated policy above of encouraging
24 the quote/unquote, withering away of nonconformities
25 to allow the new owners to recreate a fourth

1 apartment that did not exist when they purchased the
2 house last year.

3 As stated in Section 2003.4, when an existing
4 nonconforming use has been changed to a conforming or
5 more restrictive use, it shall not be changed back to
6 a nonconforming use or less restrictive use. Given
7 the strict rules governing the conversion of houses
8 zoned R-4 to apartment houses, rules that were
9 tightened just last year, a three-unit apartment
10 house must be considered a more restrictive use than
11 a four-unit one.

12 In closing, Historic Mount Pleasant urges the
13 Board of Zoning Adjustment to recognize the failure
14 of the prior owner to maintain the legal right to
15 convey the right to use 1833 Lamont as an apartment
16 house. That is, a dwelling with more than two units.

17 If you find, instead, that notwithstanding
18 the failure to comply with the various legal
19 requirements for maintaining an apartment house at
20 this address, the prior owners were able to convey
21 the right to continue that nonconforming use. We ask
22 that you limit the current renovation to the three
23 units that were in existence at the time of sale. To
24 do otherwise would be to authorize the recreation of
25 a less restrictive use after a more restrictive use

1 had been voluntarily adopted by the prior owner.

2 The Zoning Regulations aim to encourage the
3 elimination or restriction of nonconforming uses
4 whenever possible. The Board of Zoning Adjustment
5 should require that this be done in the present case.

6 Mount Pleasant is primarily a residential
7 district that is zoned R-4. A significant number of
8 its single-family houses were converted to apartment
9 use decades ago. Some are now being reclaimed as
10 single-family homes or two-unit flats. That is the
11 original use is being reclaimed with the
12 redevelopment of the property.

13 There is no reason that that cannot and
14 should not be the objective for this property as
15 well, particularly as it is undergoing a full
16 rehabilitation. That is the result that we feel is
17 most in the interest of the Mount Pleasant Historic
18 District and which we believe is mandated by the
19 Zoning Regulations. Thank you very much.

20 CHAIRMAN HILL: Thank you, Ms. Armstrong.
21 Mr. Hayden, you have a testify you'd like to make?

22 MR. HAYDEN: Yes. Thank you, Mr. Chairman.
23 My name is Dustan Hayden and I live three doors away
24 from the house in question.

25 I'm a retired teacher. I know nothing

1 whatever about zoning regulations, and I have no
2 desire to learn more. However, a couple of false
3 statements have been presented to the D.C. Government
4 and I would like to see them corrected. And I just
5 have a one-page statement.

6 For more than 20 years I have been friends
7 with Dwayne Shank and Ellen Kennel, former co-owners
8 at 1833 Lamont Street. During that time I have been
9 in and out of their house numberless times. On more
10 than one occasion I have helped with repairs to their
11 house. At no time during that period has there been
12 a kitchen on the second floor.

13 Dwayne and Ellen used their first floor for a
14 kitchen, parlor, dining room, and half bath. They
15 used their second floor for three bedrooms, study,
16 and bathroom.

17 I have seen a kitchen in the basement and on
18 the first floor, and my wife has seen the kitchen on
19 the third floor. But I repeat that there has never
20 been a kitchen on the second floor during that entire
21 time period. And therefore that house contained
22 three kitchens, not four, up to the time of its most
23 recent sale.

24 I have studied the memorandum from Studio
25 Crowley Hall. Unfortunately that's the thing you

1 didn't get, apparently. It contains several errors,
2 and I say that based on many years of personal
3 observation. On page 6 there is a photo that she
4 referred to a minute ago, labeled bathroom. The
5 front room on the first floor. Wrong. That room was
6 the parlor. It was not a bedroom. Like it was a
7 parlor like the first floor front room found in so
8 many other houses in Mount Pleasant, including my
9 own.

10 It contained a sofa, a coffee table, several
11 chairs, and a TV. I watched the Superbowl there
12 several times. It was never used as a bedroom.

13 The adjacent room in that photo, which
14 unfortunately you don't have, was their dining room.

15 On page 8 of that same memorandum, a photo
16 was labeled entry unit -- unit entry and kitchen
17 beyond, which has been referred to. That area where
18 the person is standing in the photo is Dwayne's
19 study, a room that contained a desk, a chair, a
20 couple of book shelves, and lots of books. It also
21 contained a very large collection of empty beer cans
22 from all over the country.

23 I have been in that study many times. The
24 room adjacent to the study is the bathroom. There
25 was no kitchen in that, or any other location on the

1 second floor.

2 These same errors are repeated later in the
3 memorandum. On page 15, the first-floor demolition
4 plan calls the front room, bedroom, which is no the
5 case. It was a parlor. And on page 15, the second
6 floor demolition plan labeled the area kitchen, that
7 was not a kitchen. It was the study, as mentioned
8 before.

9 I hope my testimony will help to eliminate
10 the false statements that have presented to BZA.
11 Thank you.

12 CHAIRMAN HILL: Okay. Thank you, Mr. Hayden.
13 Mr. Tondro, would you like to go next?

14 MR. TONDRO: Yes. Good afternoon, Mr. Chair,
15 Madam Vice Chair, Members of the Board. I'm going to
16 try to keep this as simple as possible.

17 Following from my brief, as I stated there,
18 the apartment house was established as a legal use
19 back in 1967 by the certificate of occupancy. That
20 one indicated -- it did not refer to the specific
21 number of units, but it did say all plus basement.
22 There are three floors, all floors plus basement, so
23 including the entire house, which I would argue is
24 circumstantial evidence of the fact that there's four
25 units.

1 But then in addition as I point out, the
2 appellant stated that at the time that the prior
3 owners purchased it back in 1987, that there were at
4 that point in use, four units. So, it's very clear
5 that the use, the Zoning Administrator believes that
6 at the time prior to the prior owners coming into
7 possession in 1987, that there was a legal existing
8 use as an apartment house for four units.

9 So, I think at that point then the question
10 becomes, what happens with a discontinuance clause.
11 Has that use as four units been discontinued or not?

12 And again, I refer you to my brief where I
13 refer to the appeal, 17902 of Joseph Park that in
14 turn relies on two court cases upheld by the D.C.
15 Court of Appeals. And in both of those cases they
16 refer to the standard rule that there is -- there
17 needs to be, to establish discontinuance, again I'm
18 going to quote from the bottom of page 2, the law
19 requires more than mere lapse of time or discontinued
20 use. The law also requires this intent to abandon
21 and some act or failure to act that impedes
22 abandonment. Such an intention must be proved to the
23 Board by demonstrable external facts.

24 And the key word I think there, is external,
25 that we're dealing with. So, much of the evidence

1 that has been provided by the appellant is about what
2 happened with the folks inside the building. But
3 we're dealing with some fact, there has to be a
4 statement, an act that's taken vis-à-vis DCRA to
5 manifest that.

6 And I'll point out that in that decision,
7 17902, the Board specifically said, even so, some
8 acts, it's not enough to have just an act in this
9 case, or a failure to act in the case of 17902, where
10 the owner of a nonconforming commercial use in a
11 residential zone stopped opening it because he was --
12 stopped operating the business because it was --
13 because he was sick. He ceased to get his basic
14 building -- sorry, basic business license, and he
15 also let the whole building fall into such disrepair
16 that the water service was terminated and required
17 extensive amounts of money to renovate the structure
18 when he finally was well and able to, as it were,
19 resume.

20 Despite that fact, the Board felt all those
21 overt external facts, the Board still felt that that
22 was not sufficient to establish discontinuance of
23 use. So, I think it's a very high bar here to
24 establish that the discontinuance of use has
25 occurred.

1 From the standpoint of the Zoning
2 Administrator, he is presented with a situation there
3 is a clear statement in the record of an apartment
4 house, there's a statement by the appellant which
5 backs up the -- by the applicant's, the permit
6 holder's architect who is saying that at least in the
7 building there was the capacity for four units. And
8 that's supported by the fact that at least as of 1987
9 and prior to that, there were actually used, four
10 units. That that establishes the baseline from which
11 the question was, was it ever discontinued. And
12 there's no evidence that the Zoning Administrator had
13 an external fact that would suffice to indicate that.

14 So, issues, for example, of getting a permit
15 to remove something or to change to combine the two
16 rooms and so forth, that is what would be required.
17 To get a certificate of occupancy that requires --
18 that moves it from four units down to two units. Any
19 of those things might have made a difference, but in
20 this case we have -- the Zoning Administrator had
21 nothing to go on for that standard. And so as a
22 result felt that the use, having been established,
23 there wasn't any clear evidence that it was ever
24 discontinued under this very high threshold.

25 And I'm going to turn it over to the Zoning

1 Administrator at this point to address that issue and
2 particularly his practice in this. Thank you.

3 MR. LeGRANT: Right. So, I've been faced
4 with this situation before where there might be
5 evidence that an interim property owner -- you have a
6 very old C of O, and then maybe an interim property
7 owner did something that deviated from that, but did
8 not secure a new C of O reflecting that use, nor ever
9 applied for building permits.

10 My stance has been, then, with the original C
11 of O then being the baseline, it's the District's
12 interest to restore the lawful condition as
13 represented in that C of O. So, notwithstanding if
14 the previous owner took out a kitchen or did
15 something, but without the knowledge of DCRA because
16 no permits were applied for, then when it comes
17 before us then we have to look to the C of O as the
18 statement as the lawful use.

19 In this particular case there was no evidence
20 that a building permit was ever applied for or issued
21 to convert or change the number of units for this
22 property, nor was there any C of O issued for a
23 different number of units.

24 One could argue that the interim property
25 owner that lived there so many years, you know, erred

1 in not securing a C of O. But now that that property
2 owner is gone and this new property owner is here, I
3 have no recourse other than to try to compel that --
4 restore the lawful condition which I believe is the
5 four-unit use. And my review of the photographs and
6 the floor plans support that the building does have a
7 four-unit configuration and so the present property
8 owner's interest in getting a -- securing a building
9 permit to reestablish the lawful four-unit use, I
10 believe is valid.

11 CHAIRMAN HILL: Sure. Let me hear from Ms.
12 Hemmings if I could, real quick, please? Thank you.

13 MS. HEMMINGS: I turned it off. Sorry.
14 Well, thank you very much, Mr. Chairman and Board
15 Members, for this opportunity to express my point of
16 view.

17 We knew from the beginning that we were going
18 to face stiff opposition from important members of
19 the community. We understood that. So the work that
20 the architect had to do was diligent and meticulous.

21 Not only that, he had -- something else, you
22 know, was done in addition to reporting to DCRA. An
23 inspector was sent to examine the building and to see
24 if in fact this had been a four-unit building.

25 So, this was not a sloppy job. This is not,

1 you know, people trying to make a quick buck. This
2 is not people who are just, you know, trying to
3 destroy the quality of the neighborhood. This was
4 something that was done, respecting the rules and
5 applying all the evidence, submitting all the
6 evidence that was necessary. Thank you.

7 CHAIRMAN HILL: Thank you. Does anyone here
8 have some questions for the Board? Please.

9 MS. BUTANI-D'SOUZA: Okay. So, Mr. Tondro,
10 can you just read again the rule that you read
11 regarding the discontinuance of use? You read it
12 quickly and I just -- or is it somewhere in the
13 record that I can read it?

14 MR. TONDRO: Yeah, I apologize. Yes, it's a
15 quotation from Board Appeal 17902, and the quote that
16 I read from is included on the bottom of page 2 going
17 to page 3 of DCRA's prehearing statement.

18 MS. BUTANI-D'SOUZA: Okay.

19 MR. HINKLE: Yeah, I have a question. Thank
20 you, Mr. Chairman.

21 So, this is an R-4 zone. Is that correct?

22 MR. TONDRO: Yes.

23 MR. HINKLE: And a single-family dwelling
24 unit is a matter of right in the R-4?

25 MR. TONDRO: Yes, and a flat.

1 MR. HINKLE: And a flat. Do they need a C of
2 O for that?

3 MR. TONDRO: No, there's no requirement for a
4 C of O for a single family or a flat.

5 MR. LeGRANT: No, there's a blanket provision
6 in the C of O section that single-family homes do not
7 need a C of O, but all -- and there's some other
8 exceptions. But a flat or any multi-unit building
9 does need a --

10 MR. HINKLE: Does need one.

11 MR. LeGRANT: -- C of O.

12 MR. HINKLE: Or at least the C of O for the
13 apartment, the separate apartment from --

14 MR. LeGRANT: Yes.

15 MR. HINKLE: -- from the dwelling.

16 So if somebody were to purchase this, and my
17 understanding is the previous owners purchased it in
18 1987 and wanted to use it as a flat or just a single-
19 family home, they wouldn't need to act on that
20 existing C of O that allowed an apartment house,
21 would they?

22 MR. TONDRO: In I guess two-fold response,
23 first of all I think that the evidence is that when
24 they had it there was four units, when they bought
25 it, and that they certainly used it with three units.

1 So, I just want to clarify that for the record. If
2 they wanted to use it as a single-family, they would
3 not necessarily had to get a new certificate of
4 occupancy because that's not required. But if they
5 wanted to use a flat or rent out an apartment or
6 anything else, that would have required, that would
7 have triggered that requirement.

8 MR. HINKLE: Okay.

9 MR. LeGRANT: I may add that, you would have
10 to secure a building permit to change the use. So,
11 DCRA doesn't know what the person is using the
12 property for unless they've secured a valid building
13 permit. And there is occasion where people will take
14 an existing apartment house or flat and say, I just
15 want a single-family. Okay? You have to get a --
16 you have to apply for a secure building permit,
17 execute all the work, and at that point right, there
18 will be a divergence. It will be, if it's single
19 family you get your final inspection, you're done.
20 If you're a flat or above number of units you get a
21 new C of O reflecting whatever the approved use is.

22 MR. HINKLE: But they could use the structure
23 just as a single-family home without making
24 modifications to the structure itself. I'm just
25 curious.

1 MR. LeGRANT: Well, one could argue that
2 you're using -- the provisions of the Zoning
3 Regulations require you to -- you must be, use your
4 structure lawfully in accordance with the Zoning
5 Regulations. So, if you have a C of O for some use
6 and you're using it for something else, one could
7 argue that you're technically in violation of the
8 regulations.

9 MR. HINKLE: Even if the single-family home
10 is a matter of right and there's a historic C of O
11 for an apartment structure, you're stating you might
12 be in violation of --

13 MR. LeGRANT: Yes.

14 MR. HINKLE: -- that C of O. Okay.

15 MR. TONDRO: What I would also point out,
16 however, is that the Zoning Commission in adopting
17 the discontinuance requirements, took this very
18 seriously. This is a serious removal of already
19 vested established rights.

20 MR. HINKLE: Uh-huh.

21 MR. TONDRO: The initial proposal was for a
22 time period of only six months and the Zoning
23 Commission said, no, no, no, that's not sufficient
24 because this is such an established -- I mean, it's
25 such an established use and this such an important

1 right to be taking away, that they moved it back to
2 three years.

3 They also removed the portion that originally
4 addressed intent, that a showing of intent wasn't
5 sufficient, and left what this is. And this goes
6 back again to the court case that was cited in 17902,
7 pardon me, the *George Washington University v.*
8 *District of Columbia BZA*, which again established
9 that it had to be these external facts. There had to
10 be this -- and set at a very, very high bar. There
11 couldn't be enough. In other words, I would posit
12 that in terms of your hypothetical situation, it
13 wouldn't be enough that they chose internally to
14 operate as if they were a single family. They would
15 have to demonstrate that by some kind of external
16 fact that would be sufficient to effect -- it's not,
17 necessarily put on notice, but it's sort of that same
18 kind of concept here. It has to be an external fact
19 that evidences that intent.

20 And so, I think in that case it would have be
21 something much more substantial than merely failing
22 to -- than just operating it as a single-family. But
23 in this case I don't think there's any evidence that
24 they failed to operate it as a three-family minimum.

25 MR. HINKLE: That almost gets to my last

1 question, and I don't know if anybody has the answer
2 to this. But, you're citing from that case that they
3 also needed -- besides the C of O, they needed to
4 obtain a basic business license and they needed to
5 register the units with the Department of Housing and
6 Communication Development. Do we know if that
7 occurred or didn't occur with the previous owner?

8 And I guess I'm asking, you know, if they
9 didn't pursue those requirements then maybe the
10 intent was to actually use the home as a single-
11 family home. But I don't know if that's in the
12 record or if we have anything on that.

13 MR. TONDRO: We don't have that. I addressed
14 that issue just to, again, comparing back to the
15 facts of the case in 17902 --

16 MR. HINKLE: Uh-huh.

17 MR. TONDRO: -- where there were very similar
18 analogous circumstances that were requirements, acts
19 that were not taken, a failure to get a business -- a
20 basic business license, a failure to continue the
21 operation of the actual business itself, a failure to
22 maintain the water service, a failure to keep the
23 building in sufficient state of repair, that it
24 actually continued to be used. And nonetheless,
25 despite all of those indicia, the Board still

1 determined that those weren't sufficient to
2 constitute discontinuance. And I think that would be
3 the same case. We would argue that's the same case
4 here. That's our understanding of the circumstances.

5 MR. HINKLE: Okay. Thank you.

6 MS. BUTANI-D'SOUZA: So, the owner testified
7 that there was an inspector that came to the house to
8 inspect. Did that inspector find a kitchen?

9 MR. TONDRO: I believe that all the -- what
10 the inspector did was confirm that the configure, as
11 the Zoning Administrator said, that the configuration
12 was consistent with four units. Again, I think they
13 were doing it when it had been broom-swept, cleared,
14 there was nothing left in terms of the previous use
15 other than what was in the actual building. And I
16 will point out, but I'll let the Zoning Administrator
17 answer to that, that when we're dealing with
18 enforcement cases where we're trying to figure out
19 for example, are they operating an illegal second
20 unit, one of those issues will be plumbing, whether
21 or not --

22 MS. BUTANI-D'SOUZA: So, there was plumbing?

23 MR. TONDRO: Yes. And the other one will be
24 kitchens, and that usually entails that there's
25 either a gas line for a gas stove, or that there's a

1 plug of some sort that would allow a stove. So,
2 everything else could be taken out and there's all
3 this other issues for --

4 MS. BUTANI-D'SOUZA: Sorry.

5 MR. TONDRO: That's all right.

6 MS. BUTANI-D'SOUZA: The building code, when
7 you say a plug that requires a stove, are you --
8 you're saying that there's a special dedicated
9 circuit for a stove, and so here there was a
10 dedicated --

11 MR. TONDRO: Right. That would be normally
12 what -- that's something that we would look to in
13 determining whether there was a legal additional unit
14 --

15 MS. BUTANI-D'SOUZA: Okay. So there was a --

16 MR. TONDRO: -- would be those --

17 MS. BUTANI-D'SOUZA: -- gas line to support a
18 kitchen, and there was, within this room in question,
19 there was a gas line to support a kitchen, and that's
20 the basis upon which the inspector stated that there
21 was a kitchen?

22 MS. HEMMINGS: Yes, there was a gas line to
23 support the kitchen. I know this because in the
24 rehabilitation of the house, the plumbing and gas
25 people, you know, used the old gas line as well as,

1 you know, the original plumbing in the kitchen, et
2 cetera, that existed.

3 MS. BUTANI-D'SOUZA: So, when the DCRA
4 inspector came in there was a gas line that was not
5 capped behind the wall?

6 MR. LeGRANT: I do not have the specific
7 inspector's report as to the presence of electrical
8 circuit or a gas line. Ms. Hemmings is making
9 representations but I have not seen that inspector's
10 report.

11 MS. BUTANI-D'SOUZA: Why don't you guys have
12 that information?

13 MR. TONDRO: I think we just, we haven't
14 pulled it. If we need to go and provide it for you,
15 we can go and provide that for you.

16 Again, I would point out that the burden of
17 proof is on the applicant.

18 MS. BUTANI-D'SOUZA: Okay. I have another
19 question. So, sorry, I'm just going to go through
20 these quickly in the interest of time.

21 So, the drawings that we have in front of us,
22 the Studio Crowley Hall drawings, are these the
23 drawings that DCRA received as the existing
24 conditions?

25 MR. TONDRO: Pardon me. The four that were in

1 the back? Yes, these were submitted with a
2 demolition permit.

3 MS. BUTANI-D'SOUZA: Okay. And if these
4 drawings had not labeled this as a kitchen, and the
5 Zoning Administrator had received these drawings, I'm
6 talking about the second-floor kitchen, and the
7 drawings had shown that there was a gas line capped
8 behind the wall, would that have changed your
9 determination that this should be four units?

10 MR. LeGRANT: Well, if that information came
11 to light in the submission, then we would have to
12 explore with the applicant what the proposal is. If
13 it's labeled a kitchen then they would have to have
14 all the necessary accoutrements that would support a
15 kitchen, meet the building code.

16 If they conversely said, well, this room is
17 not a kitchen, but then they said there's a stubbed
18 out gas line and that we would say, well, that's
19 questionable. The gas line maybe would have to be
20 removed so that room could not be used as a kitchen.

21 So, ultimately in the back and forth with the
22 applicant would be to push to one or the other. It
23 would have to be a clear statement of the proposed
24 use of that room.

25 MS. BUTANI-D'SOUZA: So, it doesn't matter if

1 the gas line is capped behind the wall or of it's
2 stubbed out and ready to connect?

3 MR. LeGRANT: My experience is, if it's a gas
4 line that's stubbed out, for people that sometimes
5 may make a representation that they're not going to
6 do a kitchen, that those can turn into kitchens
7 because it's very easy. So my policy has been oh, if
8 there is a gas line it must be removed. A stub out
9 is not a condition that would be allowed if you, for
10 example, if you have a family room or a bedroom, why
11 would you need a gas line to such that room. It
12 should be removed.

13 MS. BUTANI-D'SOUZA: Fireplace? I mean,
14 okay. Let me just move on to the other questions
15 that I have.

16 So, why does DCRA not believe that a C of O
17 was necessary from 1987 onward to maintain the use?
18 It just seems to me that if you have someone testify
19 that the kitchen was cut and capped, whether it was
20 behind the wall or not is a question. But the
21 kitchen was gone. They were living in it as a
22 single-family home. They did not apply for a C of O.
23 That, to me, suggests some intention.

24 I mean, this says a failure to act can also
25 imply abandonment right?

1 MR. TONDRO: Yes, but again, I would call
2 your attention to the fact that it's an external, a
3 demonstrable external fact. Again, not something
4 that's necessarily with the inside and limited to the
5 interior. Again, I want to emphasize, this is a huge
6 invasion by the government of private property rights
7 that have already been deemed to be applied. The
8 burden of proof will fall on the government to prove
9 that, and that we can take back those rights once
10 they've been vested.

11 And so what this issue does is frame that.
12 And the Courts are very aware of that and that's why
13 they said they needed this, not just simply the fact
14 that it was vacant for two years. It was a situation
15 where you have to prove that. And again, with
16 demonstrable external facts, and it's not sufficient
17 that there's one. Even in the case again, of the
18 Board 17902, there were those multiple different
19 external facts which even still were not sufficient
20 to justify determining that there was a
21 discontinuance.

22 MS. BUTANI-D'SOUZA: I guess if the argument
23 turns on this definition of external facts, I'm a
24 little confused about what external facts means,
25 because I mean, I don't understand what that means.

1 Does external facts -- how is --

2 MR. TONDRO: I would --

3 MS. BUTANI-D'SOUZA: Is there something that
4 says how that's been interpreted in the past, because
5 it would seem to me that an external fact here, right
6 where it says, the law requires intent to abandon and
7 some act/failure to act --

8 MR. TONDRO: Uh-huh.

9 MS. BUTANI-D'SOUZA: -- that implies
10 abandonment, such an intention to abandon a
11 nonconforming use must be proved to the Board by
12 demonstrable external facts. I mean, the fact that
13 we have someone testifying that there was no kitchen
14 there, why is that not an external fact? Especially
15 since DCRA doesn't have the inspection report.

16 MR. TONDRO: It would be an issue of, I
17 think, of an external fact in terms of that something
18 that's related outside again, not to the inside, is
19 not sufficient. I'm repeating myself. I think also
20 again, looking at 17902, the Board considered those -
21 - those are specific cases where they applied this
22 ruling, and they have applied it and they said these
23 demonstrable external facts, even so, are not
24 sufficient.

25 So, they said that there's this very -- the

1 Board, as established precedent, has established that
2 this is not a right to be taken away lightly, and
3 that it's something where you have to show above and
4 beyond in terms of being able to take that away. And
5 I think at this particular time it's demonstrable
6 that there was a valid use as an apartment house,
7 there was -- the appellant herself -- the statement
8 indicates that as of 1987 they were used for four
9 units, that they continued to be used as three. So,
10 with all due respect, I don't think, Member Hinkle,
11 that that hypothetical is what's applied -- your
12 hypothetical. I understand it but I don't believe
13 that's what's relevant in this particular case.

14 I think here there's a situation where
15 there's clear evidence there's at least three units
16 that were used, and then in addition we come to the
17 situation where the architect provided the evidence
18 that he provided, at which point we're dealing with
19 trying to evaluate one or the other.

20 Again, the Zoning Administrator has to issue
21 the permit if it's valid.

22 MS. BUTANI-D'SOUZA: Okay. So, from the
23 Zoning Administrator's view there was never a point
24 where this was a three-unit building?

25 MR. LeGRANT: We had no knowledge of the

1 representation that it was a three-unit building.
2 There was no application for a building permit, nor
3 an application for a C of O that makes such a
4 representation.

5 MS. BUTANI-D'SOUZA: So, for the purposes of
6 external fact, essentially in 1987 there was a C of O
7 for a four-unit building. The C of O stays with the
8 property. It doesn't travel with the owner, so the
9 fact that the new owner didn't apply for a new C of O
10 doesn't matter. The C of O still stands. Is that
11 correct?

12 MR. LeGRANT: Yes.

13 MS. BUTANI-D'SOUZA: Okay. So, the C of O in
14 1987, and then you received a set of plans for a
15 renovation, a set of plans for demolition, existing
16 conditions, showing this as a four-unit building.
17 So, from the Zoning Administrator's point of view
18 it's always been four units because --

19 MR. LeGRANT: Yes.

20 MS. BUTANI-D'SOUZA: -- you don't concern
21 yourself with what's going on inside the property.

22 MR. LeGRANT: Correct.

23 MS. BUTANI-D'SOUZA: Okay.

24 CHAIRMAN HILL: Okay. So, Ms. Armstrong,
25 you're going to have an opportunity to ask some

1 questions.

2 MS. ARMSTRONG: Yes.

3 CHAIRMAN HILL: Can I keep you to like five
4 minutes? Is that okay?

5 MS. ARMSTRONG: Oh, yeah. I'm not going to -
6 -

7 CHAIRMAN HILL: Okay.

8 MS. ARMSTRONG: Yeah.

9 CHAIRMAN HILL: Okay. Okay. Thanks.

10 MS. ARMSTRONG: I don't have it here, I have
11 it in my office, the certificate of occupancy
12 application form. And, you know, it says -- you
13 know, and you read the law and it says, "No person
14 may use a property unless for single family or
15 there's another exception or something, unless
16 there's a properly issued certificate of occupancy."

17 So, Mr. LeGrant or Mr. Tondro, on what basis
18 do you say that a C of O stays with the property when
19 the C of O is issued to the person?

20 I have tracked other cases in Mount Pleasant
21 and I'll be tracking more of them as these issues
22 accumulate, where a property owner, her husband dies,
23 she goes to get a new C of O just so that she is
24 indeed the proper holder of the certificate of
25 occupancy.

1 Mr. Park, in Case 17902, if I'm not mistaken,
2 I don't believe I am, he was the holder. It was in
3 his name, and there were a number of -- we just had
4 extenuating factors, suggested health reasons and
5 other by the prior case. He had some of those other
6 issues. But he was the holder of the C of O. The C
7 of O was in his name.

8 And he didn't stop running his liquor store,
9 he didn't -- you know, there were a number of
10 extenuating factors. But then he leased it out. But
11 he was the holder because the certificate of
12 occupancy, as I read the law, goes with the person
13 who is using the property.

14 So, why is that not the case and why is not
15 the failure of the prior owners to apply for and
16 obtain a certificate of occupancy in their name not a
17 significant change?

18 CHAIRMAN HILL: Okay, let the Zoning
19 Administrator answer. Thank you.

20 MR. LeGRANT: So, you're correct that the
21 current owner of a property is to -- is supposed to
22 maintain -- obtain a C of O in their name. There was
23 an interim property owner apparently who did not do
24 that. Okay? So, the mere establishment of that
25 means that a new property owner comes along who wants

1 to secure a C of O and put it in her name, and there
2 was a gap. And again, I've seen this in a few
3 instances. So, we go back to the whatever the issued
4 C of O for that property was, which was 1967, and
5 that's the baseline.

6 So, one could argue, yes, that the interim
7 property owner erred, were not in compliance. Well,
8 they're gone and I take the stance, I'm not going to
9 take any -- I'm not going to track them down and try
10 to do some enforcement action after the fact. I'm
11 going to deal with the property owner, the current
12 owner that's before me to come into compliance.

13 CHAIRMAN HILL: Okay. Thank you.

14 MS. ARMSTRONG: Where is the case law to
15 support that position?

16 MR. TONDRO: I think, I'm struggling a bit to
17 try to frame this issue. The rules that are written
18 in the regulations are -- do require a certificate of
19 occupancy if there's a change of ownership. But, if
20 a strict application of that rule across the District
21 would render tens of thousands of current uses, no
22 longer valid, and I believe the Zoning Administrator
23 can speak to that more clearly in terms of how he has
24 administered that, these issues would come up only
25 after the fact to him. I think there's a distinction

1 between a change of use where you did not get a
2 certificate of occupancy.

3 But I believe what the Zoning Administrator
4 is saying is it's quite common that you have a
5 situation where the use is continued but they failed
6 to have gotten the certificate of occupancy in their
7 name.

8 If it comes to our attention, then we will
9 have them go and do so. That -- I mean, I think at
10 this point that requires, I should point out, a
11 building permit application to change a C of O, even
12 if there's no change of the structure to the
13 building. You still have to get a building permit to
14 change a C of O. To change the use or to change the
15 ownership. And --

16 MR. LeGRANT: Clarify.

17 MR. TONDRO: Yeah.

18 MR. LeGRANT: You need a building permit to
19 change the use of a property, or if you do additions.
20 You do not need a building permit for a ownership
21 change if the use is maintained, as in the case here,
22 the use is being continued from the baseline, then no
23 building permit is required.

24 CHAIRMAN HILL: Ms. Armstrong, you have
25 another question?

1 MS. ARMSTRONG: I have lots of questions but
2 maybe they'll have to wait for another day.

3 MS. BUTANI-D'SOUZA: I'm sorry, I didn't
4 understand that last point.

5 MS. ARMSTRONG: I just wanted to know how,
6 you know --

7 MS. BUTANI-D'SOUZA: You said the building
8 permit is not required if there's a change of
9 ownership. But the C of O is still required if
10 there's a change of ownership?

11 MR. LeGRANT: Yes. The Zoning Regulations
12 require a C of O to be in the current owner's name,
13 or in the case of the leased property they can assign
14 that right to a lessee. So, and two-thirds of our C
15 of O application volume is change of ownerships.
16 They come in, we verify, we look at the baseline,
17 what the previous current, or the last C of O in our
18 records establishes what the current legally approved
19 use is.

20 Then, through an application we ascertain
21 what the person is representing to do. If it
22 matches, then that C of O is now issued. A new C of
23 O is issued with a new number in the name of the new
24 owner with that same use. And that's the practice
25 for a change of ownership C of O.

1 CHAIRMAN HILL: Ms. Armstrong --

2 MS. ARMSTRONG: How do you square the
3 suggestion here that the legal status of this
4 building, which again is a row house on a 2,530 or
5 whatever square foot lot, longstanding nonconforming
6 use, how do you square going back to a nonconforming
7 use and reestablishing it and saying that that is the
8 legal -- that is the legal condition that we wish as
9 a matter of policy, to recognize and to reestablish.
10 This is how it should be limited to two units only,
11 even under the '58 rules which were very forgiving
12 with the 900-square foot rule. Historic Mount
13 Pleasant has a lot of large lots. So, we have quite
14 a number of houses where there are, you know, three
15 and four units legally under that 900-square foot
16 unit.

17 This lot is that whole block, virtually that
18 whole block has smaller lots which do not rise to the
19 level of allowing ever for three or four units as a
20 matter of right.

21 CHAIRMAN HILL: Ms. Armstrong, I'm sorry.
22 I'm a little confused what your question is for Mr.
23 Tondro.

24 MS. ARMSTRONG: My question is, how do you
25 square his suggestion that the legal situation of

1 this property is an out of date nonconforming use,
2 which the policy on nonconformities is to see it
3 wither away.

4 CHAIRMAN HILL: Okay. I think you're going
5 to give me the same answer, but go ahead, Mr. Tondro.

6 MR. TONDRO: I will try to keep it short.
7 The issue -- I think there's two different issues
8 we're dealing with. I don't think there's any
9 evidence of the fact -- there may be some dispute in
10 fact as to whether they were used as three units or
11 four units, but I note in the statement of appellant
12 she indicated that at the time the current owner
13 purchased it they were at least in use of three
14 units. That's an important issue because the use
15 that's on the C of O, the use that we're talking
16 about here, is an apartment house which is three or
17 more units.

18 So, I think there are sort of two different
19 issues. One could make the decision that the four
20 unit was not maintained, but there's no indication
21 that there was ever any discontinuance from not
22 having the --

23 CHAIRMAN HILL: Okay. That's okay. All
24 right. I'm going to interrupt you for one second.

25 So, Ms. Armstrong, do you have any more

1 questions, or would you like to sum up?

2 MS. ARMSTRONG: Well, my statement is my
3 statement. And I just -- the Board of Historic Mount
4 Pleasant is before you were asking, you know, for
5 advice here, how is it that these -- and I accept Mr.
6 LeGrant's statement or suggestion that there are
7 many, many -- many houses in this District that do
8 not have proper certificates of occupancy. How, and
9 I can count some others up and down my street. How
10 are we to deal with that where we are trying to
11 protect the character of our neighborhood, and we
12 don't want to see eight units in a house that should
13 only have three. And that's an example on my block.
14 Or four units where there should be only two, and
15 there's several of those in a couple of blocks of
16 Lamont Street.

17 It just does not seem right that if you're
18 required under the law, person to use a building for
19 other than a single-family house, that you're
20 required to get a certificate of occupancy, that
21 there should be essentially no penalty for a failure
22 to do so over a long period of time, such as in this
23 case.

24 And again, as I've suggested in my statement,
25 I don't think this case is unique in our

1 neighborhood. And we're very concerned as a
2 neighborhood about all of these cases and how can we
3 deal with them?

4 So on one hand I'm contesting this in the
5 first instance. But I'm looking for guidance, how do
6 we deal with these things because we don't want these
7 very out of date certificates of -- during the war
8 there were apartment houses all over Mount Pleasant.
9 We have large houses that were divvied up room by
10 room, and those don't support the kind of use that we
11 are now seeing in the neighborhood with families
12 returning and things like that. And we want to see
13 these houses, as many as possible, restored to larger
14 units.

15 So, how can we do that where certificates of
16 occupancy, if they haven't been maintained, can just
17 spring forth like a Phoenix after 30, 40 years of
18 lack of maintenance. Even where you see -- there's
19 been some -- here's an example of abandonment,
20 partial abandonment of a multi-unit dwelling, down to
21 three. Yes, the configuration of the house, sure you
22 can put in a kitchen back in the back room. That
23 should not be the issue. That house should not have
24 more than two units as a matter of right.

25 CHAIRMAN HILL: Okay. Okay. That's all

1 right. And, Ms. Armstrong, I think that, you know,
2 you've made a very good case and you've presented
3 everything very well.

4 As far as like, what you know, your
5 organization might want to do in terms of the future,
6 I mean, I don't know where this is going to go, but I
7 guess, you know, you might go talk to the Zoning
8 Administrator and see what old certificate of
9 occupancies are there, which is --

10 MS. ARMSTRONG: No, no, I pulled those.

11 CHAIRMAN HILL: Okay.

12 MS. ARMSTRONG: You can pull the C's of 0
13 very easily --

14 CHAIRMAN HILL: So, so --

15 MS. ARMSTRONG: -- from the --

16 CHAIRMAN HILL: But the --

17 MS. ARMSTRONG: -- room down on the second
18 floor.

19 CHAIRMAN HILL: But I thank you for your
20 time.

21 So, would the Zoning Administrator, because
22 now I've been taught, you get the last word. And
23 then the property owner has 30 seconds, if that's
24 okay, just to sum up.

25 MR. TONDRO: Yes. Thank you. Again, want to

1 caution the Board to be very careful in dealing with
2 this. If we accept what the appellant is asserting,
3 we're in a situation where we're saying that contrary
4 to established precedent, I believe of the Board and
5 of the Court of Appeals, that we're in a situation
6 where whenever somebody fails to get a new C of O not
7 for a change of use, but solely for a change of
8 ownership, that that automatically divests them. I
9 think that would establish a precedent that will
10 cause enormous harm to the functioning of the
11 District and I just want to call your attention to
12 that.

13 I believe that in this case it's a situation
14 where we have a fact that there was a legal use. It
15 was legal at the time and it was a continuation of
16 it. Sure, did they screw up? Did they not go and
17 follow the letter of the law to be able to get that C
18 of O? Yes. But I do not believe that rises to the
19 level of a demonstrable external presentation of fact
20 that would trigger then the discontinuance of at
21 least the apartment house for three units because we
22 have evidence provided by the appellant that that was
23 continued up until the current building permit was
24 applied for.

25 So, I think arguably maybe the fourth unit

1 versus the third unit, but certainly the apartment
2 house used for the three units is something that I
3 think there's no evidence whatsoever of any
4 discontinuance of that. Thank you.

5 CHAIRMAN HILL: Okay. And I'm going to let
6 the property owner finish up. Mr. Tondro, I
7 appreciate the way that you go about summing up. I
8 do want to note, like, you put in like the fear of
9 God. You know, you're like if this happens then
10 everything is going to fall apart. And, you know,
11 all these things are going to happen.

12 And I appreciate you pointing that out, and I
13 do hear you, and I do appreciate you pointing it out,
14 but it is, it's interesting.

15 Please, if you could go forward?

16 MS. HEMMINGS: Rapidly. I disagree with the
17 assessment that Mount Pleasant is now being populated
18 by individual families. First of all, few people can
19 afford to buy the houses in Mount Pleasant, given the
20 prices. It's a very young neighborhood with young
21 professionals moving in, looking for housing, and
22 it's going to get even more pressing in the future.
23 Especially since students, you know, people who are
24 graduating from graduate school, have huge debts to
25 pay.

1 To pretend that these houses are being
2 populated by individual families is a simple
3 demographic fallacy. And that's all I have to say.

4 CHAIRMAN HILL: Okay. Thank you. So, is --
5 I'm going to close the hearing here unless the Board
6 has anything else they'd like to add. Okay.

7 So, I'm going to close the hearing, and then
8 is the Board ready to deliberate?

9 Okay. I guess I'll start. It always seems
10 difficult for me that when people come before us, you
11 know, there's people that have very strong opinions
12 and somebody is going to lose. In this particular
13 case again, by listening to what was presented and is
14 in the record from the Zoning Administrator, I do
15 think -- I don't think that all hell would break
16 loose, but I do think that like there is a high bar
17 that needs to be overcome in terms of this being an
18 error on the Zoning Administrator.

19 The certificate of occupancy that was there,
20 that's a certificate of occupancy that was there.
21 And so for the Zoning Administrator -- I don't think
22 the Zoning Administrator is doing anything
23 differently than he would have done, and so to go
24 back and now say that, you know, that certificate of
25 occupancy is no longer valid also throws, you know,

1 people don't know how they would move forward in
2 terms of development or in terms of what they're
3 purchasing.

4 I do think that there was probably only three
5 units at one point. And so, you know, if that also
6 then brings in the certificate of occupancy which was
7 an apartment, and you had three or more. And so the
8 more part is the -- you're getting the fourth unit
9 there.

10 So, I would not be in a position to be able
11 to approve the appeal given the burden that the
12 appellant needs to provide. I do think that for the
13 appellant, and depending upon how the rest of the
14 Board goes, I do think for the appellant these
15 certificate of occupancies then are there. And that
16 is what -- knowing now that's what's going to be
17 moving forward. And so, that's my thoughts. I don't
18 know if anyone has anything else they'd like to add
19 right now.

20 MS. BUTANI-D'SOUZA: I'm curious to hear from
21 the other members of the Board here because I've got
22 two issues that I'm really struggling with and I
23 don't really know exactly where I am here.

24 First, I think that the appellant has
25 presented some pretty compelling evidence that there

1 was no kitchen. She's presented testimony and she's
2 presented pictures. And I haven't seen evidence from
3 the owner or DCRA that there was a kitchen there.
4 And there was an inspection that was done and which
5 kind of, to me, links a little bit to this whole
6 external facts question. If there was an inspection
7 done by DCRA, doesn't that get to this question of
8 external facts, because DCRA has now inserted itself
9 into the building.

10 So, that's one thing that I'm kind of
11 struggling with here. And from that point of view I
12 could get behind a conclusion that there were three
13 units that were being used here. And that, that use
14 should continue. But I don't know that I'm convinced
15 about on the four units.

16 A second question that I'm really struggling
17 with here is, it seems to me that the law is that you
18 need to have a C of O to -- in your name, to use it
19 in this manner, to use it as an apartment house. It
20 seems to me that you would need to have a C of O.

21 So, I don't fully understand why we would be
22 establishing a new precedent, because to me it seems
23 as though all we're doing is enforcing that you need
24 to have a C of O in your name, which it's my
25 understanding that that's the law; that that's what

1 we've said, and the fact that many people in the
2 District of Columbia fail to get C of Os for their
3 rental properties when they purchase them, I don't
4 understand why that's a justification for not
5 enforcing that law.

6 So, I'm a little bit, I'm curious to hear
7 what Board Member Hinkle and Commissioner Hood have
8 to say. Thanks.

9 MR. HINKLE: Well, I tend to agree with Board
10 Member Butani that I think the applicant did show
11 compelling evidence that there is not that fourth
12 kitchen in that last room. And I certainly
13 appreciate the write-up that -- and the research that
14 the applicant has done on this property, including
15 the testimony, the written testimony that states that
16 the previous owners, you know, did not apply for the
17 basic business license or register the rental units
18 with the Department of Housing and Community
19 Development. And to me that seems like, you know,
20 demonstrative external facts that they were not using
21 this as an apartment building. Perhaps as a flat.
22 Maybe, you know, without the appropriate C of O for
23 that.

24 But, I'm leaning on the side that the
25 applicant has made their case, and you know, I would

1 grant the appeal.

2 MS. BUTANI-D'SOUZA: It just, I mean, yeah,
3 it gets to this question of the failure to act is --
4 that's where I'm curious about what Commissioner has
5 to --

6 MR. HOOD: This whole thing about -- I'm
7 trying to separate it because I have some other
8 issues when it comes to housing stocks, and it's in
9 this -- I forget her last name. Ms. Armstrong. I
10 didn't want to call her Fay. It's Ms. Armstrong.

11 Ms. Armstrong knows what my position is about
12 the city losing housing stock, so I'm trying to
13 separate my person with the case that's in front of
14 us, this appeal.

15 I learned something from the ZA and Mr.
16 Tondro today about the C of O transferring, and I
17 think Ms. Armstrong makes a good point. I too did
18 not know a lot of how I guess DCRA functions and CFO
19 goes -- keeps going, keeps going, keep going. I'm
20 not saying I condemn it. I just didn't understand a
21 lot of those things of how it moves from ownership.

22 Now, use would be a whole different issue for
23 me. But I think ownership, I think ownership as it
24 moves on, I still have some questions. I still have
25 some uncertainties. But I think that the use of it,

1 or how this was used previously, I think it's a known
2 fact.

3 And, Mr. Tondro, you mentioned earlier about
4 whether something has been abandoned. I remember --
5 I can't remember how the Board ruled in that case
6 sometime back, and I'm not good at reciting all the
7 case law that happened for years ago. We deal with
8 so many different cases. But I do know that there
9 was a precedent setting, or I think it was precedent
10 setting, of how the Board at that time dealt with the
11 change and was it abandoned, was the use changed, and
12 I can't remember exactly what the case law is on
13 that.

14 But I would also fall on the side of holding
15 the ZA's decision in this case, even though I have my
16 own personal issues, Ms. Armstrong, with the housing
17 stock in this city. But I can't put my personal
18 issues in this because I dealt with that on the
19 Zoning Commission. But, I think I would uphold the
20 ZA in this case. That's where I am.

21 MR. HINKLE: I'm just curious if I could ask
22 the Zoning Administrator a question.

23 CHAIRMAN HILL: Sure, please. Ask the Zoning
24 Administrator.

25 MR. HINKLE: Thank you. So, with the new

1 purchase, sir, and I think we've established they
2 would have to get a C of O in their name, none of the
3 previous C of Os, which is why we're here, they don't
4 list a number of units specifically. So, would they
5 have to look at the regulations that requires the
6 900-foot property lot in order to receive a C of O
7 that lists the number of units?

8 MR. LeGRANT: Okay. How it works.

9 MR. HINKLE: Yeah, thank you.

10 MR. LeGRANT: So, the older C of Os do not
11 list the number of units. I can say that at least or
12 the last decade all C of Os do explicitly list the
13 number of units. Okay? So, when we're faced with
14 the older C of Os we have to go through a process.
15 Oh, was there representation in the application for
16 that C of O.

17 If the answer is no, as the case here, then
18 we have an inspector go out and we look at the
19 owner's representations, we look at what -- if
20 there's any building permit records that may have
21 happened. That sometimes, oh, here's a building
22 permit. They put in a gas line five years ago and it
23 referred to the building. Some piece of evidence as
24 to the number of units.

25 On occasion it's unclear and I have to make a

1 judgment call based on all the information that's
2 presented to me as to what is the awful number of
3 units on the property. So, but it's -- as time goes
4 by this is an increasingly rare occurrence because as
5 -- because C of Os that we issue today do list the
6 number of units.

7 Yeah, and this, it's clear that it's an
8 apartment house with at least a minimum three; three
9 units.

10 MR. HINKLE: I appreciate the clarification.
11 Thank you.

12 CHAIRMAN HILL: So, did that do anything for
13 you, Mr. Hinkle? Okay.

14 All right. So, Ms. Butani, we're with you
15 here, and I guess you know, I --

16 [Discussion off the record.]

17 CHAIRMAN HILL: I'm going to reopen this for
18 a second again. People on the Board here are just
19 asking particular questions and so there's no
20 response or anything. I'm sorry. Ms. Butani.

21 MS. BUTANI-D'SOUZA: Okay. So, like I said,
22 I'm struggling with two pieces here and I'm wondering
23 if Mr. Tondro or Mr. LeGrant can help me understand
24 their thinking, because I am sensitive to the comment
25 that this is precedent setting, even though I don't

1 know that I understand that.

2 So, if the law is that you need a C of O in
3 your name to use it in this manner, then why would it
4 be precedent setting for us to simply enforce that
5 law, that there was no C of O in your name for this
6 use from the owner that purchased it in 1987, they
7 never got a C of O. So, why is it -- I don't
8 understand why that it is precedent setting to -- how
9 do I phrase this?

10 The law is that you need a legal C of O in
11 your name in order to use it in this manner. So,
12 they were using it illegally. So, now we are -- if
13 they didn't get a C of O, correct? It's not a legal
14 -- I mean, if I had an apartment and I was -- if I
15 had a building that I operated as an apartment
16 without a C of O in my name, that would be a
17 violation of DCRA law, correct?

18 MR. LeGRANT: Yes.

19 MS. BUTANI-D'SOUZA: So, I just don't
20 understand that argument that you're making there,
21 that it's not -- that this is not an abandoned use if
22 they never got a C of O because they weren't using it
23 as a four-unit apartment. They never got a C of O.
24 I just --

25 MR. LeGRANT: Well, this interim owner who

1 never came to DCRA, never made any representations to
2 us, arguably used the building for three units, never
3 filed an application nor a building permit. So,
4 we're not aware of this.

5 The new owner comes along, makes a
6 representation that there's a four-unit building.
7 The record is a little unclear, so we do some further
8 research, we ask for additional documentation. Based
9 on the documentation I conclude that the 1967 C of O
10 was for four units. That is the lawful condition of
11 the property.

12 I don't want to say that it doesn't matter
13 that it was illegally used for 20 years in between,
14 but I have -- I don't feel I have recourse. I'm not
15 going to go try to track down this owner any more to
16 -- I have to deal with the case before me. This
17 owner is representing, I have to make a decision
18 what's before me for this property.

19 MS. BUTANI-D'SOUZA: So, you're saying that
20 the use is separate from the C of O in the eyes of
21 the Zoning Administrator. That, in the eyes of the
22 Zoning Administrator the four-unit use continued even
23 though the C of O did not continue because the
24 property was sold.

25 MR. LeGRANT: Yes.

1 MR. TONDRO: And I think the way of thinking
2 about it is, there's a distinction I would draw as I
3 said before, between a situation where use is used
4 that distinguishes from a prior C of O. Right. So,
5 case A -- both cases, there's no obtaining of a new C
6 of O for change of ownership. But in the first case
7 there's actually a change of use.

8 And in the second case there's a continuation
9 of what was already there. I think what we're
10 talking about is the later. And in that later case
11 there's a continuance of the published public record
12 notice, which is the certificate of occupancy that
13 exists, that can be consulted by anybody at that
14 time.

15 So, that that establishes -- I think that's
16 why the Zoning Administrator, and I don't believe
17 it's limited to this administrator, but has gone on
18 as prior practice, is that it's a situation where
19 that was not deemed to sufficient statement to divest
20 on the basis of a discontinuance.

21 Because it's a continued use as that
22 apartment house, in this case, as that apartment
23 house.

24 MS. BUTANI-D'SOUZA: And this was a DCRA
25 inspector that went to the property to inspect?

1 MR. LeGRANT: Yes, I believe. As -- yes.

2 MR. TONDRO: And if I can respond to that?
3 Please remember that the external affects, those
4 demonstrable external affects, those still require
5 the three-year period. So, you have to first
6 demonstrate that there's a demonstrable external act
7 to discontinue, and for three years. The three years
8 is tied to those two. They're tied together. So, I
9 would --

10 MS. BUTANI-D'SOUZA: Why didn't you submit
11 the inspection report showing whatever it was that
12 the inspector found that to him proved that this was
13 not an abandoned -- this was not a three-unit
14 building?

15 MR. TONDRO: To be quite honest, it was an
16 oversight on my case, on my side. I'm perfectly
17 happy if you want to continue this until I can submit
18 that to the record and you all can make your decision
19 if you would like to do that. It's fine.

20 CHAIRMAN HILL: Well, no. I mean, I know
21 where I am. I'm not going to get changed. And so, I
22 don't know if Jeff is, or you know, Chairman Hood is.
23 If getting this additional document might help you
24 get over to where -- because I need three.

25 MS. BUTANI-D'SOUZA: Well, okay. So, here's

1 where I am. I think that the comments that the
2 Zoning Administrator provided where he said that the
3 use in the view of the Zoning Administrator continues
4 even though the paperwork supporting the use, which
5 is the certificate of occupancy was lapsed, I think
6 that's compelling. To me that answers this question
7 of around the C of O that I had.

8 I, you know, the evidence of whether it's
9 four units or three units, you know, I think we have
10 to assume that if the Zoning Administrator states
11 that they did an inspection and that there was
12 something that came out of the inspection, a report
13 that indicated that it was configured for four units,
14 and the definition of configuration for four units
15 pertains to the presence of a gas line, which is
16 something that is relatively esoteric to a standard
17 person, then I think I could get behind the evidence
18 that there's four units.

19 So, I think that this was a helpful exercise
20 and I would change my view.

21 CHAIRMAN HILL: Okay. I'm not trying to
22 twist your arm. I mean, really, if you want some
23 more information if it's something -- so, it says --

24 MS. BUTANI-D'SOUZA: You're not twisting my
25 arm.

1 CHAIRMAN HILL: Okay. I'm going to make a
2 motion. And again, I feel for the applicant, I feel
3 for the property owner also. And so, but I'm just
4 giving my thoughts on the regulations and basically
5 the high standards that an appeal actually does come
6 to.

7 So, I'm going to make a motion to deny the
8 appeal of No. 19370 and ask for a second.

9 MR. HOOD: Second.

10 CHAIRMAN HILL: Motion has been made and
11 seconded.

12 [Vote taken.]

13 CHAIRMAN HILL: The motion passes.

14 MS. ROSE: Staff would record the vote as
15 three to one to one to deny the appeal and uphold the
16 Zoning Administrator's decision with Mr. Hill making
17 the motion, seconded by Mr. Hood, with Ms. Butani in
18 support, Mr. Hinkle is opposed, and one board seat
19 vacant.

20 CHAIRMAN HILL: Okay. Great. Thank you.
21 Thank you all very much. We're going to move to the
22 next case.

23 MS. ROSE: This is Application 19366 of
24 California Land Company, LLC., pursuant to 11-DCMR,
25 Subtitle X, Chapter 10, for variances from the

1 nonconforming structure requirements of Subtitle C,
2 Subsection 202.2, and the lot occupancy requirements
3 of Subtitle E, Subsection 304.1 to construct three
4 balconies to the rear of an existing 16-unit
5 apartment building in the R-A-2 zone at premises 1829
6 California Street Northwest, Square 2554, Lot 4.

7 CHAIRMAN HILL: Thank you. All right. Let's
8 see. Let's go ahead and introduce ourselves if we
9 could, from left to right for me. I'm sorry. My
10 left.

11 MR. MARCUS: Rich Marcus, architect.

12 CHAIRMAN HILL: Say it again. I'm sorry.

13 MR. MARCUS: Rich Marcus, architect.

14 MR. GOULD: John Gould, Columbia Property
15 Capital, General Manager of Construction.

16 MS. WILSON: Alexandria Wilson from Sullivan
17 and Barros on behalf of the applicant.

18 MR. SULLIVAN: Martin Sullivan from Sullivan
19 and Barros on behalf of the applicant.

20 CHAIRMAN HILL: Okay. Great. Okay. Mr.
21 Sullivan, I don't have a lot of questions about this,
22 but if you would like to go ahead and give kind of a,
23 I guess kind of a high-level presentation to the
24 application. And then really, I'm kind of interested
25 in focusing on the conditions also, so I'll turn that

1 over to you if that's good.

2 MR. SULLIVAN: Okay. Thank you. First of
3 all I would like to inform the Board that the
4 property recently exchanged control from the
5 developer to the condo association. The developer of
6 the original applicant had control when the
7 application was filed. Very recently control has
8 been passed to the condo association even though the
9 developer still owns two of the 16 units. So, I have
10 an authorization letter from the condo association.

11 CHAIRMAN HILL: Oh, great.

12 MR. SULLIVAN: For the file.

13 ALLISON: Mr. Sullivan, just quickly. Would
14 you like the applicant name updated based on this
15 authorization?

16 MR. SULLIVAN: Yes.

17 ALLISON: Thank you.

18 MR. SULLIVAN: Thank you.

19 CHAIRMAN HILL: And I'm sorry, Mr. Sullivan.
20 I was looking at a different case and I got a little
21 confused here. There's not a bunch of conditions so,
22 so, but if you would just like to do a brief high
23 level --

24 MR. SULLIVAN: Sure.

25 CHAIRMAN HILL: -- presentation, and then I

1 think there might be a few questions and then we'll
2 see what happens.

3 MR. SULLIVAN: Okay. Sure. The relief that
4 we're requesting is area variance relief for lot
5 occupancy. The existing property, including one set
6 of balconies, the lot occupancy was 68.2 percent at
7 the beginning of this. And the applicant added a set
8 of three balconies mirroring the existing three
9 balconies in an area where balconies previously
10 existed. And that took the lot occupancy up to 71.4
11 percent, which would be the maximum permitted lot
12 occupancy in this zone is 60 percent. And if we were
13 at 70 percent we could have asked for special
14 exception relief, but we're 1.4 percent over that so
15 we needed to request area variance relief.

16 Also, included in that section is the
17 expansion of an existing nonconforming structure
18 because the existing lot occupancy was over. And so,
19 what we have submitted is a request by which we think
20 there are two possible paths to relief; two possible
21 area variance arguments. The one being the, what
22 I'll call the de novo argument, asking as if we were
23 asking for relief anew and the balconies weren't up
24 yet, and none of the permitting issues had taken
25 place. And we think we have an argument for that

1 based on the fact that it's -- we're dealing with an
2 existing footprint that was there in 1958, and these
3 balconies existed in 1958. I'm not sure if it was
4 with the original construction of the building, but
5 apparently before 1958 the balconies were
6 constructed.

7 It's a historic building. It was approved by
8 HPRB with the balcony.

9 And also, regarding the practical difficulty
10 aspect of this, I believe you could say this is de
11 minimis relief because it's just an additional 3.2
12 percent of footprint. But that footprint also is not
13 the building. So, we're not expanding the building
14 at all. It's just the three levels of balconies.

15 The other path to relief is the reliance or
16 estoppel argument. So, the original building permit
17 approved this and the balconies were constructed.
18 And it wasn't until several months after the
19 balconies were constructed that the Zoning
20 Administrator first informed, or the Zoning staff
21 first informed the applicant there was a hold on the
22 property. And when that took place we met with the
23 Zoning Administrator in April of 2016, and went over
24 the issues, went over the plans and basically made a
25 reliance argument at that point, and the Zoning

1 Administrator said, it's okay. he lifted the hold.
2 And then as you can see from the record, that process
3 went on like about three times after that.

4 And it wasn't until July that we were told
5 finally that there is a hold in place and you're
6 going to need to ask for relief. And he granted a
7 contingent C of O at that point.

8 CHAIRMAN HILL: Okay.

9 MS. BUTANI-D'SOUZA: I had a question but
10 it's been answered by your presentation so I'm good.

11 CHAIRMAN HILL: Okay, great. So, I don't
12 have any questions. Does anybody else on the Board
13 have any questions? Okay.

14 Obviously, we've read through the record and
15 I'm very interested in hearing what the Office of
16 Planning has to say. Is it all right with the
17 applicant if I turn to the Office of Planning?

18 MR. SULLIVAN: No, that's fine.

19 CHAIRMAN HILL: Thanks.

20 MR. SULLIVAN: Nothing more. Thanks.

21 CHAIRMAN HILL: Hello, Office of Planning.

22 MS. FOTHERGILL: Good afternoon. For the
23 record, I'm Anne Fothergill with the Office of
24 Planning and in the interest of brevity we found that
25 the application did meet the variance test and we

1 recommend approval of the variance and rest on the
2 record in support of the application.

3 CHAIRMAN HILL: Thank you. I'm sorry. I
4 didn't mean to be so funny. I just realized it's the
5 first time I got to look at the Office of Planning
6 all day. I was like, I was like, I was like, wow,
7 there's the Office of Planning. Somebody else can
8 tell me something.

9 All right. So, I'm going to turn back to the
10 applicant. Does the applicant have -- oh no, wait,
11 hold on. First, I'm going to see, is there anyone
12 here who would like to speak in -- from the ANC? Is
13 there anyone here from the ANC who would like to
14 speak?

15 Is there anyone here who would like to speak
16 in support of the application? Anyone who would like
17 to speak in opposition to the application?

18 All right. That all being done, Mr.
19 Sullivan, I'm going to turn back to you and say if
20 you would like to add anything --

21 MR. SULLIVAN: No, we have --

22 CHAIRMAN HILL: -- in conclusion.

23 MR. SULLIVAN: No, we have nothing further.
24 Thank you.

25 CHAIRMAN HILL: All right. Then I am going

1 to close the hearing. Is the Board ready to
2 deliberate?

3 I'm going to do quick deliberations, which is
4 that I agree with the Office of Planning and their
5 report that the variance has been -- standard has
6 been met. I also, I thought it was an interesting
7 project. I think that just on a side note I guess, I
8 was thinking that the condo association is letting
9 you talk on their behalf but, you know, they want
10 their balconies.

11 So, I would go ahead and make a motion to
12 approve Application No. 19366 of California Land
13 Company as captioned.

14 MR. HOOD: I'll second it and also note the
15 ANC 1C's report.

16 CHAIRMAN HILL: Oh, thank you, Mr. Hood,
17 Chairman Hood, Commissioner Hood.

18 MS. BUTANI-D'SOUZA: And I would just note,
19 the aspect that I found compelling in the argument
20 here was the zoning history, that that contributed to
21 the practical difficulty, just for the record.

22 CHAIRMAN HILL: Great. Thank you. So, the
23 motion has been made and seconded.

24 [Vote taken.]

25 CHAIRMAN HILL: All right. The motion

1 passes.

2 MS. ROSE: Staff will record the vote as four
3 to zero to one to approve the application with Mr.
4 Hill making the motion, Mr. Hood seconding, in
5 support is Ms. Butani and Mr. Hinkle. One board seat
6 vacant.

7 CHAIRMAN HILL: Okay. Great. Can we get a
8 summary order?

9 MS. ROSE: Yes.

10 CHAIRMAN HILL: Thank you. If we can call
11 our next case? Thank you.

12 MS. ROSE: Next is 19371, the application of
13 14th and R Street Enterprise, LLC., pursuant to 11-
14 DCMR, Subtitle X, Chapter 9 for special exceptions
15 under the loading requirements of Subtitle C, Section
16 901., the penthouse setback and height requirements
17 of Subtitle C, Subsection 1502.1, and Subtitle K,
18 Subsection 803.3, the rear yard requirements of
19 Subtitle K, Subsection 805, and the side yard
20 requirements of Subtitle K, Section 806, to construct
21 a seven-story mixed use building in the Arts 3 Zone
22 at premises 2213 14th Street Northwest, Square 234,
23 Lot 163.

24 CHAIRMAN HILL: Good afternoon. Good
25 evening.

1 MS. BROWN: Good afternoon.

2 CHAIRMAN HILL: If you could please introduce
3 yourself from my left to right?

4 MR. ANDRES: Good afternoon, Erwin Andres
5 with Gorove Slade Associates.

6 MR. FOTIU: Good afternoon, Steve Fotiu,
7 architect.

8 CHAIRMAN HILL: Could you say that name
9 again?

10 MR. FOTIU: Yes, Steve Fotiu.

11 CHAIRMAN HILL: Fotiu.

12 MS. BROWN: And Carolyn Brown with the law
13 firm of Donohue and Stearns on behalf of the
14 applicant.

15 CHAIRMAN HILL: Okay. Ms. Brown, I don't
16 think I've seen you here before.

17 MS. BROWN: Not as -- in your position as
18 chair, but I have been before you on some small cases
19 in the past. Yes.

20 CHAIRMAN HILL: Oh, okay. Well, welcome to
21 this late evening.

22 MS. BROWN: Thank you.

23 CHAIRMAN HILL: You just submitted something
24 to us?

25 MS. BROWN: Yes. I think that we can be very

1 brief with our case presentation. There were some
2 issues raised in the Office of Planning report in the
3 DDOT report, both of which have been resolved, and
4 that e-mail that I distributed to you explains the
5 resolution of this DDOT issue, and I'm happy to walk
6 through the issues that have come up and how they've
7 been addressed if you're ready for my presentation.

8 CHAIRMAN HILL: You know, I appreciate that.
9 And please, I'll ask the Board to ask anything
10 particular if they'd like to hear from the applicant.
11 I mean, I myself am really just you know, again just
12 more of a high-level presentation.

13 But, you know the Office of Planning was in
14 denial and now they are in approval. I'd be kind of
15 curious to hear about, you know, what they were in
16 denial of and now how you got around -- got to work
17 with them, I should say.

18 And then, yeah, there was the conditions at
19 the end that I'd like to kind of make sure we're all
20 on the same page of. But --

21 MS. BUTANI-D'SOUZA: I do have two aspects
22 that I'd like you to focus your presentation on. The
23 first one is the question that the Office of Planning
24 raised about why the stair on the new floors can't be
25 moved, such that you no longer need the side -- I

1 believe it's side setback relief that you did not
2 request but they believe that you should have
3 requested.

4 And the second question that I have is, I
5 know that on past cases we have typically required
6 the plans to be pretty complete, pretty near complete
7 to avoid confusion before granting the relief. So, I
8 understand that you have not gone to the Historic
9 Preservation Review board, or rather that the
10 Historic Preservation Review Board has found the
11 design incompatible with the Historic District and
12 directed the applicant to further study the massing
13 and façade design. I'm not sure if that's current
14 status or not.

15 But, I'm a little bit concerned about hearing
16 this today, given that it sounds like there's pretty
17 significant changes that Office of Historic
18 Preservation is requesting.

19 MS. BROWN: Sure, those exactly were the
20 issues I was hoping to focus on as well.

21 So, first with the penthouse setback relief
22 that the Office of Planning indicated that we needed
23 relief from, they have since changed their position
24 on that, and Mr. Mordfin can probably clarify that
25 now. But the issue, Ms. D'Souza was that in a

1 historic district -- typically you do not need to set
2 your penthouse back from sidewalls, except when
3 you're in the historic district and you have historic
4 structures that are of a lower height next to your
5 building, you need to set back the penthouse from
6 that wall.

7 So, we have that situation in this case on
8 the south side of the building. We have historic
9 properties of a lower height and the penthouse, and
10 you can see this in the illustration here. The blue,
11 small two-story structure, three-story structure, is
12 the historic building. And our construction is to
13 the left of that. And we are required to have our
14 penthouse set back one to one on that side, and we
15 have done that.

16 The Office of Planning had an interpretation
17 that we also needed relief on the north side, even
18 though there are no historic properties there. They
19 have since changed that position and say that relief
20 is no longer needed on that north side wall. So,
21 that's one issue off the table now.

22 The second issue you asked for information on
23 was the Historic Preservation Review Board. We did
24 go to the Historic Preservation Review Board on
25 October 27th. They were fine with the height and

1 massing of the building but had asked for some sort
2 of mitigation to step down the building somehow in
3 relationship to the historic buildings to the south.
4 We have done that now. We have worked with the
5 Historic Preservation staff. We're getting ready to
6 -- what you see on the screen now is the resolution
7 to that issue. We have gotten the endorsement from
8 the staff on that particular set down issue and we'll
9 be going back to the Historic Preservation Review
10 Board on December 7th. And we asked flexibility to
11 make adjustments to the design.

12 MS. BUTANI-D'SOUZA: Those look like pretty
13 significant changes between what you had originally
14 shown and this. And again, I raise this as an issue
15 from a practicality point of view, that in the past
16 we've held pretty firm on requiring final drawings.
17 So, I leave that -- I mean, I guess this is an issue
18 for the Chair and for the Office of Zoning about
19 whether this will create confusion when you go for
20 permitting.

21 MS. BROWN: Well, that's why we would ask for
22 flexibility as a condition in the order, which we
23 have done in the past, which is as long as we -- to
24 allow us the flexibility to get approved by HPRB as
25 long as we don't create any new areas of relief or

1 increase the areas of relief, which we have requested
2 here. And I know that I've done that in the past on,
3 I don't know, many projects.

4 And if it's helpful, we can submit this
5 particular drawing to the record as well, if that
6 helps clarify it.

7 CHAIRMAN HILL: Yeah, I'm okay. You can go
8 ahead with your presentation.

9 MS. BROWN: Thank you.

10 CHAIRMAN HILL: Thanks.

11 MS. BROWN: All right. And then another
12 issue that was raised in the Office of Planning
13 report was they wanted additional justification for
14 the need for the elevator override height, increasing
15 the overall height of the building to 88 feet. So,
16 our architect can run through that very quickly as to
17 why we can't comply with the 83 and a half feet
18 limitation in the Arts 3 Overlay.

19 CHAIRMAN HILL: Okay. Please. Thank you.

20 MS. BROWN: And then before he starts, the
21 final issue was with the DDOT report. They had asked
22 for, as a condition that we provide -- that we agree
23 to an easement so that the trucks serving our
24 property could turn around on the adjacent property.
25 That really is an impossibility. You know, zoning

1 doesn't allow you to use the property adjacent to you
2 for your operations.

3 So, what I handed out to you is the agreement
4 that we have reached with DDOT and substitute
5 conditions that the applicant has agreed to put in
6 place instead of having an easement. And otherwise
7 we agree to the other conditions in the DDOT report.

8 CHAIRMAN HILL: Is that -- where are the
9 conditions in your e-mail? Is it --

10 MS. BROWN: If you look at the e-mail that
11 starts below --

12 CHAIRMAN HILL: Yeah, is it the second one?
13 Yeah.

14 MS. BROWN: -- with Mr. Andres addressing Mr.
15 --

16 CHAIRMAN HILL: Got it. Okay. I got it.
17 Okay. Thank you.

18 MR. FOTIU: Okay. I'll just speak to the
19 elevator overrun issue specifically. In looking at
20 elevator manufacturers, what we first did in order to
21 mitigate the height of the elevator overrun was to go
22 to machine-room-less technology which already lowers
23 the height of the overrun above the cab. The next
24 thing we did was researched six manufacturers,
25 determined immediately there was one that had a much

1 higher requirement than the others and eliminated it.
2 The remaining five that are -- that can be
3 retrofitted into an existing building, of those, four
4 essentially have the same overrun within an inch or
5 two of each other.

6 And so, we believe that what is being
7 requested is a appropriate dimension for the elevator
8 overrun, and to add to that it's not visible from
9 14th Street. It's hidden to the north by the 1350
10 Florida Avenue project that's shown to the left of
11 our proposed property and is only visible from the
12 rear alley.

13 CHAIRMAN HILL: Okay. Thank you. Does the
14 Board have any questions of the applicant?

15 Okay. Then, with that I'm going to turn to
16 the Office of Planning. Office of Planning.

17 MR. MORDFIN: Good afternoon. I'm Stephen
18 Mordfin and there are several things I'll address.

19 CHAIRMAN HILL: Please do.

20 MR. MORDFIN: Okay. The first one has to do
21 with the additional relief, that Office of Planning
22 did revise its interpretation of the penthouse
23 regulations when you're adjacent to a historic
24 property. Ms. Brown is correct so we do not -- we no
25 longer think that relief is required from the north

1 wall, which is then for the amenity space, the
2 staircase and the elevator override, so that we no
3 longer believe that the staircase then would also --
4 should necessarily be relocated.

5 So, that relief is no longer required. The
6 second one has to do with, I did speak with Aaron
7 Zimmerman yesterday regarding this case and the e-
8 mail that was handed out, and the conditions that are
9 listed in here are what we spoke of and he did
10 indicate to me that with these conditions he would be
11 satisfied with the applicant's proposal.

12 And the third one, oh, having to do with the
13 elevator override, the additional height. It's not
14 that we're against it. We just felt that the
15 applicant should provide additional information as to
16 why that additional height was necessary to justify
17 it. And I think the applicant has provided
18 additional information here at the hearing this
19 afternoon.

20 CHAIRMAN HILL: Okay. Mr. Mordfin, in terms
21 of what Vice Chair D'Souza brought up, the
22 flexibility from the applicant, do you have any
23 issues with flexibility?

24 MR. MORDFIN: I don't have any issues with
25 the flexibility as long as they don't -- it doesn't

1 result in requiring additional variances that --

2 CHAIRMAN HILL: Well, if it did they'd have
3 to come back.

4 MR. MORDFIN: Right. Then they would have to
5 come back if they were to redesign the building.

6 CHAIRMAN HILL: Okay.

7 MR. MORDFIN: Such that it would require it.

8 CHAIRMAN HILL: Okay. Thank you. If the
9 applicant, if you could put -- what's the -- you had
10 the handwritten, the sketch there. If you could just
11 submit that to the record?

12 MS. BROWN: We'd be happy to.

13 CHAIRMAN HILL: And that, I'm comfortable
14 with the flexibility. In this case. In past cases,
15 which is true, we've been more -- you know, we want
16 to see the drawings and usually I would hold to that.
17 It's been a long day.

18 And so, unless the -- I've lost my -- okay.
19 So, I'm getting smiles over -- yeses over there, so
20 I'm okay.

21 Do you have anything else you would like to
22 add?

23 MS. BROWN: No, I think the record is full
24 and complete on the other areas of relief and how we
25 have met the standards, and we agree to the

1 conditions as we stated earlier.

2 CHAIRMAN HILL: Yeah, so the conditions, just
3 you agreed to the conditions from the Office of
4 Planning and then the DDOT conditions that were
5 submitted that you've -- the e-mail you've submitted
6 in addition to the loading management plan, and --
7 oh, you're relocating the alley street lights?

8 MS. BROWN: Yes.

9 CHAIRMAN HILL: Okay. All right. With that,
10 then, I'm going to ask if there's anybody here from
11 an ANC wishing to speak. Anyone here from an ANC?

12 Is there anyone here wishing to speak in
13 support of the application? Is anyone here wishing
14 to speak in opposition to the application?

15 MR. HOOD: I just want to -- I'm not in
16 opposition, but let me just ask a quick question.

17 CHAIRMAN HILL: Sure. Please do.

18 MR. HOOD: Ms. Brown, I want to make sure I'm
19 clear on this. You're not asking for any penthouse
20 relief, setback or anything, are you?

21 MS. BROWN: We are for the existing elevator
22 on the -- as it overlooks --

23 MR. HOOD: What's there.

24 MS. BROWN: -- to the east of the property
25 and it's in the -- if you can put your --

1 MR. HOOD: But I may have missed this, so
2 forgive me.

3 MS. BROWN: So, it is -- the building is
4 shaped like a T and it narrows as it goes to the
5 alley in the back. So, along the north of the
6 property that is now a side yard. The elevator will
7 be right -- will be flush with the wall that starts
8 the side yard.

9 MR. HOOD: But with a designing issue you
10 actually can meet that penthouse setback, right? If
11 you do a different design?

12 MS. BROWN: No, because we -- it's an
13 existing building, an existing three-story building
14 with an elevator. We are using the existing elevator
15 shaft that is being taken up to the roof. So, we
16 can't --

17 MR. HOOD: Okay. Okay.

18 MS. BROWN: Transfer it.

19 MR. HOOD: Okay. I got you. I got you. All
20 right. Those are very hard for us now to prove on
21 penthouse setbacks. Okay.

22 CHAIRMAN HILL: You know, that penthouse
23 setback, the ears just popped right up.

24 MR. HOOD: Well, sitting here trying to think
25 of, was that -- were they asking for relief? But

1 anyway, okay.

2 CHAIRMAN HILL: Okay. Let's see. So, we've
3 gone through the conditions. Does anyone have any
4 other questions for the applicant? Okay. Then, I'm
5 going to close the hearing.

6 Is the Board ready to deliberate? Would
7 somebody like to deliberate? Okay.

8 I am comfortable with the application. I am
9 glad that they were able to get the Office of
10 Planning on board. I very much appreciate the
11 analysis of the Office of Planning and I'm going to
12 rest on the record with their analysis to how the
13 standard has been met. So, I would go ahead and make
14 a motion to approve application No. 19371 of 14th and
15 R Street Enterprise, LLC. as captioned.

16 MR. HINKLE: Second.

17 CHAIRMAN HILL: Motion has been made and
18 seconded.

19 [Vote taken.]

20 CHAIRMAN HILL: Motion carries.

21 MS. ROSE: Staff will record the vote as four
22 to zero to one, with Mr. Hill, Mr. Hinkle, Ms.
23 Butani, and Mr. Hood to approve the application, one
24 board seat vacant.

25 CHAIRMAN HILL: Thank you. Can we get a

1 summary order?

2 MS. ROSE: Yes.

3 CHAIRMAN HILL: Thank you.

4 MS. BROWN: Thank you very much.

5 MS. ROSE: Next is Application 19372 of Glenn
6 Counts, as amended pursuant to 11-DCMR, Subtitle X,
7 Chapter 9, for a special exception under Subtitle D.

8 CHAIRMAN HILL: No, no, no. Oh, no sorry.
9 I'm sorry. My mic was on. I didn't know my
10 microphone was on. I apologize.

11 MS. ROSE: Subtitle D, Section 5201, from the
12 lot occupancy requirements of Subtitle E, Subsection
13 304.1 to construct an accessory garage in the R-F-1
14 zone at premises 440 N Street Northwest, Square 513,
15 Lot 932.

16 CHAIRMAN HILL: Thank you, again. It was
17 read an accessory garage, correct? Okay. Great.

18 Good afternoon. If you could please
19 introduce yourself? Oh, you need to push the green
20 light.

21 No? Try it again. Try another microphone.

22 MR. COUNTS: Oh, there we go.

23 CHAIRMAN HILL: Okay.

24 MR. COUNTS: My name is Glenn Counts and I am
25 the resident owner of 440 N Street Northwest.

1 CHAIRMAN HILL: Okay, Mr. Counts. This is
2 your property?

3 MR. COUNTS: Yes, it is.

4 CHAIRMAN HILL: Okay. Could you at a very --
5 I don't really have a lot of questions for you and at
6 the same time I know that this is something that you
7 know, you don't normally do. Right? This is just
8 your own personal property, you're coming down here.

9 MR. COUNTS: That is correct.

10 CHAIRMAN HILL: So, if you could just kind of
11 tell us a little bit at a high level about the
12 project and I'll see if the Board has any questions.

13 MR. COUNTS: Certainly. I'm planning to add
14 a detached garage to the rear of my home and it
15 exceeds the lot occupancy in Zone R-F-1. The maximum
16 lot occupancy is 60 percent, and my proposed garage
17 if approved by the Board will make the lot occupancy
18 rise to 69.3 percent.

19 Essentially the attached garage is to store
20 my car as well as to provide additional storage for
21 my home. I have a very small row home and there's
22 not a lot of storage in that property.

23 CHAIRMAN HILL: Okay. Thank you, Mr. Counts.
24 Does the Board have any questions for this
25 application? Okay.

1 Again, I find the application to be complete.
2 I just don't want you to feel cheated. You've been
3 here all day. You know, you can take a little bit
4 more time if you like.

5 MR. COUNTS: I'm fine. Thank you.

6 CHAIRMAN HILL: Okay. With that, then I'm
7 going to turn to the Office of Planning.

8 MS. VITALE: Good afternoon, Mr. Chair,
9 Members of the Board. Elisa Vitale for the record.
10 The Office of Planning will rest on the record in
11 support of the requested lot occupancy relief for the
12 detached garage.

13 CHAIRMAN HILL: Okay, great. Thank you.
14 Does the Board have any questions for the Office of
15 Planning?

16 All right. Well, with that I'm going to turn
17 again to my slowly smallening (sic) crowd and say, is
18 there anyone here from the ANC wishing to speak?
19 Anyone here from the ANC?

20 Is there anyone here wishing to speak in
21 support of the application? Is there anyone here
22 wishing to speak in opposition of the application?

23 I will also note for the record that ANC 6E
24 is in approval. Congratulations of going through
25 that process. And also, DDOT and obviously, the

1 Office of Planning here.

2 I again don't have any further questions.
3 Would you like to say anything in summary?

4 MR. COUNTS: No, I do not.

5 CHAIRMAN HILL: Okay. Thank you. Then,
6 unless the Board has anything else I'm going to close
7 the hearing. Okay. I'm going to close the hearing.

8 MR. HOOD: Mr. Chairman, I would move that we
9 approve, if it's appropriate, approval of the
10 following special exception pursuant to Subtitle E,
11 5201, 301.1 lot occupancy of 60 percent maximum
12 permitted to 69.3 percent proposed, and let the
13 record and the merits of this case speak for itself,
14 what's in the record, and ask for a second.

15 MS. BUTANI-D'SOUZA: Second.

16 CHAIRMAN HILL: The motion has been made and
17 seconded.

18 [Vote taken.]

19 CHAIRMAN HILL: Congratulations. The motion
20 passes.

21 MR. COUNTS: Thank you.

22 MS. ROSE: Staff will record the vote as four
23 to zero to one with Mr. Hood, Ms. Butani, Mr. Hill,
24 and Mr. Hinkle in support of the motion, and one
25 board seat vacant.

1 CHAIRMAN HILL: Thank you. Ms. Rose, if we
2 can get a summary order?

3 MS. ROSE: Yes.

4 CHAIRMAN HILL: Thank you. And, Chairman
5 Hood, please, you're welcome to speak up. My throat
6 is going to get, you know, sore here today. I'm
7 going to need a lozenge or something. So --

8 MR. HOOD: I don't make a lot of motions on
9 the BZA. I make enough.

10 MS. ROSE: Next is Application 19373 of
11 Stephen Babatunde as amended pursuant to 11-DCMR,
12 Subtitle X, Chapter 9 for a special exception under
13 the RF use requirements of Subtitle U, Subsection
14 320.2(m) to expand an existing four-unit apartment
15 house in the R-F-1 zone at premises 911 T Street
16 Northwest, Square 361, Lot 803.

17 CHAIRMAN HILL: Good afternoon. If you could
18 please introduce yourselves from left to right that
19 would be very helpful. My left, to your right. My
20 right.

21 MS. MOLDENHAUER: Good afternoon, Meredith
22 Moldenhauer, land use counsel here on behalf of the
23 applicant.

24 MR. ADOKO: Good afternoon, Anthony Adoko,
25 architect for the project.

1 MS. AGB00LA: And good afternoon, Ajoke
2 Agboola, land use counsel on behalf of the applicant.

3 MR. BABATUNDE: My name is Stephen Babatunde.
4 I'm the owner of the property.

5 CHAIRMAN HILL: Okay. Great. Well, welcome.
6 I don't particularly have a lot of questions
7 concerning this application. If you would like to do
8 a little high-level presentation that would be what I
9 would be kind of interested in hearing again, just
10 kind of the applicant itself and how it meets the
11 variance, or the standards.

12 And then, if the Board had any other
13 clarifying questions I'm sure they'll go ahead and
14 let you know as we kind of move through this. So,
15 please, go ahead.

16 MS. AGB00LA: Good afternoon. Thank you to
17 all the board members. This property is located at
18 911 T Street Northwest. It is an existing four-unit
19 apartment house that was converted to an apartment
20 house in 1957. The applicant has owned the property
21 for over 20 years since 1968. The C of O is in the
22 record. Currently the property occupies about 800
23 square feet of the lot. The applicant is proposing
24 an 1810-inch rear addition to the property which will
25 increase the size of the units. The applicant does

1 not propose increasing the number of units. The
2 property will continue to have four units as it has
3 had since 1957.

4 CHAIRMAN HILL: Okay. Does anyone have any
5 questions for the applicant?

6 Okay. Then, I think they have some questions
7 for the Office of Planning. If it's all right with
8 you, I'm going to turn to the Office of Planning.
9 Office of Planning.

10 MR. JESICK: Thank you, Mr. Chair and Members
11 of the Board. The Office of Planning can rest on the
12 record in support of the application, but I'd be
13 happy to take your questions. Thanks.

14 MS. BUTANI-D'SOUZA: Mr. Jesick. Mr. Jesick,
15 right? I noticed, if I understood this correctly,
16 that the addition extends greater than 10 feet past
17 the rear wall. Is that not -- doesn't that require a
18 waiver of one of the provisions? Or am I getting my
19 special exceptions mixed up?

20 MR. JESICK: I believe by our analysis it was
21 only extending three to four feet past the rear wall
22 of the adjacent buildings. So.

23 MS. BUTANI-D'SOUZA: Oh, it wasn't extending
24 greater than -- I thought it was greater than --
25 three to four feet greater than 10 feet.

1 MR. JESICK: No, I'm sorry if my report was
2 misleading. This building is actually set back from
3 its neighbors. So, once they bump out they would
4 only be extending beyond them just a short amount.

5 MS. BUTANI-D'SOUZA: Okay. So, they don't
6 need a waiver of that provision?

7 MR. JESICK: Correct.

8 MS. BUTANI-D'SOUZA: Okay. Thank you.

9 MS. AGBOOLA: May I just state, the applicant
10 does not believe that provision applies to this
11 application. We noted in our prehearing statement
12 that we met with the Zoning Administrator on several
13 occasions and he advised us that provisions A through
14 L did not apply to this application, and we also have
15 a zoning determination letter from him stating that.
16 And I can provide that to you if you wish. But we
17 are seeking relief pursuant to 320.2(m), only as it
18 applies, and for part of that, only the special
19 exception provision of that.

20 CHAIRMAN HILL: Okay. Any other questions?
21 Okay.

22 I'm going to ask here if there's anyone here
23 from the ANC wishing to speak.

24 Is there anyone here wishing to speak in
25 support of the application? Is there anyone here

1 wishing to speak in opposition of the application?

2 Ms. Agboola. Agboola. How do you say?

3 MS. AGB00LA: Agboola.

4 CHAIRMAN HILL: Agboola. Is this the first
5 time presenting with us or no?

6 MS. AGB00LA: No, I presented once before in
7 July.

8 CHAIRMAN HILL: Maybe I wasn't here that day.

9 MS. AGB00LA: Maybe.

10 CHAIRMAN HILL: Yeah. But welcome.

11 MS. AGB00LA: Thank you.

12 CHAIRMAN HILL: Yeah, I don't think they'll
13 all go this smoothly.

14 MS. AGB00LA: I don't think so.

15 CHAIRMAN HILL: Yeah, so just letting you
16 know.

17 MS. AGB00LA: Thank you.

18 CHAIRMAN HILL: Let's see. Okay. The Board
19 doesn't have any more questions. I'm going to go and
20 close the hearing.

21 With that, oh yeah, I'm going to close the
22 hearing. So, I again, after going through the entire
23 record and reading the record, I am also in agreement
24 that the applicant has met the standards, and I also
25 rest on the analysis of the Office of Planning and am

1 glad that they were able to approve the application.
2 I also would like to make note that the ANC 1B is
3 also in approval and that, you know, obviously you
4 had to go through that process as well. So,
5 congratulations with that.

6 That being said, I would go ahead and make a
7 motion to approve Application No. 19373 as captioned.

8 MR. HINKLE: Second.

9 CHAIRMAN HILL: Motion has been made and
10 seconded.

11 [Vote taken.]

12 CHAIRMAN HILL: The motion passes.

13 MS. ROSE: Staff will record the vote as four
14 to zero to one with Mr. Hill, Mr. Hinkle, Ms. Butani,
15 and Mr. Hood in support of the motion. One board
16 seat vacant.

17 CHAIRMAN HILL: Thank you. Summary order.

18 MS. ROSE: Thank you.

19 CHAIRMAN HILL: Thank you. Congratulations.
20 Yes, congratulations, Mr. Hinkle. I'd agree.

21 MS. ROSE: Last case.

22 CHAIRMAN HILL: We have one last case.
23 Please.

24 MS. ROSE: The last case is 19353,
25 application of 770 Park, LLC., pursuant to 11-DCMR,

1 Subtitle X, Chapters 9 and 10 for a special exception
2 under the RF use requirements of Subtitle U,
3 Subsection 320.3, and a variance from the use
4 requirements of Subtitle U, Subsection 301.1 to
5 convert a nonresidential building into an eight unit
6 apartment building with ground floor commercial uses
7 in the R-F-1 zone at premises 770 Park Road
8 Northwest, Square 2894, Lot 915.

9 CHAIRMAN HILL: Great. Good afternoon. Just
10 take your time, get set up. I think, if you want,
11 you have a whole hour.

12 MR. KADLECEK: I think you probably wouldn't
13 be so happy if we took a whole hour.

14 Good afternoon.

15 CHAIRMAN HILL: You can introduce yourself.
16 Yeah, please.

17 MR. KADLECEK: Cary Kadlecek from Goulston
18 and Storrs on behalf of the applicant.

19 MR. REISHMAN: Lindsay Reishman, I'm with
20 District Quarters. I'm an applicant.

21 MR. LINAM: I am John Linam, architect for
22 the client.

23 CHAIRMAN HILL: Okay, great. So, gentlemen
24 you all were here before and there was some further
25 information and clarification that we were looking

1 for in terms of the application.

2 So, if you can maybe just go ahead and fill
3 us in on what happened since the last hearing, that
4 would be a great place to start.

5 MR. KADLECEK: Sure. I'll just give you a
6 quick overview and then if you have any questions
7 please -- but we'll just try and keep it brief.

8 There were just a few items that the Board
9 had asked for as a result. Just quickly, a couple of
10 them as you see in the I guess supplemental filing
11 that we providing on November 14th, we provided a
12 rendering of the project in a context photo. I
13 believe Mr. Hood asked for that. More specificity
14 for colors of the materials on the addition. The
15 Office of Planning asked for that. That's provided
16 in the drawings.

17 CHAIRMAN HILL: Can you actually pull them
18 up?

19 MR. KADLECEK: Oh, sure.

20 CHAIRMAN HILL: Yeah, that's all right.

21 MR. KADLECEK: Yeah.

22 MR. REISHMAN: Before we get to the drawings
23 I'll just go to the things that didn't have drawings
24 associated with them. One of the questions from
25 Board Member Butani was about what the neighborhood

1 understood the possible uses were. And you'll see in
2 the record there's a letter from the ANC explaining
3 what they did understand the possible uses for the
4 retail space would be.

5 I believe Ms. Butani also asked for some
6 neighborhood development context. There's a map in
7 the filing that we provided that shows what some
8 recent developments in the neighborhood are. And
9 then finally, regarding more specific conditions, the
10 last point in our supplemental statement on the
11 second page, it lists the 13 conditions that we
12 proposed, and those were offered in conjunction with
13 consultation with the Office of Planning, and derived
14 from, as we explained at the last hearing, derived
15 largely from conditions that are associated with
16 corner stores, but also we took some additional
17 conditions based on other use variance cases for
18 restaurants in the R-F-1 zone and recent other cases
19 as well. And so, it's an amalgamation of those types
20 of conditions.

21 CHAIRMAN HILL: Can you tell me which exhibit
22 that is that has the conditions?

23 MR. REISHMAN: Yes. It's -- I have to pull
24 it up here. Sorry.

25 ALLISON: It's Exhibit 48 of the record.

1 MR. REISHMAN: Yeah. Thanks. I was trying
2 to pull it up.

3 CHAIRMAN HILL: Thank you. That's okay.

4 MR. REISHMAN: I didn't have it.

5 CHAIRMAN HILL: Oh, I'm sorry. I just don't
6 want to have to read them. Okay. So, the Office of
7 Planning is on the same page with these conditions as
8 is the ANC?

9 MR. REISHMAN: Yes.

10 CHAIRMAN HILL: Okay. All right. Okay,
11 great. Please, continue. Or, we're trying to. I'm
12 sorry.

13 MR. REISHMAN: Yeah, so we'll --

14 [Discussion off the record.]

15 ALLISON: Is the same as Exhibit 49 of the
16 record?

17 MR. REISHMAN: It is the same, yes.

18 ALLISON: So, you can pull up Exhibit 49 to
19 following along as well.

20 CHAIRMAN HILL: Yeah, if you just want to --
21 I'm just trying to look at what the changes were.
22 Where were the -- from 49. Can you look at -- can
23 you pull it up for yourself, or no?

24 No, no, I have it right in front of me. You
25 can just tell me what page you're looking at.

1 MR. REISHMAN: We'll just direct you to the
2 different pages. So, page A12-D. I think that's the
3 -- it's near the end of the package.

4 MR. KADLECEK: A12-D is the photo rendering
5 illustration that we added to the set to show more of
6 a straight on view, rather than the corner view that
7 we had previously.

8 CHAIRMAN HILL: Okay. I got it.

9 MR. KADLECEK: To illustrate the addition
10 that is added to the side, and showing that in
11 conjunction with the existing building as opposed to
12 just -- the existing photograph, I should say, as
13 opposed to an entire image created just by the model.

14 CHAIRMAN HILL: Okay.

15 MR. REISHMAN: And then regarding the
16 specificity for colors and materials on the addition,
17 those are identified on pages A14 and A16.

18 MR. KADLECEK: Yes. So, yes, basically --

19 CHAIRMAN HILL: All right. The slate gray
20 brick and the artic white siding, and the windows.

21 MR. KADLECEK: That's correct.

22 CHAIRMAN HILL: Okay. Okay. Thank you.

23 MR. REISHMAN: We have nothing, nothing
24 further. I think we can rest on the record and just
25 to remind the Board that we do have ANC support, and

1 as well as the adjacent neighborhood, who has
2 submitted a letter of support to the record.

3 CHAIRMAN HILL: Okay. Great. Thank you.

4 Does the Board have any additional questions
5 from the applicant? Okay. I don't know whether we
6 did the whole hearing, I don't want to say or not,
7 but I'm going to turn to the Office of Planning.
8 Okay?

9 MS. VITALE: Good afternoon, again, Mr.
10 Chair, Members of the Board. Elisa Vitale with the
11 Office of Planning.

12 We appreciate the applicant's additional
13 information that was provided, and we are
14 recommending approval of the special exception relief
15 and the use variance subject to the conditions that
16 are outlined in the staff report. This concludes my
17 report. I can answer any questions. Thank you.

18 CHAIRMAN HILL: Okay. Thank you. The one
19 question I guess I had, there was the -- in the
20 conditions, number 13, if a tenant of the commercial
21 space is a restaurant, it shall not be a chain,
22 meaning should not establish one with no more than
23 one location in the D.C. Metropolitan area.

24 The Office of the Attorney General has kind
25 of pointed out that it's not something that it would

1 necessarily be enforceable. Or it would be difficult
2 for us to enforce. So, I'm going to remove that
3 condition. And so, unless the Office of Planning has
4 something else they'd like to say about it.

5 MS. VITALE: No, that was actually a
6 condition proffered by the applicant.

7 CHAIRMAN HILL: Okay. Okay.

8 MR. REISHMAN: We're comfortable removing
9 that condition as well.

10 CHAIRMAN HILL: Okay. So, I'm going to take
11 that condition off, otherwise the conditions that are
12 listed in Exhibit 48 will convey.

13 So, out of an abundance of caution I'm going
14 to just again do the whole hearing because I can't
15 recall what we did. I'm going to ask if there's
16 anyone here from the ANC that would like to speak.
17 Anyone here from the ANC? I see, obviously, that the
18 ANC has -- from the record, that the ANC is in
19 support.

20 Anyone here to speak in support of the
21 application? Anyone here interested in speaking in
22 opposition to the application?

23 There's no one here in the room. With that,
24 I go ahead and turn to the applicant and see if they
25 have anything else they'd like to add.

1 MR. REISHMAN: No, thank you.

2 CHAIRMAN HILL: Okay. Does the Board have
3 any further questions for the applicant? All right.

4 Then I'm going to go ahead and close the
5 hearing. And I can again start the discussion,
6 deliberations. I was pretty comfortable with the
7 previous hearing, actually, and I'm glad to see that
8 there are -- there was more information that we got
9 that was helpful in terms of, I did like to see the
10 different angle, the new angle that was shown from
11 the architect as well as the different materials that
12 were being provided. And, you know, I'm comfortable
13 putting forth the motion to approve Application No.
14 19353 of 77 Park, LLC. with those conditions that
15 were in Exhibit 48, minus numbers 13 and approve as
16 advertised.

17 MS. BUTANI-D'SOUZA: I appreciated that the
18 applicant went back to the ANC and confirmed that
19 their understanding of the retail that you were
20 planning was correct, as to what your plans actually
21 were. And I think the project looks great so I would
22 second the motion.

23 CHAIRMAN HILL: And I appreciate you pointing
24 that out. That was something that I wanted to be
25 clear on, that the ANC knew that there could be a

1 restaurant with alcohol and so, so the motion has
2 been made and seconded.

3 [Vote taken.]

4 CHAIRMAN HILL: The motion passes.

5 MS. ROSE: Staff will record the vote as four
6 to zero to one with Mr. Hill, and Ms. Butani, Mr.
7 Hinkle, and Mr. Hood in support. One board seat
8 vacant.

9 CHAIRMAN HILL: Thank you. Supplemental.
10 Supplemental. Summary order.

11 MS. ROSE: Summary order. Oh, yes, sir.

12 CHAIRMAN HILL: Thank you. So,
13 congratulations.

14 MR. REISHMAN: Thank you.

15 CHAIRMAN HILL: Mr. Hinkle, once again, going
16 to miss you. You know. I don't know if
17 congratulations is the right thing to say, but you
18 know, I hope you enjoy your -- I don't even know it's
19 retirement.

20 MR. HINKLE: No, it's not retirement.

21 CHAIRMAN HILL: The next phase. The next
22 phase.

23 MR. HINKLE: It's just, yeah, going off.
24 Thank you, Chairman Hill.

25 MR. REISHMAN: Yes, congratulations, Mr.

1 Hinkle.

2 MS. ROSE: Closed meetings.

3 MR. HINKLE: Thank you.

4 CHAIRMAN HILL: Oh, yeah. I have to -- we do
5 have to do a roll call vote, still. The closed
6 meetings.

7 Okay. So, I do -- the D.C. Board of Zoning
8 Adjustment, so Chairman's motion and follow up
9 announcements for a closed meeting, legal advice, and
10 deliberations, but not voting, the month of December,
11 2016 roll call vote.

12 So, in accordance with Section 405C of the
13 Open Meetings Act, D.C. Official Code Section
14 2575(c), I move that the Board of Zoning Adjustments
15 hold closed meetings on the Mondays of December 5th,
16 12th, and 19th. These meetings start at 4:00 p.m.
17 and are held for the purpose of obtaining legal
18 advice from our counsel and deliberating upon but not
19 voting on the cases scheduled to be publicly heard or
20 decided by the Board on the day after each such
21 closed meeting. Those cases are identified on the
22 Board's public meeting and hearing agenda for
23 December 7th, 14th, and 21st.

24 A closed meeting for these purposes is
25 permitted by Section 405(b)(4) and (b)(13) of the

1 act. Is there a second?

2 MS. BUTANI-D'SOUZA: Second.

3 CHAIRMAN HILL: Motion has been made and
4 seconded. Will the secretary please take a roll call
5 vote on the motion?

6 MS. ROSE: Please indicate your vote with a
7 yea or nay when your name is called.

8 [Roll call vote taken.]

9 CHAIRMAN HILL: The motion passes. You're
10 going to go out on a no?

11 MR. HINKLE: I am. I am.

12 CHAIRMAN HILL: That's good. That's all
13 right. There you go.

14 I request that the Office of Zoning provide
15 notice of these closed meetings in accordance with
16 the act.

17 Is there any additional things coming before
18 the Board today?

19 MS. ROSE: No, sir.

20 CHAIRMAN HILL: Well, then we are adjourned.

21 [Whereupon, at 4:46 p.m., the Board Hearing
22 was adjourned.]

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