GOVERNMENT

OF

THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING - CIVIL INFRACTIONS

+ + + + +

TUESDAY

JANUARY 23, 2001

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The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 1:11 p.m., Robert N. Sockwell, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

ROBERT N. SOCKWELL	Chairperson
SHEILA CROSS REID	Vice Chairperson
ANN RENSHAW	Board Member
RODNEY MOULDEN	Board Member

ZONING COMMISSION MEMBER PRESENT:

ANTHONY J. HOOD	Commissioner
CAROL MITTEN	Commissioner

OFFICE OF ZONING STAFF PRESENT:

Alberto Bastida, Secretary
Sheri Pruitt, Office of Zoning

D.C. OFFICE OF CORPORATION COUNSEL PRESENT:

Marie Sansone, Esq.
Corey Boffo, Esq.
Alan Bergstein, Esq.

C-O-N-T-E-N-T-S

AGENDA ITEM PAGE

I. APPEALS TO BE DECIDED 4

Appeal of the Administrative Determination
BZA No. 98-004
OAD No. 98-1889-E 5

Representing the Appellant:

CAROL ROSENTHAL, ESQ.

Representing the Government:

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Appeal of the Administrative Determination
BZA No. 97-0002
OAD No. 97-1785G 16

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C-O-N-T-E-N-T-S

AGENDA ITEM PAGE

Appeal of the Administrative Determination
BZA No. 98-0002
OAD No. 98-1154-G 61

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Appeal of the Administrative Determination
BZA No. 00-0001
OAD No. 99-1821-E 86

Representing the Government:

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

(1:11 p.m.)

CHAIRPERSON SOCKWELL: Good afternoon, Ladies and Gentlemen. This is the time scheduled for the Board of Zoning Adjustment to hear appeals from orders of the Hearing Examiners issued pursuant to the Civil Infractions Act, involving violations of the zoning law and regulations.

My name is Robert Sockwell, Chairman of the Board. Also present today are Sheila Cross Reid to my right, Vice Chairperson; Ann Renshaw, and Rodney Moulden, to my left, and Rodney Moulden representing the National Capital Planning Commission.

And representing the Zoning Commission are Carol Mitten and Anthony Hood. I'm sorry, to my right. Oh, I'm sorry, Carol Mitten to my left. The Board has four appeals on today's agenda. We will be taking up procedural matters in each of the four cases as the cases are called.

Are there any preliminary matters affecting today's agenda that the staff wishes to bring to the Board's attention for the first case?

MR. BASTIDA: Mr. Chairman, the staff has no preliminary matters on the first case. Thank you.

CHAIRPERSON SOCKWELL: Thank you. All right. Then we will proceed with the first case. Mr. Bastida, please call that case.

MR. BASTIDA: Yes. This is BZA Case 98-0004, OAD Number 98-1884-E (sic). The appellant is Eric Rudd, and the appellant's legal representative is here to do preliminary matters.

CHAIRPERSON SOCKWELL: Please set your mikes to the on position, and will the Appellant's representative introduce themselves.

MS. BLOOMENTHAL: Mr. Chairman, my name is Carol Bloomenthal, and I represent the Appellant, Eric Rudd.

MR. THOMAS: And I am Charles Thomas, representing the Government.

CHAIRPERSON SOCKWELL: Thank you.

MR. BASTIDA: Mr. Chairman, if I may, I would like to thank Ms. Bloomenthal for being so accommodating and trying to accommodate the wishes of the staff, and to be here at this time.

CHAIRPERSON SOCKWELL: All right. The Board should recognize that today's hearing is occurring prior to the expiration of the period during which the Appellant in this case could file a reply brief under the briefing order.

MS. BLOOMENTHAL: Actually, Mr. Chairman, I don't know that the Government has actually filed a brief in this case, and I think --

MR. THOMAS: We are here on a different matter, Your Honor. We are here on the Government's unopposed motion for an enlargement of time to file a responsive brief, and I can

safely say that it is our motion for an enlargement of time to file a brief.

Actually, we are still within the briefing period, and for some reason this matter was set for a hearing. As we indicated in our motion for the enlargement of time, that the record has not yet been certified to the Board of Zoning.

And it will almost be an exercise in futility to proceed on a matter where the Board itself cannot make a determination without a complete and accurate certified record.

And as of Friday, or the 18th, the record was not certified to the Board. So that would pose a problem. We are saying that we have to file briefs based on the certified record.

CHAIRPERSON SOCKWELL: Sir, your name is?

MR. THOMAS: Charles Thomas.

CHAIRPERSON SOCKWELL: Thomas, all right.

MR. THOMAS: And secondly the Government has not had an opportunity, or did not receive the Appellant's notice of appeal. We just received it with the Appellant's brief.

We don't know the manner of service, or the time of service, and therefore the Government is sort of prejudiced. We don't know about the timing and legal sufficiency of the notice of appeal. I mean, we just had a unsigned notice of appeal attached to the Appellant's brief.

And so we spoke to the representative here, we were told that we were coming in here just on this motion, a motion for

enlargement of time based on the fact that the record had not been certified to the Board of Zoning.

CHAIRPERSON SOCKWELL: The Board has before it a memorandum certifying that the foregoing documents represent the complete case files in the above-reference matters in this case. It is inclusive of Number 98-004, Eric Rudd.

MR. THOMAS: And the Government --

CHAIRPERSON SOCKWELL: And that is dated January 16th, 2001.

MR. THOMAS: Right. And it appears as if the record was certified after the date had expired for the Appellant to file a brief. The Appellant had been requesting a copy of the certified record, and we were told --

CHAIRPERSON SOCKWELL: Well, there is a date of December 20th that is referenced in this that states --

MR. THOMAS: That it was received on the 16th.

CHAIRPERSON SOCKWELL: It was received on the 16th, but it does state that the records were forwarded on December 20th of 2000.

MR. THOMAS: Right. There were just pieces of documents that were filed here that were inconsistent with records that were at the agency. So we inquired and said, well, we recognize that this is not the certified record that was filed here.

It may have been copies of the Appellant's notice

of appeal attachments, and we asked the agency about the certified record as of January 17th, and they said they were not certified because they were not requested by the Board.

So I think there are some inconsistency, and that's why we, the government, has asked for an enlargement of time. We recognize that the Board itself cannot make a decision, a valid, binding decision on an incorrect, and incomplete record that is uncertified. And opposing counsel has no objection to that.

MS. BLOOMENTHAL: That's correct, Mr. Chairman. The time for -- under the scheduling order, the time for the government's brief to have been filed was the 22nd, and I had wished to receive that brief, and had --

CHAIRPERSON SOCKWELL: That is the 22nd of?

MS. BLOOMENTHAL: Of this month, or in other words, yesterday. And as I understand the rules, I would then have had a period of time to file a reply brief.

Since I had not received a brief from the government, I had made inquiries myself about the propriety of going forward today, and how I would like to be privy to the District of Columbia's position before argument, and would like to have the benefit of reviewing a brief, and filing a reply if warranted.

Accordingly, when we received the motion from Mr. Thomas on behalf of the District for an enlargement of time, I had indicated to him that I would consent to that.

CHAIRPERSON SOCKWELL: Then on that basis is it my understanding, or the Board's understanding that you are both amenable to or desiring that an enlargement of time be provided; the government, ostensibly for the receipt of a certified record, and the Appellant for an opportunity to review the government's response for the purpose of providing a reply. Is that correct?

MS. BLOOMENTHAL: That's correct, if the government chooses to file a brief, Your Honor, and as I said, the briefing was due yesterday. My understanding is that no brief has been filed at this time.

Yes, my request would be if we could have an enlargement of time, and basically to reset the scheduling order for the case insofar as setting a date for the District of Columbia filing a brief.

And then the time period to file a reply, and we would request that oral argument be set sometime after those dates.

CHAIRPERSON SOCKWELL: Anything further? Mr. Bastida.

MR. BASTIDA: Yes. Mr. Chairman, can we ask from the representative from DCRA to provide us with a copy of the briefing or the motion that he filed? It appears at this point that it is not officially in the record, and we had not received it.

So I would like to make sure that in fact that becomes part of the

record. Thank you.

CHAIRPERSON SOCKWELL: All right. In regard to the record, we have Item 4 in our exhibit log that a DCRA file was received on the 22nd of December.

MR. BASTIDA: Mr. Chairman, I am looking for Exhibit 4, which is the one that you are referring to?

CHAIRPERSON SOCKWELL: Yes.

MR. BASTIDA: Would you bear with me for a minute, please.

(Brief Pause.)

MR. BASTIDA: Exhibit 4 is a transmittal from Mr. Newsome, Chief Administrative Law Judge, and it has basically the decision, and an order, and it goes to the importance of the appeal, and so on. So I see that more as part of the record.

CHAIRPERSON SOCKWELL: So it is a document, as opposed to a record?

MR. BASTIDA: Right. As opposed to a request for a -- what basically amounts to a time extension in my non-lawyer thinking.

CHAIRPERSON SOCKWELL: All right. Then we would then entertain a motion on behalf of both the Appellant and the Government for a resetting of the clock you might say to enlarge the time period for the receipt of documents, and responses, and answers to said records.

Is that the appropriate direction that the staff

would suggest we take?

MS. SANSONE: Yes, Mr. Chairman, and since we don't have a copy of the motion available to us -- it possibly didn't get logged in or something -- but maybe you could inquire how much time the government is suggesting?

MS. BLOOMENTHAL: I believe the government asked for 30 days.

MR. THOMAS: That's right. We asked for 30 days from the date of the receipt of the certified record, yes.

CHAIRPERSON SOCKWELL: Staff, upon receipt of the certified record, the clock would start, and what is the official prescribed time frame?

MR. BASTIDA: It would be 30 days for the government to file, and it would be 21 days subsequent to that for the appellant to file their brief. And then a public hearing on the matter would be schedule after that.

CHAIRPERSON SOCKWELL: Mr. Bastida, would you make sure your mike is on.

MR. BASTIDA: Thank you, Mr. Chairman, I apologize. It is 30 days after the record is certified, which is certified already, and so it should be available as of today; and then 21 days for the appellant to file after the receipt of the government response.

And I am requesting that the government serve the appellant directly in order to avoid further delays.

CHAIRPERSON SOCKWELL: Is that --

MR. THOMAS: Yes, that's fine.

CHAIRPERSON SOCKWELL: Then, Board Members, I would request approval of the expansion of the time period for the receipt of certified record, and appropriate responses and answers, and I so move.

BOARD MEMBER RENSHAW: I second.

CHAIRPERSON SOCKWELL: All in favor or is there any discussion?

(No audible response.)

CHAIRPERSON SOCKWELL: All in favor?

(A chorus of ayes.)

CHAIRPERSON SOCKWELL: Opposed?

(No audible response.)

CHAIRPERSON SOCKWELL: The motion carries, and if there are no more questions, then we will await the certification of records and the ensuing response and answers.

MR. BASTIDA: And, Mr. Chairman, the staff will record the vote five to zero; Mr. Sockwell moving it, and Ms. Renshaw seconding it, and the remaining board members voting in the affirmative; and Mr. Hood being the representative of the Zoning Commission to the Board voting in the affirmative also. Thank you.

CHAIRPERSON SOCKWELL: Thank you.

MR. BASTIDA: Thank you, Mr. Chairman.

COMMISSIONER HOOD: Mr. Chairman, if I may, if this is an appropriate time, I wanted to recuse myself from the next two cases dealing with the Rodgers Brothers because of my previous involvement.

I am going to ask that my colleague, Commissioner Mitten, sit in place of me. Thank you.

CHAIRPERSON SOCKWELL: Thank you very much, Mr. Hood. Will the staff call the next case, please.

MR. BASTIDA: Yes, Mr. Chairman. The second case of the afternoon is BZA Number 97-0002, and OAD Number 97-1786-G (sic), and the Rodgers Brothers representative, Mr. Cooper, is here, and he might have some preliminary matters. Thank you.

MR. PARKER: Good afternoon. For the record, Arthur Parker, Assistant Corporation Counsel, on behalf of the Department of Consumer and Regulatory Affairs, here with my co-counsel, Laura Gilbert, Attorney-Advisor from the Department of Consumer Regulatory Affairs.

MR. COOPER: Good afternoon. My name is A.J. Cooper, from Cooper and Associates, representing A New Partnership, et al., in this appeal. Accompanying me is Mr. George Rodgers, Junior, from Rodgers Brothers, Incorporated.

CHAIRPERSON SOCKWELL: All right. Mr. Cooper, you may proceed.

MR. COOPER: Mr. Chairman, on this past Wednesday, we received a telephone call from the Director, telling us that

there was to be a hearing on today. We have not yet received any written notice of a hearing.

The Director advised us that the hearing was going to involve our motions, and the appeal itself, but was not able to otherwise be specific about that. We inquired --

COMMISSIONER MITTEN: Mr. Cooper, when you say the director, who are you referring to?

MR. COOPER: Mr. Bastida.

COMMISSIONER MITTEN: Okay. Thank you.

MR. COOPER: And, subsequently, we spoke to the attorneys for the Board as well. And we are still unable to get any specifics as to what was going to happen here today.

On that same day, we again came over to the offices here because the government had yet to file the certified record. This appeal was filed over 2-1/2 hears ago approximately, and when we first got the notice of the scheduling, the briefing, the notice was only directed to the appellants, and there was no notice to appellees.

Our response was to say to the Board to please redo the briefing order, because notice must be provided to both parties. Otherwise, we can go through all the briefings, but we have to start all over again because the City would not have received notice.

And at that point we advised the Board that the certified record had not been submitted. Mr. Bastida informed me

that he had requested that the District submit the certified record.

As of the date of Mr. Bastida's call to us on the 16th approximately, the record had not been filed. On that Friday, we received a call to say that the District had filed the record.

We came over to see it, and as it turned out, the District had stated to the Board that it was filing the record. However, the paperwork that was submitted was paperwork with regard to a case involving a Mr. Sleckter, and all of the paperwork that was submitted was on the Sleckter case, which had nothing to do with this case.

As far as I can determine the District of Columbia, Department of Consumer and Regulatory Affairs, two years plus to date, still has not yet filed a certified record.

And it is on that basis that we had filed a motion; one, a motion to dismiss for failure to prosecute for not filing the record; a motion to reset the scheduling order; a motion to have a scheduling hearing so that the Director and the lawyers from both sides could talk about scheduling, and dates, and so forth.

The District filed a motion in opposition. Their motion in opposite was filed 7 or 8 days beyond the time we contend when a motion in opposition was due to be filed, which is 10 days after receipt of the original motion.

And so we have all of these things here, and yet without any record having been certified. So that the citizen appellant can review the record and prepare his appeal.

This record is a voluminous record, covering many weeks of hearings, probably 750 to a thousand pages of testimony. Plus, an equal number of pleadings and briefs on legal issues.

And it is appropriate, I think, for the Board to conclude that it ought to dismiss the matter, and for the District to note the appeal, to note the briefing schedule, to file a certified record, all to the disadvantage of the appellant.

And at the least to note a scheduling conference, and reset the whole briefing schedule if the District at some point decides that it wants to file at its convenience a certified record, and that's all we have at this point, Mr. Chairman. Thank you.

MR. PARKER: And I have some response to that.

CHAIRPERSON SOCKWELL: Yes.

MR. PARKER: First of all, with regard to the record issue, unfortunately it appears that the Board of Zoning Adjustment, as you sit in two different modes -- one of them is your de novo hearing, where you have your normal hearings, and you conduct your normal process -- there is ample rule making there that describes how you give notices, and the procedures that you follow.

Apparently when you sit in this capacity to do on

the record reviews, there doesn't seem to be many procedural regulations or rules that inform the staff what they are supposed to do, and when they are supposed to do it.

Primarily, when to request the record be certified or be sent up to the Board of Board Administration. On the other end, back at the Office of Adjudication where these hearings were conducted, the regulations that govern those hearings just set up a procedure by which the appellant needs to file a notice of appeal.

It doesn't give any directions to them to prepare the record, or when they are supposed to prepare it, and when they are supposed to send it. So that there is a gap in between the two entities, and who should make the request, and who should deal with the records.

What took place in this case is a number of matters that were before this board for on the record review were issued briefing orders. And at that time, it was determined that in a number of these cases that the record -- that there was no record in the files. All that was in the files was notices of appeals, this case being one of them.

In this case, we should note first off that the notice of appeal referenced the case below, and referenced the number as 97-OAD-1785G, and I believe that was the number that the Executive Staff requested to have the record certified.

CHAIRPERSON SOCKWELL: Mr. Parker, you are stating

that the notice from the Office of Zoning?

MR. PARKER: No, the notice of appeal from the appellant.

CHAIRPERSON SOCKWELL: From the appellant?

MR. PARKER: Right, had that number on it.

CHAIRPERSON SOCKWELL: It had the wrong number on it?

MR. PARKER: Right. And when that number was used to request the record, that's the record that Mr. Cooper has been referring to that was just sent, and that was the wrong case.

The Executive Staff has discovered that error, and has made a second request as I understand it to the Office of Adjudication, and they are now preparing the correct record to be sent up, and there was some hope that that would be to the office by the end of this week.

So that I do not believe that it would be appropriate to dismiss the case because of, one, failure to be adequate regulations that determine what triggers the certification of the record. Is it a request from the BZA, or is it something that the OAD should do.

And second of all, that when a request was made there was an error in the number, and I think the error can be attributed some to the appellant, but let me be fair to the appellant. There has been some confusion about the number, I believe, in the matters below.

MS. GILBERT: In the case below, as I reviewed the pleadings in the case below, in some cases it was referred to as 97-OAD-1785, and in some cases it was referred to as 97-OAD-1786. So there was that confusion below.

And as a result the notice of appeal, the original notice of appeal that was filed referenced 1785-G, and that is what caused the incorrect record to be sent over.

So that is something that has been cured, or is in the process of being cured at this time.

CHAIRPERSON SOCKWELL: Under what number was the case originally docketed?

MS. GILBERT: I am not sure how it was docketed before the BZA. I know that the decision and order in the Office of Adjudication has the number 1786-G.

MR. PARKER: And that deals with the issue with regard to what has been referred to as the record, and we should be clear about the words that we use when we are talking about the record.

The record, as we have been using it so far, merely refers to, I believe, the documents, and the orders, and the exhibits that were made part of the file of the Office of Adjudication.

But the record also includes a transcript of the proceedings below. For us to be able to file appeals, presuming -- and I don't know what issues are going to be raised by the

appellant.

But assuming that there is any kind of factual dispute or a dispute with regard to the underlying factual findings, and it is not just a procedural appeal, the Board is going to need the transcript of the proceedings below, as well as all the documents in what we have been referring to as the record, and our appellate briefs, to sit in judgment as an appellate body to make a decision.

Now, those transcripts have not been prepared, and the regulations that I have cited in my pleadings, and the statute that I cited in my pleadings, puts the burden on having those transcripts prepared and paid for by the appellant.

And that has not been done either. I have been advised by the Office of Adjudication that there is some 27 audio tapes that pertain to this hearing, of which transcripts would need to be prepared.

So our position on behalf of the government at this point is that you deny any motions to dismiss; that we need to have additional schedules set, and from our view, a schedule needs to be set for having the Office of Adjudication's certified record filed with the Board.

And followed by an order or a date by which the appellant needs to procure the transcripts in this hearing, and file those with the Board. And then some date -- and I would suggest 30 days after the transcripts are filed -- for the

appellant to file his appeal; followed by 30 days for the government to respond to the appeal, and 21 days for any replies. And that is our proposal.

MR. COOPER: Mr. Chairman, briefly, in listening to Mr. Parker there is no explanation for the 24 months that expired before this was set for any activity.

And it is incomprehensible to me that we go through a case that lasted a year-and-a-half, which used this Number 1785-G as admitted by the District.

But more important than that, the case has a name, DCRA versus A New Partnership.

There is a notice of appeal, and the case had a decision date of October 20th, 1998. And to say, well, the reason that we didn't file it on time is because somehow or another we just went to the number, and we didn't look to see whether or not the number relates at all to the name of the parties even.

And now we are here, and the government wants even more time to file the certified record. And we just think that is fundamentally unfair to the appellant.

The second thing is that with regard to the preparation of the transcript of a hearing, we are prepared to move forward on the basis of using the tapes themselves, and the notarized transcript that we have in our possession now of the court-reporter.

Those notarized transcripts certainly can be used.

They are legal documents. If there is some dispute that the District has over what those notarized transcripts said, they can pay the costs of having a whole brand new set of 24 tapes being paid for again.

And as we read the District's regulations, the parties who want to use the transcript have to share the costs for them.

COMMISSIONER MITTEN: Mr. Cooper, can I just interrupt and ask you a question?

MR. COOPER: Sure.

COMMISSIONER MITTEN: You said that the government has an issue with some of the content in the notarized transcripts.

MR. COOPER: If they do have an issue.

COMMISSIONER MITTEN: If they do. Okay. Sorry, I misheard you.

MR. COOPER: If they do.

COMMISSIONER MITTEN: Okay.

MR. COOPER: And the notice that somehow the appellant ought to pay a hundred percent of the costs of transcribing tapes, and then turn over their transcript of it to the appellees, and for the appellees to use without sharing any of the costs, as far as I know is unheard of in the law.

And if you have any sort of deposition, or if you have court hearings, if one party wants a copy of it, the court

reporter makes the copy for them and bills them. But not that one side would pay a hundred percent of the costs.

And finally with regard to the timing of all of this, I would ask the Board to keep in mind two things; one, the voluminous nature of this matter, and the fact that the decision was issued two years ago.

The decision was issued a full six months after the last hearing, and so this is information which is going to have to be reread, restudied, and so forth to prepare an appropriate appeal.

And the original scheduling order I think gave each party 40 days for its brief, as opposed to the 30 days now proposed. And we would think something at a minimum of 40 days for each side would be much more appropriate and we thank you for your attention.

COMMISSIONER MITTEN: Mr. Chairman, can I ask a question of questions, follow-up questions?

CHAIRPERSON SOCKWELL: Yes, you may.

COMMISSIONER MITTEN: Mr. Parker, do you have any intention of relying on the transcript in presenting your briefing order in this case?

MR. PARKER: At this time, I can't answer that question because I don't know what the issues are that are going to be raised on appeal. If they are all procedural issues, procedural issues meaning certain things that were asked to be

admitted and weren't admitted, something of that nature, I would have no need for the transcript.

But if there is going to be factual -- if there is going to be a challenge to the findings of facts that are contained in the Administrative Law Judge's orders, or the facts that support his legal findings, I would need to have the availability of the transcripts.

I would like to respond to something that Mr. Cooper said, and then I can answer further questions if you have them on this issue. But I don't know what transcripts he is referring to.

He may have procured his own transcripts as part of this proceeding, but there has not been any transcript requested from the Office of Adjudication, which would be the official transcript, as far as I know.

COMMISSIONER MITTEN: Let me just ask Mr. Cooper directly then. You did not obtain this transcript through the Office of Adjudication, and this was obtained privately from the court-reporter?

MR. COOPER: The Administrative Law Judge granted us permission to have a court-reporter record each and every day of the hearing, which we did.

COMMISSIONER MITTEN: Your own?

MR. COOPER: Yes. And we have a certified, notarized set of transcripts from the court-reporter.

COMMISSIONER MITTEN: Okay.

CHAIRPERSON SOCKWELL: Were those certified and notarized transcripts ever shared with the government?

MR. COOPER: No, sir.

CHAIRPERSON SOCKWELL: They were not shared with anyone but your client?

MR. COOPER: Yes, sir.

MS. GILBERT: Mr. Chairman, may I ask an additional question be added?

CHAIRPERSON SOCKWELL: All right.

MS. GILBERT: Have these transcripts been filed with the BZA, because this is the first that we are hearing of any notarized transcripts even having been prepared by the appellant?

CHAIRPERSON SOCKWELL: They are not to my knowledge a part of any of the briefing packages that the Board has received, the Board Members have received.

MR. COOPER: Mr. Chair, I can answer that directly. No, they have not been filed. There has not been the occasion for us to file them at this point in the proceedings.

MS. GILBERT: Your Honor, may I --

MR. PARKER: Excuse me just a second, please. I just wanted to comment on this issue about the transcripts, and our access to them, and who says for them.

There was a representation that it is unprecedented in the legal system that one side has to pay for the entire amount

of the transcript, and the other party can't have any access to it unless they share in the expense.

First of all, my brief cites the regulations and the law on this issue, which says that the appellant bears the cost of providing these transcripts to the Board as part of the appeal.

Once it is part of the Board's records, they become available and they are public records. We have them and the appellee has access to them by the fact that them being public records.

This is not unusual. The appellants in any appeal, in the Court of Appeals, have to procure the transcripts. They have to procure the section of the transcripts, and they have to pay for them unless they file in forma pauperis petitions to have the court themselves pay for the transcript.

So this is nothing unusual, and the fact that the appellants had a private transcript made towards moving this thing along, it may be agreeable that we can submit those transcripts as the official record, assuming that OAD wants to certify that as the official transcripts, and we may not have to wait to have them redone.

But that does not relieve them of their obligation to follow the rules regarding who prepares the transcripts and who has to file them.

MS. GILBERT: May I supplement this response? I

would just like to add that the fact that the Administrative Law Judge below may have authorized Mr. Cooper to have his own court-reporter there, that is something which is done sometimes for the convenience of the parties so that they will have their own set of tapes that they can listen to when they get back to their own office.

I am not sure, but did you have a court-reporter, or did you just have your own tapes? But in any case that is not a substitute for the official transcript, and I believe under the rules that it makes clear that the appellant's duty is to request an official transcript.

Before the Department of Consumer and Regulatory Affairs would consider agreeing to the transcripts, which allegedly were prepared, we would want to know who prepared them, and under what circumstances, and was it done by an official court reporter.

And I would also like to mention at the same time that Mr. Cooper has suggested that there has been a fault on the part of the Department, in the fact the official record has not been certified for the past two years.

As Mr. Parker indicated, there are no rules which directly address whose responsibility it is to prepare the transcript. It is the Department's position that the BZA should request the official record.

The Department's rules only say that the department

is required to send up the opinion and the notice of the appeal to the BZA. So that certainly it is not the appellee's fault that nothing has been done over the period of the two years to move this case forward.

And so I would just like to emphasize that this is not a reason to dismiss the appeal. I think what we should be doing here today is exactly what Mr. Parker said earlier. We need to get an official transcript before the BZA.

The Department needs access to that official transcript in order to be able to respond to the appellant's appeal. The official record needs to be filed before the BZA, and then we need to set up a briefing schedule and move this case forward.

COMMISSIONER MITTEN: Mr. Chairman --

CHAIRPERSON SOCKWELL: Yes.

COMMISSIONER MITTEN: Could I direct a question to Ms. Sansone, please.

CHAIRPERSON SOCKWELL: Yes.

COMMISSIONER MITTEN: Is there an obligation on the part of the appellant to obtain the transcript if they do not intend to rely on it in presenting their appeal?

MS. SANSONE: Ms. Mitten, let me -- I need to confer with Mr. Boffo for a minute. He has been researching this issue.

MR. COOPER: Pending that, I just wanted to refer

the Board to 16 DCMR 3120, et seq, which governs transcripts of hearings. And 3120.1 says transcripts of hearings may be ordered from the Director.

The fee for the transcripts shall be $3.50 a page. Nowhere in those six sections does it say that it is the obligation of the appellant to provide and pay for the transcript. And this is the section that deals with administrative appeals, including appeals to the BZA.

This notion that somehow or another the agency doesn't have an obligation to file the certified record with this Board approaches the bizarre.

How could a case be brought forward if they didn't have the responsibility for certifying an official record. That is the only way it could happen.

An appellant can't go and get anything from the agency and then bring it in and say, oh, by the way, here is the official record. I mean, that has been the history of administrative proceedings for decades.

MS. GILBERT: Excuse me, but may I respond to that?

COMMISSIONER MITTEN: I would rather hear Ms. Sansone's response first, please.

MS. SANSONE: Yes. It appears that our office has researched this issue, and not really come to any conclusive answer. There is a provision for a transcript in the Civil Infraction Act, and I guess there is mention of it in the

Administrative Procedures Act.

But there is nothing that would specifically address the question that is before the Board right now. And it may be that what would aid in answering this question is if the parties were to perhaps brief this issue.

To have both parties submit a brief outlining their arguments without the transcript, and possibly they could even try to come to some resolution regarding it.

But it is a very complicated issue. We didn't find anything in the time that we researched it and it might be that this issue can't really be resolved today on what is before the Board.

COMMISSIONER MITTEN: I think that is a worthwhile suggestion, Mr. Chairman. One of the things that I would like to have included in that is some discussion -- and to the extent that Mr. Cooper says that he has a transcript, and that transcript was obtained, however it was obtained, and he will explain that to us in his response.

But to the extent that he wants to rely on that and that it has not been obtained through the normal channels, then I think that would go to the weight of reliability.

And then that perhaps you could address as well on whether or not there has to be some second transcript obtained through the normal channels from the Office of Adjudication.

CHAIRPERSON SOCKWELL: The question might be raised

as to the certification, and/or qualifications, of court reporters working in a court environment working in the District of Columbia, which would determine whether or not the reliability of the transcript can be established.

MR. COOPER: Mr. Chairman, if I could, the court reporter who was engaged is from a reputable, experienced, court reporting firm, who reports for all agencies, and Federal and District Courts. This court reporter was present at all of the hearings with the transcribing machine and so forth.

The District's lawyers who tried the case were obviously aware of the court reporter, and there was no objection to the court reporter recording, and what the court reporter did.

The court reporter transcribed the record, and we now have what we paid for from the court reporter. To the extent that we want to use excerpts from that transcription and provide the Board with the pages and the cites for the date of the record, we believe that we are entitled to do that under the due process requirements.

CHAIRPERSON SOCKWELL: Well, the question that I would raise to you, Mr. Cooper, would be that if you were to utilize excerpts from a transcript, are you saying that transcript would be provided in its entirety to the government and to the Board?

MR. COOPER: It would be provided to the Board, but it is fundamentally unfair for the government to take the

appellant's work product and use it, and the government not incur any of the costs for the preparation of it.

And we would provide it to the board as a courtesy, because otherwise what it requires is for the Board to go to the date and the time on the tape, and try and listen to the tapes.

The government has done that in the past, using and citing to tapes and times, if they wanted to do that. If the government wishes to be involved in appeals, the government has got to be willing to expend the costs and the time that appellants have to do.

COMMISSIONER MITTEN: Mr. Sockwell, I think we have gotten to the point where it would be best to have both parties put their positions on this matter in writing.

CHAIRPERSON SOCKWELL: Yes. I was --

MR. PARKER: Could I comment just briefly?

CHAIRPERSON SOCKWELL: Briefly, yes.

MR. PARKER: Because I believe we are being led down a path that we don't need to go on this. In our brief, we have already cited a specific statute that specifically states that the costs of providing a transcript of a civil infractions hearing shall be borne by the appellants, unless excused by the Mayor, pursuant to rules issued by the Mayor.

And that is in D.C. Code 6-2722. Furthermore, 16 DCMR 3120.6 states that the Director, being the Director of DCRA, may waive all or part of the costs of a transcript in cases of

financial hardship or other appropriate circumstances as determined by the Director. Now, the --

CHAIRPERSON SOCKWELL: All right. Let me break this off briefly. It appears that the appellant and the government have different viewpoints on which regulatory support establishes who pays.

MR. PARKER: Right.

CHAIRPERSON SOCKWELL: And as was suggested earlier by Ms. Mitten, it might be appropriate for both parties to prepare a brief supporting their contention, and that this Board would review and try to establish a position on that, I suppose, based upon the lack of conflicting regulations, or the absolute applicability in the specific case of the regulations being cited by the two sides.

And I think that would be -- because here we don't have the information before us to decide who is right or who is wrong.

COMMISSIONER MITTEN: Mr. Chair, if we could just be crystal clear about what the issues that they will be briefing us on are. And one of the issues would be who should pay, and then the other issue that I would like to see their positions on is the legality of relying on the transcript that has already been obtained through -- you know, sort of the non-traditional source.

CHAIRPERSON SOCKWELL: Well, I believe among other things that the government would have to establish its criteria

for the acceptability of transcripts, regardless of who pays for them, because it is the government's responsibility to utilize the information within those transcripts if it so chose.

And/or if the justification of who pays could be established, then the determination of whether or not transcripts would be used at all by the appellant would probably determine whether or not an additional transcript would have to be produced from the tapes that are available. And under that circumstance, it would be borne out who is going to pay for it.

BOARD MEMBER RENSHAW: Mr. Chairman.

CHAIRPERSON SOCKWELL: Yes.

BOARD MEMBER RENSHAW: To add to the issues, or just to expand on the issues brought up by Ms. Mitten, I would like to have a reaction from Mr. Parker on Mr. Cooper's request for a sharing of costs. That has not been addressed, and so if in your material you could also touch on that matter.

And to get some information on the credentials of the court reporter, or the reporter who has done the transcript of the tapes used by Mr. Cooper.

MS. GILBERT: Mr. Chairman, may I just supplement for one moment.

MR. COOPER: Just a matter of procedure. I have got two lawyers here, and they are sort of playing tag team. Which one of them is going to represent the government? I thought Mr. Parker was here on appeal.

MS. GILBERT: We are representing the government here together.

CHAIRPERSON SOCKWELL: Go ahead, please.

MS. GILBERT: Let me just supplement for one moment and that is that I would like to ask a question, have the Board ask a question directly to Mr. Cooper if we are going to have to brief this issue, and that is was there -- and just so I am crystal clear, was there actually a court reporter at the hearing below, because there has been a change in counsel, or were there only tapes.

MR. COOPER: I don't understand.

MS. GILBERT: Did you have a court-reporter at the hearing below every day?

MR. COOPER: I thought I had made perfectly and crystal clear that there was a court-reporter present at each and every day of the hearing, who used a transcribing machine to type the transcript into her computer. But I am not here for discovery.

CHAIRPERSON SOCKWELL: All right. I think there are a couple of issues here. One is that if the transcribing machine handled turning the reports into readable material, then there is a different costs perimeter from transcribing the tapes, and there may be economies of scale you might say one way or another.

But the point is that we will have to get -- we are

suggesting that briefs be prepared by both sides to determine the applicability of the costs, and that within those the government will have to determine its requirements for acceptability of the court-reporter provided by the appellant if the appellant's transcripts are to be acceptable, and we will have to look at all of this.

MR. COOPER: Mr. Chair, I think each party could comment on its view of what is acceptable, but it would be up to the Board to determine what is and what is not acceptable. For example, some would say that a live court-reporter --

CHAIRPERSON SOCKWELL: Well, you don't have to discuss that with us now. You will prepare that within your brief.

MS. GILBERT: May I have a moment to confer with counsel?

CHAIRPERSON SOCKWELL: All right.

(Brief Pause.)

CHAIRPERSON SOCKWELL: While you all are thinking about this other issue, we want to deal with the motion to dismiss, I believe. The issue of time and all of the other associated parts of that include some responsibility by the government, and that includes some of the issues that create the backlog of civil infraction cases that are before us.

And so not all of this is something that we can address and say just happened, or what not. There are procedures,

and there have been problems, and the procedures by which the Office of Zoning works are improving and have improved markedly over the last year or so.

But things that have gotten caught up in the backlog created by inefficient procedures and high volumes of cases, and limited staff, are all part of what has created this 24 month issue.

And I believe that it in itself does not make grounds for dismissal, but certainly at this point in time we are proceeding and will proceed, or should proceed, on all cases with all due speed. So I would move --

MR. COOPER: Mr. Chair --

CHAIRPERSON SOCKWELL: Yes?

MR. COOPER: Could I ask that you give the government a drop dead date to file the record, because obviously 24 months is a long time for a delay to happen, and justice delayed oftentimes is justice denied. And either they file it or they don't. It is up to them.

CHAIRPERSON SOCKWELL: Well, if the transcript is determined to become part of the record, then that drop dead date is going to have to --

MR. COOPER: But the written part of the record --

CHAIRPERSON SOCKWELL: Exclusive of --

MR. COOPER: Yes, exclusive of the transcripts. That's all I am talking about, the written part of the record,

because that means that we could at that point -- that the lawyers on both sides at that point be able to proceed with a review of all of that written material.

BOARD MEMBER RENSHAW: Mr. Chairman, I believe you were in the midst of a motion, and that takes precedence here.

(Brief Pause.)

CHAIRPERSON SOCKWELL: I'm sorry.

MR. COOPER: That's all I have.

CHAIRPERSON SOCKWELL: Yes. I think that a firm date can be established for supply of the entire record, inclusive of tapes, but not inclusive of transcripts, and we will just work the transcripts out on a separate cycle once we have come to a conclusion.

And for that record to be presented to the Office of Zoning, a time frame of perhaps three weeks might be reasonable, or --

MS. GILBERT: That's agreeable.

MR. COOPER: Three days? They have had forever to --

MS. GILBERT: Three weeks.

CHAIRPERSON SOCKWELL: Three weeks, and not three days. I said three weeks, and you said three days.

MR. COOPER: Yes.

CHAIRPERSON SOCKWELL: Well, three days is generally considered to be impossible in the government

bureaucracy. But the question is can the government provide the documentation in -- and since this has gone on for a long time, and it is not like the documentation should be lying in a vault somewhere.

It might be lying somewhere else, but the point is that can it be provided in less than 3 weeks, and if in less than 3 weeks, give me a time period; with 3 weeks being the outside, and something else perhaps being in the inside.

MR. PARKER: I don't have direct knowledge of what can be done. I know that I have talked with Mr. Bastida, who has talked with the staff at OAD regarding the preparation of this particular -- the re-preparation of this record.

I was told that they were going to try and get it done by the end of this week. So I would ask out of an abundance of caution for two weeks. I think that would be sufficient time for them to prepare, and certify, and send over what is available now that we have the right number.

CHAIRPERSON SOCKWELL: Okay.

MR. BASTIDA: Mr. Chairman, I would be a little more cautious than Mr. Cooper, and I would give it a three weeks deadline, even though Mr. Cooper is opposed to it.

But I think it is a voluminous record, and it is several hearings, and a tremendous amount of tapes, and I want a full certified record given at one given time. I would like to avoid any potential of any errors or misunderstandings. Thank

you.

COMMISSIONER MITTEN: Mr. Chair.

CHAIRPERSON SOCKWELL: Yes.

COMMISSIONER MITTEN: What I would like to suggest is that if we allow for three weeks to produce the certified record, and we also request that the briefs on the issue related to the transcript and who should pay, and the reliability of the other transcript, if we get those in three weeks, and then we as a Board, we will take up the issues related to the transcript at that time.

And we will also if we do not have the record at that time, then I think we will need to make a hard choice about how to proceed. That will put some pressure on the government.

CHAIRPERSON SOCKWELL: Ms. Mitten, I was thinking in terms of something slightly different, and to run this by you. The brief on the transcript I think could be prepared by both parties in less than 3 weeks. I mean, we are not talking about -- I mean, you already have cited your code references, Mr. Cooper.

Mr. Parker has cited his, and I think that you should be able to prepare a reasonably good brief in less than 2 weeks really. But now Mr. Cooper is looking at me with --

MR. COOPER: Mr. Chairman, there are six issues that different members of the Board have asked to be addressed. Assuming that there was nothing else happening --

CHAIRPERSON SOCKWELL: That's true.

MR. COOPER: -- two weeks would be great.

CHAIRPERSON SOCKWELL: Right.

MR. COOPER: But we have other matters, and --

CHAIRPERSON SOCKWELL: Well, the reason that I was suggesting two weeks to try to advance slightly your schedule. But if three weeks is to your benefit, then I am willing to defer to you on that, because it is a scheduling issue.

COMMISSIONER MITTEN: Mr. Cooper and Mr. Parker, is three weeks on the briefs sufficient?

MR. PARKER: Yes, Ma'am.

MR. COOPER: Yes, Ma'am.

COMMISSIONER MITTEN: Then, okay, I think what we should do is that we will set or find out what that date is, and then at the next hearing or the next meeting of the Board, we will take up -- we will defer the motion the motion to dismiss until that time.

And then if we don't have the record at that point, then that will bear on our decision significantly.

CHAIRPERSON SOCKWELL: Well, the issue would be, depending upon who is delinquent at that time.

COMMISSIONER MITTEN: Well, I mean the certified record, which that is the sole responsibility of DCRA.

CHAIRPERSON SOCKWELL: Right. But the issue of the briefs would as well have to come into play, because both sides are most concerned with getting this thing out of the way.

COMMISSIONER MITTEN: Okay. So what would three weeks be?

MS. PRUITT: Mr. Chairman, I have a question. Three weeks would make it February 13th, would that then be done at a special public meeting? I am asking.

COMMISSIONER MITTEN: Well, what is the next regular hearing date or meeting date after three weeks?

MS. PRUITT: It would be the March meeting.

CHAIRPERSON SOCKWELL: Do we want to have a special public meeting with a reporter here?

MS. PRUITT: A special public meeting? February 13th is just a regular hearing day that is already scheduled, but you could do a special public meeting in the morning to accommodate them.

COMMISSIONER MITTEN: That would work well.

MS. PRUITT: And that's why I was inquiring.

MR. BASTIDA: Mr. Chairman, there is latitude to take that decision, because it can be due at an executive meeting, and it can be provided to all of the Board Members in advance, the entire record, so that a decision could be done prior to the March regularly scheduled monthly meeting of the Board.

COMMISSIONER MITTEN: We don't need to have the whole record in order to make the decision that we will make in February. We are going to rule on the issues related to the transcript, and we will take up the motion to dismiss based on the

issues that were raised by the appellant.

MR. BASTIDA: That is correct, but in that way, that would be Tuesday, February 13th?

MS. PRUITT: Correct, at a special public meeting.

COMMISSIONER MITTEN: Excuse me, but if they are due on February 13th, the Board may wish some time to review them. So that may actually be a little too early.

MR. BASTIDA: Could I complete, please? Then the Board might be able to do it on the 20th of February, or the 27th of February, or the 6th of March, and it will be at the Board's pleasure.

The record would be provided to all the members, and then the Board can decide on any of those three dates when they so wish to make a decision on the narrow issue of the dismissal and the transcript.

CHAIRPERSON SOCKWELL: Well, if we are going to get the briefs and the issue of dismissal, which we have already had time to study, then I think we should probably have it sooner than later, because we would really be dealing with one new piece of information, which will be the six points of the transcript issue.

MR. BASTIDA: Correct, but what I am suggesting is that you have a little more latitude and you don't have to set it right now to make that decision.

CHAIRPERSON SOCKWELL: So basically we would request the information on the 13th, and hold the meeting a week

or two after that?

MR. BASTIDA: Well, you can do it either on the 20th or the 27th of February, or the 6th of March. And I will be in contact with everybody to see what is the pleasure of the Board after expeditiously providing you with copies of the request, and which I would imagine would be filed in a promptly fashion by the close of February 13th.

CHAIRPERSON SOCKWELL: If we can get them by February 13th, and because this is separate from the regular board packages that would be coming out on the 16th, and we could get them by fax on the 13th or the 14th, it would give us a couple of extra days, and then we could do it on the 20th.

MR. BASTIDA: I would be glad to try to expedite it as much as I can. It might be too voluminous to do it by fax, but if the briefs are brief enough, I will be glad to fax it. That's not a problem.

CHAIRPERSON SOCKWELL: A couple of paragraphs, Mr. Cooper? I'm just kidding.

MR. COOPER: Mr. Chair, you know, I think the Board could appropriately limit the length of the brief to 10 pages for one thing, which ought to be enough to cover the subject.

And just as a corollary to that, as both the government mentioned in its opening today, and as we mentioned it in our motion recent motion, the Board is simply bereft of any policies or regulations with regard to appellant practice, motions

practice, on the appellant's side.

And I really do want to publicly thank Mr. Bastida and Mr. Boffo, who have been very courteous and as helpful as they could be in trying to get us to understand the rules that basically don't exist.

So I think it would be perhaps helpful if when the Board issues its order -- and I guess one rule ought to be that there shouldn't be telephonic notices, but that there should be written orders, because that becomes part of the record if it ever goes to the Court of Appeals.

You can't take a telephone call and make it part of the record. You know, just something that says that these are interim rules of the road so that all lawyers on both sides know how to play.

CHAIRPERSON SOCKWELL: Well, the rules are handled by the Zoning Commission, and there are Members of the Zoning Commission present at this meeting. So they are now aware of some potential items of discussion I would think.

COMMISSIONER MITTEN: But in the meantime, we certainly do need to incorporate rules or procedures for this into our regulations. But Mr. Cooper's point is a good one, which is just so everyone is on the same page, as we modify things and as the briefing schedules change, everything should be in writing so that everybody knows what is going on, and there is no lack of clarity about how we are proceeding. And so I think that is a

worthwhile suggestion.

MR. PARKER: Could I along that vain, we were trying to listen and write at the same time, but would it be possible for the Board in some manner either to go back over -- somebody referred to six issues, and I don't know whether it is 6 or 5.

CHAIRPERSON SOCKWELL: It came from Mr. Cooper, and I just responded.

BOARD MEMBER RENSHAW: I was going to ask that, because I have got four, and Mr. Cooper has six.

MR. PARKER: So could we at least either -- maybe we could do it on the record here again, or maybe the Board issues some writing that says here are the issues to be briefed by the 13th so that we all know what we are doing, and we are all working together on the same page.

CHAIRPERSON SOCKWELL: Is it 6, 5, or 4, Mr. Cooper, since I used your words?

MR. COOPER: One question was who should pay.

CHAIRPERSON SOCKWELL: Right.

MR. COOPER: And one question is the legality of reliance on a transcript prepared by a court-reporter, and one issue was the government to establish reliability of the transcript.

One issue was cost share, which is similar to (a), and then the credentials of the court-reporter. And I guess where

I got six was that in my notes it say we had to prepare six.

But this is such -- well, maybe not an unusual one, but most of the appeals that came to the BZA are pretty uncomplicated appeals, and much of this --

CHAIRPERSON SOCKWELL: Well, actually not always, but this happens to have a few more pathways.

MR. COOPER: And I think it would be appropriate if the Chair, or whomever, would just write out its order directing us what to brief, and when it is due, and the length of the brief.

CHAIRPERSON SOCKWELL: The staff can prepare a document that would be submitted to both the government and to the appellant stating what is required, when it is required, and the length maximum. Do you want us to specify a font so that --

BOARD MEMBER RENSHAW: Mr. Chairman, would it speed things along if this material was -- came to the Board via E-mail, both hard copy and E-mail?

CHAIRPERSON SOCKWELL: Well, it is going to come by fax, or E-mail, or a hard copy as well. It is going to come two different ways.

MR. PARKER: We can submit it any way you direct us.

CHAIRPERSON SOCKWELL: Yes, that's fine.

MS. GILBERT: Mr. Chairman, on the question of the order, because we have two counsels here, and we are at two

different locations, could we request service on both counsel both by the appellant's attorney and by the Board?

CHAIRPERSON SOCKWELL: Well, lead counsel would be expected to distribute downward.

MS. GILBERT: Well, the only reason I say that, Mr. Chairman, is because I am located at the Department of Consumer and Regulatory Affairs. I am part of the legal service of the District of Columbia, which makes us a part of corporation counsel, but Mr. Parker is in his office.

Usually it just cuts down on time. I don't think it is any burden to request service from Mr. Cooper or the Board.

CHAIRPERSON SOCKWELL: In that you are acting in a capacity, a team capacity, it might be appropriate that lead counsel receives the document, and that the other counsel receives notification that the document has been sent to lead counsel.

MS. GILBERT: I am not quite sure if a lead counsel has been established, Mr. Chairman.

CHAIRPERSON SOCKWELL: Well, a point of contact. We can establish the POC and that person would receive the documentation. And the other person would receive a notification that the documentation has been sent out.

Because if you establish it loosely, and say, well, there are two of you today, and maybe another day there would be five.

And all five in different locations, all working on

the same case with different responsibilities, would all be expecting to receive the documentation. It would not be a good precedent to set, for the Board to send out to all attorneys associated with the case.

And even if it started as two, it might wind up as 22 in some other case located in New York, Chicago, Los Angeles, and perhaps Guam.

But the point is that I think if we let you know effectively that it has been sent to Mr. Parker, then if Mr. Parker happens not to be in the office that day, you will know that Mr. Parker received documentation, that you should make representation to his office to get to you or vice versa as the case may be.

MR. COOPER: Mr. Chairman, may I respond?

CHAIRPERSON SOCKWELL: Yes. The fact of the matter is that this lady is the lawyer in the Office of Enforcement who was the lawyer below.

MS. GILBERT: No, I was not.

MR. COOPER: She is the client of the Office of Corporation Counsel. Mr. Parker and I were involved in a similar case, which we cited in our brief, where we went through the whole briefing schedule.

Corporation Counsel said, oh, you notified DCRA's lawyer, but you didn't notify us. So we had to start all over again.

CHAIRPERSON SOCKWELL: Well, I think we have settled this by the fact that notification that I am suggesting would be given, but the documents are only going to go to one person.

If you receive notification that the documents have been sent out and you don't do anything about it, then it is your responsibility.

MR. COOPER: At this point, the only attorney on the record here is Mr. Parker.

CHAIRPERSON SOCKWELL: All right.

MR. COOPER: Who is representing the City. DCRA is not on the record in this matter. They have no lawyer before this body.

CHAIRPERSON SOCKWELL: Then are you suggesting that the documentation goes to Mr. Parker?

MR. COOPER: Right.

CHAIRPERSON SOCKWELL: And it will, but a notification as well might be by courtesy sent out.

MR. PARKER: That we are responsible for sending?

CHAIRPERSON SOCKWELL: No.

MR. COOPER: Thank you. I appreciate it.

CHAIRPERSON SOCKWELL: All right. I have been advised by staff that we will make the decision to send the documentation to both Corporation Counsel and DCRA because of DCRA's relationship to the case, since it comes basically from

DCRA initially anyway as a civil infraction.

All right. Let us -- we have a motion before us, which is to request briefs from both the applicant and the government regarding the transcript issue.

It also includes deferring a decision on dismissal until the public meeting at which the transcript issue will be dealt with. And that the points to be covered, and the issues of briefs and the dates that the dates should be submitted, and that the public meeting will be held, will be provided in writing to both parties. And I think that covers it, doesn't it?

COMMISSIONER MITTEN: Did you move that?

CHAIRPERSON SOCKWELL: And I so move.

COMMISSIONER MITTEN: Second.

CHAIRPERSON SOCKWELL: Any more discussion on this issue? If not, all in favor?

(A chorus of ayes.)

CHAIRPERSON SOCKWELL: Opposed?

(No audible response.)

CHAIRPERSON SOCKWELL: The motion carries.

MR. PARKER: Thank you, Ladies and Gentlemen.

CHAIRPERSON SOCKWELL: Thank you.

MR. BASTIDA: Mr. Chairman, the staff will record the vote five to zero. Mr. Sockwell moved it, and Ms. Mitten seconded it, and all the board members voted in the affirmative. Thank you.

CHAIRPERSON SOCKWELL: All right. We will call the next case.

MR. BASTIDA: The third case of the afternoon --

CHAIRPERSON SOCKWELL: There seems to be familiar faces on both sides again.

MR. BASTIDA: Mr. Chairman, the third case of the afternoon is BZA Case Number 98-0002, OAD Number 98-1154-G, of the Rodgers Brothers. Mr. Pascal is here representing the appellant.

MS. GILBERT: We have Laura Gisalfi Gilbert and Mr. Arthur Parker from Corporation Counsel.

CHAIRPERSON SOCKWELL: Mr. Pascal.

MR. PASCAL: Good afternoon. I am Paul L. Pascal, of Pascal & Weiss, and with me is George Rodgers, Junior. By the way the brief in this case has been filed. So we won't have to go through that issue. However, I would be interested -- rather, the transcript.

I would be interested to know what the outcome of your decision is, because as I read in the rules of the Board of Appeals and Review, it is the government's responsibility to provide the transcript.

And I just recently filed a case here where I filed it out of an abundance of caution, because I think the issues are dual, both there and here. So I will be curious to see what you come up with on that.

A little history of this case would be helpful, I

1 believe, for you. The original notice of infraction was issued on
2 October 9th of 1997. The hearing was on April 7th, 1998. The
3 order that was appealed was January 28th, 1999.
4 I filed a notice of appeal on 2/12/99, and I filed
5 the transcript on 3/24/99. The hearing in this case was not as
6 extensive as you previously discussed. I received two briefing
7 orders actually on October 30th, 2000.
8 And quite frankly it was like out of the blue to
9 receive those. One of those was in another case that I was
10 dealing with, the case of James Taylor, Trash Removal, and which
11 we have since paid the fine on that.
12 And I filed a motion to stay the briefing order on
13 November 27th for a number of reasons, some of which were
14 personal, and they are moot now because I had a number of ABC
15 hearings that were pending, and the schedule made it virtually
16 impossible to deal with.
17 And others dealt with a more substantive issue that
18 is looming out there. The history of this case in and of itself
19 is Mr. Rodgers, on behalf of his company, filed a request for a
20 certificate of occupancy back in 1991 or 1992.
21 And so the original history and basis of all of the
22 subject matter of this goes back that far in time. In 1995, a
23 Solid Waste Facilities Act was passed. In 1998, it was amended.
24 And in the '95 Act, the construction and demolition
25 debris was not mentioned, and in the '98 Act after an order by

Judge Saltzman in the Superior Court, construction and demolition debris was put in the Act.

The essence of this case goes to the nature of his operation. This Board previously ruled in a case, the Taylor case, in almost a factually similar case, of how the CFO is obtained -- basically they being my clients -- and being told what to put down on the paper and what was issued.

This Board, in BZA Number 94-0001, rules that Taylor was grandfathered in his operation. And in this case, it really in essence is not any different than that.

What has now come into the scene is because of the passage of the 1998 Solid Waste Facility Act, the Act was vetoed and then the veto was overridden, there was a provision for a solid waste facility site selection advisory panel.

And that panel has gone through their deliberations. They have visited my client's site, and as part of their recommendations, they specifically stated that special rules and regulations should be adopted for the construction and demolition operators.

And it specifically names the Rodgers' facility and the Taylor facility. So we now have the ball back into the political arena, if I may phrase it that way, subsequent to the panel's findings.

And I have by the way copies of the recommendation as it relates to that, which I could submit to the Board if it

would be interested to have it. And I have met, and my client met with me, along with Mr. Taylor, and we have met with Carol Schwartz's office, who would be drafting the rules and regulations.

And she instructed us to provide her, and instructed her staff to provide her with suggestions to go and formulate specific rules and regulations to deal with the operation of construction and demolition facilities.

One of which would require the facilities to enclose their facility, and my client has always been willing to enclose the facility. If we presume that the City Counsel is going to go down t his road

-- and I think there is a strong presumption that they will based on the recommendations of the panel, and meeting with Ms. Schwartz.

We at some point in time would probably dismiss the appeal and pay the fine, because it would become moot with specific rules and regulations, and we will meet those rules and regulations. We will construct whatever is required and move forward.

It is a complicated matter because if we are to believe that Mr. Rodgers, and in the Taylor case, are grandfathered in, the general law is that you can't change a grandfathered facility.

And so we are going to have to try and craft

something that will allow these grandfathered facilities to change to meet the rules and regulations that we hope will be crafted.

So the real purpose of my motion to stay was aside from the personal matters that have somewhat become moot, was to stay this for a period of time in order to aid judicial time, and costs, and expenses for everybody, so that we could have an opportunity to try to work forward with the City Council.

So that in essence what I am requesting is a period of time to stay this appeal. I don't think the City is going to be prejudiced. They have filed 17 more cases that are sitting right this case, which we have a meeting as a matter of fact with Judge Quander next week.

So there is 17, by the way, identical citations to this one, and no different, and those 17 were part of a process where in about a two weeks time just came there and hit them every day with violations.

So the City would not be prejudiced to allow this to sit for some period of time to try to craft some regulations. So as the site facility selection panel recommended, special rules and regulations be adopted for their operation, and my clients are prepared in that rule making and legislative process.

And they are prepared to do whatever it is necessary to alter their facilities to accommodate and work under those facilities. So at the very least I would request perhaps a six month stay.

CHAIRPERSON SOCKWELL: Mr. Pascal, I think we attempt to look at each case upon its individual merits, as opposed to looking at them as a class action issue.

MR. PASCAL: Well, I understand that. I was only commenting for the record about the 17 other cases that will ultimately follow here. I am hoping to try and save you time and trouble with the number of cases, because I think that something could take place that will make this all moot.

If we get some regulations adopted, we will deal with that, and at that point in time I would not need to continue this appeal because then we would be functioning on special rules and regulations adopted for their industry.

COMMISSIONER MITTEN: And, Mr. Pascal, I just want to make sure that I heard you correctly. If those regulations are put in place, that you would abandon the appeal in each of these cases and pay the fines in each case?

MR. PASCAL: We have been negotiating -- the answer in this case is yes, but this is only one case. We have been attempting to negotiate with the District of Columbia with respect to the other 17 cases, and we have a status conference coming up next week.

The Judge ordered counsel and myself to meet. We have not had that opportunity yet because I had to meet first with the council member's office, and she then had to meet with the executive part, or in other words, her principals.

So we have not had that opportunity. In a related Rodgers case, he did agree to pay fines and the City agree to a settlement, where paying those fines wouldn't be used against them in further cases.

I am willing to do that, but it is not for me to discuss that issue necessarily in front of you. But the answer is that we are prepared to sit down with the City and deal with that, and all the more reason I would suggest for a stay in this matter.

MS. GILBERT: Mr. Chairman and Members of the Board, we have opposed the motion for a stay in this case. I did consent to an extension of time on the briefing schedule, and my goal today would be to set up a briefing schedule for this case.

As Mr. Pascal noted, this case has been pending since 1997. That is the reason that I would say to move forward with the case and not to delay it further. No settlements have been reached at this time in any of these cases.

As Mr. Pascal indicated, his client, Mr. Rodgers, had a certificate of occupancy for temporary storage. The finding in the case below was that that was not an appropriate certificate of occupancy for the type of activities that he had at the premises at 2225 Lawrence Street, which included the processing of construction and demolition debris.

And the finding of the court below was that his certificate of occupancy was not the right certificate of occupancy for the activities which were taking place at the

facility.

There are substantive issues of law to be decided in this case and in this appeal which may have a bearing on other cases which are pending between the parties.

Mr. Pascal mentioned that there are 16 or 17 pending certificate of occupancy cases waiting for a hearing before the Office of Adjudication right now. If this case were decided, rather than this case being stayed, you know, I think Mr. Pascal has it backwards.

If this case is decided, it may clarify or it would clarify the other 17 cases which are on the same issue, and that would avoid those 17 consolidated CFO cases having to come up to this Board for a decision.

Because if the Board decides, or whatever the Board decides, would have a direct bearing on the case before Judge Quander. With respect to the site selection panel recommendations, yes, the site selection panel did recommend that the City Council consider separate regulation of construction and demolition debris from other solid wastes.

But there is nothing specific in those recommendations that would suggest that this certificate of occupancy issue is not still an issue, and there is no reason for me to believe, contrary to what Mr. Pascal has stated, that a different regulation of construction and demolition debris would moot this certificate of occupancy issue.

Mr. Rodgers would still need to have an appropriate certificate of occupancy for whatever activities he is conducting at the premises. And furthermore the fact that he is talking with council members about the introduction of legislation doesn't mean that that legislation is necessarily going to be passed.

We have no idea what will be passed and in what form, when, and how it will affect the current regulatory scheme. That could happen six months from now and that could happen a year from now. I could happen a year-and-a-half from now, or it may not happen at all.

I might also mention that there is also another pending case in the Superior Court involving the Rodgers Brothers, and that the decision of this body on the certificate of occupancy issue, and it may have some bearing on that case.

So that these are all reasons why this case needs to be resolved before this body. There is nothing which merits a stay. I mean, if this would be one issue that could be resolved and be out of the way.

Now, if something changes in the course of the next 6, or 8, or 10 months, and there is some grounds for settlement, then we could settle at that time. But I don't see that coming in the near future. I think the issues that are raised before this Board are alive and well, and they need to be determined.

And it has been three years as Mr. Pascal said, and I think we should get on with it and set up a briefing schedule.

And if you will give me one moment.

(Brief Pause.)

CHAIRPERSON SOCKWELL: Just one thing, Ms. Gilbert. Any cases before the Superior Court that are not before this body would not be relevant to our decision making process, and would not be considered in our decision making

MS. GILBERT: I understand that, but what I am saying is that your decision may be relevant to some of the decisions before the Superior Court.

CHAIRPERSON SOCKWELL: Right.

MS. GILBERT: The opposite direction.

CHAIRPERSON SOCKWELL: Yes, I understand what you are saying, but regardless, it is attempting to bind one to another and we can't do that.

MS. GILBERT: Right, I agree.

MR. PASCAL: May I add a few things, Mr. Chairperson?

CHAIRPERSON SOCKWELL: All right.

MR. PASCAL: I would like to raise the question whether the record has been certified here, because I have received no notice that the record has been certified in this case either.

MR. BASTIDA: If you look in your package, Mr. Chairman, you will see the notice of certification, and that it is stamped January 16th.

MR. PASCAL: The 16th of this year?

MR. BASTIDA: Of 2001.

MR. PASCAL: Again, there is always a problem that we never seem to get notices from either opposing counsel or others as to what takes place. I would only like to add that there is a time prejudice to get back into this case.

And certainly if the Board is not going to stay this matter, certainly a significant amount of time should be given, because we are dealing with a case that was tried, or a hearing that was held, almost three years ago.

And I have had a number of other cases in between. So the mind is foggy, because there is just a number of these cases that I've had both for Mr. Rodgers and for Taylor. So it would take some significant time to at least get back in and look at it, and prepare a record.

And additionally the co-counsel that worked with me on this case, Kathleen Andrews, and was with me in this case, had a baby at the end of December, and she will be coming back to the office on April 1st, and I would certainly like any time frame for scheduling to be after that period of time.

But I still would assert that I would like a stay for six months, and if not, then the scheduling order to start from a time frame of April 1.

CHAIRPERSON SOCKWELL: Board Members.

VICE CHAIRPERSON REID: Well, Mr. Chair, I think

that given the fact that you have both taking an opposing position, and if in fact we did not grant the stay, then it would be a matter of how much time before we had talked about.

And first Mr. Pascal is saying six months, and now he is saying there has been -- that the attorney for the government is saying that she would prefer to oppose the stay.

But then he is saying now within four months, and so how much time is required to actually have --0

MR. BASTIDA: Well, in our briefing schedule, we have 40 days for the appellant to respond to it, and 40 days for the government to respond to it, and 21 days for the appellant to respond to the brief of the government.

That is a total of 101 days. If the things are sent by mail, we have to add another three days, in which instance it would bring it to 110 days.

VICE CHAIRPERSON REID: So it is not that far from four months, and so I would not have a problem with a stay of perhaps four months, a four month period.

MR. BASTIDA: Yes, but on the other hand, those briefing schedules can be shortened at the request of the appellee or the appellant.

MS. GILBERT: Excuse me, but may I be heard?

CHAIRPERSON SOCKWELL: Yes, go ahead.

MS. GILBERT: I see no reason to delay this further. The original briefing order was issued October 30th, and

required the appellant to file a brief by December 11th.

VICE CHAIRPERSON REID: But, excuse me. We understand that you do oppose it. What we are trying to do now is to ascertain a time line, and if I hear the staff correctly, the time line that they have ascertained would take approximately 3-1/2 months. Mr. Pascal has asked for a compromise of four months, and --

MR. PARKER: No, I asked that the clock at least start no earlier than April 1st. If you are not going to grant a six month stay, I ask that the clock for the --

VICE CHAIRPERSON REID: Well, maybe I didn't understand you. You are saying that -- first you said a six month stay.

MR. PASCAL: I would like a six month stay, and to be able to report back to you what is happening with the City Counsel with respect to the regs and what have you.

If that is not granted, I would like the time line not to start any earlier than April 1st, because my co-counsel is coming back to the office then. And I don't think the City will be prejudiced by that or by either proposal.

VICE CHAIRPERSON REID: Well, the time line, on Mr. Bastida's time line, what you were talking about was --

MR. BASTIDA: The total time required for a briefing as we have on our original briefing schedule.

CHAIRPERSON SOCKWELL: Right. That was not a stay

time line, but a briefing schedule time line.

MR. BASTIDA: Right.

VICE CHAIRPERSON REID: Right.

MR. BASTIDA: Now, depending upon the situation, we can modify that briefing schedule, especially the appellant and the appellee, and try to shorten the time requirements, and they concur on that.

VICE CHAIRPERSON REID: They do?

MR. BASTIDA: If.

VICE CHAIRPERSON REID: Oh, oh, oh.

CHAIRPERSON SOCKWELL: So you want an April 1st if we don't do the other so that your staff member can return to the office?

MR. PASCAL: She tried this case with me, and she is coming back April 1st, and I would have her.

CHAIRPERSON SOCKWELL: Are you going to submit certified copies of the baby pictures, and other documentation?

MR. PASCAL: I will have her E-mail them to them, because I am sure that she has done it to her grandparents.

VICE CHAIRPERSON REID: Perhaps we can -- well, I would not have a problem to start the time at the April 1st date.

CHAIRPERSON SOCKWELL: If I may make this statement.

MR. BASTIDA: Oh, I'm sorry, I was just trying to clarify. That means that the briefing schedule, that the 110 days

would begin on April 1st?

CHAIRPERSON SOCKWELL: That's correct.

MR. BASTIDA: Is that what you are saying?

MR. PASCAL: Yes. That would be my fall-back argument.

MR. BASTIDA: I think that the government might have a problem with that.

CHAIRPERSON SOCKWELL: Well, if she does, then that is something that she herself would have to assert, Mr. Bastida.

MS. GILBERT: May I be heard one more time?

CHAIRPERSON SOCKWELL: Sure.

MS. GILBERT: I would simply say that I believe that the appellant in this case benefits from any delay in a decision in this case, and so I would like to be sensitive to his concerns about staffing. But I think if he has 40 days, or if he wants 60 days in which to file a brief, that he should be able to make whatever adjustments he has to make.

I mean, I am also dealing with a case -- I mean, I was not the attorney below in this case. I will be filing the appellee's brief, and familiarizing myself with the record within a 40 day period. So I don't see any reason why any attorney on his staff is not able to file the appellant's brief in this case.

CHAIRPERSON SOCKWELL: Let me ask a couple of questions here if I may. Mr. Pascal, how many people do you have in your office, professional attorneys?

MR. PASCAL: Myself, my partner of 30 years, Anton Weiss -- who is totally out of this field. It is not his area -- and Kathleen Andrews, who has been with me 11 years. That's the office. That's Pascal & Weiss.

CHAIRPERSON SOCKWELL: All right. So under the circumstances, your office is hobbled by the absence of your co-counsel, and --

MR. PASCAL: Myself and my other partner are handling her work while she is gone, and she has E-mail at her house, and so there is some limited communications with her.

But she is due back April 1, and she did try this case, and so she is familiar with it, as well as you can be familiar with something that happened two years ago.

CHAIRPERSON SOCKWELL: Well, I can certainly understand that a small office would be far more burdened than maybe some of the larger firms that have far more resources directly available for such.

One of my feelings is that if we were to grant a six month stay on the basis of undefined time lines for the development of the regulations that you speak of, there would be no true basis for the six months, except to say that is a nice period of time to grant pending decisions that have not been set down to any precise schedule or developmental period.

And so I would be against a six month stay personally. I just don't feel that is justified by the

information available either to you or to us.

COMMISSIONER MITTEN: Mr. Chairman, I guess my thoughts on the subject are -- we are all working through a process that doesn't have clear procedures, and doesn't have clear time lines, and all of that.

And we are asking for some indulgence from the parties because long periods of time have elapsed before these cases have been taken up, and there is not a predictable schedule associated with disposing of these cases.

So I would be amenable to having a small firm myself and appreciating the kind of burden that Mr. Pascal might be asked to bear, that we start the briefing schedule from April 1st, but that that be a firm date, and that there be no accommodation of that if, for instance, the new mother wanted to extend her maternity leave or something like that, and that is a firm date.

MR. PASCAL: I would understand that.

CHAIRPERSON SOCKWELL: I would concur with that, Ms. Mitten.

CHAIRPERSON SOCKWELL: Thank you. All right. Any other discussion on that?

BOARD MEMBER RENSHAW: I would agree to that.

VICE CHAIRPERSON REID: Can I make a motion then? I move that we --

CHAIRPERSON SOCKWELL: Well, first, is there any

discussion from you?

MR. PARKER: Is there any discussion from you?

MR. PARKER: No, I just wanted to make sure that we noted our objection. We had already noted our objection, and there is nothing else for us to say at this point.

CHAIRPERSON SOCKWELL: Thank you.

VICE CHAIRPERSON REID: I move that we set the time line to begin briefing on April 1st.

MR. PARKER: The 40 days from either file would start April 1?

VICE CHAIRPERSON REID: Right. That would be the date --

CHAIRPERSON SOCKWELL: That we would advance the time line.

VICE CHAIRPERSON REID: Right. And then that there would be no further extensions in this regard

MR. PASCAL: I wouldn't want to be precluded though to come back to the Board and file a progress report, for instance, if the City Council, 15 days or 30 days from now, were to file --

VICE CHAIRPERSON REID: Mr. Pascal, excuse me. My motion was that there would be no further extensions.

MR. PASCAL: I understand.

VICE CHAIRPERSON REID: And anything other than that -- well, first, let us first complete this motion, and

notwithstanding anything else you have to say, but that has not relevance to the motion that I am making at this particular time.

COMMISSIONER MITTEN: I second.

CHAIRPERSON SOCKWELL: Any more discussion?

(No audible response.)

CHAIRPERSON SOCKWELL: All in favor?

(A chorus of ayes.)

CHAIRPERSON SOCKWELL: Opposed?

(No audible response.)

CHAIRPERSON SOCKWELL: The motion carries.

MR. BASTIDA: The staff will record the vote as five to zero. Ms. Sheila Cross Reid moving it, and Ms. Mitten seconding it, and the rest of the members voting in the affirmative.

COMMISSIONER MITTEN: And if I could just ask that Mr. Bastida will provide in writing the new schedule to the parties so that everybody is clear about when things are happening going forward.

MR. BASTIDA: I intend to do that, and serve it to the appellant, and corporation counsel, and the appellee, and the representative of the DCRA.

MR. PASCAL: I would like to clear the record. Heretofore, I have only communicated and sent copies to Laurie Gilbert. So am I to understand today, or at least for the record, I will continue to do that.

CHAIRPERSON SOCKWELL: They didn't ask, and you don't have to.

MR. PASCAL: Well, I didn't want to have a problem later.

MR. BASTIDA: I think that if the government is going to require -- the government, the board would require to serve it to both, and I think the appellant would be in a better position to make sure that he serves it on both.

VICE CHAIRPERSON REID: Okay. Mr. Chair, just a --

MR. PARKER: Just to further confuse this, I would note that in a civil case that I have versus Rodgers Brothers, I have to serve two attorneys for them, and so it wouldn't be all that unfair for him to have to send a copy to me.

CHAIRPERSON SOCKWELL: All right.

VICE CHAIRPERSON REID: Touche.

MR. PASCAL: Touche. He is correct on that. Thank you very much.

CHAIRPERSON SOCKWELL: Thank you very much.

VICE CHAIRPERSON REID: Excuse me, Mr. Chairman, Mr. Pascal did -- he had a statement to make, and if that concludes this, if you would allow him the time to do that.

CHAIRPERSON SOCKWELL: Certainly.

MR. PASCAL: I did note that I would want to feel free that if the City Council in its wisdom did something prior to the April 1st day, I would want to be free at least to bring that

to the Board's attention, and then we could deal with that at that point in time.

CHAIRPERSON SOCKWELL: Anything that you would serve on the Board, you would as well serve on the government, assuming that they didn't know about it.

MR. PASCAL: Of course. Of course.

MS. GILBERT: I just want to make sure though that you have denied the motion to stay.

MR. PASCAL: Today they did.

CHAIRPERSON SOCKWELL: Yes, by our motion to in fact advance the schedule, we in fact denied the motion to stay.

MS. GILBERT: So that if Mr. Pascal files something new, it will be a new motion?

MR. PASCAL: That's correct.

CHAIRPERSON SOCKWELL: Yes.

MR. PASCAL: Thank you.

CHAIRPERSON SOCKWELL: And, Mr. Rodgers, we appreciate your participation as the silent one.

MR. PARKER: Good day.

CHAIRPERSON SOCKWELL: Thank you. Will you call the next case, please.

VICE CHAIRPERSON REID: And last case.

CHAIRPERSON SOCKWELL: And last case.

MR. BASTIDA: Mr. Chairman, this is the last case of the afternoon, and it is BZA Case Number 00-0001, OAD Case

Number 99-1821-E, and is the one referenced to the Carey Brothers. I would like to note that it appears that the appellant is not being represented. Thank you.

CHAIRPERSON SOCKWELL: The appellant was duly notified?

MR. BASTIDA: No, Mr. Chairman, it was done verbally, and I didn't do it in writing. So he is not duly notified as such.

CHAIRPERSON SOCKWELL: Just a second, please.

(Brief Pause.)

CHAIRPERSON SOCKWELL: If we have not notified the appellant officially, then I don't believe that we can proceed with this case.

MR. GREEN: Good afternoon. May I be heard, Mr. Chairman?

CHAIRPERSON SOCKWELL: Yes.

MR. GREEN: My name is Matthew J. Green, Junior, and I represent the government. I have before me -- and I am quite sure that the Board does, too, a motion for an extension of time within which to file briefs.

Now, this was done by the appellant, and so it would appear that the appellant had every intention of participating in this process, and at some point did not follow through.

It would appear that that following through would

encompass being here today as well, or at least making inquiry as to being here today. It would appear as though due notice of today's proceeding, as well as participation in this process, is noted as being a part of what the appellant's responsibility would be.

And based on that, I would ask that this matter be dismissed in light of the fact that the appellant is not here. But the appellant apparently wanted to participate to some degree and did not follow through.

We have a classic Robinson versus Howard University type situation, where we have a failure to prosecute.

MR. BASTIDA: Mr. Chairman, the appellee has provided a motion to dismiss, and it was filed today at 12:59, and I have provided that to you. But if I may point out, the appellant has 21 days by law or by the rules, I believe, to address the motion to dismiss from the government. Thank you.

MR. GREEN: Again, Mr. Chairman, if I might be heard, please. It would seem that the appellant, if they wish not to be a participant in today's proceeding, would at least enter a special appearance either through counsel or in person, and say I can't make it, or they would have called and said I can't make it.

To my knowledge -- and again I am not the keeper of the record, but to my knowledge there has been no such effort on the part of the appellant to say that I can't make it for today's proceeding.

Yet, they took the time to ask for an extension way back on December 11th of the year 2000. They have an obligation to at least follow through, Mr. Chairman.

CHAIRPERSON SOCKWELL: Mr. Green, it appears that the extension request was received by this office on the 19th of January, which was Friday last, and t here is a certificate of service as part of that motion.

MR. GREEN: Yes, I am looking at it, and it says the 11th day of December, 2000. Maybe we are looking at different documents. I would be happy to share with you what I have.

COMMISSIONER HOOD: Mr. Chairman, are you looking at Exhibit 7?

COMMISSIONER MITTEN: Exhibit 4.

MR. GREEN: I have a document, Mr. Chairman, which was faxed to me from your offices, and it is to me, and it is from a Mr. Bastida. Now, it is dated, as far as the certificate of service is concerned, the 11th day of December, 2000.

CHAIRPERSON SOCKWELL: Okay. I'm sorry. This was served on DCRA on the 19th, or sent to DCRA on the 19th of January, excuse me, and was received I guess here on the 19th. Mr. Bastida, can you respond to this just to make sure that I am looking at the same thing, on what we have got here, please?

MR. BASTIDA: Could you restate the question, Mr. Chairman?

CHAIRPERSON SOCKWELL: I'm sorry, but with regard

to the extension request, I am showing a certificate of service, and that it was sent via U.S. Mail on the 19th of January to DCRA.

And of course we have a time stamp on the copy that is in my file to the Office of Zoning as of January 19th, at 3:47 p.m., of a motion for final extension of time within which to file appellant's brief.

MR. BASTIDA: Mr. Chairman, may I have a minute?

CHAIRPERSON SOCKWELL: All right. Mr. Green, just give us a minute to confer and figure out what we are looking at here.

MR. BASTIDA: Mr. Chairman, Mr. Corey Boffo, from the Office of Corporation Counsel, will address that question.

CHAIRPERSON SOCKWELL: Thank you.

MR. BOFFO: Well, the Appellant's motion before us is a motion to extend the time. So the appellant doesn't need to be here and we can still rule on that issue.

As for the motion to dismiss, the appellant still needs time to address that issue and so we can't reach that today.

CHAIRPERSON SOCKWELL: So is it suggested that the motion for extension be postponed?

VICE CHAIRPERSON REID: No, we can deal with that today, but we can't deal with the motion for dismissal because of the notice requirements.

CHAIRPERSON SOCKWELL: Well, if we rule on the motion for extension, then does that moot the motion for

dismissal?

MR. BASTIDA: No. Mr. Chairman, the motion for an extension is at your pleasure. You can take it today, or you might decide to defer it. The motion to dismiss is not appropriate to rule on it today.

COMMISSIONER HOOD: Mr. Chairman --

CHAIRPERSON SOCKWELL: All right. I am with you on it. Yes, go ahead, Mr. Hood.

COMMISSIONER HOOD: I am going to yield to Ms. Reid.

VICE CHAIRPERSON REID: My understanding with regards to this case is that there was an issue with regard to the page that was not included or was missing in regards to this case, and as such not having a conclusive record, that we would be unable to act on this particular case today anyway; isn't that correct?

CHAIRPERSON SOCKWELL: Mr. Bastida.

MS. SANSONE: Well, the question was that the staff had raised an issue about whether or not there was a tape available of the proceedings in this case before DCRA, and that the Board should inquire of DCRA if they did in fact have the tape, to have a complete record or needed more time to research that issue.

VICE CHAIRPERSON REID: Mr. Green, did you understand the nature of the question that is being presented?

MR. GREEN: I understand the nature of the question being presented, and as I understand it, the Office of Adjudication, of which I do not work for, nor have any control over, or any interest in other than to appear, controls tapes and transcriptions, and documents. It is my understanding that they cannot or have not been able to locate the tape in question.

VICE CHAIRPERSON REID: And as such, sir, are you aware of the fact that in order for this Board to be able act upon any particular motion, or to take any action, that we cannot do so with an inclusive record?

MR. GREEN: It is my understanding again that that is the rule that you have adopted.

VICE CHAIRPERSON REID: That who has adopted?

MR. GREEN: This Board. That is your rule; is that correct?

VICE CHAIRPERSON REID: Well, let me just say this, Mr. Green. This Board does not -- we do not promulgate rules. We have rules under which we must operate.

MR. GREEN: Well, that is the rule that you operate under then?

VICE CHAIRPERSON REID: Correct.

MR. GREEN: Fine. I understand.

VICE CHAIRPERSON REID: And as such, we are not -- and given that fact, that then means that the Board does not have the capability to be able to act or to in any way proceed with

this particular case until such time that we have a full and complete record in which to act.

So I would move then, Mr. Chair, that -- well, two things. One, that we would grant the extension of time to a date certain in this particular case, at which time it would give us an opportunity to either have the tape found, or for there to be another case or another record that would be established.

And in that event, Ms. Sansone, would we then grant the extension of time, or do we have to remand in order to have the record completely completed for us to be able to act? What is the correct action? I am not really certain.

CHAIRPERSON SOCKWELL: Ms. Sansone, if I am correct, we have the option to conduct an action based upon the lack of a complete record.

MS. SANSONE: Mr. Chair, I believe whether or not the Board could proceed without the complete record would depend upon the nature of the issues that were being presented to the Board.

It is highly irregular, but it is conceivable that there might be a situation where the tape was not a critical element, and possibly the parties would waive their rights in that regard.

But it seems as though there are a number of issues here. The first is whether or not DCRA wishes any more time to locate this tape, or to perhaps present an argument to the Board

as to why the case should not be vacated for lack of the tape, and remanded to DCRA for further proceedings.

If the case were not to be vacated and remanded, then there would be the question of the motion to dismiss, in which case the appellant should be given an opportunity to respond to this motion in writing.

And then if the case is not dismissed, then we would have this question of what the appellant's request for the extension of time line briefings. We really have a number of outstanding issues here, and probably the most logical one to start with is the lack of the tape, and how to best proceed.

CHAIRPERSON SOCKWELL: Well, I think the problem that we have with this Board, or with this particular case, is that we have the government represented, but as Mr. Green, representing the government, does not have direct knowledge of the availability of the tape, or the -- and on that issue alone, it makes it difficult for us to proceed.

If the government could say conclusively that the tape doesn't exist, or that the tape can't be found, or the tape can be made available, then we would not have access to the appellant in this case with regard to a decision.

And by the same token, we don't have the appellant for the discussion of the extension of time. And I think we are sort of working with tied hands, because on the one hand we have an individual, but not enough information.

On the other hand, we have information and no individual to support it. So, do other Board Members have anything else, as long as it is on this?

COMMISSIONER HOOD: Mr. Chair, I kind of agree with what I heard in Mr. Green's statement. On the other hand, my concern is the statement that I heard from Mr. Bastida about the way he was contacted, by telephone calls. There is no paper trail.

So I would be reluctant in proceeding, and while I definitely associate myself and agree with the comments, I think if we are going to make an error that we error on the side of caution. And I think we need to move cautiously.

CHAIRPERSON SOCKWELL: Well, would we want to continue this case to a date certain with the responsibility for assuring adequate notice to the appellant, and to give time for the government to determine the availability, and/or disposition of the requested required tape?

VICE CHAIRPERSON REID: Mr. Chair, if that is done -- and, Ms. Sansone, you can respond to this as well, would they be able to -- well, let's take the worst case scenario, in which they were unable to find the tape, and then would there not have to be an additional hearing to establish a record?

MS. SANSONE: Yes.

CHAIRPERSON SOCKWELL: And give us our options.

MS. SANSONE: Well, I guess what I would suggest is

that we continue the case to a date certain, with written notice to the parties that would set out what was going to be determined at that hearing.

And the first order of business would be the question of whether the tape could be found, and the government's arguments, if any, as to whether the appeal could in fact proceed without it.

And if in fact the Board determined that the appeal could not proceed without the tape, then at that point it would be appropriate to vacate the appeal, and remand it back to -- or vacate the decision, remanding back to DCRA to conduct further proceedings.

VICE CHAIRPERSON REID: Well, I think that's what I was asking now, is that inevitably if in fact there is no tape, and we have to have that for the record, wouldn't that be more expedient to remand -- to vacate and remand at this time, and then we would know that at the next hearing -- I mean, at the next time that this came back before us that we would ensure that we would have the adequate record?

CHAIRPERSON SOCKWELL: My feeling or my problem with that is that we have a request for a time extension, and yet because we don't know that the tape is or isn't available, it would seem to me improper to act on the time extension without knowing what perimeters we are dealing with.

It would be irrelevant to grant an extension

without knowing that the tape is available so that the record could be completed. And it would certainly be improper to entertain dismissal without having followed due process.

And at the same time, to remand it back to DCRA without knowing that the tape cannot be produced would be putting the cart before the horse, I believe.

VICE CHAIRPERSON REID: Oh, I'm sorry, Mr. Chair, I thought that Mr. Green -- and maybe we can ask him again -- affirmed here today that he had no idea where the tape was.

CHAIRPERSON SOCKWELL: Right. He said he has no contact with the people that produce or maintain the tapes. Therefore, he can't provide information. That is what concerned me.

VICE CHAIRPERSON REID: Do you know, Mr. Green, if the tape is lost, or is it in existence, or is there any possibility of being able to find it?

MR. GREEN: I have absolutely no idea. I really don't.

VICE CHAIRPERSON REID: Then that being the case, then I can understand where you are coming from.

MR. GREEN: May I be heard just briefly?

CHAIRPERSON SOCKWELL: Yes.

MR. GREEN: You know, it seems to me, Mr. Chairman and Members of the Board, that there is some element of personal responsibility that we cannot overlook.

The appellant was in contact with this body through Mr. Bastida, this body's representative. The appellant was aware of today's proceedings through Mr. Bastida. The appellant failed to show. The appellant failed to call.

The appellant didn't do anything at all to prosecute his case. I don't think we ought to lose sight of that. We are not operating in a vacuum here.

CHAIRPERSON SOCKWELL: All right.

MR. GREEN: And I might go along with that if there were no contacts on the part of the appellant with the Board.

CHAIRPERSON SOCKWELL: But, Mr. Green, by the same token the government is here expecting to proceed with the government's position.

MR. GREEN: Of dismissal, yes.

CHAIRPERSON SOCKWELL: But the government has no idea what the disposition of crucial documentation is, and has had time to determine at least generally the availability, and/or history of that tape, or those tapes, as it may take place.

So if the government doesn't have the information, then the government is just as responsible in its own right for providing adequate information to the Board.

And that means having read the documentation presented to us, you would know that that tape is a critical discussion item, and yet you have absolutely no information on that tape in association with the people who are involved or not.

You should know.

MR. BASTIDA: Mr. Chairman, the staff will contact officially the Chief Administrative Law Judge for this City, and would require a written answer within two weeks, and then perhaps in a meeting subsequent to that, you can make a decision if you decide to extend the briefing period or not.

And also the staff will send the motion to dismiss to the appellant, and give him 21 days to answer such request.

COMMISSIONER HOOD: Mr. Chairman --

MR. BASTIDA: Or a time frame, you know, to answer it, and I think that in that way the judicial process will be better followed.

COMMISSIONER HOOD: Mr. Chair, I am going to ask that all phone calls be followed up with letters from now on, and I think we could proceed a lot more efficiently.

CHAIRPERSON SOCKWELL: In this case, I would certainly suggest that any communication, any substantive communication be conducted officially in writing. If you mean all --

COMMISSIONER HOOD: All cases in the operations of the office that need -- well, that is another matter, but in this case, yes.

CHAIRPERSON SOCKWELL: Yes, anything that is deemed to be substantive communication, which means dates, places, requirements, for submissions should be conducted in writing if

that is what you are saying.

BOARD MEMBER RENSHAW: Clarification, Mr. Chairman.

CHAIRPERSON SOCKWELL: Yes.

BOARD MEMBER RENSHAW: Mr. Bastida stated that he made the recommendation that the staff would contact the Chief Law Judge to get a written answer in two weeks about the tape. Does that mean that we are going to get a transcript of the tape if it is available in two weeks?

Or does it mean that we just receive word that, yes, the tape exists; or, no, the tape does not exist?

CHAIRPERSON SOCKWELL: I think the question --

MR. BASTIDA: Mr. Chairman, if I may answer that.

CHAIRPERSON SOCKWELL: Yes, go right ahead.

MR. BASTIDA: The purpose would be an inquiry by telephone this afternoon, followed by a letter tomorrow morning, stating that the tape has to be provided for the record. An entire record consists in accordance with EPA --

COMMISSIONER HOOD: APA.

MR. BASTIDA: I mean APA.

CHAIRPERSON SOCKWELL: The Administrative Procedures Act.

MR. BASTIDA: Yes, the APA. An entire record consists of all of the documentation, plus a copy of the tape of the proceedings, and that is what I am going to ask to have within 2 weeks, and the certified record, and that record will be

certified.

In that way, there is not any doubt what is in front of this Board.

BOARD MEMBER RENSHAW: Mr. Chairman, if that tape is provided to us, who bears the cost of transcribing the tape?

MR. BASTIDA: I think you have asked for that issue to be briefed, and I think we would have a better idea in three weeks how you are going to rule on that.

COMMISSIONER HOOD: Let me just say that is another case.

CHAIRPERSON SOCKWELL: I think that -- well, let's take these things in-turn, in order. The first thing is to determine the availability of the tape, after which we would deal with the issues of extension, and/or dismissal.

I mean, I missed sort of a piece of what Ann Renshaw said. So I am sort of paraphrasing what I think she said.

MR. BASTIDA: I have no problem with that position. I would advise you to follow that, especially regarding the responsibility to do the transcript would be -- is going to be briefed, and you would have much better information, and much better ability to render a fair decision.

CHAIRPERSON SOCKWELL: And basically to the government, I apologize for the fact that this procedure will further complicate the time lines on getting this resolved.

But unfortunately I think the only way we can

proceed is directly through the elements as they presented themselves in a straight line fashion.

CHAIRPERSON SOCKWELL: All right. Do we need a motion on this?

VICE CHAIRPERSON REID: I think I had a motion that we would honor a request for an extension of time to a date certain, and in the interim, perhaps as Mr. Bastida and Ms. Sansone said, perhaps the tapes can be located.

And then if not, at the subsequent hearing, we would then determine whether or not we can go forward, or whether or not we have to send it back again.

CHAIRPERSON SOCKWELL: And at which time we will either have a certified record or we will have a certification that the tape is not going to be available.

COMMISSIONER HOOD: With further clarification, I will second the motion.

VICE CHAIRPERSON REID: For the time line.

MR. BASTIDA: Excuse me, but I was consulting with corporation counsel. Can you repeat your other motion, please?

VICE CHAIRPERSON REID: I was saying to honor the request -- is that the correct language in these types of motions -- for an extension of time on the part of the appellant for a date certain.

COMMISSIONER HOOD: And with further clarification, again I will second the motion.

MR. BERGSTEIN: Are you going to set a date certain for the brief to be filed, or are you simply granting an extension of time, at which at some other point you are going to determine when the brief should be filed?

At this point, there is a brief owed, and you have to determine either you are going to temporarily absolve the appellant of having to produce a brief until you decide when it should be due, or you either establish when it is due.

CHAIRPERSON SOCKWELL: Am I correct in thinking that what we may be doing here is not actually dealing with the appellant's motion, but providing a substitute motion by the Board for the purpose of gaining information on the disposition of the tape, because there is no -- we have no information from the government on that issue.

And that this is being handled not as part of the appellant's motion, but as a motion from the Board for more information to allow us to adequately deal with the appellant's motion.

MR. BASTIDA: And then if that is your intent, then I don't think it is consistently reflected on the motion in front of you.

CHAIRPERSON SOCKWELL: Okay. I am trying to figure out which way we are going on this, and I am asking corporation counsel for their assistance.

MR. BERGSTEIN: What you are essentially doing is

holding a briefing order in abeyance until you determine whether or not the record is complete to your satisfaction; is that what you are doing?

And then after that determination, you will consider when the appellant's brief would be due if a brief is due at all based upon your decision that you make with respect to the record. Is that what you are --

CHAIRPERSON SOCKWELL: Okay. I think that sounds reasonable.

MS. SANSONE: And with respect to the motion to dismiss, and that would also be deferred until that time.

MR. BERGSTEIN: Is there a response due then of the motion to dismiss, and if so, I think you should indicate when a response would be due from the appellant.

And 10 days is normally -- the Board has no rules with respect to motion practice, and 10 days is usually an appropriate period for oppositions to be filed, plus 3 days if the motion was served by mail.

CHAIRPERSON SOCKWELL: Okay. I think that is correct for our past, most recent direction on such issues. So then I put the motion to a vote. All in favor say aye.

(A chorus of ayes.)

CHAIRPERSON SOCKWELL: Opposed?

(No audible response.)

CHAIRPERSON SOCKWELL: Then the motion carries, and

a date certain for submissions and to proceed with this case will have to be determined.

MR. BASTIDA: Mr. Chairman, the staff will record the vote as five to zero; with Ms. Cross Reid moving, and Mr. Hood seconded the motion, and the rest of the Board Members voting in the affirmative. Thank you.

And I would intend to put this matter in front of you as soon as your schedule allows it, and in that way you can make a decision on the narrow issues that you have stated on your motion.

CHAIRPERSON SOCKWELL: Thank you. Mr. Green, I guess that concludes our need for you this afternoon. Thank you very much for appearing.

MR. GREEN: Certainly. Thank you.

MR. BASTIDA: Thank you, Mr. Chairman and Board Members.

CHAIRPERSON SOCKWELL: That concludes the business of this public hearing today.

(Whereupon, the Public Hearing was concluded at 3:35 p.m.)