

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

Tuesday,  
March 19, 2002

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The Public Meeting convened in Room 220, South, 441  
4th Street, N.W., Washington, D.C., 20001, pursuant to notice at  
9:56 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

Geoffrey H. Griffis	Chairperson
David Levy	Board Member (NCPC)
Curtis Etherly, Jr.	Board Member

ZONING COMMISSION MEMBER PRESENT:

Anthony J. Hood	Commissioner
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COMMISSION STAFF PRESENT:

Beverly Bailey	Office of Zoning
Paul O. Hart	Office of Zoning
John K.A. Nyarku	Office of Zoning
Alberto Batisda	Office of Zoning

D.C. OFFICE OF CORPORATION COUNSEL:

Marie Sansone, Esq.

D.C. OFFICE OF PLANNING:

Maxine Brown-Roberts

John Moore

David McGettigy

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(9:56 a.m.)

CHAIRPERSON GRIFFIS: This hearing will please come to order. This is the 19th of March, 2002, public hearing of the Board of Zoning Adjustments. My name is Geoff Griffis. I am Chairperson and joining me today is not the Vice Chair, Ms. Anne Renshaw. She is not present today for personal matters. However, Curtis Etherly is with us today and Mr. Levy representing the National Capital Planning Commission and representing the Zoning Commission is Ms. Carol Mitten who will be -- is on my right.

Let me just quickly introduce the staff that's with us today, Ms. Bailey at my very far right, Mr. Nyraku is here also and Mr. Hart and Ms. Sansone, corporation counsel is with us.

Copies of today's hearing are available to you. They are located at my left at the door. That is the door that you did come into this morning. Please be aware that these proceedings are being recorded. So we must ask that you refrain from any disruptive noises or actions in the hearing room. When presenting information to the Board, please speak into the microphone and when starting I will ask you to state your name and your home address before presenting your testimony.

All persons planning to testify either in favor or opposition are to fill out two witness cards. They are located

1 on the table in front of us and I believe there's also a stack at  
2 the table where you entered in. Upon coming forward to speak to  
3 the Board, please give both cards to the Reporter who is sitting  
4 to my right.

5 The order of procedure for special exceptions of  
6 variances this morning will be first, statement and witnesses of  
7 the applicant's. Second will be government reports which include  
8 Office of Planning, Department of Public Works and any others  
9 that we have received. Third will be the report of the Advisory  
10 Neighborhood Commission. Fourth will be parties or persons in  
11 support, fifth, parties or persons in opposition and sixth,  
12 finally, we will have closing remarks by the applicant.

13 Cross examination of witnesses is permitted by the  
14 applicant or parties. The ANC within which the property is  
15 located is automatically a party in the case. The record will be  
16 closed at the conclusion of each case except for any materials  
17 specifically requested by the Board. The Board and the staff  
18 will specify at the end of the hearing exactly what is expected  
19 and the date when persons must submit evidence to the Office of  
20 Zoning.

21 After the record is close, no other information  
22 will be accepted by the Board. The Sunshine Act requires that  
23 public hearing on each case be held in the open before the  
24 public. The Board may, consistent with the rules, procedures and  
25 the Sunshine Act, enter executive sessions during or after a

1 public hearing on a case for purposes of reviewing the record or  
2 deliberating on the case.

3 The decision of the Board in these contested cases  
4 must be based exclusively on the record. To avoid any appearance  
5 to the contrary, the Board requests that persons present not  
6 engage members of the Board in conversation and at this time, I  
7 would ask that everyone turn off their beepers or cell phones so  
8 that we do not disrupt these proceedings.

9 The Board will now consider any preliminary  
10 matters. Preliminary matters are those which relate to whether a  
11 case will or should be heard today, such as request for  
12 postponement, continuance, withdrawal or whether proper and  
13 adequate notice of the hearing has been given. If you are not  
14 prepared to go forward today with the case or if you believe that  
15 the Board should not proceed, now is the time to raise such a  
16 matter. Before I go to the general public, I would ask if staff  
17 has any preliminary matters.

18 MS. BAILEY: Members of the Board, good morning.  
19 Mr. Chairman, there is a preliminary matter concerning the second  
20 and third case. Those are the second and third cases of the  
21 morning but the preliminary matter is better dealt with when  
22 those cases are called but there is none for the first case.

23 CHAIRPERSON GRIFFIS: Okay, thank you very much, in  
24 which case, does anyone else have any preliminary matters for the  
25 Board at this time? Not seeing a rush to the table, I will

1 proceed and ask that the first case be called.

2 MS. BAILEY: Application Number 16845 of Robert  
3 Burchard, pursuant to 11 DCMR 3104.1 for special exception under  
4 Section 223, to allow a two-story rear addition to a single-  
5 family dwelling that is non-conformant (subsection 2001.3) as to  
6 lot width (section 401), lot area (section 401), open court  
7 (section 406) and side yard (section 405). The property is not  
8 meeting the rear yard requirements as well, which is also Section  
9 404.

10 The property is located in the R-2 District at  
11 premises 4417 Faraday Place, NW, Square 1582, Lot 220. Please  
12 stand and come forward, sir. Please raise your right hand.

13 (Witness sworn.)

14 MS. BAILEY: Please, have a seat at the table.

15 CHAIRPERSON GRIFFIS: Is anyone else here involved  
16 in this application at this time? Very well. Good morning to  
17 you. I'm going to give you some technical advice here. When you  
18 speak, you have to speak into the microphone and you have to turn  
19 it on, exactly.

20 MR. BURCHARD: Thank you, Mr. Chairperson. My name  
21 is Robert Burchard. Again, I live at 4417 Faraday Place NW.  
22 I've been a long-term District resident, over 12 years and my  
23 wife and I have lived in this house for six years. We love the  
24 neighborhood, we love the street and we feel fortunate to live  
25 where we do. I consider myself an involved neighbor, park clean-

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1 ups. We're at the Turtle Park, Four Bear Park, involved in local  
2 ANC.

3 My family is growing. I have a two-year old  
4 daughter and another child due in July and my wife and I began  
5 talking about expanding our house, putting a small addition on  
6 about a year ago and we submitted plans. Now, as you know,  
7 addition, I'm sorry, a 12 by 20 two-story addition will be one  
8 room on the first floor, basically a playroom for my daughter and  
9 my second child and a bedroom upstairs for us.

10 Way back when we started this process, we went  
11 around and talked to the neighbors and told them what we were  
12 planning to do and actually generated a lot of excitement. In a  
13 way, we're sort of the Bell Weather (phonetic) for the rest of  
14 the neighborhood. They're watching to see what happens. Our  
15 immediate neighbors two houses to the left and two houses to the  
16 right of us and behind us, we actually went and talked with them  
17 and showed them the plans and they signed a little paper which I  
18 have, saying that they were not opposed to what we're going to  
19 do.

20 I also went to our ANC meeting and gave a  
21 presentation for the ANC members and the audience about our plans  
22 and they voted -- passed the resolution in unanimous support for  
23 our addition.

24 Another thing that I did is a couple weeks ago I  
25 xeroxed about 60 pieces of paper saying here we are, what we're

1 planning to do and passed them out to everyone on our street and  
2 the two additional street and it's interesting. We got a couple  
3 neighbors coming over and saying, "Hey, this looks interesting  
4 and let us know how things go and we may want to do things as  
5 well".

6 So that -- we did that and finally, I wanted to  
7 point out that a neighbor two houses down at 4425 Faraday Place  
8 put a similar size addition on her house two or three years ago  
9 and she also came before you and she got a zoning variance. I  
10 believe a precedent has been set for a variance.

11 A final thing as far as mess and so forth with the  
12 work, obviously, it's going to get a little messy. Our  
13 contractor has promised that there won't be any dumpster out  
14 front and he will clean up every day so the impact on the  
15 neighbors should be minimized.

16 CHAIRPERSON GRIFFIS: Good, thank you very much.  
17 Appreciate that. Several things. First of all, you just  
18 indicated that you have several letters in support.

19 MR. BURCHARD: Right.

20 CHAIRPERSON GRIFFIS: Have those been submitted for  
21 the record?

22 MR. BURCHARD: I don't believe they have. I have  
23 them here.

24 CHAIRPERSON GRIFFIS: Okay, before you leave, if  
25 you can submit them for the record.

1 MR. BURCHARD: Will do.

2 CHAIRPERSON GRIFFIS: And you know anything you  
3 pass in if those are originals they won't be returned, it goes  
4 into the case.

5 MR. BURCHARD: Okay.

6 CHAIRPERSON GRIFFIS: Secondly, clarification, you  
7 are not coming in for a variance. You are for a special  
8 exception.

9 MR. BURCHARD: Okay, sorry.

10 CHAIRPERSON GRIFFIS: And your special exception  
11 under Section 223. I bring that up for two important points.  
12 One, it's a heck of a lot easier test for a special exception  
13 than a variance.

14 MR. BURCHARD: Okay.

15 CHAIRPERSON GRIFFIS: Secondly, you made a  
16 statement that we have great sensitivity to, that there is  
17 precedent for a variance approval of which heard before this  
18 Board. There is no precedence, each case is unique --

19 MR. BURCHARD: I understand.

20 CHAIRPERSON GRIFFIS: -- and taken on its merits.  
21 So that being said, I want to continue with Section 223 which, I  
22 think, is one of the most positive sections recently added to the  
23 zoning regulation and it is, in fact, based for specifically this  
24 type of application, that is for a single family. We cannot have  
25 zoning regulations that do not allow families to expand in this

1 city. Otherwise we will not have expanding families in this  
2 city.

3 They will find housing elsewhere, most likely  
4 outside of the city. So 223 is an excellent and well-written  
5 section and I think you have absolutely no problem in coming up  
6 to the test of the special exception and so, frankly, I'm going  
7 to kind of speed this along because I don't think we need to get  
8 into a lot of detail on most of this stuff.

9 You have stated and I will just reiterate the fact  
10 that you have an incredible amount of support for this from the  
11 Office of Planning, from the ANC. There's obviously, no one in  
12 opposition, party or otherwise. It is clearly laid out in the  
13 Office of Planning report which we will get to briefly and in  
14 your own indications and from the record that there won't be any  
15 sort of impact for the adjacent neighborhoods.

16 What I'd like to -- any other questions of the  
17 applicant at this time?

18 I'm going to spend a brief moment on the design.  
19 As you know, Section 223.4 gives the Board the jurisdiction to  
20 review and, in fact, direct some of the special treatments in  
21 terms of design and screening, exterior and interior lighting,  
22 building materials. If you wouldn't mind just taking a brief  
23 second and talk to me a little bit about material choices.

24 You have, obviously, an existing brick structure.  
25 The addition, which is plainly laid out in drawings and also in

1 your written statements that you are adding a vinyl siding  
2 addition to the back. Is there some pertinent reason for  
3 material choices in this situation?

4 MR. BURCHARD: Basically, cost. We're going to put  
5 on -- we would like to have a brick addition but we honestly  
6 can't afford it. We're on a very limited budget, so we did  
7 choose vinyl and we were planning to do a muted gray vinyl so it  
8 wouldn't stand out quite as much as white, white vinyl.

9 CHAIRPERSON GRIFFIS: Okay, so color is trying to  
10 integrate at least into the existing -- okay, any other comments?

11 Okay, let's move ahead then. Let's go straight to the Office of  
12 Planning and just welcome our planning representative and first,  
13 let me just state again, it is incredibly appreciated -- first of  
14 all, have you seen the Office of Planning report?

15 MR. BURCHARD: Actually, no, I have not.

16 CHAIRPERSON GRIFFIS: Oh, indeed, well, you're  
17 missing something. We'll get you a copy. Very well done, put  
18 together and it is incredibly helpful for this Board when we have  
19 such a well articulated Office of Planning report and color  
20 photographs that obviously, help tremendously. The Office of  
21 Planning report actually shows the adjacent addition I believe  
22 you just referenced --

23 MR. BURCHARD: Correct.

24 CHAIRPERSON GRIFFIS: At 4425 Faraday Place, if  
25 that's correct. Okay. Good morning, sir.

1 MR. MOORE: Good morning, Mr. Chair. I'm John  
2 Moore, Office of Planning. And if it's acceptable to you, we'll  
3 stand on the record. I would like to mention, if you look at the  
4 bottom of page -- the photograph on page 5, the Mayberry  
5 (phonetic), I think that's the same color gray that the applicant  
6 is going to use on his, so it would be consistent.

7 CHAIRPERSON GRIFFIS: I see.

8 MR. MOORE: If I'm correct on that one.

9 CHAIRPERSON GRIFFIS: I see.

10 MR. MOORE: I will stand on the record that that's  
11 acceptable.

12 CHAIRPERSON GRIFFIS: I think that's very  
13 appropriate. Any questions of Office of Planning. I believe the  
14 planning report has just been delivered to you.

15 MR. BURCHARD: Yes, sir.

16 CHAIRPERSON GRIFFIS: Okay. Do you need to take a  
17 minute to look at it so that you can question Office of Planning?  
18 Okay, I imagine not as they are in support but they do -- it's  
19 well worth taking a look at what they put together. I'm not  
20 showing any other indications of government reports in this case.

21  
22 We have that ANC report, which is on file from  
23 March 15th. It was also in support, if I'm not mistaken. Does  
24 anyone have that right in front of them? Thank you, Ms. Mitten.

25

1 MS. MITTEN: I'm getting it, just a second.

2 CHAIRPERSON GRIFFIS: Oh, sorry.

3 MS. MITTEN: I'm not putting my hand on it. It was  
4 -- according to our summary sheet, it was not in the file as of  
5 March 15th.

6 CHAIRPERSON GRIFFIS: Oh, I'm sorry. Yeah, I read  
7 that too quickly. I'm not showing it on the list of exhibits  
8 either. Do we have the original case file, just to make sure  
9 that it's in there?

10 MR. MOORE: Mr. Chair, I have a copy. I can  
11 provide it to you.

12 CHAIRPERSON GRIFFIS: Okay, but you've seen a copy  
13 and it is for an approval, correct?

14 MR. MOORE: Correct.

15 CHAIRPERSON GRIFFIS: Okay, well, we'll make sure  
16 that that gets into the record. Okay, the last piece, anybody  
17 here in favor for or opposition of this application? The crowd  
18 is not moving towards you, so don't worry. Okay. Do you want --  
19 let me just take another brief moment and ask, are these -- are  
20 your designs finalized, pretty final?

21 MR. BURCHARD: Yes, we had a lengthy meeting with  
22 the contractor to go over the final designs particularly so we  
23 could submit them to the appropriate offices. I don't actually  
24 have a copy with me right now.

25 CHAIRPERSON GRIFFIS: That's okay. Let me just

1 make quick recommendations in looking at this and I think you can  
2 -- in fact, the addition that you reference which is adjacent to  
3 you, I think it might be interesting to pay particular attention  
4 to kind of how that addition is articulated. I'm not saying I  
5 like it or not. That doesn't make any issue, but in terms of the  
6 different shapes and volumes that are added on to, I think adds  
7 some attraction which conceivably adds some value to property and  
8 it certainly makes it more pleasing for use and also for the  
9 adjacent neighbors.

10 That won't necessarily fit exactly what you're  
11 doing. However, I think it might be well worth sitting down with  
12 your designer and just paying attention to that.

13 Secondly, I would pay particular attention to your  
14 fenestrations, your windows. According to the designs we have,  
15 and again, we're not a peer design board, as much as I'd like it  
16 to be, but that's a joke actually. I wouldn't like that at all,  
17 the -- but in 223.4, you know, we do have to look at these things  
18 in terms of lighting and how they might effect it and stuff like  
19 that, I would also pay particular attention of your windows. Is  
20 it actually serving what you want in terms of the rooms and the  
21 uses.

22 According to the drawings that we have, there may  
23 be some other creative possibilities that don't necessarily add  
24 cost. One comment that I have it that I don't see some of the  
25 windows actually aligning which may be something that over time

1 becomes a frustration if not just a visual impairment. But other  
2 than that, I think that's all I need to say on it.

3 Any other questions? Last chance, in which case, I  
4 would move approval of Application 16845 for special exception  
5 under Section 223 to allow a two-story rear addition on a single-  
6 family dwelling that is not conforming under subsection 2001.3 as  
7 to lot width, section 401, lot area, open court in side yard,  
8 requirements not meeting the rear yard requirement at premises  
9 4417 Faraday Place and I'd ask for a second.

10 MS. MITTEN: Second.

11 CHAIRPERSON GRIFFIS: Thank you very much. The  
12 other thing, the record shows that we didn't actually bring up is  
13 the -- right, is the lot occupancy, which even with this addition  
14 is well under the requirements of R-2. I was kind of struck with  
15 that. Often times we see these kind of maxing out towards the  
16 edge of that. Obviously, this will fit fairly well into the lot  
17 size itself and that was spoken to in terms of lacking any  
18 adverse impact to adjacent areas.

19 Any other discussion, comments? In which case I'd  
20 ask for all those in favor signify by saying "Aye".

21 (Aye)

22 CHAIRPERSON GRIFFIS: Any opposed? The staff will  
23 record the vote.

24 MS. BAILEY: The vote is recorded as four, zero,  
25 one to approve the application. Mr. Griffis made the motion, Ms.

1 Mitten, second. Mr. Levy, Mr. Etherly in support, Ms. Renshaw is  
2 not present and not voting. And this is summary order, Mr.  
3 Chairman?

4 CHAIRPERSON GRIFFIS: I believe that's appropriate,  
5 yeah. And that's okay with you, summary order?

6 MR. BURCHARD: Yes.

7 CHAIRPERSON GRIFFIS: Very good. I thank you and  
8 appreciate your time coming down this morning and good luck with  
9 this, have fun with it.

10 MR. BURCHARD: Thank you. Will do, thank you.

11 CHAIRPERSON GRIFFIS: Okay, and I think we are  
12 ready to proceed on and call the next case of the morning.

13 MS. BAILEY: Mr. Chairman, the applicant has asked  
14 for just a second so they can set the model up and just get  
15 organized.

16 MS. BAILEY: Okay, do you want to set the clock?  
17 We'll give them 52 seconds. I think that's fine. Let me also --  
18 we'll pick it up in a second.

19 CHAIRPERSON GRIFFIS: Actually, why don't you  
20 introduce the panel and --

21 MS. MITTEN: I think Ms. Bailey has to call the  
22 case first.

23 CHAIRPERSON GRIFFIS: Oh, indeed. It's one of  
24 those processes that we have to go through.

25 MR. DePUY: Mr. Chairman and Ms. Mitten, Jacques

1 DePuy, attorney for the applicant.

2 CHAIRPERSON GRIFFIS: Excuse me.

3 MR. DePUY: Before the case is called, there's been  
4 a request that the two cases be consolidated --

5 CHAIRPERSON GRIFFIS: It's already in my mind.

6 MR. DePUY: -- so if the Board agrees then we would  
7 ask the staff to call both cases or announce both cases.

8 CHAIRPERSON GRIFFIS: Well, that's a very  
9 expeditious way of dealing with that. Let's do that and I think  
10 we're all in concurrence and I had assumed that it was through my  
11 mind when I had to read both of these. So I think it's  
12 absolutely and perfectly appropriate. So if any other Board  
13 members have no comments or objections, I would say we proceed in  
14 that manner and Ms. Bailey, you can call both cases.

15 MS. BAILEY: Application Number 16841 of 1440  
16 Church Street, LLC, pursuant to 11 DMCR 3103.2 for a variance  
17 from the residential recreation space requirements under Section  
18 773, for the construction of a residential condominium building  
19 in the Arts/C-3-A District at premises 1440 Church Street, NW,  
20 Square 209, Lot 102.

21 Application Number 16848, of 1425 P Street LLC,  
22 pursuant to 11 DCMR 3103.2 for a variance from the residential  
23 recreation space requirements under Section 773 for the  
24 construction of a residential condominium building in the Arts/C-  
25 3-A District at premises 1425 P Street NW, Square 219, Lot 94.

1 Please stand to take the oath. All those wishing to testify  
2 today, please stand to take the oath.

3 (Witnesses sworn)

4 MS. MITTEN: Mr. Chairman, before we proceed, I'd  
5 just like to put something on the record.

6 CHAIRPERSON GRIFFIS: Yes, Ms. Mitten.

7 MS. MITTEN: Mr. Colbert, who is the architect for  
8 the applicant in these two cases, Mr. Colbert and I share office  
9 space and we haven't discussed either of these cases and I  
10 believe I can be impartial, but I would be happy to respond to  
11 any objections that anyone would like to state.

12 CHAIRPERSON GRIFFIS: You share office space but  
13 you don't have business that are joined; is that correct?

14 MS. MITTEN: Correct.

15 CHAIRPERSON GRIFFIS: Comments from the Board?  
16 Comments from the applicant? Any objection of Ms. Mitten  
17 proceeding?

18 MR. DePUY: No objection.

19 CHAIRPERSON GRIFFIS: Board members, any objection?  
20 Well, then, we'll let her stay. Very good, all right, let's get  
21 right to it. Mr. DePuy, you can introduce yourself again and  
22 then the panel and then I will let you have relatively free reign  
23 until I interrupt.

24 MR. DePUY: Thank you, Mr. Chair. Again, for the  
25 record, I'm Jacques DePuy, attorney representing the applicant of

1 the law firm of Greenstein, DeLorn and Lux (phonetic). Appearing  
2 as co-counsel with me to my extreme left is John Patrick Brown,  
3 Jr. And our witnesses include Lamont Monte Hoffman, who will be  
4 our first witness, representing the applicant, to my right. Eric  
5 Colbert, the architect to my immediate left and David Mayhood,  
6 with the Mayhood Company, who's sitting in the first row.

7 And if there are no other questions at this point,  
8 I have a brief opening statement which has gotten a little  
9 briefer because I don't need to argue the merits of consolidating  
10 the two cases, the Board having agreed so readily which I think  
11 it makes a lot of sense. And as you'll see, the projects are  
12 intricately joined and have become even more joined because we  
13 are offering to provide additional recreation space in response  
14 to concerns of the Planning Office in one building serving  
15 another building. So it makes a lot of sense to proceed with  
16 both cases being heard together.

17 These are two significant residential projects, one  
18 a condominium project, one a rental project; one that furthers  
19 important historic preservation objectives, the other which  
20 offers important retail services to a community that desperately  
21 needs additional retail services, both projects of which have  
22 received very strong community support including support from the  
23 Advisory Neighborhood Commission 2F and the Logan Circle Citizens  
24 Association, both of which provide underground parking which is a  
25 very strong need in this neighborhood, and both of which are not

1 only under construction but both of which have been topped out  
2 and they're on the roof.

3 The applicant seeks, as the staff has indicated in  
4 calling the case, area variances from the residential recreation  
5 space requirements. The requirement in the Arts/C-3-A zone is 15  
6 percent of gross floor area. The applicant provides, proposes to  
7 provide six percent which is an increase from the original  
8 proposals made, again in response to some concerns raised by the  
9 Planning Office.

10 However, we'd like to point out and as our witness  
11 will point out, when counting what we're calling private  
12 recreation space that is space dedicated to individual tenants,  
13 and remember one of these projects is a condominium, and  
14 therefore, there are limited common elements and other aspects of  
15 the project that provide space solely dedicated to individual  
16 unit owners, when combining again what we're calling private  
17 recreation space with what we're calling public, although it's  
18 public only to the members, residents or owners of the building,  
19 we reach 13 percent of gross floor area, which is not very far  
20 off of the 15 percent.

21 So we think in spirit we are doing the best we can  
22 to satisfy the intent of the regulations to provide maximum  
23 recreation space for all the residents in the project.

24 CHAIRPERSON GRIFFIS: Mr. DePuy, just for  
25 clarification, what you're saying is, if you added in the private

1 rec space which we all understand what you're talking about, the  
2 cumulative total would be 13 percent, so you're basically adding  
3 seven percent.

4 MR. DePUY: That's correct.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. DePUY: That's correct. As will be indicated  
7 later, the Advisory Neighborhood Commission 2-F supports this  
8 project and supports the variances and a representative from the  
9 Advisory Neighborhood Commission is here today. The Logan Circle  
10 Citizens Association also supports and a representative from that  
11 organization is here today as well to support.

12 We're not aware of any opposition to the project or  
13 to the variances. Unfortunately the Planning Office, as the  
14 Board, I'm sure is aware, does not support the applications and  
15 we hope that that's not the same thing as opposing the  
16 applications. We believe that while we recognize that the Board  
17 treats each case on its own, that there is ample precedent for  
18 these variances. In fact, the Board has approved within the last  
19 year a similar area variances in projects presented to it and  
20 interestingly, the Planning Office has supported each of those  
21 six cases.

22 CHAIRPERSON GRIFFIS: In that statistic, do you  
23 know how many were denied?

24 MR. DePUY: None of those were denied.

25 CHAIRPERSON GRIFFIS: No, I mean, you say six were

1 approved. Do you know how many applications came forward that  
2 were denied?

3 MR. DePUY: We're not aware of any that were  
4 denied. There may have been some but we're not aware of any and  
5 there were some --

6 CHAIRPERSON GRIFFIS: Just for complete context.

7 MR. DePUY: Yes. There were some prior to the six  
8 within the last year which were also approved but we only  
9 researched the last year.

10 CHAIRPERSON GRIFFIS: Good, thank you.

11 MR. DePUY: That concludes my opening statement.  
12 I'd like to call Monte Hoffman, ask him to identify himself, give  
13 a very brief statement of his background for the Board, for those  
14 who are not familiar with his experience and then describe the  
15 projects and the requests for the variances. Mr. Hoffman.

16 MR. HOFFMAN: Good morning, I'm Monte Hoffman. I  
17 am the principal owner of PN Hoffman. It's a company that I  
18 started in 1993 with my partner Pete Nazelrod (phonetic). We  
19 started the company in '93 for the basic purpose of developing  
20 housing in the District and to put this in context at that time,  
21 Mayor Sharon Pricalli (phonetic), she was serving at that time.  
22 We had an exodus of people leaving the District. We had crime,  
23 we had high taxes. It was a different environment. Most banks  
24 at that time along with others, said our business plan was  
25 stupid.

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1 I'm glad to say that we hung in there. We started  
2 very small. We had very little capital. We did have quite a bit  
3 of construction experience, however, so we applied our technical  
4 coordination and a lot of imagination with the hope and desire to  
5 create stimulating spaces, be a part of the redefining of urban  
6 lifestyle and specifically helping bring back residential into  
7 the District.

8 Since that first project which was relatively  
9 small, we have performed 28 projects to date or in the middle, I  
10 should say of 28. We have done five projects on 16th Street. We  
11 went over to Logan Circle. This was in the mid-'90's and  
12 resurrected Logan 1 and 2. We also did Logan Mansions on the  
13 only vacant parcel on Logan Circle and that area is vibrant today  
14 with several good developers doing residential work in that area.

15 We also stretched north, north of Rock Creek Park  
16 into Woodley Park which has not really seen any redevelopment for  
17 about 10 years prior and we executed a project called Woodley  
18 Park Place. That again, was successful. Each time the market  
19 responded to the things we were doing. From there we went up to  
20 UDC a little farther north and completed Park Hill and then we  
21 went farther west and also farther east and south.

22 Today, we are completing projects in the Adams  
23 Morgan with the Keyworths (phonetic) family. That is a 350-car  
24 parking garage with a residential component on top. We believe  
25 that would help alleviate the parking congestion in Adams Morgan.

1 We're very proud of that project. We're also going to be doing  
2 some redevelopment in the Reed Cook neighborhood adjoining it.

3 Further, we just received an award on the Mather  
4 Building. This was actually about six months ago and we've  
5 started to work on that, and that's near the MCI Center. That  
6 will be urban lofts. That is a very rewarding project because  
7 that also contains affordable housing, an arts incubator space  
8 and market rate, so a nice mixed use project.

9 We are also doing a high rise project in Bethesda,  
10 a condominium project approximately a \$44 million project there,  
11 and we are doing P Street and Church Street which is why we are  
12 here today.

13 I would like to go over the process, if I may, on  
14 Church Street. I know we're consolidating but I think it is  
15 meaningful to explain why we are here and now. This project, as  
16 you probably know, has already a building permit. In fact, it is  
17 up. It is -- the shell is built. We are putting in the  
18 interiors of this project. Similarly, P Street is also being  
19 built and I'm going to try to come over here so I can point to  
20 the model and work -- I guess work from this mike here.

21 CHAIRPERSON GRIFFIS: You can probably pick that up  
22 so you don't break your back.

23 MR. HOFFMAN: This is Church Street right here and,  
24 of course, it faces Church Street. This is the residential  
25 project with a historic existing building, circa 1920 and this is

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1 part of the historic district, the 14th Street District, this  
2 area here. This project is on P Street. Faces the Fresh Fields  
3 Store (phonetic), if you're familiar with P Street between 14th  
4 and 15th Street over here.

5 We entered into these projects with our partner,  
6 John Gersenfeld (phonetic) approximately two years ago. It was  
7 right when the Fresh Fields project was really getting kicked  
8 off. We were very excited to keep the momentum going. We had a  
9 contract purchase for these two properties. They're two separate  
10 lots and there's an alley in between them and we were excited  
11 about getting going on these and keeping the momentum going in  
12 that area.

13 When we presented concept drawings to the  
14 community, we first isolated or concentrated, I should say, on  
15 the Church Street. We knew from the very beginning, we would  
16 need parking for this facility. Technically, it's an addition  
17 because this is a historic building here. So we could have  
18 waived that. But obviously the market would require the parking  
19 in there and the neighborhood wanted parking as well because the  
20 area is already congested with cars parked along the side of the  
21 streets.

22 The initial solutions we had going in the parking,  
23 we did not have a good solution for actually entering into the  
24 parking garage. We met with the neighborhood several times and  
25 with the Historic Preservation Review Board staff and all

1 concluded that the best way of putting parking into this building  
2 would be from P Street. That made sense because we had a  
3 contract on the P Street parcel that P Street is much wider.  
4 It's a thoroughfare and it's a high concentration of retail.

5           Conversely, Church Street is very narrow and it's  
6 one way. So it made good sense to do that. We worked with the  
7 neighborhood and with the Historic. That would help preserve an  
8 entire facade, as you see here without the interruption of a  
9 parking coming in and out and use-wise it made sense as well.  
10 The problem that created was that there's again an alley in  
11 between. In order to accomplish this, we would have to purchase  
12 the alley from the District of Columbia, close the alley, build a  
13 structure underneath it and give a perpetual easement back to the  
14 District.

15           That process would take approximately two years.  
16 We understood that back then. The only way that we could get  
17 these projects kicked off was to create a matter over right  
18 project which is what we did showing a parking garage, which is  
19 what we built, but putting on there a recreation and storage  
20 space, knowing that when it would be appropriate, when we did  
21 have access in there, we could come to the Board as we are here  
22 today and ask for the variance.

23           We had good reason to believe we would get the  
24 variance because of the practical hardships of trying to place 15  
25 percent recreation in the confined area and I will go over that

1 in a minute, as well as the burden it would place on us and the  
2 users and the neighborhood. So we went forward. We received the  
3 permits based on that and we finally go the alley closed in mid-  
4 November of last year.

5 As soon as we got the alley closed, we started our  
6 paperwork and out filings to get here today. So we didn't wait  
7 on our heels to the last moment. I want to talk briefly now -- I  
8 mean, that's the process and why we are here today. I want to  
9 talk briefly about the practical hardships of trying to get 15  
10 percent in the Church Street property.

11 First of all, as I mentioned, it's a historic  
12 building that we're putting an addition onto. Historic  
13 Preservation not only wanted us to preserve the front of the  
14 building, but they also wanted us to preserve the back of the  
15 building. That required a very expansive floor plate and what we  
16 were able to achieve with them was to hollow out the building, if  
17 you will, to create a small courtyard in between.

18 I don't know if you can actually see. I'm going to  
19 try to turn this table so we can see it from the side.

20 CHAIRPERSON GRIFFIS: Okay, and we also have plans  
21 that are in the record that show some of that. So maybe -- Board  
22 members, maybe we can open those up and be walking through with  
23 the model. That large piece of glass at the adjacent property  
24 must be expensive to do.

25 MR. HOFFMAN: It's all tempered. It was very

1 expensive, very custom. It's not Marvin (phonetic).

2 CHAIRPERSON GRIFFIS: Just the window washing alone  
3 would be a fortune.

4 MR. HOFFMAN: An added expense and a burden all  
5 around. But the idea was to try to create at least a courtyard  
6 inside here and what we came up with was a combination of private  
7 and public courtyard and by that I mean, we have a unit in the  
8 front. We have a unit in the back and we would have a private  
9 terrace come about four feet and then that would wrap around as  
10 you can see here.

11 Actually, I have something else that might help.  
12 This is the courtyard. We wanted to pull the public area away  
13 from adjoining bedroom windows and such, so that for privacy and  
14 obvious reasons. So we had private terraces and commune public  
15 area, recreation space in the center all open to the existing --  
16 this is the party wall, which we kept.

17 CHAIRPERSON GRIFFIS: An access to that is the  
18 building, correct?

19 MR. HOFFMAN: The access -- thank you. The access  
20 to that is from the building, and not only can you get into it  
21 from this space, but you also have a view of it from every floor.

22 What we did is we took this corridor and I say "we", I mean,  
23 this is Eric Colbert's design. I'm not taking credit for it. It  
24 was a brilliant design on opening the corridor right into the  
25 courtyard. So we have French doors at the edge of the corridor

1 if you can imagine, that open up into these terraces and these  
2 are all public terraces, embracing this courtyard.

3 In the center of the courtyard we placed a water  
4 fountain and we've done this a couple of times before. You know,  
5 we have lights in the water fountain. It will give a certain  
6 ambience and sound in there that I think is quite pleasant. But  
7 all floors have a view into that courtyard.

8 The rest of the site is really taken up in the back  
9 --

10 MEMBER ETHERLY: Pardon me for interrupting you  
11 real quick.

12 MR. HOFFMAN: Yes.

13 MEMBER ETHERLY: What's the size of each of those  
14 public terraces that --

15 MR. HOFFMAN: These public terraces here are about  
16 four feet out and about seven feet in width. It's enough you can  
17 stand. These doors, by the way, open in so that's all standing  
18 area.

19 In the back of the building, of course, we have to  
20 have a dumpster area for trash and the rest we made terraces,  
21 again. But again, these will be right u close to the residences,  
22 so we made these private terraces. And then we put a security  
23 wall there and to allow for parking. So if you own a condominium  
24 in the back, you could pull your car into the alley to the back  
25 of your terrace and go in that way.

1           But we did provide recreational space, albeit, it's  
2 not public, but at least it's some recreational space. The  
3 Historic Preservation staff also wanted us to add relief to the  
4 front. I want to rotate this way. They wanted us to have some  
5 relief in the front so we didn't have this big mass up here. So  
6 we have three different plains. This is face on line, this is  
7 set back 15 feet and this is set back six feet from the property  
8 line, breaking up the massing and trying to be more sensitive to  
9 some of the smaller structures we were surrounding.

10           So this, again, took up valuable land space and  
11 once again, this was up next to the residences inside, so we did  
12 the best thing we could and that was to provide private terraces  
13 for each one of these condominiums in the front and create some  
14 buffer from that and the public sidewalk out front.

15           That pretty much consumed the entire floor area.  
16 The only thing left is the roof. On the roof the Neighborhood  
17 and Historic Preservation staff wanted us to keep the lines down  
18 as much as we could. This we were held to 70 feet which is set  
19 back another 10 feet from this plane which is set back six feet  
20 from this plane. So the objective was to push this 70 feet back  
21 as far as we could and having roof access was okay but not within  
22 the site line from Church Street. All this was to be pulled  
23 back.

24           What I'm getting after is we did not have room to  
25 have a penthouse, conventional penthouse with elevator override

1 to provide public access up to the top roof. Again, we did the  
2 best think that we could with this. We created private terraces  
3 that are legal with stairs coming up internal into the units and  
4 we used the entire roof area up here for recreation, albeit,  
5 private.

6 We placed the condensers then up on the very top  
7 roof. And I might point out and maybe this is obvious, but in  
8 today's market, everyone is requiring independent heating and  
9 cooling and that means independent heating and cooling  
10 condensers. The best place to place those are up onto the roof  
11 so that you're not surrounded by white noise in the lower areas  
12 and so you're not encumbering some of the other areas that I've  
13 just described earlier. So we got that out of the way.

14 The only remaining roof area is this right here.  
15 And we were able to salvage that for a public recreation area  
16 which we did. That's this point here. Condensers were all moved  
17 back into here and here and here. I want to point out that in  
18 our effort to try to be responsive to Office and Planning, we  
19 increased this roof area, this terrace area from here over to  
20 here as well. That got back into my office.

21 My partner and I did a quality review check on this  
22 and it really is something that wasn't acceptable to us for  
23 quality reasons. We have condensers back there. Even if I  
24 reconfigure them, I could not remove enough noise to make it  
25 practical. There were some other practical considerations with

1 it and so what we are doing and what we're presenting today in  
2 response to Office of Planning is to share a larger roof terrace  
3 on P Street with the Church Street property so that the -- and  
4 this is all public in the front. So that the owners of the  
5 Church Street property have use of the P Street terrace.

6 The --

7 CHAIRPERSON GRIFFIS: But you've indicated that  
8 they're two different products, correct? The Church Street is  
9 the rental?

10 MR. HOFFMAN: The Church Street is a rental which  
11 we own and which we can put the covenant on and the P Street will  
12 be a condominium project. It's not an ideal situation. I'm not  
13 presenting it that way but it's certainly a way to help mitigate  
14 or respond to Office of Planning's concerns with the amount of  
15 recreation space. So we're doing every effort we can to please  
16 the Office of Planning.

17 MR. DePUY: Mr. Chair, on that particular point,  
18 there are easements now given the fact that the garage is a joint  
19 garage. So that we would propose to add in the easement access  
20 from the one building to the other to make sure that the condo  
21 owners had the legal right to get access to property owned by  
22 somebody else.

23 CHAIRPERSON GRIFFIS: Yeah, I understand the  
24 practicality of making it happen. I'm wondering more on the  
25 reality side. Is it -- you know, I absolutely appreciate what

1 you're saying in terms of trying to mitigate some of the concerns  
2 of Office of Planning. I think we need to get to all that  
3 because at this point, I'm not convinced that that's such a great  
4 scenario but we'll hear more.

5 MR. HOFFMAN: I want to also point out another  
6 restriction that we have on this. You know, I went over a lot  
7 occupancy, I went over heights and setbacks. The other  
8 restriction we have is the water table is about 23 feet below  
9 grade. So we have gone right to the water table. I'm right now  
10 about two feet above the water table. The option of going down  
11 another level doesn't exist. I mean, it would be totally  
12 economically a disaster to try to achieve on this.

13 I would like to explain some of the hardships now  
14 onto the P Street property if I can. The P Street property is a  
15 combination of retail and residential. Retail is on the first  
16 level and I think I have a rendering here that better describes -  
17 - this is the look you'll see if you're across the street looking  
18 over to P Street. We're talking cafes and other local retail  
19 neighborhood uses there. And we believe that this is going to be  
20 the start of a chain of retail vitality on P Street.

21 This is going to be a residential one floor up.  
22 That's how that was designed. With the retail component on the  
23 lower floor, the retail takes up 80 percent lot occupancy. In  
24 addition to that, we have 84 residential units in the building.  
25 Because we have 84 residential units in the building, which, you

1 know, above 50 we're required to have a loading dock in the back.

2 By the time you have 80 percent lot occupancy, you include a  
3 loading dock in the back of the property, in addition to that you  
4 have a vent shaft that has to be removed 10 feet from the  
5 adjoining property line and from operating windows to ventilate  
6 down below, there's no real quality space in the back for  
7 recreation use.

8 And we could draw it on there but you talk  
9 practicality, I mean, I think that is the case it would be an  
10 insult to the Board to say that I'm going to put recreation  
11 there. It just is not quality space and it won't be used. The -  
12 - again, we did the next best thing that we could. We provided  
13 balconies on every unit facing the back towards the alley. So  
14 every tenant in here will have a balcony. We get onto the roof,  
15 we increase the roof size, not the roof size but the deck size  
16 from approximately 4100 feet and pushed it back further to  
17 capture 5,000 feet of rec area, public rec area on the roof.  
18 That is an occupancy of over 250 people that could fit up there.

19 In all probability it will never reach its  
20 capacity. This is quality space up here. You'll be able to look  
21 up and down the P Street which is going to be, you know, full of  
22 life and vitality. I mean, this is quality space in our mind  
23 here. To accomplish this we have pushed -- and actually this  
24 wall here actually will be back here to capture the 5,000 feet.  
25 We are pushing about 100 condensers all into the back here with

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1 screen walls to dissipate any sort of white noise and visually so  
2 you don't see it from the terrace.

3 It's accessed by an elevator in the center and two  
4 stairs. So this in our mind is a creative quality recreation  
5 space that can be used by the P Street tenants as well as the  
6 condominium owners off Church Street.

7 If I can digress, if we add the Church Street  
8 private and public recreation space, we're actually at about 16  
9 percent, slightly over 16 percent, I think back here. Upon  
10 combining the public areas of here and here, both projects  
11 collectively have in excess of six percent public recreation  
12 space and then of course, more when you would add in private.

13 CHAIRPERSON GRIFFIS: Let me ask about the  
14 combination. And you may have said it. I'm sorry if I missed it  
15 but how would you actually access if you were a Church Street  
16 resident, the roof on P Street? Are you coming in for a variance  
17 for a fly bridge that walks across on the --

18 MR. HOFFMAN: No, no, no fly bridge. What I'm  
19 proposing and actually it's a natural fit, to be quite honest,  
20 there is already a corridor that comes out of the back of this  
21 building, a public corridor for people to take their trash out  
22 and to have access to the back which means egress. That corridor  
23 opposed a corridor from this building as well which is open to  
24 the alley. So it's as simple as coming through the corridor into  
25 this corridor, into the building and the elevator, of course, is

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1 sitting in the middle.

2 CHAIRPERSON GRIFFIS: So I live on the sixth floor  
3 in a rental on Church Street. I have my own balcony but for some  
4 reason I'm going to go all the way down the floor, walk across  
5 the alley, go into another building and to up to the roof. It's  
6 rhetorical I'm --

7 MR. HOFFMAN: If I were you, I would stay on your  
8 own balcony.

9 CHAIRPERSON GRIFFIS: I would say the same, okay.

10 MR. HOFFMAN: And that's actually what we find to  
11 be honest. What we have done -- if I can add a little on this, we  
12 have done on project as an example, I mentioned it earlier, on  
13 Park Hill. It's on Connecticut Avenue. Everyone has private  
14 terraces. My partner and I, in our brilliance, put a roof  
15 terrace as well up there, thought it would be nice and flashy.  
16 Nobody uses it. Everybody has their private terraces. It was a  
17 waste of money on our part and, you know, good intentioned but no  
18 one used it.

19 CHAIRPERSON GRIFFIS: Well, I'm glad you say that  
20 because I think it brings up an interesting point of what the  
21 purpose, what's the contemporary purpose of residential  
22 recreation space and I think we'll delve in substantially to  
23 that, but what you're saying is with your experience and on your  
24 past projects, in fact, when you have offered areas of common  
25 usage, roof terraces you just said, they're under-utilized, if

1 used at all; is that correct?

2 MR. HOFFMAN: That's correct, and actually the  
3 concept of what you're penetrating here is a larger battle than I  
4 guess I'm willing to take on today but I totally --

5 CHAIRPERSON GRIFFIS: I thought you may get dragged  
6 into it but we'll see.

7 MR. HOFFMAN: I completely agree with that point of  
8 view just based on our practical experience.

9 CHAIRPERSON GRIFFIS: Okay, before you go on, Ms.  
10 Mitten, did you have a question? I thought --

11 MS. MITTEN: Well, I guess it was just following on  
12 the same notion, which is there's the idea of providing  
13 recreation space just to say that you've met the minimum and then  
14 there's providing space that you know will be utilized. And  
15 you're going to provide space that you know will be utilized  
16 because that's what the market expects and there's a disconnect  
17 in terms of the requirement versus the practical --

18 MR. HOFFMAN: There's a huge disconnect and I am  
19 providing what I believe actually with the linkage that we're  
20 sort of focusing on right now in an attempt to get as close as I  
21 possibly can to an Office of Planning concern for the purpose of  
22 succeeding here because a rejection here would be, you know,  
23 devastating to us, to the consumer, to the neighborhood. And you  
24 know, I don't need to speak on their behalf, I suppose, they  
25 will.

1           So I am going what I believe above and beyond what  
2           the market wants. And I'd like to actually get into that in one  
3           minute because we do have some information on that. I'll try not  
4           to drag this out but our company has, PN Hoffman, I mean has its  
5           own sales department and I should point out, we have our  
6           construction department development team. You know, we're pretty  
7           seamless. We try to control the process.

8           On the sales end, we have a lot of information that  
9           are coming in from buyers and renters and it's helping use evolve  
10          our product to what the market is demanding. But we have a  
11          website as well and before we let someone enter into explore one  
12          of the condominiums that we have out on the market, we require  
13          them to fill out this owner's survey. And this information is  
14          really valuable to us and I think it will help make the points  
15          that we're talking about.

16          I just really have three points on this. Number  
17          one, the people that are buying into this product vary. They  
18          vary in age. They vary in income makeup, they vary in interests.  
19          And that's exciting, that's good, that's what we want. And  
20          we're mixing our product. We have small affordable units and we  
21          have very large expansive units all in the same project. This is  
22          a chart just on Saxon Court.

23          This is a survey specifically on this building  
24          right here. In the survey, we have approximately 750 respondents  
25          that have called in, inquiring about it, between the ages of 31

1 to 38 years old. And you can see how they sort of drop off from  
2 there. That's the mean, but the point is we still have almost  
3 200 people inquiring about it between the 46 and 56 years old.  
4 We have a variety here.

5 Our product mix reflects that. In addition, if you  
6 look at the income range of the people, and I see this actually  
7 very often, where you have sort of a bell curve that comes down  
8 and spikes back up. What you have here are the empty nesters and  
9 the 50-year olds who have made it and are ready to move out of  
10 the three story living into a flat and they're going to travel  
11 and they're going to do all that. They don't want commune  
12 recreation space. They have, again, their own personalized  
13 lifestyle, if you will.

14 Finally, if you look at the price ranges that  
15 people are looking to buy as well, there is a broad mix here. My  
16 point on the variety is that everyone has their own thing,  
17 they're going to go to their own health club, where there's state  
18 of the art equipment, there's professional trainers there.  
19 There's their own social group that they want to mingle with.  
20 They're looking for authentic city living. They're not looking  
21 for some little echo system, some local Club Med environment.  
22 It's not happening.

23 That would be a Park Summerset up in Chevy Chase.  
24 That's not what we have here and that's not what I think we  
25 should be embracing.

1 CHAIRPERSON GRIFFIS: I'm glad you bring that up  
2 actually. I just want to interject quickly because it seems to  
3 me that some of the residential requirements that we do, it is a  
4 very suburban concept and that is a self-contained entity where  
5 you conceivably can sell the unit by, "You'll never have to leave  
6 this building", which seems to fly in the face and I know we're  
7 going to get into it, of one; as you stated in the beginning,  
8 your kind of concept of defining urban lifestyle in your  
9 development but more importantly, I think, the city's direction  
10 of trying to reanimate and revitalize streets, P Street being a  
11 classic one, of used to be retail connected to 14th Street,  
12 strong retail corridor that needs to -- that needs some  
13 additions, let's say.

14 How do you say -- how do you balance the fact that  
15 you want to capture your people in the building, facilitate all  
16 their needs so they never have to leave, and yet, also balance  
17 the fact that we want strong vibrant people walking on the  
18 streets and businesses, retail businesses, that will come and  
19 that can only happen with people shopping there?

20 MR. HOFFMAN: We should want people shopping. The  
21 health clubs don't want the recreation space. This is a chart of  
22 the health clubs in the area and I'm sorry that's so small but  
23 there's approximately 40 in the general area. There's about a  
24 half a dozen right within walking distance and, you know, people  
25 are going to choose their own health clubs that they're going to

1 go to. They're going to go to the real thing, not some --

2 CHAIRPERSON GRIFFIS: And folks the go to health  
3 clubs should walk to them, right?

4 MR. HOFFMAN: I agree, they should run.

5 CHAIRPERSON GRIFFIS: Okay, we're going to need a  
6 copy of that.

7 MR. HOFFMAN: We have copies, yes.

8 CHAIRPERSON GRIFFIS: That's great. That would be  
9 tremendous.

10 MR. HOFFMAN: So --

11 CHAIRPERSON GRIFFIS: Common sense, right?

12 MR. HOFFMAN: -- the next point I want to make,  
13 this is the second point, is that, you know, prices are  
14 escalating, and they're escalating for all of us. I mean, the  
15 cost of land, construction is going up. I'm not expecting  
16 anybody to feel sorry for me but the price is going up for all of  
17 us. People are concerned about two things; location, they want  
18 to be in the right location and they want to be able to afford  
19 it, especially in this particular area.

20 On the P Street area where you have, again, we  
21 looked at the 31 and the 38-year olds being more the prominent,  
22 they're looking for the affordability and location and that's  
23 what's represented by this bar. These are weighted averages and  
24 what I do on this graph, basically when someone puts in the  
25 survey, we ask, "There's four competing interests here, pick your

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1 favorite to least favorite", and we'll give a weighted score  
2 based on your favorite to least.

3 And what comes up very high is the location.  
4 Second is the affordability, up here. This is relevant because  
5 when you add recreation space into a unit, you have to manage it,  
6 you have to maintain it. You have to have a service for it, a  
7 concierge for it and the condo fees are going to go up  
8 accordingly. That is not what people are looking for in  
9 particular in the Dupont, Logan Circle area.

10 This is also consistent with another question we  
11 asked which is, "Which do you prefer on your building amenities,  
12 security, service concierge, low condo fees or maintenance", and  
13 you can see right up here, people want security and they want low  
14 condo fees. That is the prominent -- I mean, I said a little bit  
15 ago there's a variety but if there's a common denominator, I  
16 believe it's this, that people are looking to do the real  
17 authentic city living, not in a little commune.

18 The other point I want to make, and I think it does  
19 relate to this is that the balconies and walk-out terraces, even  
20 though we're proud of that, the tall ceilings are actually even  
21 more desirable on that.

22 Third and final point is the parking. Underground  
23 parking is absolutely a need. Again, when we look at the  
24 transportation priorities, parking, underground parking is way up  
25 here. Just because people have parking in the city doesn't mean

1 they don't use mass transit. You know, they go to work, they can  
2 use mass transit. They bike, we have bicycle rooms, by the way,  
3 in both buildings. They can roller blade, walk, whatever but at  
4 some point they've got to go to the suburbs. You know, there's  
5 more than just the District, so they want a car to do that.

6 This car is parked in this parking garage for the  
7 week and whenever they make their occasions out of the city,  
8 that's what they take.

9 CHAIRPERSON GRIFFIS: You know, an interesting  
10 example of that, I think would be some of the larger more dense  
11 cities, but New York City, for instance, which has an incredible  
12 car ownership but not necessarily a driving -- people that get in  
13 and out of the city and this is antidotal, I must say, from my  
14 own observations living there.

15 But people do use the metro, which is exactly your  
16 point. If you had space underground parking, you would basically  
17 store your car.

18 MR. HOFFMAN: Right.

19 CHAIRPERSON GRIFFIS: And that way it's not stored  
20 on the street but stored in underground parking and you're out  
21 getting to and from wherever you need to go.

22 MR. HOFFMAN: That leads to the actual final point  
23 of my testimony and that is I've described the practical  
24 hardships. I believe requiring or imposing the 15 percent would  
25 by unduly burdensome to the consumer, the developer for sure, but

1 also the neighborhood because people will have their cars and  
2 what they would end up doing is parking them out into the street.

3 We have some people that I think will be talking to that.

4 The final point I'm going to make with this is that  
5 we have -- and this is a good thing for the District, for  
6 everybody -- we have a lot of supply that's hitting the  
7 residential market in the next few years, a lot of residential  
8 supply. We have approximately, I've got here 39 projects that  
9 are in the approximate location as our two projects right here.

10 CHAIRPERSON GRIFFIS: They're not all yours?

11 MR. HOFFMAN: I wish they were, well, not all of  
12 them actually, I'm glad they're not. Some of them are. I had  
13 another chart here. I wonder where that went. That's it, thank  
14 you. This chart shows the projects that are hitting the market.

15 CHAIRPERSON GRIFFIS: Great. Now, give me the  
16 south and north boundaries on that. It looks like it's --

17 MR. HOFFMAN: Yeah, we did this in a hurry. We  
18 were supposed to be in red, but this is our project right here, a  
19 "You are here", type.

20 CHAIRPERSON GRIFFIS: So centered on P Street.

21 MR. HOFFMAN: It's centered on P this way and 14th  
22 and 15th coming this way.

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. HOFFMAN: So you're seeing the business  
25 district over on this end. Avalon Bay is over here.

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1 CHAIRPERSON GRIFFIS: I see.

2 MR. HOFFMAN: The Murray Building redevelopment,  
3 you know, all of that, and then you have uptown and this is Adams  
4 Morgan up this way.

5 CHAIRPERSON GRIFFIS: Right.

6 MR. HOFFMAN: I tried to focus on this sort of  
7 central area of approximate competing projects.

8 CHAIRPERSON GRIFFIS: Okay, because the streets  
9 aren't labeled but the density of projects I'm looking at is on  
10 the north boundary would probably be Columbia Road and on the  
11 south boundary would probably be -- what is that, is that M  
12 Street?

13 MR. HOFFMAN: The southbound would be about Mass.  
14 Avenue right here.

15 CHAIRPERSON GRIFFIS: Yeah, Mass., okay.

16 MR. HOFFMAN: And then you have this poking in here  
17 which is --

18 CHAIRPERSON GRIFFIS: Right.

19 MR. HOFFMAN: You have these other that are  
20 happening over there.

21 CHAIRPERSON GRIFFIS: Okay, but obviously, you're  
22 showing us there's lots of density in and around that area.

23 MR. HOFFMAN: There's a great deal of supply. What  
24 I'm showing you are projects that have been completed within the  
25 last several months --

1 CHAIRPERSON GRIFFIS: Right.

2 MR. HOFFMAN: -- that are under construction  
3 currently or that I know are pending permit right now, that are  
4 going to happen.

5 CHAIRPERSON GRIFFIS: Right, okay.

6 MR. HOFFMAN: All these projects that I'm showing  
7 you on here have either five percent or less recreation space in  
8 them, all of them.

9 CHAIRPERSON GRIFFIS: And those are because they're  
10 in different zones?

11 MR. HOFFMAN: Yeah, in fact, the irony is, the  
12 residential zone doesn't require any and several are in the  
13 residential zone, so they have actually zero. The majority of  
14 them actually have zero public recreation space in them and  
15 several others received variances through this Board or currently  
16 under the new guidelines in the DD overlay, they're down at five  
17 percent.

18 CHAIRPERSON GRIFFIS: Right.

19 MR. HOFFMAN: I'm competing with all of those  
20 projects and it would be an unduly burden to have -- I mean,  
21 right now, we have to use our best efforts to meet the consumer  
22 needs. The consumer is saying they don't need this. We have to  
23 use our best efforts to maximize the optimize our space within  
24 the building. It's a value and financial impact on me. And we  
25 also have to meet the needs of the neighborhood and all of our

1 projects have been in neighborhoods.

2 We enjoy a very good record with communities and  
3 neighborhoods. We have a very strong outreach program. And to  
4 that end, the added parking, again, would be a negative impact to  
5 this neighborhood. That is all I have to say.

6 CHAIRPERSON GRIFFIS: Good, thank you very much.  
7 That was incredibly informative. One quick kind of before I  
8 forget it, do you have the base survey that you sent out to your  
9 potential renters, clients?

10 MR. HOFFMAN: You know, I didn't send a survey out  
11 to potential buyers.

12 CHAIRPERSON GRIFFIS: Well, I guess what I'm trying  
13 to get to is, what was the base questionnaire that --

14 MR. HOFFMAN: Oh, I can provide you with that.

15 CHAIRPERSON GRIFFIS: Yes, that would be great.

16 MR. HOFFMAN: Yeah, that's on our website, people  
17 come in. One other point I should make is on the Saxon Court  
18 project --

19 MEMBER LEVY: Mr. Chair, just to clarify, I believe  
20 both Ms. Mitten and myself and our colleagues are also looking  
21 for copies of the actual survey results, the graphic  
22 representations.

23 CHAIRPERSON GRIFFIS: Yeah, I assume that they're  
24 presenting it.

25 MR. HOFFMAN: I will provide that, yes.

1 CHAIRPERSON GRIFFIS: Okay.

2 MR. HOFFMAN: The contracts that we have in place,  
3 the pre-sales on Saxon Court, I have 32 contracts; 31 have chosen  
4 parking.

5 CHAIRPERSON GRIFFIS: Okay, Board questions of Mr.  
6 Hoffman?

7 MS. MITTEN: I'd just like to understand in terms  
8 of if we grant the variance and you have no input from the  
9 neighborhood as to what their desires were, what would you do  
10 with the additional space that you would gain through us granting  
11 the variance? Would you, on your own, do parking or would you do  
12 something else?

13 MR. HOFFMAN: I, on my own, would do parking and  
14 the reason is, the space that is there right now labeled  
15 recreation is honestly, lousy space. It was always an interim  
16 step, always intended to be an interim step in order to push  
17 these projects along. So the best and highest use for that space  
18 is parking. So that is what I would do.

19 MS. MITTEN: In the future, and this is going to go  
20 a little beyond just the scope of this, if you were starting from  
21 scratch and you knew that there was this -- or you anticipated  
22 that there was this unconditional waiver available that would  
23 take you from 15 percent to five percent, would you have designed  
24 more residential space or more parking?

25 CHAIRPERSON GRIFFIS: More residential recreation

1 space?

2 MS. MITTEN: No, more places for people to live,  
3 another unit or --

4 MR. HOFFMAN: To be quite honest, no, I am -- I'm  
5 not opposing recreational space. I'm really trying to make a  
6 quality recreation space is what I'm for and so recreational  
7 space is desirable, but it's private. That's what the consumers  
8 -- whether they're a renter or they're a purchaser, that's what  
9 they're looking for and they're also looking for the parking.  
10 I'm not sure if I'm responding directly to your question. Maybe  
11 I don't fully understand it.

12 MS. MITTEN: I guess I'm trying to take it one step  
13 outside of this specific case and say if there were a waiver  
14 available for the recreation space requirement at 15 percent,  
15 would you see that increment of space that would be gained, say  
16 10 percent of the space, would you see that as being devoted --  
17 you know, given market demands, would you find yourself making  
18 more place for people to live, actually live, or would you be  
19 putting in more parking?

20 MR. HOFFMAN: No, I would put in places to live.  
21 That's -- I mean, I'm sorry, that's obvious to me. That's what  
22 we would do is put in more residential. That's what we would do.  
23 We would put in ample parking below and above grade, we would  
24 put in more units.

25 MS. MITTEN: Okay, thank you.

1 CHAIRPERSON GRIFFIS: Any other questions?

2 MR. DePUY: Thank you.

3 CHAIRPERSON GRIFFIS: Okay, thank you, Mr. Hoffman,  
4 and we, of course, will reserve the right to ask you further  
5 questions as we move along.

6 MR. DePUY: He's not going anywhere, believe me.  
7 Mr. Colbert?

8 MR. COLBERT: Good morning, Mr. Chairman and  
9 members of the Board. My name is Eric Colbert and I'm an  
10 architect in Washington and my office is actually a couple blocks  
11 from here.

12 CHAIRPERSON GRIFFIS: With Ms. Mitten, we  
13 understand right.

14 MR. COLBERT: Right, with her.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. COLBERT: As a lot of you may know, you've  
17 probably seen our red signs, we are -- over the recent history,  
18 we've been doing an incredible amount of apartment buildings in  
19 DC, that's our specialty and we've been doing it in all areas of  
20 DC, including thousands of units in Ward 7 and 8 and a lot of the  
21 neighborhoods around Dupont and Logan Circle that are  
22 redeveloping.

23 And my point is that so I am sitting with the  
24 owners when they're starting to think about the programs for  
25 these projects. A lot of it is redevelopment of existing

1 buildings, reconstruction and also more recently, in the last  
2 five to six year, new construction in the District. And so I'm  
3 there when people are talking about what their wish list is for  
4 the apartments before the money comes into it and I can testify  
5 honestly that I've never been in a situation where someone stated  
6 that they had a need for 15 percent recreation space in the maybe  
7 100 projects that we've been involved with. I would say at least  
8 50 percent of those projects have zero and then the rest of those  
9 have an average of between maybe two -- or three and four  
10 percent. Five percent is really on the high side.

11 CHAIRPERSON GRIFFIS: But when you say they've  
12 stated that they have a -- you're talking about he developers?

13 MR. COLBERT: Well, any of the developers we've  
14 worked with, which a lot of them are private developers like PH  
15 Hoffman, but we work with a lot of other non-profit groups like  
16 Jubilee Housing and some of the other people. And I'm just  
17 saying, we have a broad range of experience and we have not  
18 encountered a requirement for 15 percent in all the projects that  
19 we've done and so I just wanted to bring that to light, just  
20 based on my experience.

21 CHAIRPERSON GRIFFIS: So based on the mixed  
22 products that you've actually designed, you haven't seen it as an  
23 integral requirement for any of the projects.

24 MR. COLBERT: Yes, not only is it not a  
25 requirement, but it's not even a desire that developers who,

1 sometimes are working with a non-profit organization that's  
2 working with a residents, nobody has ever said, "This is the  
3 amount we need", anywhere close to that.

4 CHAIRPERSON GRIFFIS: Okay, good.

5 MR. COLBERT: As a matter of fact, my firm is the  
6 project architect for the Avalon Bay project on 5th Street  
7 between G and H. That's over 200 units and they --

8 CHAIRPERSON GRIFFIS: I think we've seen that,  
9 haven't we?

10 MR. COLBERT: Yes, the -- as a matter of fact, the  
11 Office of Planning was very strong in supporting our effort to  
12 get the requirement reduced to less than five percent there and  
13 we actually have a rood deck on that building which is over 200  
14 units, so this is less than half the size and we have actually a  
15 larger roof deck here than we will have on the building adjacent  
16 to us.

17 CHAIRPERSON GRIFFIS: Let me interrupt you for a  
18 quick second. We're at 11:15. I would like to finish this  
19 before we break for lunch, so -- wait a minute, I think that's  
20 for me. It shouldn't be, I'm sorry, that's a joke. The -- so we  
21 have 45 minutes.

22 What I'm going to do is have you jump right into  
23 the project, walk us through. I think the Board is getting very  
24 comfortable with the context and what is before us, but I know we  
25 have questions about some of the plans and more specifically

1 looking at the private recreation space which is outdoor and in  
2 comparison to what is defined by the zoning regs as the common  
3 recreation space.

4 So I'll let you go but I may move you on a little  
5 bit.

6 MR. COLBERT: Okay. My only other general  
7 statement was that just kind of to reiterate what Monte said, is  
8 that we've probably had about 15 public hearings with the  
9 neighborhood and they helped us evolve this design. Because of  
10 the narrowness of Church Street, as Monte suggested, we did -- in  
11 order to gain approval, we worked carefully with Historic  
12 Division and the neighbors, Logan Circle, to break up into  
13 smaller masses. What that did is it obviously created multiple  
14 roofs which where you have a building where you have a singular  
15 roof, obviously, it's a lot easier to, you know, have access to  
16 it for the public and create one big space.

17 Here, because of the demands of the Historic  
18 Division, it really created a scenario that was very difficult to  
19 provide public access to the roof areas.

20 CHAIRPERSON GRIFFIS: Well, let me also just say  
21 that I think Mr. Hoffman mentioned, you not only have the  
22 Historic Preservation but you have Zoning. I mean, Section 411  
23 starts to talk about roof structures and you get -- you wanted to  
24 heighten the overrides of the -- of an elevator that would give  
25 you public access up to it. How do you create one penthouse and

1 have a whole roof terrace available for public. Okay.

2 MR. COLBERT: And the only other general comment I  
3 have is that more recently, we were involved in this project on  
4 Capitol Hill where we're doing the Medland (phonetic) Hospital,  
5 converting it to 270 apartments and after 37 public meetings, we  
6 finally obtained approval but the number one community concern by  
7 far was parking and in coming to this site for the construction  
8 meetings, I can tell you -- and I come there at all times of the  
9 day. I like to go to the Fresh Fields on my way home at 9:00  
10 o'clock at night or whatever, but I can tell you that there's --  
11 parking is a real problem now and it's going to continue to be a  
12 more significant problem as a lot of the parking lots in the area  
13 are redeveloped as apartment buildings.

14 This -- I'll quickly go through the plans and this  
15 first document that I'm showing you is a consolidated site plan.

16 This is the Church Street project and as Monte mentioned, there  
17 was an existing building here that because of the depth the  
18 Historic Division didn't want us to demolish part of the back, so  
19 we created this courtyard in the middle in order to gain windows.

20  
21 And then we built out the rest of the Church Street  
22 side in different components to look like a warehouse because  
23 this block has a very interesting character. It was the  
24 automobile area for Washington and so this was an automobile  
25 repair shop at one time. We still have the Rainbow, you know,

1 body repair across the street, but we were capturing the  
2 industrial feeling that was kind of unique to this block.

3 You can see there the close proximity and also  
4 through the model, between Church Street and the P Street project  
5 so that conceivably, as Monty stated, it would be possible  
6 without too much difficulty for someone to come down on grade and  
7 go through the rear entrances into the adjacent building. And I  
8 know this wouldn't happen very often but maybe on the 4th of July  
9 or something, that would be something that might occur.

10 This next drawing is -- this is a plan showing our  
11 B-2 level, which, when we originally permitted it, we permitted  
12 this building first and there was no access to the lower levels  
13 because we didn't have a ramp at that time. The rest of the  
14 building was called storage and this is where we had identified a  
15 possible location for the remainder of the residential recreation  
16 space that we were not able to accommodate in other areas of the  
17 building.

18 And I think here on Church Street we're going to be  
19 able to pick up about 18 parking spaces and then on P Street  
20 significantly more than that. This is the --

21 CHAIRPERSON GRIFFIS: Just a quick clarification on  
22 that sheet, the residential recreation was actually below grade?

23 MR. COLBERT: That's correct and --

24 CHAIRPERSON GRIFFIS: Okay, okay.

25 MR. COLBERT: -- and that's another reason that

1 even if we didn't have this requirement, here we would not be  
2 able to pick up any additional residential space because this was  
3 not counted in the FAR.

4 And this is the upper level of parking. And this  
5 would essentially remain the way it is. This next document is  
6 the first floor plan and here you can see, this is our lobby  
7 coming in off of Church Street and here you can see the corridor  
8 going out to the rear and this is the elevator. This is the  
9 courtyard that we created in the middle of the existing building  
10 and that's truly accessible under any definition of the  
11 residential recreation space.

12 In addition to that, we also have these private  
13 terraces along the alley adjacent to their parking spaces and  
14 then we have some more terrace space in the front of the building  
15 facing Church Street.

16 CHAIRPERSON GRIFFIS: Mr. Colbert, as a designer,  
17 before you put that sheet away, what's your opinion of the actual  
18 use you'll get out of that courtyard? This is a bit of a  
19 digression but I think it goes to the discussion larger of the  
20 importance in our contemporary society of common residential  
21 recreation space. Do you -- just a quick idea; do you think that  
22 will be heavily used?

23 MR. COLBERT: I think people on a nice day will  
24 come out here and read, you know, if they want to -- you know,  
25 sometimes, like say you're using a dating service or something,

1 you may not want to let those people up into your apartment, so  
2 this would be a potential place, you know, you could say, "Meet  
3 me in the courtyard", and you can kind of --

4 CHAIRPERSON GRIFFIS: You know, I hadn't thought of  
5 that.

6 MR. COLBERT: But, yeah, I think that --

7 CHAIRPERSON GRIFFIS: Just for clarification, that  
8 is not part of the amenity package; is that correct?

9 MR. COLBERT: But I mean, also, like in the Avalon  
10 Bay project, we have meeting rooms on the first floor so that,  
11 you know, if someone came that you wanted to meet but you know,  
12 say you hadn't done the dishes or something and you wanted to  
13 meet them, they could still be in the building without actually,  
14 you know, invading your space.

15 CHAIRPERSON GRIFFIS: I see.

16 MR. COLBERT: This is sort of a typical floor plan,  
17 although they vary, but you can see the balconies that we have on  
18 the rear of these apartments.

19 CHAIRPERSON GRIFFIS: Okay, don't flip that too  
20 quickly. I'm sorry, but I want to point out, first of all, give  
21 us -- I know you don't have typical layouts here but reviewing  
22 the drawings that are in our file, all of these have a bedroom, a  
23 living room, dining room, some have the balconies, some actually  
24 have two bedrooms; is that correct? I mean, these --

25 MR. COLBERT: I think in terms of unit size, the

1 majority or our units are two-bedroom units.

2 CHAIRPERSON GRIFFIS: Okay, with large interior  
3 living spaces.

4 MR. COLBERT: That's correct.

5 CHAIRPERSON GRIFFIS: I mean, that's the center  
6 rooms that I'm seeing in all of those.

7 MR. COLBERT: Yeah, and usually what we try to do  
8 is -- another thing that is kind of a sociological factor, you  
9 can see in a lot of our developments we do with Hoffman and other  
10 folks, the kitchens are very elegant but they're also very --  
11 smaller than, you know, an older traditional apartment building  
12 and a lot of the reason for that is it goes along with the urban  
13 concept of people wanting to be on the street.

14 A lot of people work late, they eat in restaurants,  
15 so the kitchen has sort of taken on a different form.

16 CHAIRPERSON GRIFFIS: But it's also -- it's open,  
17 if I'm reading those plans correctly.

18 MR. COLBERT: Exactly.

19 CHAIRPERSON GRIFFIS: And so -- and that also lends  
20 itself to the interaction of all the rooms and the amount of  
21 living that happens in that common area with the open plan.

22 MR. COLBERT: Yeah, you're making a good point is  
23 that wherever possible, we've tried to create conditions where we  
24 have, like here double doors so that some rooms that are labeled  
25 the bedroom, could also function as a den or when the doors are

1 open, the space really flows from one space to another.

2 CHAIRPERSON GRIFFIS: It goes to, I think, Mr.  
3 Hoffman's point that he brought up is that, you know, in  
4 residential zones, you don't have the requirement for the  
5 recreation and I think it goes to also quite a bit of what the  
6 Zoning Commission itself went to and the whole point of  
7 residential recreation space was to establish areas that people  
8 could, you know, can live and they actually differentiated  
9 between outdoor recreation space and interior recreation space.

10 One would think that in a commercial area you might  
11 have a lack of both, but what we're obviously seeing here is a  
12 very substantial interior and private exterior.

13 MR. COLBERT: Exactly, because you have areas of  
14 the city which are even further south toward the business  
15 district that have zoning like R-5-E, a greater density than 6  
16 FAR, we have four and a half here, with no residential recreation  
17 space requirement at all.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. COLBERT: This is a plan, this is the fifth  
20 floor where you're starting to get some of these setbacks. You  
21 can see the expanse of the roof deck on the Church Street side,  
22 again, the balconies on the south and then another roof deck over  
23 here.

24 This is our diagram for where we ended up on the  
25 seventh floor. As Monte stated we had, you know, looked at the

1 possibility of having -- you know, showing it here and at this  
2 location but that created a practical situation that we weren't  
3 able to resolve.

4 CHAIRPERSON GRIFFIS: Does that differ  
5 substantially with the submitted plan?

6 MR. COLBERT: No.

7 CHAIRPERSON GRIFFIS: Okay, it doesn't, okay.

8 MR. COLBERT: And this is the upper most level and  
9 you can see the expanse of ducts that we have around. These are  
10 units that are six units where they have two levels plus this  
11 upper access to the roof and, you know, it's obvious how  
12 extensive this is. I'm also working on the Adams Morgan project  
13 with Monte and I think the number one thing that I've heard from  
14 your company back is the private roof decks are what really  
15 capture people's attention and it's been an incredible marketing  
16 for us on these projects.

17 CHAIRPERSON GRIFFIS: And just to be clear, those  
18 are the private -- those are private and there, in fact, is a  
19 division wall that shows between the two.

20 MR. COLBERT: Yeah, there will be a wall, a privacy  
21 wall.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. COLBERT: And here, again, this is -- now we're  
24 on P Street and this will be a little shorter because there are  
25 fewer pages, because it's a typical floor plan. But this shows

1 again where we had made accommodations that if -- you know, for  
2 permitting purposes to show where we could conceivably have that  
3 use although, you know, we couldn't practically really do it, but  
4 we did accommodate that in our permit drawings.

5 And this is the upper level parking. We don't have  
6 any shown on that level, and this is the opposing access from the  
7 alley that we have on the first floor. This is the first floor  
8 of the 1425 P Street project and we've created a little bit of a  
9 wider access way into the lobby here than normal so that we could  
10 have some seating and people could use that as another place  
11 where they could mingle and greet each other.

12 This is the second floor plan. You can see we have  
13 the balconies here. There's larger terraces kind of in the knock  
14 hole (phonetic) of this building. And then this is our roof plan  
15 for P Street which shows the 5,000 square feet that we're going  
16 to accommodate. I was personally in attendance at the ANC  
17 meeting and we were very pleased that in a very short period of  
18 time, they voted unanimously to support our application today to  
19 make this change.

20 CHAIRPERSON GRIFFIS: Good. A quick question then,  
21 in terms of what was being proposed, what we had obviously was a  
22 five percent. We talked about six percent today and that's just  
23 -- it's a -- how can I say it? Well, architecturally nothing is  
24 changing except for the roof terrace division is coming back,  
25 correct?

1 MR. COLBERT: That's correct.

2 CHAIRPERSON GRIFFIS: In terms of use, it's a use,  
3 it's a program, you're going to have to deal with that. And  
4 you're convinced that you want -- well, I would leave it up to  
5 the Board for discussion of whether we go to five percent or six  
6 percent and look at realities with that, but I just wanted to be  
7 clear, we don't need to see any other drawings that show areas  
8 and that's showing the five percent right? That's not the  
9 increase of the roof terrace.

10 MR. COLBERT: No, we have increased it on this  
11 drawing.

12 CHAIRPERSON GRIFFIS: You have?

13 MR. COLBERT: This drawing is different than the  
14 one you have in your packet.

15 CHAIRPERSON GRIFFIS: Oh, I see, right, you have  
16 the flanking sides. Okay.

17 MR. COLBERT: Exactly.

18 CHAIRPERSON GRIFFIS: Well, obviously, we'll need  
19 copies of that but that's pretty clear. Board members, any other  
20 questions of the architect?

21 MEMBER ETHERLY: Mr. Colbert, very quickly, could  
22 you return to Drawing A-9 on the 1440 Church Street site?

23 MR. COLBERT: Okay.

24 MEMBER ETHERLY: Thank you, thank you.

25 CHAIRPERSON GRIFFIS: You're all set?

1 MEMBER ETHERLY: Yes.

2 MR. DePUY: Our next witness, Mr. Chair, members of  
3 the Board is David Mayhood. Mr. Mayhood, would you identify  
4 yourself for the record and give a very brief description of your  
5 professional background and your statement for the Board.

6 MR. MAYHOOD: Good morning, my name is David  
7 Mayhood, and I'm president of the Mayhood Company. We're located  
8 in McLean, Virginia. I've been involved in downtown development  
9 since 1972, so that's almost 30 years, believe it or not, and we  
10 are primarily in the area of marketing, assisting in design and  
11 some development and have been involved in almost every  
12 condominium project or competed against it in downtown DC for the  
13 last several years.

14 To give you some sense of things we've recently  
15 done, we were involved at the Lincoln at 12th and U which is  
16 major, 156 units that really helped revive the U Street corridor.

17 Currently, just finishing up Wardman Court, which is an  
18 interesting story because that used to be Clifton Terrace which  
19 was a drug infested owned by HUD property and that has been  
20 turned into -- going to be turned into, construction just  
21 starting, 76 new condominium units.

22 Opened up within the last month an interesting  
23 conversion at 14th and Columbia Road up in Columbia Heights area  
24 and down in this end of town, we're involved in Market Square  
25 into Pennsylvania, into Landsberg (phonetic) and testified in

1 front of this Board on CarAmerica's residential portion of the  
2 Hex Block, called Tarrow (phonetic) Place. So we're familiar  
3 over a long period of time with the development side of this  
4 question as well as the consumer side of the question, so I'll  
5 try to address it from both sides of your questions there.

6 Kind of really starting the whole conversation  
7 about rec space and what is needed, you almost have to go back  
8 and say what's driving this renaissance of housing in the city,  
9 why are people buying, what amenities are they looking for, what  
10 lifestyle are they looking for and what cost is this rec space  
11 requirement and who's paying that cost.

12 I won't try to go through the whole litany of  
13 what's happening in the renaissance but clearly we know what's  
14 happening is happening because people want an urban lifestyle.  
15 There's a word that I used the last time that I was here, I'll  
16 use it again, too, and it comes from an architect friend. And he  
17 says, "When you're doing urban developments, you do the concept  
18 of the bundling amenities rather than in suburban locations where  
19 you design amenities, in the city you bundle the neighborhood  
20 amenities. In fact, the amenities of this projects and many of  
21 the other projects that I talked about in downtown Washington are  
22 really the neighborhood amenities.

23 What are the amenities here; Fresh Fields, Fresh  
24 Fields, shopping, I'll tell you it's probably one of the biggest  
25 recreation facilities in the neighborhood. Restaurant, theaters

1 up and down 14th Street, shopping, this consumer whether they be  
2 the young urban and this consumer is primarily the young urban,  
3 Monte talked about demographic, yes, there is a portion that is  
4 the empty nesters moving back into the city, but we're only  
5 seeing the beginning of that.

6 That will play out over the next 20 years. The  
7 real urban buyer today is primary 25 to 45 years old, single.  
8 We'll come back to this point. Most popular unit, you heard Eric  
9 say that, is a two-bedroom, singles buying two-bedrooms, so they  
10 have an extra room for a den or an office or for internal  
11 recreation if you want to think of it that way.

12 We had the opportunity last year to be involved in  
13 one of the cases here, Jacques spoke, there were six that came  
14 here last year that got variances. We were involved in one of  
15 those which was CarAmerica's Tarrow Place. We had a five percent  
16 recreation requirement there and this Board, in its wisdom,  
17 allowed reduction of 1.25 percent. But getting away from this  
18 for a minute, what we were talking about there.

19 We were talking about a 700-square foot windowless  
20 space on the basement that should have been storage for the  
21 residents which will now be outfitted as a -- probably not a  
22 health facility because people don't want to go down in the  
23 basement to do recreation, it will probably be fitted out with a  
24 board table and a couple chairs and used once a month when the  
25 condominium association has a meeting.

1           But again, we are chasing this 15 percent. And you  
2 say who are we doing this 15 percent for? We're clearly not  
3 doing it for the developer. I think you can hear the developer's  
4 frustration coming through in all that. We're not doing it for  
5 the residents. If the residents wanted it, the developer would  
6 be doing it. These residents want to be out on the streets. You  
7 ask the interesting question, and there's always these nice  
8 rendering of the courtyards with people in them.

9           And Eric, before he got in the dating service part  
10 of the comment, made the comment, well, you can imagine going  
11 sitting down there and reading a book. I don't know how many  
12 people stay at home and sit on their couch and read books but  
13 they don't go out and sit in the common areas and read books.  
14 And from experience, I'll tell you that people don't go out and  
15 use these rooftop decks. They are used once a year -- actually  
16 there's one building that uses it more than once a year. They're  
17 used once a year for the 4th of July.

18           Pennsylvania Avenue and Market Square is used once  
19 every four years for the Inauguration. We care chasing this 15  
20 percent, not for the residents, not for the neighbors, not for  
21 the developers, but because it's in the Code that 15 percent is  
22 required. I'm told the history of this and believe it or not, it  
23 predates me, I believe, was if we're going to build in-town  
24 housing, and realize this requirement of 15 percent, I believe  
25 also says that 50 percent of it has to be outdoors. Okay, so

1 what was the whole thought process there?

2 Let's make sure there's a place outside for the  
3 kids to play. I would contend -- first of all, there are no  
4 children in these buildings. The empty nesters purposely don't  
5 have children there, hope they don't come back and if they do  
6 come back, they're twenty something. The young urban singles  
7 don't. Occasionally there will be a young married couple who  
8 will have a surprise. When that surprise is a year or two old,  
9 they will move out to a townhouse or a single family home or out  
10 to the suburbs.

11 I would contend that the addition of a top lot to  
12 this building is as inappropriate as this 15 percent requirement.

13 I mean, we are dealing with the renaissance of the city, where  
14 people are coming back in, looking for a lifestyle and they are  
15 not looking to cocoon inside the building, other than in their  
16 own unit.

17 CHAIRPERSON GRIFFIS: Can I interrupt you for a  
18 minute?

19 MR. MAYHOOD: Yeah.

20 CHAIRPERSON GRIFFIS: First of all, I appreciate  
21 how so well you are articulating this issue and I want to just  
22 underscore the importance of having the chair of the Zoning  
23 Commission with us today on the BZA because I think this is  
24 absolutely appropriate for -- and a lot of the rounds for the  
25 Commission members to be hearing it. I am in total understanding

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1 of what you're saying and I would just emphasize the point in  
2 terms of outside space, I think you're exactly right in terms of  
3 the history. When you look back at the Lewis Plan in '56 and '58  
4 when it was adopted, it was certainly trying to make sure that  
5 one, we had enough air coming into residential areas but we had  
6 enough open space.

7 I think it's in the record and I'm surprised there  
8 wasn't more oral testimony about Logan Circle and Dupont Circle  
9 are walkable areas which are, in not one of the best things about  
10 Dupont Circle is how it's so animated on the weekends because  
11 it's filled. And it looks like everyone has a kid in the world.

12 They may say people don't have children in the city but I know  
13 Dupont Circle and there are kids down there. So what I want to  
14 do is, if you can, just abbreviate --

15 MR. MAYHOOD: I will.

16 CHAIRPERSON GRIFFIS: -- because you've sold me and  
17 I think we can focus exactly on this application and I would, in  
18 fact, encourage when the Zoning Commission takes this up again,  
19 that you are in front of them and give the same testimony, and so  
20 I appreciate everything you're saying.

21 MR. MAYHOOD: Let me make two observations and  
22 comments. First of all, I think Jacques started off by saying  
23 these are significant projects. These really are significant  
24 projects. The Hoffman Company, they've done a specular job of  
25 changing these neighborhoods. Monte went on and said this is

1 brilliant design. I think as he went through the intricacies of  
2 it, you can see this is challenging intricate design. The real  
3 key is this infield housing stuff is very difficult.

4 You add on top of -- another dynamic that's working  
5 here is the Disability Act where you have to make everything 100  
6 percent accessible. If you make the roof 100 percent accessible,  
7 you take the elevator up on the south, you hit a height  
8 limitation, you take the building down one level in order to  
9 accomplish it and you've lost a floor of units. The kind of --  
10 the change of the demographic coupled with the accessibility  
11 problem, we are creating this false idea that we are creating  
12 rooftop rec space and we are doing it in name only, it's not  
13 used.

14 My last point, at what cost is this, and I'm not  
15 really saying the cost to the Hoffman Company. When the consumer  
16 buys, they look for a great design, they look for a location they  
17 want, they hopefully look for something they can afford. Their  
18 other two major priorities, and Monte touched on this, are number  
19 one, security and number two, parking.

20 And I would contend that they are coupled. Let's  
21 take that atypical urban buyer for this. Let's say it is a  
22 junior partner law firm, and she works in the west end and she  
23 works till 11:00 o'clock tonight and she comes home and she has  
24 to park on the street and walk a block and a half or two blocks  
25 to get into the building. And maybe take the same young lady and

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1 she goes to U Street and this weekend and she stays till 2:00  
2 o'clock and she drives back and has to find a parking space.

3 This -- in this case, forcing the recreation space  
4 at the expense of parking is hurting the consumer, it's hurting  
5 the neighborhood, it's not necessary. With that I'll --

6 CHAIRPERSON GRIFFIS: Great, and again, I  
7 absolutely appreciate your articulation of very important and  
8 pertinent points. I would add to that, if you walked back from U  
9 Street and you had the vibrant streets with the retails and the  
10 late night restaurant and shops, it would be a safer area to be  
11 walking in which underscores the fact that we need to get people  
12 out on those streets.

13 So any questions from the Board at this point?  
14 Okay, again, I absolutely appreciate it.

15 MR. DePUY: I have one question for Mr. Mayhood.

16 CHAIRPERSON GRIFFIS: Yes.

17 MR. DePUY: The Office of Planning focused on the  
18 fact that with respect to both these projects, permits had been  
19 issued. You've now seen through Mr. Colbert's testimony where  
20 the original permits showed residential recreation space, namely  
21 in the sub-surface area. In your opinion, would that be  
22 appropriate residential recreation space and would that space  
23 actually be used?

24 MR. MAYHOOD: Let me just go back to my example  
25 again of the young junior partner. She's going to go back out on

1 the street. She's going to go out to dinner. This space is not  
2 used. We are created space in difficult sites to satisfy  
3 outdated requirements. I'm not sure that the bars close at 2:00  
4 o'clock on U Street, though.

5 CHAIRPERSON GRIFFIS: We don't want to get into  
6 that. We know people on the ABC Board.

7 MR. DePUY: Mr. Chair members, the Board, the  
8 concludes our case in chief and we'll take our place and be  
9 prepared to answer questions and to rebuttal.

10 CHAIRPERSON GRIFFIS: Great, thank you very much.  
11 Let's move on to the Office of Planning report. Do we have --  
12 oh, yeah, it's right here. All right, I would do the same on the  
13 ANC report also that that we might move this along, and welcome  
14 again our Office of Planning representative.

15 MS. BROWN-ROBERTS: Good morning, Mr. Chairman and  
16 members of the Board. My name is Maxine Brown-Roberts from the  
17 Office of Planning. I was encouraged to hear the applicant's  
18 presentation today as the Office of Planning was not given a lot  
19 of this information that was presented here today and so I think  
20 our report was sort of based on the information that we had  
21 requested and what was presented to us.

22 I think that our overall position was that we could  
23 support this application. We really do support the application  
24 for the provision of residential units at the time when the  
25 District was trying to maximize residences within the city as

1 well as the accompanying retail space that will serve residents.

2 However, I think a bigger issue right now before us is  
3 concerning the 15 percent recreational space and is that  
4 something that we need to take a look at in another forum.

5 But based on the information that we were presented  
6 with by the applicant, we did not think that they met the  
7 sufficiency of the standards to -- that should approve the  
8 variance. We would have preferred that the variance request was  
9 done at the time that was prior to the issuance of the building  
10 permit and I think if that was done similarly to other  
11 applications that we have reviewed and have supported with a  
12 reduction in the recreational space, I think we would have come  
13 out more forcefully on recommending approval of this application.

14  
15 I think if we had another chance to get the  
16 information that the applicant has provided here today, for  
17 example the survey and the appropriateness, it is an application  
18 that we would support. Again, I want to say that we do support  
19 the application for the provision of residential use and think  
20 that they have met the standards as set forth in Section 3103.2.

21 However, we still would like based on what the zoning  
22 requirements are currently, there is some questions about having  
23 the private recreational space and should that be taken into  
24 consideration and thank you, Mr. Chairman.

25 CHAIRPERSON GRIFFIS: Great, thank you. For my

1 clarification, then are you in fact, changing your statement in  
2 your Office of Planning report at this time having heard the --

3 MS. BROWN-ROBERTS: I think having heard the  
4 presentation today, I would say that we could support the  
5 application. However, I think we would like to have some  
6 direction from the Board about you know, how are we going to  
7 proceed on this matter of the 15 percent and of evaluating  
8 applications, because there have been a number of applications  
9 submitted to the Board where we have recommended you know,  
10 reduction. And I think if these are going to continue to come  
11 in, it's something that we need to take a look at.

12 CHAIRPERSON GRIFFIS: Yeah, I feel very strongly  
13 about that. I think in the changing of this particular city and  
14 in the objectives that the city has in the Office of Planning,  
15 certainly supporting those, I think it's well worth a look. Let  
16 me go -- which goes some to that. I mean, we've talked a lot  
17 about this and frankly, I could spend the rest of the day talking  
18 about it because I find it so intriguing, but I won't.

19 But you bring up in terms of the zoning  
20 requirements, one this is in the uptown arts mixed use overlay  
21 which in fact, talks about bonuses and requirements for street  
22 front utilization for retail. I mean, I know we're talking about  
23 14th Street in that area. This is directly adjacent to that. I  
24 see a very difficult balance of requirements here when, again, as  
25 we've talked about having and wanting that revitalization of the

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1 retail corridors with then requiring amenities to be provided  
2 within the building. So it is a bigger discussion, I think well  
3 worth having and I appreciate your comment in terms of your exact  
4 word was "could support this application", but you're looking to  
5 us for that. Okay.

6 Ms. Mitten?

7 MS. MITTEN: I guess I just want to -- I want to  
8 share with the Board some of what's been going on with the Zoning  
9 Commission and, you know, the zoning ordinance, everyone agrees  
10 in large part, is outdated. And when areas -- when we finally  
11 start to achieve the objectives that we -- that we set for  
12 certain areas the zoning ordinance, then evolves in response to  
13 that and we have seen that in the DD overlay. And there was  
14 relief granted through a change in the ordinance that came to our  
15 attention in part because there were these series of requests for  
16 variances in that part of town and I would guess that the six  
17 variances for relief from the recreational space requirement  
18 were, in fact, in the DD overlay.

19 Now, when we took that issue up, we asked and Ms.  
20 Brown-Roberts wasn't there, so she's not the messenger to take it  
21 back -- or she wasn't the messenger at the time to take it back  
22 to the Office of Planning, but we asked to take a look at this  
23 issue more broadly because it was clear that this is an onerous  
24 requirement and relatively impractical.

25 So I think there is already sentiment at the Zoning

1 Commission that this needs to change.

2 CHAIRPERSON GRIFFIS: Right.

3 MS. MITTEN: Now, what I very much appreciate from  
4 the Office of Planning report is that they are giving us and they  
5 have given us a very strict reading on the variance test and I'm  
6 not saying that we should put blinders on and adhere to that  
7 strictly but it's an important standard to recognize and I think  
8 there is flexibility in the ordinance to recognize extraordinary  
9 conditions that may be don't arise exclusively from  
10 characteristics of the property in question. But I would like,  
11 and I think there are certain constraints for these two projects  
12 that should be recognized.

13 I think what we need to do, however, is urge the  
14 Office of Planning, perhaps with the assistance of developers  
15 like Mr. Hoffman, to bring a case -- a text amendment case before  
16 the Zoning Commission very soon, because here's an area we wanted  
17 to evolve. It's finally evolving. There are handicaps in the  
18 ordinance that need to be dealt with and this is not the forum to  
19 do that. The Zoning Commission is the forum.

20 So I'm sympathetic to this case and let's move it  
21 to, you know, a forum where we won't have to put applicants  
22 through this. You know, if it doesn't work, let's fix it.

23 CHAIRPERSON GRIFFIS: Yeah, thank you for saying  
24 that because I know the Office of Planning has done a lot of look  
25 at one, doing the DD but also in the north of Massachusetts area

1 and they've done, you know, assessments of how much and what the  
2 cost is if you were going to, you know, basically buy out and put  
3 the recreation space somewhere else.

4 And what struck me in some of those -- in the  
5 reading and discussion of that is, you know, here we are  
6 emphasizing in this area and then further north, Mr. Mayhood had  
7 talked about, you know, the Columbia Heights area and things like  
8 that. We want to develop the open spaces that are usable that  
9 are public. I mean, some of our parks in this city are just  
10 amazing and yet, we need people to be there and that's the only  
11 way it's going to change.

12 And, so, again, I see the kind of internal battling  
13 of itself when we're saying, well, we've got to give the  
14 residential requirement but as you say, it's a big picture,  
15 larger than we have now.

16 MEMBER LEVY: Mr. Chair.

17 CHAIRPERSON GRIFFIS: Mr. Levy.

18 MEMBER LEVY: I just want to comment on that same  
19 point and build on it a bit but pointing out and it's probably  
20 obvious to the Board members, but a great deal of testimony today  
21 has gone to the issue of whether or not there should be a  
22 recreational space requirement. And that's a matter that as we  
23 sort of touched on, is more appropriate before the Zoning  
24 Commission than it is before the BZA and so I would just urge us,  
25 as we decide the case, is sort of pick through the testimony and

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1 only deliberate on that which is -- which goes to the variance  
2 for recreation space in this case and not to the overall issue of  
3 whether or not the requirement is appropriate.

4 CHAIRPERSON GRIFFIS: Right. Well, I think you  
5 bring up an appropriate point and I do want to address it because  
6 I think, one, yes, we are talking about a larger issue that may,  
7 in fact, proceed to changing the regulations, but I think what is  
8 pertinent to this case and this Board is an understanding of the  
9 intent of the zoning regulations. Once we can understand then we  
10 can start to evaluate what the practical difficulties are and I  
11 go to one particular point the applicant has made.

12 But as we can see, we're looking at the below grade  
13 residential space that could conceivably be carved out and called  
14 anything, you know, could be satisfactory to the zoning -- strict  
15 adherence to the zoning regulation. But a lot of the background  
16 of the zoning and the discussion that has happened since its  
17 inception has been the word "quality" that's talked about; how is  
18 it used, what is the usability I would say of this residential  
19 space.

20 So my point being it goes to the intent of the  
21 regulation itself and the spirit of the regulations that I think  
22 we need an understanding of in order to then assess and  
23 deliberate on whether we grant the variance or not.

24 MEMBER LEVY: If I could then just follow up on  
25 that.

1 CHAIRPERSON GRIFFIS: Sure.

2 MEMBER LEVY: The applicant has made reference to  
3 other projects this Board has reviewed and granted variances for  
4 rec space. I personally find it very distracting in trying to  
5 focus on the merits of this case in that the case that we have  
6 before us are buildings that are already under construction, that  
7 are nearly done, that were presented as matter of right projects  
8 when, in fact, that applicant has testified that they never  
9 really intended on using the space identified below as rec space  
10 for rec space. In fact, it shows in the drawings as parking with  
11 a big X through it.

12 So I think that's a major difference between this  
13 case and the cases we've seen before. I'm trying very hard to  
14 focus on the merits of the variance -- merits of the case and  
15 specific tests for the variances when, in fact, this is a project  
16 that maybe went forward, pretending to be something that it  
17 actually is not.

18 MS. MITTEN: If I could just interject one thing  
19 that might give you some comfort, which is, unlike some other  
20 cases, the applicant is not presenting -- well, we acknowledge  
21 that the project is under construction but they are not  
22 presenting the fact that it is under construction as adding to  
23 their hardship. That's not the origin of the hardship. The  
24 origin -- the hardship is really that this is -- it's  
25 impractical. It will not meet the purpose -- it will truly not

1 meet the purpose for which it was intended and given the larger  
2 context where there has been some consideration given to relief  
3 from the rec space requirement that, in fact, one could  
4 anticipate that if they don't get the relief today, that the  
5 ordinance will change and eventually catch up with them, so in  
6 the meantime the space would be wasted.

7 So if you believe that the sentiment is out there  
8 to grant this sort of relief and you can do it now or let the  
9 Zoning Commission make accommodations later and just try to  
10 consider all of that as the larger context.

11 MEMBER LEVY: Right, and I recognize that and I  
12 think that the applicant has made some arguments that go more to  
13 the merits of the case, go more to the variance tests. I just --  
14 I don't think this is the way to go about -- to do business and  
15 we talk a lot about not setting precedence. I think this is a  
16 really bad potential precedent, to be looking at projects that  
17 are already under construction.

18 They were presented as a matter of right projects  
19 that come in for variances after the fact and I just think it's  
20 important that whatever decision we make today, we make on the  
21 real merits of the case and try not to be further distracted by  
22 the other matters.

23 CHAIRPERSON GRIFFIS: Good, Mr. Levy, and I  
24 appreciate you bringing up that important and pertinent point. I  
25 mean, we do need to keep focused and I think that the Board

1 members are doing that, but I also hear your concern of as a  
2 Board member, not being -- not being presented with things that  
3 are trying to fool us and I think we have seen issues of that  
4 before. I do not believe that this is the case, but you make  
5 excellent points in terms of the process and not setting  
6 precedence for process in the future.

7 Okay, anything other on that issue or others at  
8 this point? Questions of Office of Planning, anything else we  
9 need to cover in that respect? Then I would like to move onto  
10 other government reports. I'm not seeing -- I don't have notes  
11 that we have other government reports except the ANC, which we  
12 can move quickly to.

13 MS. BAILEY: Mr. Chairman, we do have a letter from  
14 Council Member Jack Evans if I'm not mistaken.

15 CHAIRPERSON GRIFFIS: Oh, right, that would be a  
16 realm of the government, wouldn't it, in which case let us note  
17 that it did come in. It is Exhibit Number 26 and we'll take that  
18 up before the ANC, of course, and this was delivered to me this  
19 morning, so I have briefly looked at it but it is clear that  
20 Council Member Evans of Ward 2 in which this property is located,  
21 support the applicant's request for a reduction in the recreation  
22 space at both the Church Street and the P Street NW properties  
23 and if there are any other relevant pieces the Board see in that  
24 we can pull it out if need be. If not, let's move onto the ANC  
25 report.

1                   Now, my understanding that the ANC was here to  
2 testify today; is that correct? Did you want to come forward?  
3 Great? And there's also the Logan Circle Community Association  
4 representative. Do you want to come up also? Yeah, absolutely.  
5 And you are Mr. Kramer?

6                   MR. HINTERLONG: No, first name is Bob, last name  
7 is Hinterlong, H-i-n-t-e-r-l-o-n-g.

8                   CHAIRPERSON GRIFFIS: Indeed, you represent 2-FO-6.

9                   MR. HINTERLONG: Correct.

10                  CHAIRPERSON GRIFFIS: Okay, and you are the  
11 treasurer.

12                  MR. HINTERLONG: Yes.

13                  CHAIRPERSON GRIFFIS: Fabulous.

14                  MR. HINTERLONG: They have to trust somebody with  
15 the money, they chose me.

16                  CHAIRPERSON GRIFFIS: Indeed. Did you have  
17 testimony today or are you just presenting the letter?

18                  MR. HINTERLONG: Well, I thought I would just read  
19 the letter as my testimony and then if anybody has --

20                  CHAIRPERSON GRIFFIS: Is it the letter that's in  
21 the record?

22                  MR. HINTERLONG: I didn't think you had it, but  
23 perhaps there is.

24                  CHAIRPERSON GRIFFIS: It is, in which case, it's  
25 March 17th dated?

1                   MR. HINTERLONG:     Correct.     I was under the  
2 impression you didn't have a copy.

3                   CHAIRPERSON GRIFFIS:     Fabulous, in which case I  
4 don't think there's any need to read it into the record --

5                   MR. HINTERLONG:     Perfect.

6                   CHAIRPERSON GRIFFIS:     -- as it's hard copy in the  
7 record. Is there any questions of the ANC at this point. Why  
8 don't you just state what the ANC position is?

9                   MR. HINTERLONG:     The plans were reviewed by the  
10 Community Development Committee of the ANC during their February  
11 meeting. They voted unanimously, I think, seven to nothing, in  
12 favor of the variance. Suggested or recommended that the ANC  
13 vote in favor of it as well. In the March meeting we, in fact,  
14 did the CDC meeting -- or the CDC vote was unanimous and the ANC  
15 vote was unanimous.

16                   CHAIRPERSON GRIFFIS:     Great, thank you very much.  
17 That's very clear. Is there any questions from the Board at this  
18 time of the ANC? Is there any cross examination of the ANC at  
19 this time? I'm seeing an indication of not. You could stay  
20 right there and we'll move onto the next gentleman, who is  
21 representing the Logan Circle Community Association; is that  
22 correct?

23                   MR. DIXON:     That is correct.

24                   CHAIRPERSON GRIFFIS:     If you would just introduce  
25 yourself.

1 MR. DIXON: My name is Wayne Dixon. I sit on the  
2 Board of Directors of the Logan Circle Community Association as  
3 the immediate past president. I'm also the Chairman of the  
4 Economic Development Committee of that organization and also very  
5 personally, I'm here both supporting this project for the Logan  
6 Circle Community Association and personally much of my adult life  
7 I've been working to enhance the quality of life in the city  
8 going back to the mid-1960's when I worked with Ladybird Johnson  
9 and served as Executive Director for the Society for Beautiful  
10 National Capital.

11 I worked with the Washington Youth Gardens of Upper  
12 14th Street and since living in the Logan Circle Community for  
13 the past 17 years, having moved from Foggy Bottom, I'm a fourth  
14 generation Washingtonian, been working very actively with the  
15 community to -- as a matter of fact, I led a group that forced  
16 Mr. Gerstenfelt (phonetic) to lease his property to Fresh Fields.

17 But in our work with the community, I think it's very important  
18 to understand that we have never worked with an organization like  
19 the Hoffman Company.

20 They have extended themselves more than one would  
21 expect to meet the goals and objectives, concerns of the  
22 community. They have revised these plans a number of times  
23 listening to the community group and so we have very high praise  
24 for this organization. They are a very socially conscious  
25 organization, very obviously committed to the community. One of

1 the things that we try to do in our community is attract retail  
2 into the community. We're working very diligently on that.

3 And through our work in the Economic Development  
4 Group, we are constantly being hit right in the face with  
5 retailers who want to come to 14th Street, who are very close to  
6 making a decision to do that and then start examining the issue  
7 of parking. And if there is a governor, a retard on the  
8 development that could be taking place, I think first and  
9 foremost is the parking issue and so when a developer comes and  
10 offers off-street parking in our community, we are aggressively  
11 supporting that and we urge you to do the same thing.

12 And then again, these projects we very much support  
13 in their own right as well as the off-street parking. And we  
14 agree that the parking should come off P Street which is a  
15 boulevard and not on the very narrow street of Church Street. So  
16 that is a summary of our position both my personally and as Logan  
17 Circle Community Association.

18 CHAIRPERSON GRIFFIS: Great, thank you very much  
19 and I just say that Logan Circle Community Association is a great  
20 model for how a community can get organized and bring in, in  
21 fact, the needed amenities for that community. Certainly, you've  
22 had a long -- as you've stated a few, but a long successful  
23 history personally, but also as the association of doing that and  
24 I think P Street looks a lot to what it does today because of  
25 your involvement.

1                   So we absolutely appreciate that and appreciate  
2 your time being down here this morning to give testimony. Is  
3 there any questions of the Board of the Logan Circle Association,  
4 any of the applicant cross examination questions? Very good.  
5 Well, then it is high noon and we thank you both very much for  
6 being with us today.

7                   Do we have any other organization's reports I'm not  
8 showing? So, is there anybody else here testifying in support of  
9 this application at this time? Anyone in opposition? Is there  
10 anyone that wants to say anything that's in the room at this  
11 time?

12                   Not seeing people charge to the table, I would turn  
13 to the applicant for closing remarks unless -- I'm sorry, let me  
14 just interrupt you, unless Board members we have other questions  
15 of which we can -- there we are. Why don't we move to closing  
16 remarks then?

17                   MR. DePUY: Mr. Chair, members of the Board, we  
18 believe we've satisfied the test of uniqueness, specifically the  
19 historic structure at 1440 Church and all the design and other  
20 constraints that were occasioned by it, including the prohibition  
21 against bringing the elevator to the top floor of the building,  
22 which obviously meant you could not use that for public  
23 residential recreation space.

24                   There has been testimony with respect to both  
25 properties to the water table immediately below the lower parking

1 level which limits the ability of the owner to go further down  
2 with parking and therefore, provide residential recreation space  
3 elsewhere. You've heard testimony with respect to the light  
4 coverage, the use of the surface for various needed functions and  
5 required functions including loading docks. You've heard  
6 testimony with respect to the P Street building being a mixed use  
7 with ground floor retail and the requirements of servicing that  
8 retail, again, use of the ground floor not being available for  
9 residential recreation space.

10 You've heard testimony with respect to the HVAC  
11 requirements for large number of condensers on the roofs which  
12 means that the roof is not available for a residential recreation  
13 space. As a result of those unique and other considerations  
14 that have been testified to, there was a number of practical  
15 difficulties to the owner including the options for providing  
16 residential recreation space are very limited, as a result of  
17 those unique conditions.

18 Providing residential recreation space in a parking  
19 garage with a low ceiling, we submit, would be a poor choice for  
20 the users. The 15 percent requirement, as testimony has  
21 indicated from Mr. Hoffman, puts these particular projects at a  
22 major competitive disadvantage to other projects who do not have  
23 such a requirement and therefore, that causes economic hardship  
24 to this particular applicant.

25 There are increased costs to the project occasioned

1 by Historic Preservation design requirements and requirements  
2 imposed and gladly met by the developer but imposed by the  
3 community. We believe that as a result of those conditions, that  
4 was can satisfy the third test which is no impairment to the zone  
5 plan and on substantial detriment to the public good. The  
6 projects provide needed public parking as the community has  
7 indicated, as the market is dictated. The projects provide a  
8 significant combination of private and public recreation space  
9 which satisfies as best we can, the spirit of the requirement.

10 The facilities provided in the two projects are  
11 highly desirable urban residential and in one case a mixed use  
12 with retail projects and finally, the projects are treated as a  
13 result in a more equitable fashion, vis-a-vis, other projects in  
14 residential zones where there is no residential recreation space.

15  
16 So we believe we have satisfied all three tests and  
17 we'd request approval of the application by the Board.

18 CHAIRPERSON GRIFFIS: Thank you very much, Mr.  
19 DePuy. Board members, last opportunity for questions and then  
20 I'd just like to get an indication if we're ready to proceed  
21 today.

22 MS. MITTEN: Mr. Chair?

23 CHAIRPERSON GRIFFIS: Yes.

24 MS. MITTEN: I think in deference to Mr. Levy's  
25 concerns and also to recognize the fact that, you know, we want

1 to be sure that we are not crossing over into the realm of the  
2 purview of the Zoning Commission as it relates to the rec space  
3 requirement, while I'm perfectly happy to take a vote today, I  
4 think a summary order would not be appropriate for this case.

5 CHAIRPERSON GRIFFIS: Right.

6 MS. MITTEN: And so whether we postpone the  
7 decision completely and allow the applicant to submit proposed  
8 findings of fact and conclusions of law or whether we take the  
9 vote today and await that submission before we write the order, I  
10 don't have a preference, but I would like a more elaborate order  
11 to be written for this case.

12 CHAIRPERSON GRIFFIS: Yeah, I would agree and let  
13 me just say that I'm fully prepared to take action today. A full  
14 order I think would be appropriate for several reasons but we  
15 have covered an awful lot of information and that will need to be  
16 distilled into a very pertinent tight order.

17 That being said, we could take action today and  
18 have findings of facts and conclusions of law submitted and then  
19 the order would be written. Mr. Etherly, did you have a comment  
20 on it?

21 MEMBER ETHERLY: No.

22 CHAIRPERSON GRIFFIS: Okay. Mr. Levy, are you  
23 prepared to move ahead today? Do you want to take a break? We  
24 could actually take a 10-minute break and come back.

25 MEMBER LEVY: No, actually, I think the suggestion

1 of a full order is appropriate; however, I am prepared to vote  
2 today if that's the desire of the Board.

3 MS. MITTEN: Mr. Chairman, perhaps we could just  
4 rather than having an official vote, we could just have a  
5 consensus of the Board and then what I think might be helpful as  
6 well in writing the order is if we were to allow the Office of  
7 Planning with a little more time to consider the testimony that  
8 they heard today since there seems to be some indication that  
9 they actually got a more definitive sense of what's being  
10 proposed today, that we would allow them to amend their report as  
11 well in writing, which I think might complete the record.

12 CHAIRPERSON GRIFFIS: Well, since it's for decision  
13 making, is that what you're saying?

14 MS. MITTEN: Right, but they can't ultimately do  
15 anything until the order has been written --

16 CHAIRPERSON GRIFFIS: I understand that.

17 MS. MITTEN: -- but, I mean, we can indicate our  
18 support if that's the direction we're going through a consensus  
19 vote.

20 CHAIRPERSON GRIFFIS: Well, yeah, that's seems to  
21 be an interesting option. I'm not sure we would have a full  
22 Board consensus vote at this time.

23 MEMBER LEVY: I guess I'm confused on the purpose  
24 of the consensus vote as opposed to just voting on the project.  
25 Does it have specifically to do with the Office of Planning

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1 report, Ms. Mitten? I'm just -- I just need some clarification.

2 MS. MITTEN: Well, it has -- I mean, I think there  
3 are some things that we need for the record. For instance, we  
4 saw some boards today that are different than the plans that we  
5 actually have in the record. And given that I think the approval  
6 is bound up with the specific design proposal, we want to make  
7 sure that we have that in the record as well.

8 So, I guess in lieu of having a complete record, we  
9 could give an indication of what direction we're going, complete  
10 the record, take the official vote, vote on the order and  
11 complete the process.

12 CHAIRPERSON GRIFFIS: Okay, all good things to  
13 think about, however, one of my concerns is obviously we like to  
14 as we can clear our schedule was it's appropriated. We don't  
15 obviously -- we're not motivated 100 percent by that. I know for  
16 a fact that our April 2nd decision making already in the half  
17 hour we have for decision making has six to eight cases to do, so  
18 this would not be conceivable that it would be on the 2nd, which  
19 would put it off till I guess the following month would be May,  
20 and my concern not is when this is going to happen. My concern  
21 is just for Board members in our deliberation and it's hard to  
22 move things out months at a time.

23 I would, at this point, first of all -- well, I  
24 think we ought to move today on this, take action on the two  
25 applications. I think Ms. Mitten brings up the pertinent point

1 of we need further information in the record. The order,  
2 obviously, will not be written without that, so we can look to  
3 that.

4 And I think we're going to go through all the  
5 specifics of the Office of Planning's report as one of the  
6 pertinent pieces to that, as well as the record that was  
7 testified today. We have one issue and I'm going to put it up  
8 for discussion here but I'm going to put it in the form of a  
9 motion and that would be for approval of Application 16841 and  
10 Application 16848, that encompasses the 1440 Church Street and  
11 also the 1425 P Street projects for variance from the recreation  
12 space requirements under the Section 773. My motion will be for  
13 the original application which was the five percent as shown in  
14 the drawings of the record.

15 And I would ask for a second on this and then we  
16 can have discussion.

17 MS. MITTEN: Second.

18 CHAIRPERSON GRIFFIS: Very well, I would like to  
19 hear comments if there's any concerns of that, and what we've  
20 seen today is the possibility of a program use connection with  
21 the enlargement of the roof. I'm a little concerned just about  
22 the practicality of it and the reality of it. I mean, is that  
23 actually going to be used, does it go to the requirements.

24 I am fully supportive and I probably would need  
25 clarification whether the six percent was part of the added roof

1 enlargement or not. To me a one percent we're talking about  
2 minimal square footage. It didn't seem to be that pertinent. I  
3 think the record was fairly clear that we had submitted in terms  
4 of the drawings. I think to speak to the motion, I can't, but  
5 I'd like to take that issue first because we may need to amend  
6 motions.

7 MEMBER LEVY: I guess I have a question. My  
8 recollection is that the percentage -- the increased percentage  
9 had to do with the roof on the P Street Building for one, but  
10 also did it not have to do with the Church Street Building as  
11 well, with additional roof deck space on the Church Street  
12 Building shown on the model? Maybe the applicant can clear that  
13 up.

14 CHAIRPERSON GRIFFIS: Yeah, we need a quick  
15 clarification on that then. Mr. Hoffman, you can -- although  
16 this is abnormal for us to take --

17 MEMBER LEVY: Well, if it's inappropriate, I'll  
18 withdraw that question.

19 CHAIRPERSON GRIFFIS: No, I think it's -- I'm going  
20 to allow it because I think it's important in terms of speaking  
21 to this motion which we've had some changes from today. So what  
22 we're going to do is just -- we're in the middle of a motion but  
23 I need you to specifically outline. Do you understand what we're  
24 talking about? Okay, good.

25 MR. HOFFMAN: Yes, I do. The change from the five

1 percent to the six percent was the increased area on the P Street  
2 roof. So that was the change.

3 CHAIRPERSON GRIFFIS: Okay, so that's the square  
4 footage that gets this. But was there any change on the Church  
5 Street roof area?

6 MR. HOFFMAN: Yes, on the Church Street roof area,  
7 as we indicated earlier, the practicality of having some of the  
8 added square footage to the back, to this area.

9 CHAIRPERSON GRIFFIS: But that doesn't -- that's  
10 been taken away now and does not go to the six percent; is that  
11 correct?

12 MR. HOFFMAN: That it correct. We are six percent  
13 without that. We are six percent, yes.

14 CHAIRPERSON GRIFFIS: There is no enlargement of  
15 the roof.

16 MEMBER LEVY: So let me just ask directly, the  
17 model that's showing the Church Street Building that shows a  
18 common roof deck, that's included in the five percent?

19 MR. HOFFMAN: Yes, that's correct.

20 MEMBER LEVY: Okay, thank you.

21 CHAIRPERSON GRIFFIS: Okay, good. Then if -- let  
22 me get a consensus that the motion is acceptable for discussion  
23 at the five percent. It has been seconded.

24 MS. MITTEN: Mr. Chairman, I guess what I would  
25 like is that the approval be tied to the design as presented

1 whether it's five percent or six percent. We want it to be where  
2 it's shown to be in the amount that has been indicated rather  
3 than having it be seemingly a generic approval for six percent  
4 recreation space somewhere.

5 CHAIRPERSON GRIFFIS: Well said. And I absolutely  
6 agree. And so what you're saying is that it actually goes to  
7 what was presented today which is actually a change from the  
8 original application.

9 MS. MITTEN: Yes, that's what I would recommend.

10 CHAIRPERSON GRIFFIS: Okay, I would accept that and  
11 I think that's appropriate as presented today. What my -- well,  
12 there it is, which is an enlargement of the P Street roof deck.  
13 Okay, I think the record would show, I think we've just been  
14 through this which it is fresh. I think the closing remarks by  
15 the applicant were well stated and went through the test and I  
16 particularly wanted to point out because I don't think he hit it,  
17 one piece of the hardship was the talking about the coordinated  
18 Historic Preservation design. He did speak to that. However,  
19 there was testimony that clearly stated the setbacks and the  
20 massing and the architecture out of the front started to take up  
21 space.

22 There's a leftover six feet, I think I recall from  
23 testimony today at the front on the Church Street side which  
24 perhaps could have been incorporated into a large area in the  
25 back but obviously, there's an awful lot of balance that makes it

1 difficult to, as Mr. Mayhood's testimony said, as to the  
2 difficulty of doing in-fill, not to mention that this was the  
3 Church Street, obviously the addition to an existing structure  
4 that had to be incorporated.

5 And I can talk a lot more on all the points but I  
6 think it would be fairly redundant at this point unless anyone  
7 feels the need to do so. I would ask any other questions,  
8 comments, discussions.

9 MS. MITTEN: I just want to clarify, Mr. Chairman,  
10 I understood your motion to exclude the proposal from the  
11 applicant to provide for this sharing of the roof space on the P  
12 Street building.

13 CHAIRPERSON GRIFFIS: I would articulate it  
14 differently and I would say I am not proposing a condition and  
15 that would be something that would have to come under a condition  
16 of the order would be my understanding. So, yes.

17 MS. MITTEN: Okay. I guess I could go either way  
18 on that notion. I think that by excluding a design provision or  
19 a -- by excluding something that has been proposed by the  
20 applicant in this case, I think we, perhaps, and I'd be  
21 interested in what the other Board members think, we're perhaps  
22 straying into the area that is rightfully the purview of the  
23 Zoning Commission which is, we are passing judgment on, as the  
24 Chair had said earlier, the quality of the space and so I would -  
25 - I think I would be in favor of accepting that provision for

1 sharing if for no other reason than to bend over backwards not to  
2 stray out of the purview of the BZA.

3 CHAIRPERSON GRIFFIS: Okay, and I would just say  
4 that often on applications there are certain balances and  
5 compromises that applicants give. Some we accept and form into  
6 conditions, some not. The pertinence to this application is the  
7 specifics of the design, the architecture doesn't change. They  
8 actually have. And I would -- yeah, I've stated my question  
9 whether it would actually be utilized what the entire function  
10 would be for it.

11 I would rather, I'd feel much more comfortable with  
12 the motion that let that be a programmed use of the building  
13 owners and if they decide that that is something they need to do  
14 that they would appropriately do it and there would be obviously  
15 no structural or design changes required. It would be, you know,  
16 issuing of card keys and that would be about it. Board members?

17 MEMBER LEVY: And so just for clarification, the  
18 motion then is to approve the application based on the design  
19 that was presented to us today.

20 CHAIRPERSON GRIFFIS: Correct, but not inclusive of  
21 -- it does not -- the design we're talking about, the layout and  
22 the architectural drawings that were submitted, it does not -- it  
23 would not include that the programming of the sharing spaces.

24 MEMBER LEVY: All right, I understand.

25 MEMBER ETHERLY: Mr. Chairman, I'll agree with

1 that. I'll come in just to clarify one final time, we're  
2 discussing six percent recreational or is it five?

3 CHAIRPERSON GRIFFIS: It is going close to the six  
4 percent --

5 MEMBER ETHERLY: Okay.

6 CHAIRPERSON GRIFFIS: -- because it's going as  
7 designed.

8 MEMBER ETHERLY: That's fine, thank you.

9 CHAIRPERSON GRIFFIS: Good, and so again, it's the  
10 expanded roof deck on the P Street side. Okay, other discussion,  
11 comments?

12 MEMBER ETHERLY: Just an additional note on the  
13 issue of practical difficulties, Mr. Chair, there was also  
14 testimony in the record to the presence or I should say the  
15 proximity of the excavation, if you will, to the water table and  
16 I think that's also a useful point to highlight because I would  
17 hazard a guess that perhaps, you're looking at a similar  
18 challenge with potentially other properties in this vicinity and  
19 it's useful to perhaps, note and highlight that in addition to  
20 the historic preservation concerns, in addition to the  
21 preservation and respect for the Church Street garage existing  
22 portion of the building, coupled with the water table you're  
23 looking at, at a nice deck scene combination of circumstances  
24 that I think lend credence to the practical difficulty aspect of  
25 the variance test.

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1                   And once again, I would probably like to highlight  
2                   the support of the community and the testimony that we heard to a  
3                   positive extent regarding the willingness of the developer and  
4                   the applicant to work with the community to address concerns.

5                   CHAIRPERSON GRIFFIS:   Great, thank you very much,  
6                   Mr. Etherly.   And I think that is very pertinent.   Any other  
7                   discussion on the motion?   Then I would ask for all those in  
8                   favor signify by saying "Aye".

9                   (Aye)

10                  CHAIRPERSON GRIFFIS:   And opposed.   I do thank you  
11                  all very much and I would ask staff to record the vote.

12                  MS. BAILEY:   The vote is recorded as four, zero,  
13                  one to approve the application.   Mr. Griffis' motion, Ms. Mitten  
14                  second, Mr. Levy and Mr. Etherly in support.   Ms. Renshaw not  
15                  voting and that's for application number 16841 and 16848.

16                  Mr. Chairman, there were a couple of submissions.

17                  CHAIRPERSON GRIFFIS:   Yes, indeed, let's go through  
18                  that.

19                  MS. BAILEY:   Okay, the Board asked for a copy of  
20                  the demographic survey that the applicant used to poll consumers  
21                  and also the copy of the results of that survey.   Revised plans  
22                  are to be submitted into the record and Mr. Chairman, I'm not  
23                  sure if a copy of the model, a photograph of the model is in the  
24                  record.

25                  CHAIRPERSON GRIFFIS:   Actually, we want the

1 original. Oh, no, that's a joke for the record, just in case  
2 that's misinterpreted. I think, yeah, a photograph of the model.

3 MR. DePUY: We have those. We brought those.

4 CHAIRPERSON GRIFFIS: I think that would be very  
5 pertinent for the file.

6 MS. BAILEY: Are we still asking for an amended  
7 report from the Office of Planning, Mr. Chairman?

8 CHAIRPERSON GRIFFIS: Indeed, yes.

9 MS. BAILEY: And the last thing is the findings of  
10 fact and I'm assuming, Mr. Chairman, when the findings of fact  
11 come in, you'd like to review that before the order is issued.

12 CHAIRPERSON GRIFFIS: Correct. Mr. DePuy, do you  
13 have any problem submitting findings of facts?

14 MR. DePUY: Not at all.

15 CHAIRPERSON GRIFFIS: Okay. Great, Board members,  
16 that's everyone's recollection? I think that was sufficient.  
17 Thank you much, Ms. Bailey and I thank you all for being here and  
18 taking the time to do this. And frankly, I appreciate the amount  
19 of information and the articulation of the issues and the views.

20 I think it helps facilitate, frankly, what could have been a  
21 very complex and cumbersome process, which was not. So with  
22 that, I will adjourn the morning session on the 19th of March  
23 2002 and wish you all a good lunch.

24 (Whereupon, at 12:24 p.m., a luncheon recess was  
25 taken.

1  
2  
3  
4  
5  
6  
7

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

2 (1:47 p.m.)

3 CHAIRPERSON GRIFFIS: Okay, good afternoon, ladies  
4 and gentlemen. Forgive the delay. We did have some business to  
5 conduct over our brief lunch break and I do want to greet you all  
6 and say good afternoon. We have -- let me just clarify what's  
7 happening in the afternoon.

8 This is the afternoon session of the 19 March 2002  
9 and I will call it to order. The first case we do have a civil  
10 infraction which we will be proceeding with and the second case  
11 in the afternoon is going to be the application. So we're going  
12 to have obviously, different procedures, so I'm only going to  
13 delve into the civil infractions at this point. So, the first  
14 case is to hear appeals from orders of Hearing Examiner's issued  
15 pursuant to the Civil Infraction Act involving violations of the  
16 zoning laws and --

17 A VOICE: (Inaudible)

18 CHAIRPERSON GRIFFIS: No, it is absolutely not. In  
19 fact, it's not appropriate to interrupt my when I'm doing my  
20 opening, because one, it's very pertinent and critical, the  
21 information that I give, although it may not be constantly smooth  
22 and eloquent. It is important for everyone's understandings of  
23 procedures and decorum in the hearing room.

24 And let me just take this opportunity to say as I  
25 do in the general opening, but I would ask that everyone turn off

1 their cell phones and beepers at this time so that we don't  
2 interrupt. I also, as is the regulations and as is expected by  
3 this Board, we will not have any sort of activities or outbursts  
4 that will distract the Board with its proceedings. I will get to  
5 everything, I am almost assured of because we have such able  
6 staff and able Board members.

7 So if there is a case, in fact, where we are not  
8 addressing something that needs to be pertinently addressed, well  
9 then, it would be appropriate to come and address the Board.  
10 However, I think that I will be able to accomplish and get  
11 everyone's concerns. Before we go much further, I should  
12 probably introduce myself as Geoff Griffis, Chairman of the  
13 Board.

14 With me today also is Mr. Curtis Etherly, also Mr.  
15 Levy, representing the National Capital Planning Commission and  
16 Mr. Carol Mitten, who is representing the Zoning Commission  
17 today.

18 As I stated, we have one appeal on today's agenda.  
19 Each party will have 30 minutes to present their argument.  
20 Questions posed by the Board and your responses thereto count  
21 against your time. You may refer to any evidence or statement --  
22 rather in civil infractions and this is very pertinent, so I will  
23 get it correctly done. You may not refer to any evidence or  
24 statement that is not in the record.

25 The appellant may reserve a portion of its time for

1 rebuttal argument and I think at this time we can call the first  
2 case, the civil infraction case and I believe Mr. Batista is  
3 going to do that.

4 MR. BATISTA: I'll be glad to do that, Mr.  
5 Chairman. You have the first case, a civil infraction case of  
6 the afternoon is BZA Case 00-0001, which is 99-OAD-1821E, which  
7 is related to -- is a case called Kuri Brothers, v. the  
8 Department of Consumer and Regulatory Affairs. Kuri Brothers is  
9 represented by the law firm of Schmidt and the Department of  
10 Consumer and Regulatory Affairs is represented by Counselor Green  
11 and that is the case, civil infraction case for this afternoon.  
12 Thank you.

13 CHAIRPERSON GRIFFIS: Okay, can I have the Kuri  
14 Brother representative or whoever is representing them to the  
15 table and also the government representation? Actually, if you  
16 would both just sit and introduce yourselves for me so that I can  
17 get this all straight. Actually, you just need to turn on your  
18 mike when you speak.

19 MR. DAMARI: Tamir Damari for the appellant.

20 MR. GREEN: My name is Matthew Green, Jr. for the  
21 government.

22 CHAIRPERSON GRIFFIS: At this time I'm going to ask  
23 either of you whether you have any procedural matters that we  
24 need to address.

25 MR. DAMARI: There's only one.

1 CHAIRPERSON GRIFFIS: You don't need to stand when  
2 you talk, plus we can't hear you on the mike.

3 MR. DAMARI: There's only one procedural matter. I  
4 understand that there's been a petition or a request to intervene  
5 on the part of Charles E. Smith Residential Management Company.  
6 That request was faxed to my office at approximately 4:15 p.m. I  
7 believe it was on Friday afternoon. Kuri Brothers would object  
8 on numerous grounds to Charles E. Smith's participation in this  
9 hearing.

10 Firstly --

11 CHAIRPERSON GRIFFIS: Okay, let's not go totally  
12 into that and let me -- I've heard you, so you want to speak to  
13 that obviously, as an objection. Mr. Green, did you have any  
14 preliminary matters or procedural matters?

15 MR. GREEN: No, I do not, Mr. Chairman.

16 CHAIRPERSON GRIFFIS: Okay. Then I say that Mr.  
17 Damari --

18 MR. DAMARI: Correct.

19 CHAIRPERSON GRIFFIS: -- okay, Mr. Damari, because  
20 I think it brings up the larger issue that we actually have three  
21 requests for intervenor status in this if all of my notes are  
22 correct, and let me just address them now.

23 We have Charles E. Smith as stated. We have ANC 3-  
24 F and --

25 MS. MITTEN: And we have Van Ness --

1 CHAIRPERSON GRIFFIS: Van Ness, right.

2 MS. MITTEN: -- Tenants Association.

3 CHAIRPERSON GRIFFIS: Is it south or street, Van  
4 Ness Street?

5 MS. MITTEN: South, Van Ness South Tenants  
6 Association.

7 CHAIRPERSON GRIFFIS: Okay, very good, and I think  
8 -- let me speak to all of the intervenors at this point.  
9 Obviously, well, these civil infractions cases are unique outside  
10 of applications for a variance, special exceptions or appeals and  
11 the -- obviously, what we're here today is to hear discussion on  
12 the briefings that were -- or participate in oral discussion on  
13 the briefings that were submitted to the case.

14 Those briefings are and we, as I stated, are not  
15 hearing any new evidence. I think a pertinent point is that as  
16 opposed to applications that we would hear pertaining to  
17 permitting issues, whether it be special exception variance or  
18 appeals, we don't look to impact in a civil infraction case. We  
19 don't look to, as I say, impact of adjoining or impact to the  
20 community or anything else. We have a very refined, very focused  
21 point that we need to address and that is looking at the civil  
22 infraction and whether it is to be upheld or not.

23 Therefore, we are in a reviewing of the punitive  
24 action. It's a punishment and we need to figure out whether that  
25 is upheld, the punishment obviously being the fine or whether it

1 is not. Therefore, I would -- it seems to me logical and wise  
2 that we do not entertain intervenors in this case and hear the  
3 oral argument of the appellant and appellee that is put before us  
4 today and that have submitted the briefs into record at this  
5 time.

6 Obviously, as also stated but to reiterate, any  
7 oral arguments today are going to be based on those briefs and  
8 that consists of the record in this case. I would hear from  
9 other Board members.

10 MS. MITTEN: Mr. Chairman, I would -- I agree with  
11 your statement and I would move that we deny the request for  
12 intervenor status from the three parties that you articulated and  
13 just to reinforce your point, each of those parties in making  
14 their request, talked about how they would be aggrieved and as  
15 you said, that's not relevant to the proceeding before the BZA  
16 today. So I would move denial of the request.

17 CHAIRPERSON GRIFFIS: Is there a second?

18 VOICE: Mr. Chairman, may we be heard in favor of  
19 our request on the procedural issue that your Honor raised?

20 CHAIRPERSON GRIFFIS: Okay, what I'd like to do is  
21 we have a motion, I'm sorry, was it seconded?

22 MEMBER ETHERLY: Seconded, Mr. Chair.

23 CHAIRPERSON GRIFFIS: Okay, and what I'm going to  
24 do is table the motion that's been seconded at this point. I'm  
25 going to ask those that had requested intervenor, I'm going to

1 ask you to come up and be very brief and speak to it, and  
2 gentlemen, I'm sorry, but I'm going to ask you to sit back down  
3 and give the table to them. And I will hold it to frankly, two  
4 minutes each. Within that parameter, I think we can have it  
5 addressed. So, again, we'll start with --

6 MR. BARDIN: Chairman Griffis --

7 CHAIRPERSON GRIFFIS: Yes.

8 MR. BARDIN: -- I am David J. Bardin, the Secretary  
9 of ANC-3-F. I am accompanying Commissioner Karen Perry, who was  
10 designated unanimously by our Commission to appear before you.  
11 On the voice mail of our Commission, we got work from Mr. Bastida  
12 on behalf of this organization, a first message that we were not  
13 allowed to appear and then a second message correcting himself.

14 He said he had misinterpreted the regulations they  
15 came under, we were party status. ANC-3-F has been a party in  
16 these proceedings for three iterations and Commissioner Perry's  
17 statement wishes to provide you with information about the  
18 history, the precedence, the record, the decisions of this Board,  
19 when most of you, I guess all of you, were not members before and  
20 the decisions of the government of the District of Columbia and  
21 its unsuccessful efforts to enforce the law over 13 years.

22 We think that's highly pertinent. If for any  
23 reason you deny us the right, which we believe the law entitles  
24 us to have our Commissioner appear, we ask that you receive the  
25 document that she's prepared, her testimony in the record as an

1 offer, a proffer to you so that if this case goes on appeal or  
2 reconsideration to the Zoning Commission, to the courts, wherever  
3 it goes, we may preserve our rights and raise those issues. I  
4 thank you very much.

5 CHAIRPERSON GRIFFIS: Okay, thank you and a quick  
6 question; have you reviewed what you're proposing to submit, the  
7 written testimony?

8 MR. BARDIN: Commissioner Perry is here and she has  
9 a one to two and a half page statement that she's ready to submit  
10 with attachments.

11 CHAIRPERSON GRIFFIS: I see, then I can ask her  
12 direct because it's directly to that. I mean, is your testimony  
13 going to the submitted briefs? Could you call it a briefing of  
14 what we have on the record?

15 COMMISSIONER PERRY: I have not read your whole  
16 record. I did read the adjudicating Law Judge's decision and I  
17 clarified what he's put in his order. He's referred to some of  
18 the documents that I've expanded on.

19 CHAIRPERSON GRIFFIS: Right, but you also -- am I  
20 making myself clear in -- I'm not a lawyer so I have trouble with  
21 a lot of this legal stuff.

22 COMMISSIONER PERRY: Join the club. That's why I  
23 prayed David showed up today. They forced me to do this.

24 CHAIRPERSON GRIFFIS: But this issue -- I mean, the  
25 issue with the civil infraction is that we have a very narrow

1 scope. You understand that.

2 COMMISSIONER PERRY: I do.

3 CHAIRPERSON GRIFFIS: And even though -- well, with  
4 everything that this Board does, we have a defined jurisdiction,  
5 a civil infraction is even more narrow than others and so my  
6 concern is that we go very far afield, that will actually have no  
7 pertinence or relevancy to what we're charged to do today. So I  
8 would ask you whether your -- would you surmise that your written  
9 statement actually goes to the briefs that were submitted today.

10 MR. BARDIN: Well, can I answer that, Mr. Chairman?

11 CHAIRPERSON GRIFFIS: Yeah.

12 MR. BARDIN: The written statement does not go far  
13 afield. I have read the written statement and it addresses the  
14 previous decisions of this Board with regard to this location and  
15 these infractions and the failure to live up to the law and to  
16 the orders of the government bodies. So it's highly pertinent.  
17 I think as those of us who are lawyers here, you think of more is  
18 it arguing the precedence and the law of the case than going  
19 afield on impact on the neighborhood and whatnot, which is what  
20 you normally have.

21 We do understand that this is a narrow function  
22 you're performing, but frankly, it's a scandalous case and it  
23 would -- you've got to understand that and when honest business  
24 people in our community abide by the law, come to the government,  
25 including this Board for special exceptions and one person

1 doesn't, whether it's the landlord or the tenant, something is  
2 going to happen.

3 CHAIRPERSON GRIFFIS: Okay, and I appreciate that  
4 and actually that's a perfect example of we're all of a sudden  
5 going off of what we're actually charged because this isn't a  
6 special exception. But I hear your point. I would be inclined,  
7 actually to accept the written statement at this point as a  
8 proffer and it will be part of the record for our decision making  
9 --

10 MS. MITTEN: Mr. Chairman --

11 CHAIRPERSON GRIFFIS: Yeah.

12 MS. MITTEN: -- before you finish your sentence, if  
13 I may interrupt --

14 CHAIRPERSON GRIFFIS: Uh-huh.

15 MS. MITTEN: -- my concern is, as Mr. Bardin has  
16 represented, I'm very -- we have an extremely narrow scope for  
17 this proceeding and I know that none of the folks that would be  
18 intervenors want to jeopardize the propriety of this proceeding  
19 in any way, Mr. Bardin has represented to us that the statement  
20 that Ms. Perry would provide to us addresses previous decisions  
21 of this Board, completely irrelevant.

22 Whatever characterizations there are of the  
23 ongoing, longstanding issues related to this property are  
24 irrelevant. It's all related to one notice, on specific notice  
25 of infraction and whether or not the Administrative Law Judge's

1 decision is proper. So I would urge the Board not to do -- not  
2 to accept -- not to accept the statement of the ANC because my  
3 concern is that it is outside the scope of this proceeding and  
4 that it may be considered prejudicial to the appellant. Thank  
5 you.

6 CHAIRPERSON GRIFFIS: Good. Thank you, Ms. Mitten.

7 I think that does clarify something and I think what we can, in  
8 fact do and I can be corrected, but we can allow it as a proffer  
9 which essentially preserves the rights to -- for the -- in front  
10 of the Court of Appeals. It would not go to the record and would  
11 not be part of the BZA decision making.

12 MS. MITTEN: Thanks.

13 CHAIRPERSON GRIFFIS: Uh-huh. No, thank you for  
14 that clarification. So --

15 COMMISSIONER PERRY: Mr. Griffis --

16 CHAIRPERSON GRIFFIS: Yes.

17 COMMISSIONER PERRY: I'm not a lawyer either. I'd  
18 just like to ask one question. In the Adjudicating Law Judge's  
19 decision on this civil infraction case and on this citation, it  
20 does refer to in his conclusions to your previous BZA order and  
21 to the longstanding --

22 CHAIRPERSON GRIFFIS: Right, that's understood,  
23 right.

24 COMMISSIONER PERRY: That's all my statement  
25 addresses is those longstanding order.

1 CHAIRPERSON GRIFFIS: I think if I would gather  
2 Board members tell me differently, but I think we have a  
3 consensus to take this in as a proffer.

4 We can hear from Mr. Damari.

5 MR. DAMARI: Briefly --

6 CHAIRPERSON GRIFFIS: You're going to need to come  
7 to the table and be on the mike, I'm sorry. I should also state  
8 and the only reason why I do that, we can obviously hear you.  
9 These proceedings are taped for the record, so the only way you  
10 get on the tape is if you're on the mike.

11 MR. DAMARI: Briefly, I'm a little bit confused as  
12 to the effects, legally and I guess from a common sense  
13 perspective, of this statement which I have yet to see, I have  
14 not seen one word of this statement, which is obviously hearsay.  
15 It will not be subject to cross examination.

16 I don't understand the legal or practical  
17 significance of proffering it and obviously subjecting it to the  
18 review of the Board and perhaps coloring the Board's decision  
19 when, in fact, the procedures of this very Board appear to me at  
20 least on my reading of the regulations have been clouded in this  
21 case. There are time periods for intervenors such as ANCs and  
22 other intervenors to enter their appearance in a case, to do  
23 things like that.

24 And we're really being deprived -- we're really  
25 being deprived of our due process here in my opinion because,

1 again, I will have no opportunity to review this.

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. DAMARI: Et cetera.

4 CHAIRPERSON GRIFFIS: All right. Hold on one  
5 second. Let's just take it one at a time and perhaps that will  
6 help me.

7 MEMBER ETHERLY: Mr. Chair, just -- I mean, I'm  
8 somewhat persuaded by Mr. Damari's comments. And I'm kind of  
9 betwixt and between here. Maybe it's helpful to reiterate as the  
10 Board works through this, that we are somewhat beholden to a  
11 different set of procedural standards in this type of format and  
12 perhaps our challenge is the fact that those standards aren't  
13 necessarily very clear, but what is clear is that we don't  
14 necessarily have the same criteria to review when it comes to the  
15 issue of party status as we would in a more traditional hearing  
16 or public meeting setting.

17 So I think that's what we're grappling with and  
18 that's more of a statement for our audience as well as food for  
19 thought for my colleagues but that being said, it would be  
20 perhaps, useful to get some clarification on what the effect of a  
21 proffer would have with respect to our deliberations. Is that  
22 something that then would be taken under consideration because I  
23 am concerned about not having the opportunity for cross  
24 examination or some other type of assessment by the parties in  
25 this case to any submission like that.

1 CHAIRPERSON GRIFFIS: And you're directing that  
2 question to corporation counsel?

3 MEMBER ETHERLY: That would be correct, Mr. Chair,  
4 and then of course, I think this raises the issue of if we do it  
5 for one potential intervenor, then we're also looking at a  
6 similar scenario for the other request, because if I understand  
7 we have two --

8 CHAIRPERSON GRIFFIS: We have three total.

9 MEMBER ETHERLY: -- three total requests, so --

10 CHAIRPERSON GRIFFIS: Well, I think we'll take them  
11 individually. I think the ANC, obviously, is in a different  
12 position than others might be, but let us hear.

13 MEMBER ETHERLY: And I would agree, Mr. Chairman,  
14 there definitely is a desire here to give some voice here to the  
15 ANC being elected representatives of the community and residents.  
16 Thank you, Mr. Chair.

17 MS. SANSONE: Mr. Chairman, the proffer of  
18 evidence, which is what the ANC has requested the ability to do,  
19 would be that they would put forward the statement simply to  
20 preserve their rights in the -- or to preserve their position in  
21 the event that any of the parties that are -- to this proceeding  
22 that are capable of bringing an appeal could then, if they wish  
23 to claim that not allowing the ANC to participate was error, that  
24 proffer would go to that issue on appeal.

25 But as I understand it, it would not be part of the

1 Board's decision, the Board would not take it into account in  
2 deciding the issues in this case. It would be simply there to  
3 flag the item for any potential future appeals on this issue and  
4 that it would not be part of the Board's deliberations or part of  
5 its decision and that, of course, recognizes that their proffer  
6 is not being subject to cross examination or other rights that  
7 DCRA and the appellant would have in this case.

8 CHAIRPERSON GRIFFIS: Okay, so you don't think it  
9 would be prejudicial and as you say, won't go into the record for  
10 our decision making.

11 MS. SANSONE: That is correct, it would not be part  
12 of the record of the Board's decision. Although it would be  
13 contained within the files --

14 CHAIRPERSON GRIFFIS: Right.

15 MS. SANSONE: -- we would have to flag it as not  
16 being part of the record for the decision.

17 CHAIRPERSON GRIFFIS: Okay, do any Board members  
18 have questions as to what's being --

19 MEMBER ETHERLY: With that explanation, Mr.  
20 Chairman, I would be prepared to support a proffer of the ANC's  
21 statement to preserve any rights that they may desire to maintain  
22 for appeal.

23 CHAIRPERSON GRIFFIS: Okay, does anyone have an  
24 objection to that? I would take that as a consensus then, that  
25 we do take in and my understanding is it's a two-page written

1 testimony as a proffer.

2 MR. BARDIN: It's two and a half, three pages --

3 COMMISSIONER PERRY: And there's lot of  
4 attachments.

5 MR. BARDIN: -- and documents attached. The  
6 decision of this Board is --

7 CHAIRPERSON GRIFFIS: Okay, so we'll call it the  
8 ANC document.

9 MR. BARDIN: The testimony of Karen Perry -- I'm  
10 sorry, I turned it off here. The testimony of Karen Perry, ANC-  
11 3-F is I think a good description of the document. To whom  
12 should I give the --

13 COMMISSIONER PERRY: And do you want one or five?

14 MR. BARDIN: I don't think they want five.

15 CHAIRPERSON GRIFFIS: I think just one if fine, if  
16 you want to give it to the staff member, that would be a  
17 tremendous help.

18 MEMBER ETHERLY: Mr. Chairman, just for  
19 clarification sake, not to beat a dead horse on this but the  
20 March 5th submission that we do have from ANC-3-F, which includes  
21 a resolution that was adopted in a February 19th vote does  
22 designate or refer to Commissioner Perry as being authorized to  
23 speak on behalf of the ANC, so, you know, it may be worth just  
24 clarifying that.

25 CHAIRPERSON GRIFFIS: Good, thank you.

1 MEMBER ETHERLY: Thank you.

2 CHAIRPERSON GRIFFIS: Okay, next do we want to hear  
3 from the Van Ness South Tenants Association?

4 VOICE: Go ahead, I would rather --

5 CHAIRPERSON GRIFFIS: You would?

6 VOICE: Yeah, combine the two, okay?

7 CHAIRPERSON GRIFFIS: Okay,

8 MR. BROWN: I can handle both Van Ness South and  
9 Charles E. Smith Residential. In the past, I have represented --

10 MS. MITTEN: Would you just identify yourself?

11 CHAIRPERSON GRIFFIS: Oh, yeah.

12 MR. BROWN: Patrick Brown, from Greenstein, Deloram  
13 and Lux. I am here today on behalf of Charles E. Smith  
14 Residential which owns Van Ness South apartment buildings as well  
15 as the consulate on Van Ness and I have on previous occasions but  
16 I'm not today, representing Van Ness South.

17 An important part if you read the Administrative  
18 Law Judge's decision, which is before you today for review, the  
19 history, both procedural and substantive of this case is critical  
20 and he lays it out in his order in a fairly effective way, but  
21 references this Board's decision when this matter was once before  
22 it on a similar appeal.

23 And if you look to that decision coming out in  
24 1998, the Board under the same procedures, represented or allowed  
25 Van Ness South Tenants Association to intervene, allowed the ANC-

1 3-F to intervene and allowed the predecessor of Charles E. Smith  
2 Residential, the current owner of those properties, to intervene.

3 So again, history is important in this case when we're  
4 considering the uses of this property, the ALJ's most recent  
5 decision and also the Board's procedure who they accepted to  
6 intervene under rules that were the same as they are four years  
7 later here today.

8 So I think it would turn the process on its head to  
9 all of a sudden start limiting the rights of intervention that  
10 existed when this exact same case absent the change of the name  
11 of who was operating it and the name on the C of O comes before  
12 you once again. There's a need for certain consistency  
13 recognizing that the Board's commission is to review the ALJ's  
14 decision and determine whether that is supported by substantial  
15 evidence.

16 We're not having fact-finding. We're not doing  
17 anything other than reviewing the ALJ's decision. But previously  
18 all of these people participated effectively when the Board was  
19 faced with the exact same challenge when we did this previously.

20 CHAIRPERSON GRIFFIS: Right. Okay, well, I  
21 appreciate that and one, I think we have a bit of a difficulty  
22 which is why this is taking some time and the quandary of the  
23 Board because our regulations are thin, let us say, regarding the  
24 civil infractions procedures. You bring up an interesting point  
25 of history and this happened all before and we should do it all

1 again the same way.

2           However, the reverse argument can be made that  
3 because we're here again, maybe we didn't do it right the first  
4 time and maybe it's time to change but that's just perhaps an  
5 answer to your argument, but not necessarily of the most  
6 substantive nature.

7           MR. BROWN: Well, if I can answer that because I  
8 think it is important because you want to do the right thing both  
9 procedurally and substantively. And the best I can tell, the  
10 Board did the right thing. Your decision previously wasn't  
11 challenged. It didn't go to the Court of Appeals, it wasn't sent  
12 back and, in fact, became the law of the land.

13           The owner chose to basically take another course on  
14 that, and that's why we're back here today. But I don't think  
15 that there was any infirmity that I can tell in your original  
16 procedure.

17           CHAIRPERSON GRIFFIS: Okay, let me ask you a quick  
18 question just in terms of intervenor status that you're  
19 requesting. How is it that you -- what is it that you will  
20 represent that we will not be -- and I don't want to go into  
21 substance, give me general points of how it is that what is going  
22 to be given today in oral testimony on these briefs is not --  
23 would not be inclusive of what you need to present and how does  
24 that presentation go to what we actually need to do today?

25           MR. BROWN: And I'll speak for Charles E. Smith

1 Residential, as the property owner involved in the process, again  
2 over a longer term period of time, it brings and through me,  
3 brings a different set of focus, skills, than perhaps even the  
4 government does. I've been involved in this case, quite frankly,  
5 for several years and while I was only asked to get involved in  
6 the last minute by Charles E. Smith here today, I have a  
7 background that is equal to or exceeds that of Mr. Green through  
8 no fault of his own, just by virtue of the experience and the  
9 experience of Charles E. Smith Residential and also I've had the  
10 opportunity to be involved in predecessors to that organization.

11 So I think we bring a broader focus, a clearer  
12 focus on zoning issues. Mr. Green doesn't spend his life dealing  
13 in zoning issues the way I do. Again, not taking away from him,  
14 he did quite well --

15 CHAIRPERSON GRIFFIS: But isn't it his case to  
16 make? I mean, he could have hired a consultant if he felt  
17 lacking in one way or the other.

18 MR. BROWN: Who, Mr. Green?

19 CHAIRPERSON GRIFFIS: Yes, I mean, what I'm  
20 concerned about is here we are now going to create an imbalance  
21 perhaps. I mean, if you bring all this great expertise, I'm not  
22 sure why Mr. Green couldn't find that and have the resources  
23 available to him to make that case as opposed to -- and I speak  
24 generically but you brought up Mr. Green, but on either side, we  
25 could have that all of a sudden.

1                   When do we begin and when do we stop weighing in on  
2 the two different sides when it seems to be fairly focused to me  
3 that we have two briefings that are done that we will hear oral  
4 testimony on today. And that's what we're charged with but hold  
5 on a second because I have a hand raised. I want to get your  
6 comments Mr. --

7                   MR. DAMARI: Damari.

8                   CHAIRPERSON GRIFFIS: -- Damari, I don't know why I  
9 have trouble with the name today but --

10                  MR. DAMARI: That's quite all right, sir. Again  
11 this matter -- the representation has been made that this matter  
12 has been pending for years and these individuals have been aware  
13 of this matter for years, 12 years.

14                  CHAIRPERSON GRIFFIS: Thirteen actually, to be  
15 correct.

16                  MR. DAMARI: My question is, where were they?  
17 Where were they? Briefs were submitted in this case a year ago,  
18 a year ago, and now on Friday afternoon, again, we get --  
19 frankly, I've only received one request for intervenor status,  
20 from Charles E. Smith. We get a request of dubious relevance as  
21 I think the Board recognizes, and somehow I'm supposed to respond  
22 to that.

23                  And frankly, you know, there are procedures here,  
24 3106 which Mr. Brown cites to in terms of providing him with  
25 intervenor status, says that, "An entity other than a party or

1 ANC shall give no less than 14 days notice". Now, if I'm reading  
2 that rule correctly, that's the rule he cites in order to give  
3 him status at this hearing.

4 And ANC, from my reading of the regulations, is  
5 supposed to give seven days notice. Where was the notice? There  
6 hasn't even been a request to show good cause or any explanation.

7 CHAIRPERSON GRIFFIS: Okay. Hold on a second here.

8 Let me make one quick clarification, because I know there has  
9 been some comments and what Mr. Damari has just indicated, his  
10 concern that this has been going on for a long time but I want to  
11 be clear that this is, in fact, a new case for this Board before  
12 us today. But Mr. Etherly, I think, may have an idea on how we  
13 might move along on this.

14 MEMBER ETHERLY: Mr. Chair, it's just a humble  
15 suggestion but I'm trying to work through this, one, with a  
16 little bit of my own legal background being sensitive to the need  
17 to insure that parties that have a history in this case have some  
18 opportunity to weigh in here. I don't want anyone to think that  
19 this Board, if I may be so bold as to say it, is not insensitive  
20 to that history.

21 Perhaps a suggestion may be we've gone the proffer  
22 route with the Advisory Neighborhood Commission and I want to be  
23 sure we maintain a distinction. ANCs have a very special place  
24 in the proceedings before the Board, that all of us are familiar  
25 with and want to contain a respect but perhaps a compromise might

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1 be to look towards providing an opportunity for the remaining two  
2 intervenors to proffer some written statement, some written  
3 testimony that would be handled in the same way as the ANC would  
4 be made a part of the record to help preserve any subsequent  
5 rights that they would like to protect from an appeals standpoint  
6 but doesn't at the same time unduly prejudice, if you will, or  
7 compromise the ability of the appellants in this case to protect  
8 their own interest.

9 That might be a compromise. I'd like to, of  
10 course, you know, hear some comment from the appellant in that  
11 regard and if the District has any comment, but that might be one  
12 suggestion, Mr. Chairman.

13 CHAIRPERSON GRIFFIS: Thank you, Mr. Etherly, that  
14 is well said.

15 MEMBER ETHERLY: And it might also be useful, of  
16 course, to get some feedback from corporation counsel  
17 representative to the Board as to whether or not that would be an  
18 appropriate step to take as well.

19 CHAIRPERSON GRIFFIS: Good, let's hear from Mr.  
20 Damari and Mr. Green and then we'll go to corporation counsel.

21 MR. DAMARI: I understand that this Board proceeds  
22 on a somewhat less formal level than let's say a Federal Court or  
23 Superior Court. My concern with the initial proffer which is now  
24 even greater now that this second suggestion for a proffer has  
25 been made is, either something -- you can't split the baby in my

1 opinion on something like this. It's like any other -- you know,  
2 it's like you have -- it's like an attorney asking a witness on  
3 the stand an inappropriate question, the inappropriate answer is  
4 given.

5 Well, you can move to strike the answer, but the  
6 answer has already been said and heard. I don't think you can  
7 strike -- I don't think you can split the baby on this. Once  
8 it's submitted, it appears to me just to be human nature that to  
9 some degree, it's going to be considered. Now, if the rights --  
10 and moreover, if this board will tell me that it's not going to  
11 be considered, that's fine with me but then it doesn't really  
12 protect their rights because it hasn't been considered. It just  
13 seems to me to be logically doesn't seem to work to me.

14 CHAIRPERSON GRIFFIS: I understand your concern.  
15 Mr. Green, did you have any comments on it?

16 MR. GREEN: Thank you, Mr. Chairman, members of the  
17 Board. I would direct your attention to my brief, I guess the  
18 third page, fourth paragraph and I go into a brief statement and  
19 I say that the purpose of the zoning regulations is to insure the  
20 protection of the health, welfare and safety of the public by  
21 bringing order to the location of businesses and residential  
22 dwellings.

23 It would appear to me that those most effected by  
24 this ought to be given the opportunity to be heard whether it's  
25 in writing or whether it is orally because before you make a

1 decision, you must remember what Phamestocleas (phonetic) said to  
2 Europhitis (phonetic), "Strike, strike, but first hear me".  
3 Thank you, Mr. Chairman.

4 CHAIRPERSON GRIFFIS: Thank you.

5 MR. BARDIN: Mr. Chairman?

6 CHAIRPERSON GRIFFIS: Hold on a second. I want to  
7 hear from corporation counsel.

8 MR. BARDIN: I'm sorry.

9 MS. SANSONE: Mr. Chairman, we're at a very awkward  
10 position here because the Board has not yet adopted rules  
11 governing civil infraction appeals so there are no, per se, rules  
12 to govern this. However, it's very clear that a civil infraction  
13 appeal is a different type of legal proceeding from a variance  
14 case or an application case or even an appeal of Zoning  
15 Administrator's decision. And in those types of proceedings,  
16 it's customary, of course, for the Board to hear -- to allow  
17 people to intervene and in the variance and special exception  
18 context, of course, to hear comments from the public at large.

19 But in this case, the Board is simply being asked  
20 pursuant to the Civil Infractions Act, to review a written  
21 decision of the Administrative Law Judge to determine whether it  
22 was in accordance with procedures required by law and whether, in  
23 fact, the decision is supported by substantial evidence. And  
24 therefore, testimony regarding the impact of the decision or the  
25 effects on the community while, I'm sure is extremely important

1 to those involved and should not be diminished in that regard,  
2 it's not part of the Board's responsibility and jurisdiction in  
3 this case.

4 The Board is here to decide whether the ALJ  
5 properly determined that there had been an infraction such that a  
6 penalty could be assessed against a respondent and there's two  
7 parties in a case like that. One is DCRA and one is the  
8 respondent, who is now the appellant here. They're the parties  
9 that have an interest in arguing about whether or not an error  
10 has been made. A briefing order was sent out a long time ago by  
11 this Board and briefs were submitted. The case is fully briefed  
12 and the purpose of the oral argument today is just to hear  
13 arguments concerning those briefs and the issues raised in them.

14 It's not to obtain additional evidence or  
15 additional hearing, additional facts or background or history  
16 about the case. It's simply to hear arguments on the issues in  
17 those briefs. Now, if the Board things that additional argument  
18 from any of the parties that would like to be intervenors would  
19 be helpful, what it would entail to be fair to the appellant and  
20 to DCRA would be to probably reset the briefing schedule and  
21 allow the briefing to occur and responses.

22 So at this late date, it's problematic to be  
23 accepting new information into the record, new arguments into the  
24 record and it certainly would be prejudicial to the parties to  
25 have information or arguments made about things that are not

1 relevant to the question of whether there's been an error in the  
2 ALJ's decision. However, the Board -- in light of the fact that  
3 we don't have rules, it's a very troublesome issue for the Board  
4 that the Board will have to resolve.

5 CHAIRPERSON GRIFFIS: Thank you.

6 MR. BROWN: Mr. Chairman, can I try to draw an  
7 analogy that might be helpful.

8 CHAIRPERSON GRIFFIS: A brief one.

9 MR. BROWN: Yes. When this Board makes a decision  
10 in a typical case, an appeal, application, or special exception  
11 or variance, your decision is reviewed by the Court of Appeals  
12 under a similar standard that you're being asked to impose in  
13 reviewing the lower decision by the Administrative Law Judge. In  
14 that proceeding, in the Court of Appeals, parties are, in fact,  
15 able to intervene other than just the -- you know, the two  
16 combatants in the case. So judging from that standard, there is  
17 room for people to intervene is what is basically you're acting  
18 as the Court of Appeals from the Administrative Law Judge.

19 So there is room -- and that flows from kind of the  
20 process we're in. How you choose to do that certainly in the  
21 Court of Appeals there's briefs and then there is, in fact, and  
22 the moment of truth, oral arguments, where anybody who has  
23 intervened is able to argue as well as having submitted a brief.

24 So I think there's -- by analogous circumstances, it's not  
25 inappropriate to have intervenors other than the actual parties

1 and have them fully participate.

2 CHAIRPERSON GRIFFIS: Okay, I appreciate that and I  
3 think I understand your entire analogy. I mean, I think it would  
4 have been appropriate at the time to have the intervenors submit  
5 briefs on narrow points and that they could have been reviewed.  
6 I think corporation counsel has clearly indicated that at this  
7 late date, it seems to be problematic if not prejudicial for us  
8 to entertain first of all, any sort of oral testimony without the  
9 briefing.

10 It's been indicated that some of the testimony may  
11 be done without, in fact, reading, you know, the entire briefs  
12 this piece. I'm inclined actually to bring back the motion that  
13 has been seconded and ask for an amendment on it, because I  
14 believe the motion was to deny all the intervenor status and I  
15 would ask Ms. Mitten if you wanted to amend that motion at this  
16 time.

17 MS. MITTEN: No, I do not.

18 CHAIRPERSON GRIFFIS: Oh, indeed.

19 MR. BARDIN: Mr. Chairman, I suggested a proffer --

20 CHAIRPERSON GRIFFIS: Right.

21 MR. BARDIN: -- because of the ruling by the Board  
22 which I understand.

23 CHAIRPERSON GRIFFIS: I think that's been decided.

24 MR. BARDIN: But I want it very clear, the Board is  
25 making a fundamental legal error. I want to associate myself

1 with Mr. Brown. I've practiced administrative law all my life  
2 and what you have not distinguished is the issue of standing to  
3 intervene which is one issue. And for that purpose, you have to  
4 say, is he aggrieved, is she aggrieved, does he have standing?  
5 That's basic American administrative law. But that doesn't mean  
6 that when you have been given the right to appear and to  
7 intervene that you may use as the material you present to the  
8 Board or any administrative body the issue which aggrieved you.

9 Aggrievement is a threshold question as to whether  
10 you have standing. Then what you may present depends on the  
11 statute, the law governing the body. In this particular case  
12 that would depend on the civil infractions appeal process that  
13 you're engaged in. And you can easily make a mistake in this and  
14 many other cases if you erroneously interpret the law of  
15 standing, as I heard one member, I think, do say I said something  
16 about aggrievement, that shows we're way off base.

17 No, we have to show aggrievement, in the case of an  
18 ordinary petitioner to intervene in order to cross the threshold.

19 Now, there is one exception under the law in the District and  
20 that's ANCs. ANCs don't have to show aggrievement. The fact  
21 that they are the ANC for the area gives them the right. We're  
22 party as of right and I respect your ruling, I'm going to abide  
23 by it. I'm governed by it, but I do want to register in this  
24 record that the notice that this agency published in the Federal  
25 Register invited petitions to intervene.

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1           It didn't tell us that we're going to have this  
2 kind of ruling. Two explicit, two telephone calls that we got  
3 from your staff, recorded on our voice mail, that's still there,  
4 because I didn't know how to wipe them out, well, one that we  
5 couldn't appear because it was civil infraction; two, "I made a  
6 mistake that's not correct. You are automatically a party".

7           MS. MITTEN: Okay.

8           MR. BARDIN: Now, we did come here seven days in  
9 advance and did everything we --

10          MS. MITTEN: I now have something -- I appreciate  
11 that this has gone on to this point because Mr. Bardin, finally  
12 somebody -- I mean, none of us are lawyers up here except for Mr.  
13 Sansone and Mr. Buffo (phonetic).

14          CHAIRPERSON GRIFFIS: And Mr. Etherly.

15          MS. MITTEN: Oh, sorry, sorry. I now finally  
16 understand the distinction between being aggrieved in order to  
17 gain the intervenor status and then what you're then subsequently  
18 going to say. Now, the problem is that okay, we have  
19 representations about the aggrievement but we don't know what  
20 you're going to say, which is Mr. Damari's point.

21                 So the only way to proceed if we do give intervenor  
22 status, is to issue a new briefing schedule. There's no other  
23 way.

24          CHAIRPERSON GRIFFIS: Right.

25          MS. MITTEN: So I would now like to amend my motion

1 now that the light has dawned and it's all clear to me, which is  
2 that we -- actually, I should just withdraw my motion and start  
3 afresh.

4 CHAIRPERSON GRIFFIS: That's fine.

5 MS. MITTEN: Which is that we grant intervenor  
6 status to the three parties that have requested it based on their  
7 written submissions and their oral representations regarding the  
8 aggrievement but then we also postpone this proceeding and issue  
9 a new briefing schedule.

10 MEMBER ETHERLY: And Mr. Chair, prior to moving to  
11 a second on that, let me just thoroughly muddy the waters a  
12 little bit and this might require some additional feedback from  
13 corporation counsel. Corporation counsel referenced the DCRA  
14 Civil Infractions Act of 1985. Section 2-1803.03 which speaks to  
15 the scope of review regarding appeals seems to be rather clear.  
16 "The reviewing agency shall make a determination of each appeal  
17 on the basis of the record established before the Administrative  
18 Law Judge or attorney examiner", period, first sentence of that  
19 section.

20 That seems to be pretty dispositive language  
21 towards any question of what grounds this body has the authority  
22 to review when looking at this appeal. Where does that leave me  
23 with regard to the direction in which my colleague, Ms. Mitten is  
24 heading towards? I don't know. I mean, once again, perhaps I'm  
25 just thoroughly mucking up the waters here but it almost -- I'm

1 almost led to believe that just to stay far afield of this and if  
2 we see an appeal at some -- you know, in some other venue then,  
3 so be it, but perhaps the cleanest way to deal with this is to  
4 just move forward and deny the intervenor's status request across  
5 the board.

6 MS. MITTEN: Mr. Chairman, if I could speak to the  
7 issue that Mr. Etherly raised which, I think is a very valid  
8 issue but what it does is, that provides direction to these  
9 intervenors as to what they may appropriately present to us in  
10 any briefs that they would want to file and I think we should  
11 emphasize this in granting intervenor status. We recognize their  
12 aggrievement but in their brief and in their subsequent oral  
13 arguments, we're not interested in it. That is outside the scope  
14 of review as you articulated.

15 So Mr. Bardin has shown that there is -- you  
16 consider aggrievement to a certain point and then it's only the  
17 boundaries of the existing record that exist. That's a  
18 distinction that I didn't appreciate prior.

19 CHAIRPERSON GRIFFIS: Ms. Mitten, would you be --  
20 are you anticipating that you'd be giving narrow focus to the  
21 briefings for potential intervenors?

22 MS. MITTEN: Absolutely.

23 CHAIRPERSON GRIFFIS: Okay. All right. Yeah, just  
24 a second.

25 MR. BROWN: Mr. Chair, could I --

1 CHAIRPERSON GRIFFIS: Just a second.

2 MEMBER ETHERLY: Mr. Chair, I apologize for that  
3 sidebar. Perhaps that's a useful point for corporation counsel  
4 to share. What I'm struggling with is -- and I appreciate Mr.  
5 Bardin's point regarding the issue of aggrievement, but I'm not  
6 sure if aggrievement necessarily gets us to where we need to be  
7 in this particular forum, i.e., a civil infractions case.

8 Corporation counsel was sharing with me some  
9 thoughts about perhaps we need to consider that issue of  
10 aggrievement or not consider it.

11 CHAIRPERSON GRIFFIS: Why don't we go to her then -  
12 -

13 MEMBER ETHERLY: Yes.

14 CHAIRPERSON GRIFFIS: -- and see if she can add  
15 additional light to this.

16 MS. SANSONE: Mr. Chairman, I'll try again. I  
17 think we have to step back and understand that the typical appeal  
18 that the Board hears or application, the notion of being  
19 aggrieved, really is important in those cases because there could  
20 be adjacent or nearby property owners that could be aggrieved by  
21 a building permit or a certificate of occupancy and the decision  
22 on that. Under the Civil Infractions Act, the appeal is an  
23 appeal of whether or not the ALJ's decision is without observance  
24 of the procedure required by the Civil Infractions Act and any  
25 other pertinent laws and whether the ALJ's decision is

1 unsupported by a preponderance of evidence on the record and that  
2 the Board's review is based entirely on the record that was  
3 before the ALJ and the ALJ's decision.

4 And what the Board is reviewing is a decision that  
5 found a respondent or a defendant to have violated a law and then  
6 assessed a fine. So the decision does not go to whether there  
7 was an impact on anyone or whether anyone was aggrieved. It's  
8 whether the ALJ has made an error, either procedurally or  
9 substantively. An infraction case is a case about a punishment  
10 or a penalty imposed on someone.

11 The interested parties are the District of Columbia  
12 government represented by DCRA in this case, and then the  
13 respondent or the defendant. In this case the neighbors and the  
14 neighborhood does not have a particularized injury. The case  
15 does not involve a particularized injury to a person. The  
16 Infractions Act is designed to address injuries to the public at  
17 large through the violation of laws and regulations.

18 So therefore, being aggrieved is not the -- should  
19 not be the focus of the Board in a civil infraction appeal. That  
20 issue is relevant to the other types of cases the Board hears.

21 The other problem is that as Ms. Mitten has pointed  
22 out, at this late stage of the case, the case has already been  
23 fully briefed, and the only issue in today's oral argument would  
24 have been to argue the issues raised in those briefs and nothing  
25 else. To recast the appeal at this point basically means going

1 back to square one and issuing a new briefing order or allowing  
2 people to make motions to intervene in deciding those and then  
3 issuing a new briefing order and so that everyone has a fair  
4 opportunity to respond to arguments being made either in favor of  
5 upholding the appeal or against the appeal.

6 So at this late date, a request to intervene would  
7 be very disruptive of the process as well as potentially not --  
8 intervention of a civil infraction case being potentially very  
9 different from policy considerations than in normal appeals.

10 CHAIRPERSON GRIFFIS: Good, thank you very much. I  
11 think that's very clear to me, because if I can interpret it from  
12 my own mind, basically even if we could establish or did  
13 establish an intervenor or party status, we -- there may not be  
14 anything that could be useful to the case because we are hearing  
15 that oral argument that is based on the record at this point.  
16 Ms. Mitten, did you have something else to say?

17 MS. MITTEN: I had a comment and then I have a  
18 question. I just want to -- I want to repeat the distinction  
19 that Ms. Sansone made, which I think is the same distinction  
20 we're hearing but with a slightly different lilt to it. Ms.  
21 Sansone aggrievement is not the focus of the appeal and I agree  
22 with that but aggrievement is a focus of whether or not a party  
23 should be given intervenor status. I think that's the important  
24 distinction that Mr. Bardin led us to.

25 CHAIRPERSON GRIFFIS: Right.

1 MS. MITTEN: My question is, at what point -- and  
2 this is probably a question for Mr. Bastida. At what point was  
3 the public made aware of this proceeding? I mean, was the  
4 briefing schedule published in the DC register so that they knew  
5 a year ago that this was coming and they should have intervened  
6 at that point so they could have been a part of that process or  
7 was it that this hearing today is what was noticed and so they  
8 had relatively less time to participate?

9 MR. BATISTA: The time that it was made -- that the  
10 public at large was made aware of the matter in front of the  
11 Board this afternoon was at the time that the -- it was published  
12 in the Register to everybody, so it was 45 days ago.

13 MS. MITTEN: So the it is notice of this hearing --

14 MR. BATISTA: Correct.

15 MS. MITTEN: -- not the briefing schedule.

16 MR. BATISTA: Correct.

17 MS. MITTEN: Okay, so in part and you know it --

18 MR. BATISTA: That has been traditionally what has  
19 been done on all the civil infraction cases.

20 MS. MITTEN: Okay, and you know, what's clear is  
21 that we don't have procedures in place and some of this is --  
22 we're trying to be fair and we're trying to move the process  
23 along. I think talking about this late date doesn't apply to  
24 the folks requesting intervenor status because it's only been 45  
25 days since they, you know, were aware that this proceeding was

1 going -- you know, that this was an ongoing process.

2 So it's not that they've been sitting on this for a  
3 year or more while the briefings have been prepared. So I would  
4 --

5 CHAIRPERSON GRIFFIS: Well, isn't she making a  
6 second point that even if intervenors status was granted, even if  
7 we rebriefed the entire piece, there would be the question to the  
8 Board of relevancy of any of that information that comes in and  
9 isn't the statement being made that there may not be relevancy to  
10 what is before us today?

11 MS. MITTEN: Well, I think the -- two things. One  
12 is the intervenors, if they manage to get there, the intervenors  
13 will be given very strict instructions about what they are to  
14 brief on and what is not to be the subject of the briefs. And to  
15 say that given those parameters that the intervenors don't have  
16 anything to say that's of relevance to us is to rejudge what they  
17 will say.

18 If you define the box in which they can function,  
19 then I think it's possible and that we will not entertain  
20 anything that's outside the box, like why it's important to them,  
21 you know, that this use be discontinued or whatever it is, I  
22 think with those strict parameters, I think that not to allow  
23 them the opportunity to participate is to prejudge what they will  
24 say.

25 MR. BROWN: Mr. Chairman, could I try to simplify

1 your lives?

2 CHAIRPERSON GRIFFIS: Hold on. Mr. Damari, did you  
3 have something to speak to?

4 MEMBER ETHERLY: And before Mr. Damari speaks, just  
5 so it's clear we're on that, because I know we've been discussing  
6 this for awhile, there's a scope of review that we have very  
7 clearly set out in the DC Code. Our regulations, our rules of  
8 procedure, are silent on the issue of how we treat the question  
9 of intervenor status in a civil infraction forum.

10 I am swayed definitively by our scope of review  
11 which says that it has to be limited to the record, to what was  
12 before the Administrative Law Judge at the time of his or her  
13 decision. That, in my mind, precludes us from entertaining a  
14 question regarding intervenor status. That is where I am at in  
15 that regard.

16 Is this the appropriate forum to make a  
17 determination about what out policy should be going forward on  
18 the issue of intervenor status, I believe that it is not because  
19 I believe to make that determination and to answer these requests  
20 with an eye towards making that determination substantially goes  
21 against our very clear scope of review in this regard. So I  
22 would be inclined to vote against any motion that seeks to grant  
23 in part or in full the request for intervenor status.

24 That is not a statement to the importance or the  
25 significance of what the intervenor -- what the parties were

1 seeking intervenor status would have to say or bring to this  
2 matter. They have a longstanding history and role in this case  
3 and I am not insensitive to that but I believe the scope of  
4 review in the DC Code is very specific about our review being  
5 limited to the record that was before the Administrative Law  
6 Judge.

7 I was potentially swayed by something that my  
8 colleague, Ms. Mitten, was flirting with which was the idea of  
9 potentially allowing briefing that was very explicitly limited to  
10 the record. But I think, once again, that runs a little too  
11 close to the line of our review of this appeal staying --  
12 limited, remaining limited to the record and I think even that  
13 suggestion steps a little over the bounds. So that's where this  
14 particular Board member is and I just wanted to note that before  
15 Mr. Damari made his remarks or before we move further with  
16 discussion regarding the motion. Thank you, Mr. Chair.

17 CHAIRPERSON GRIFFIS: Thanks, Mr. Etherly. Mr.  
18 Damari.

19 MEMBER LEVY: Mr. Chair --

20 CHAIRPERSON GRIFFIS: Yeah, Mr. Levy.

21 MEMBER LEVY: -- I want to agree with Mr. Etherly.

22 I think even if we somehow -- I find it hard to imagine what  
23 could be submitted that would be relevant given the scope of the  
24 review. We're looking at the ruling of the Administrative Law  
25 Judge. I'm having a hard time even imagining what an intervenor

1 might submit that could be relevant within the scope of that. So  
2 I agree with Mr. Etherly.

3 MS. MITTEN: Could I just put a question to Ms.  
4 Sansone, particularly following on what Mr. Levy said which is,  
5 you know, trying to figure out well, what could they possibly say  
6 that would be persuasive. Given that I assume that whatever  
7 notice was put out to the public that this hearing would take  
8 place, that included the opportunity for at least folks to make  
9 application to participate as intervenors. I assume that was  
10 reviewed by corporation counsel.

11 So perhaps, you know, to illustrate for folks maybe  
12 for me, under what circumstance would someone be allowed to  
13 participate as an intervenor if -- I mean, it seems to me that if  
14 you deny these folks the opportunity, then you would always deny  
15 people the opportunity to participate because what could they  
16 possibly say. So is there some circumstance that I just don't  
17 appreciate?

18 MS. SANSONE: Mr. Chairman, Ms. Mitten, I think Mr.  
19 Bardin has been kind enough to hand me a copy of the public  
20 hearing notice that was published in the DC Register. And it  
21 contains -- and it's the hearing notice for today's agenda which  
22 consisted of the applications that we heard this morning and will  
23 hear this afternoon, but -- and it also includes the civil  
24 infraction appeal. And then since this is the typical notice  
25 that went out, it includes the standard language about testifying

1 at the public hearing or providing written comments or requesting  
2 party status.

3 Now, the distinction is that it says that the  
4 public hearing would be conducted pursuant to Chapter 31 of the  
5 Title 11 which is the Board's rules of practice and procedure.  
6 Those rules do not govern civil infractions cases, so  
7 unfortunately, the language in the public notice does not pertain  
8 back to the civil infraction case. It pertains to the other  
9 types of application. But I should also say we did not -- the  
10 Office of Corporation Counsel does not review the public hearing  
11 notices before they go out, so we would not have had the  
12 opportunity to catch it with respect to that.

13 It also -- I mean, the notice simply says that the  
14 Board will be hearing a civil infraction case and it gives the  
15 street address.

16 MEMBER ETHERLY: Mr. Chair, just to respond to Ms.  
17 Mitten's question, I think the answer to that would be, yes, in a  
18 civil infraction arena in the absence of some clear promulgation  
19 of rules and regulations which govern this type of proceeding, my  
20 outcome our dictate that there would be on intervenor status in  
21 any civil infraction setting because the scope of review is  
22 limited to the record.

23 That's -- and keep in mind, that's not an  
24 interpretation of -- well, that's my interpretation of -- if you  
25 took my outcome on this particular question to its logical

1 extension. That's not what I'm saying existing law is but that's  
2 just one kind of read on it and if I feel your -- the sense,  
3 that's a harsh outcome. That is a very definitive step towards  
4 saying we are limiting the voices that have an opportunity to  
5 come before this body in a particular setting but when you're  
6 talking about appeals, as Mr. Brown knows, as I'm sure Mr. Bardin  
7 knows from their legal experience, and as Mr. Damari knows, you  
8 have to be very sensitive to what the scope of your review is.  
9 That's the first -- that's one of the threshold questions that  
10 you have to deal with. Thank you, Mr. Chair.

11 CHAIRPERSON GRIFFIS: Thank you. All right, Mr.  
12 Damari, you were up. Did you want to say something or it's  
13 passed. It's fine if it's passed. Thank you.

14 MR. BROWN: Mr. Chairman, could I try to guide us  
15 through this to a conclusion because the argument on intervention  
16 is going to last longer than the actual argument on the case --

17 CHAIRPERSON GRIFFIS: Exactly.

18 MR. BROWN: -- for which I apologize.

19 MS. MITTEN: We're sorry, too.

20 MR. BROWN: And recognizing one, I think there is  
21 some urgency for this matter to move forward, this case has been  
22 going on for quite some time even in its current iteration. I  
23 notice the brief was filed in February of 2001. Would it be  
24 appropriate to suggest that at least and I'm speaking on behalf  
25 of my client, that we limit our participation to the opportunity

1 to leave the record open for us to file a brief, leave the record  
2 open for perhaps two weeks.

3 I'm confident that I can file a brief that is  
4 responsive to the issues raised in a way that respects the  
5 Board's burden, the standard that it has to apply substantial  
6 evidence on the record below so that it can add something to the  
7 discussion while not monopolizing the discussion or not  
8 preventing it from going forward today because -- and I think  
9 that serves my client's interests as well as the Board's  
10 interests and even the Kuri Brothers' interests to have this  
11 matter adjudicated promptly.

12 CHAIRPERSON GRIFFIS: Well, I appreciate that  
13 suggestion. I think the difficulty would be whether -- well,  
14 frankly, we could leave that --

15 MR. BARDIN: If that were the decision of the  
16 Board, Mr. Chairman, the ANC would also be willing to abide by  
17 that and we would assume that you would give Mr. Damari the  
18 opportunity --

19 CHAIRPERSON GRIFFIS: Yes.

20 MR. BARDIN: -- to respond to anything that was  
21 filed --

22 CHAIRPERSON GRIFFIS: Right.

23 MR. BARDIN: -- and Mr. Green if he disagrees.

24 CHAIRPERSON GRIFFIS: Right.

25 MR. BARDIN: And we would furthermore try to

1 coordinate sufficiently with other intervenors so that there was  
2 a minimum of paper. We have done that successfully before other  
3 bodies. I think Member Mitten can attest to that in terms of  
4 appearances before the Zoning Commission, in which we have  
5 managed to capsule so that there's little or no extra paper  
6 given.

7 CHAIRPERSON GRIFFIS: And I don't think that -- if  
8 we get to that point, that's fine, but it brings up an  
9 interesting piece of clarification. Mr. Brown, are you joined  
10 now with Van Ness South Tenants and Charles E. Smith?

11 MR. BROWN: I have not joined together. I mean, I  
12 guess the question -- I spoke briefly just to kind of accumulate  
13 our comments in a focused way, but I don't currently have the  
14 authority to represent both.

15 CHAIRPERSON GRIFFIS: Okay. Mr. Damari?

16 MR. DAMARI: Mr. Chairman, it's the same problem  
17 essentially, I mean, whether there's oral testimony -- in fact,  
18 it's worse as far as I'm concerned because let's assume that  
19 evidence or affidavits are attached or affixed to whatever brief  
20 is going to be filed, we have no opportunity to examine the  
21 affiants. We have no opportunity to test the validity or the  
22 authenticity or the circumstances under which certain evidence  
23 may be submitted.

24 As far as I see it -- and nor is the threshold  
25 question of whether there's any meaningful standing here. The

1 way I see it, sir, the only two permissible -- the only two  
2 logical options in light of everything I've heard and  
3 understanding and deferring to your judgment, is that either; A,  
4 intervenor status be denied here and now rather than myself  
5 having to deal with, you know, trying to respond to matters that  
6 I have no idea where they're coming from, or request that the  
7 proposed intervenors make a threshold showing that they have the  
8 right to intervene, in which case I'm confident that the Board  
9 would find that they do not and the matter could be swiftly reset  
10 for hearing.

11 But those, to me, are the only two fair and  
12 reasonable options. Thank you.

13 CHAIRPERSON GRIFFIS: Okay, good, and I agree. Mr.  
14 Brown, I absolutely appreciate kind of the steps trying to move  
15 us on but I am of the agreement that we have two choices.  
16 Although what Mr. Damari just brought up in terms of maybe if we  
17 went -- if the Board goes the way to deliberate on intervenor  
18 status, I think it may be well said to have a threshold test  
19 submitted for our review and decision making. So with that, I  
20 want to have a motion in one way or the other so that we might  
21 move this along.

22 MS. MITTEN: Well, I actually had made a motion  
23 earlier that was never seconded. I made one that was seconded  
24 and then I didn't like it any more, so I argued the other  
25 position. But I'll just repeat my motion, which is -- and I'd

1 like to just speak on it one last time. I move that we grant  
2 intervenor status to the three parties that have requested it  
3 under whatever circumstances the Board would want to proceed.

4 And just as one final point, there seems to be some  
5 hesitation on the part of the Board to grant intervenor status to  
6 folks that are aggrieved because there's this sense that you --  
7 that they cannot function, that they cannot make their arguments  
8 within the scope of the existing record, which is what our charge  
9 is, and I guess I just want to emphasize the fact that I think  
10 they're well aware of what the scope of our review is and I  
11 think, in fact, they are capable of making arguments within that  
12 narrow scope and we could assure them that we would ignore any  
13 other kinds of arguments. So I don't think that because they are  
14 aggrieved, they are de facto incapable of functioning within the  
15 scope of the record. So that's my last word on that.

16 CHAIRPERSON GRIFFIS: Well, said and Ms. Mitten is  
17 looking for a second. Interesting. I'm going to second the  
18 motion and ask for additional discussion on it if required. Not  
19 seeing any at this point, I'm going to have to ask for all those  
20 in favor of the motion signify by saying "Aye".

21 MS. MITTEN: Aye.

22 CHAIRPERSON GRIFFIS: And those opposed?

23 MEMBER LEVY: No.

24 MEMBER ETHERLY: Deny.

25 CHAIRPERSON GRIFFIS: Opposed. And we should

1 probably record the vote on that motion.

2 MR. BATISTA: Mr. Chairman, the staff would record  
3 the vote. I will just for clarification, Mr. Chairman, you voted  
4 in the affirmative?

5 CHAIRPERSON GRIFFIS: No.

6 MR. BATISTA: Oh, you abstained. So then the staff  
7 will record the vote two to one to one, two to deny, one to  
8 affirm and one to abstain.

9 CHAIRPERSON GRIFFIS: I'm sorry, I say it was three  
10 opposed.

11 MR. BATISTA: Oh, okay. Then the motion fails  
12 three to one. Three Board members, Mr. Griffis, Mr. Levy to  
13 deny, Ms. Mitten to approve.

14 CHAIRPERSON GRIFFIS: Okay, the motion did fail.  
15 Do we have another motion?

16 MEMBER LEVY: Mr. Chair, I would move that we deny  
17 the request for intervenor status for all three parties.

18 MEMBER ETHERLY: I'll second that.

19 CHAIRPERSON GRIFFIS: The motion is before us and  
20 seconded. Discussion? Then all those in favor signify by saying  
21 "Aye".

22 MEMBER LEVY: Aye.

23 MEMBER ETHERLY: Aye.

24 CHAIRPERSON GRIFFIS: Aye. And opposed?

25 MS. MITTEN: No.

1 MR. BATISTA: The staff would record the vote three  
2 to one to approve, Mr. Etherly, Mr. Levy and Mr. Griffis to  
3 approve, Ms. Mitten not to approve. Thank you.

4 CHAIRPERSON GRIFFIS: Thank you.

5 MR. BARDIN: Out of an abundance of caution, Mr.  
6 Chairman, I take it our proffer then will stand as a proffer but  
7 will not be considered by the members of the Board and knowing  
8 your extremely busy case load, unlike Mr. Damari, I don't suspect  
9 that you will be tempted to reach into the file and read that  
10 testimony.

11 CHAIRPERSON GRIFFIS: In fact, that's very well  
12 said. I can pretty much guaranty that.

13 MR. BATISTA: So just for clarification, Mr.  
14 Griffis, then, this will be entered into the file, the testimony  
15 of Karen Perry, but it will not be provided to the Board members  
16 for consideration while reviewing and deliberating this case.

17 CHAIRPERSON GRIFFIS: Yeah, that's correct, and I  
18 think we will have it marked in some fashion.

19 MR. BATISTA: Yeah, I will make sure that that's  
20 the case, Mr. Chairman.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. BATISTA: And I thank you.

23 CHAIRPERSON GRIFFIS: Thank you. We now have the  
24 civil infractions case. Just give me one second, Mr. Damari and  
25 I'll be right with you as I get reorganized now.

1                   Let me first ask, Mr. Damari, are you wishing to  
2 reserve any time for rebuttal?

3                   MR. DAMARI: Yes, I don't anticipate needing more  
4 than -- I have 30 minutes; is that correct?

5                   CHAIRPERSON GRIFFIS: Correct.

6                   MR. DAMARI: Ten minutes for rebuttal, I don't  
7 think I'll need all of it.

8                   CHAIRPERSON GRIFFIS: Okay, we'll give you an  
9 indication of that and, of course, as stated in the beginning but  
10 to refresh, 30 minutes does, in fact, include questions from the  
11 Board. We will have the clock running and let me just state  
12 technically if you see this clock acting up, let's just say, I  
13 will keep excellent track and the clock in front of me usually is  
14 fine and so we can do it.

15                   So don't be distracted by the clock. We'll make  
16 sure that the time is working well. Okay, I think technically  
17 we're ready, so Mr. Damari, whenever you're ready.

18                   MR. DAMARI: Ladies and gentlemen of the Board,  
19 Tamir Damari on behalf of the appellant; I think appellant's  
20 case, in my opinion, well set forth in our brief and my role here  
21 today is to answer your questions and to succinctly summarize the  
22 more pertinent portions of the brief. As I'm sure the Board is  
23 aware, this proceeding today is an appeal from the administrative  
24 determination of Lenox Simon, Administrative Law Judge, made on  
25 December 27th, 1999, finding appellant in violation of 11 DCMR

1 Section 3203.1 which, in turn, in effect adopted or upheld a  
2 notice of infraction by Zoning Inspector Yvonne Rocket for  
3 purportedly operating an automobile garage, a repair garage  
4 within a C-3-A zoned area without a certificate of occupancy.

5 As noted in our brief, I think for purposes of, I  
6 guess chronology as well as substantive purposes, it's important  
7 to recount briefly the history of this space. For the past  
8 approximately 40 years this property has been used by subsequent  
9 tenants for certain automobile repair functions. Beginning in  
10 1964, Flood Pontiac constructed the property and was issued a  
11 certificate of occupancy for an auto sales and repair garage and  
12 that is Exhibit 2 to our brief.

13 Subsequently, a motor -- a certificate of occupancy  
14 was given to Connecticut Avenue Nissan for a motor vehicle  
15 dealership on the premises. The parties more pertinent to this  
16 case became involved in 1989 when 4221 Connecticut Partnership  
17 acquired the property where the premises is located and leased  
18 the property to Van Ness, Incorporated. In 1989 Van Ness  
19 obtained a certificate of occupancy permitting the retail sale of  
20 automobiles and accessories including installation, that's  
21 Exhibit 4 to our brief.

22 Jumping forward to 1998, the Board of Zoning  
23 Adjustment did issue an order directing Van Ness to cease  
24 operating what it determined to be a quote, unquote, "repair  
25 shop" on the premises. The Board ostensibly found that the use

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1 of the premises as a repair shop was inconsistent with its  
2 certificate of occupancy.

3 Very, very shortly thereafter, approximately three  
4 weeks thereafter, Pru Huon (phonetic) who was a principal of Van  
5 Ness, applied for and received a certificate of occupancy issued  
6 by Zoning Technician Toye Bello, I believe the pronunciation is  
7 and that certificate of occupancy permitted the premises to be  
8 used as an automobile service center. And this is, in fact, the  
9 certificate of occupancy which relevant to this case. This  
10 pertinent certificate of occupancy is attached as Exhibit 5 to  
11 our brief.

12 MS. MITTEN: Mr. Damari, on the point that you just  
13 said which is that the certificate of occupancy for automobile  
14 service center is what's relevant to the notice of infraction  
15 that's the subject of this case, what's the relevance of all of  
16 the rest of the history of the property? Why is that relevant at  
17 all?

18 MR. DAMARI: Well, we have made the argument that  
19 various species of latches and estoppel in this case, this  
20 premises has been used for certain automobile repair functions  
21 analogous or similar to the ones that it is being used for now  
22 and the failure of --

23 MS. MITTEN: We're with you.

24 MR. DAMARI: Yeah, I'm somewhat --

25 CHAIRPERSON GRIFFIS: I'm sorry.

1 MR. DAMARI: Mr. Brown has not entered his  
2 appearance on behalf of the government, so I'm a little  
3 disconcerted by the fact that he's whispering.

4 CHAIRPERSON GRIFFIS: I didn't notice. I won't let  
5 it happen again.

6 MR. DAMARI: So essentially, this premises has been  
7 used for certain repair functions for now close to 40 years. We  
8 have cited to case law in our brief indicating that under  
9 circumstances such as these, where in effect, the government has  
10 sat on its rights that even assuming arguendo that there is an  
11 inconsistency between the certificate of occupancy and the use of  
12 the premises.

13 MR. BROWN: Mr. Chairman, I have to interrupt.

14 CHAIRPERSON GRIFFIS: You can't interrupt, it's  
15 absolutely --

16 MR. BROWN: I have a serious problem.

17 CHAIRPERSON GRIFFIS: -- not appropriate. We have  
18 his time rolling and it is inappropriate, Mr. Brown, to be  
19 interrupting at this point.

20 MR. BROWN: Well, part of the intervention was a  
21 concern that we bring up things that were beyond the scope.

22 CHAIRPERSON GRIFFIS: I understand that and that's  
23 -- I think we're --

24 MR. BROWN: I was at this hearing and none of this  
25 was raised and now he's making new arguments before this Board.

1 CHAIRPERSON GRIFFIS: And we're going to need to  
2 deal with it in terms of the briefing that's been submitted. And  
3 I think the question comes to that point. I think that's where  
4 Ms. Mitten's going. So I think the Board can handle it well  
5 enough, Mr. Brown, but I do appreciate that. Let us get back to  
6 what the issue is at hand here.

7 And Ms. Mitten, if you want to follow up with a  
8 question or is the sufficient?

9 MS. MITTEN: That's sufficient for my purposes,  
10 thank you.

11 MR. DAMARI: And I'll get back to that argument  
12 somewhat later.

13 Shortly thereafter that point, on August 12th,  
14 1998, Mr. -- appellant who's in fact, the sublessee of Mr. Hewett  
15 (phonetic), applied for a certificate of occupancy for the  
16 premises explicitly indicating that auto repairs -- certain auto  
17 repairs would be performed on the premises. Mr. Bello again  
18 issued a certificate of occupancy permitting the use of the  
19 premises as an automobile service center.

20 As I'm sure the Board is aware, a hearing was held  
21 before Ms. -- before the Honorable Administrative Judge Lenox  
22 Simon on August 11th, 1999. The hearing -- the determination of  
23 Judge Simon upholding the notice of infraction essentially  
24 determined that the premises was being used as a quote, unquote  
25 "repair garage", which is actually a defined term in the District

1 of Columbia municipal regulations as, "A building with  
2 facilities", and I'm paraphrasing, "for the repair of motor  
3 vehicles including body and fender repair, painting, rebuilding,  
4 reconditioning, upholstering, equipping or other motor vehicle  
5 maintenance or repair".

6 It is our contention and I trust that the Board  
7 will accept this, that the burden was upon the DCRA to determine  
8 that this -- that the use of the premises was, in fact,  
9 inconsistent with the certificate of occupancy and that to the  
10 extent that the notice of infraction was premised upon the  
11 contention that the premises was, in fact, being used as a repair  
12 garage, it was the burden upon the government to show that, in  
13 fact, the premises was being used in that manner.

14 In that regard, Inspector Rocket was the principal  
15 witness called at the hearing and during that hearing she  
16 described her visit to the premises on April 27th, 1999. Her  
17 testimony and I'm going to summarize it, hopefully briefly,  
18 basically, was extremely general and failed to address the -- any  
19 of the specific activities that define a premises as being used  
20 for a repair garage.

21 She mentioned that several autos in the basement  
22 were being operated on but when asked what she meant by being,  
23 quote unquote "operated on", she said, quote, "Working on cars  
24 under the hood, doing things just auto repairs", close quote.  
25 Ms. Rocket admitted she didn't take any notes during her

1 inspection. She -- in order to support her contention that the  
2 notice of infraction was valid she claimed that she saw a  
3 mechanic under the hood of one care, quote, unquote, "Doing  
4 something", and, quote, unquote, "Working on a headlight or  
5 something".

6 The only specific work, in fact, that Ms. Rocket  
7 could describe was, quote, "The guy doing something to the  
8 light", close quote. With respect to the specific activities  
9 constituting a repair garage, Ms. Rocket admitted that she did  
10 not see any hammering on the body of any car, she did not see any  
11 painting done to any car. She did not see any filler or putty  
12 being used on any car. She did not see any upholstering of any  
13 sort being done on any car. She did not see anyone adding  
14 equipment to any cars or installing any batteries or chrome, et  
15 cetera.

16 CHAIRPERSON GRIFFIS: And you're bringing up those  
17 issues as that would go to the definition of repair garage; is  
18 that correct?

19 MR. DAMARI: Exactly.

20 CHAIRPERSON GRIFFIS: And you're drawing the  
21 distinction several times of course, between the automobile  
22 service center and repair garage and you're indicating then that  
23 that was not seen, that the activities conducted were accurately  
24 under the C of O as defined by the automobile service center.

25 MR. DAMARI: Correct.

1 CHAIRPERSON GRIFFIS: Can you talk again briefly,  
2 then, how your definition falls within the parameter of repair  
3 garage or differs substantially from it?

4 MR. DAMARI: Well, I guess my contention is that  
5 there are -- if I understand -- let me ask before I answer a  
6 question I don't understand, let me ask Mr. Chair, could you  
7 rephrase that, please? I'm not sure I understand your question.

8 CHAIRPERSON GRIFFIS: Yeah, actually I guess I can  
9 very direct with it or perhaps I'll try. The issue -- and  
10 actually, I'll go to your statement on page 22 which is the last  
11 paragraph, that "The appellant is lawfully operating its  
12 business, an automobile service center, within the parameters of  
13 its certificate of occupancy". What I'm looking for is the  
14 definition difference between automobile service center and  
15 repair garage.

16 MR. DAMARI: That's a very -- that's a question I  
17 was certainly anticipating. Obviously, a repair garage is a term  
18 of art as it seems. An automobile service center appears not to  
19 be defined. That -- it's my understanding and certainly no  
20 substantial evidence was proffered before the Administrative Law  
21 Judge to the contrary in my opinion, that the unlawful -- the  
22 quote, unquote "unlawful" activities, i.e., the activities of a  
23 repair garage that are not permitted as a matter of right at this  
24 location, are not -- are not being performed at this premises.

25 Now, certain repair activities are being performed

1 and I'm not a mechanic, so I can't -- you know, I know where  
2 you're going and I'd probably go there myself. To the -- I'm not  
3 exactly -- I can't exactly define what is going on there but I do  
4 know in talking to my clients that the repair -- the repair  
5 garage activities, so to speak going on there, are not being  
6 undertaken there and since -- it's my contention that since it is  
7 the government's burden to prove that the premises is unlawful  
8 rather than our burden to prove that it's lawful, that the real  
9 issue is not so much what exactly is going on there and I'm not  
10 saying this, you know, to be flippant, but it is their burden to  
11 prove that something unlawful is going on there.

12 And that's why I was going into Ms. Rocket's  
13 testimony because I just think her testimony was utterly vague on  
14 that point.

15 MS. MITTEN: Well, Mr. Damari, on the Chair's point  
16 a little bit, maybe a little bit more, if they're not doing auto  
17 repair, why were they required to get an auto repair license and  
18 why did they in fact --

19 MR. DAMARI: I did not say they weren't doing auto  
20 repair. They are doing some -- again, and not being a mechanic,  
21 I couldn't tell you exactly what types of repair they're doing.  
22 What I do know, obviously, this premises has always been used for  
23 repair of minor sorts for about 40 years. What I do understand  
24 is that repair garage, the activities that are prohibited in this  
25 zone under the definition of a repair garage, body and fender

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1 repair, painting, rebuilding, reconditioning, upholstering, et  
2 cetera, are not taking place on this premises.

3 Now, obviously, repair is kind of a somewhat open-  
4 ended term. In many gas stations, you'll have certain amounts of  
5 repair being done. It runs on a continuum. You have minor  
6 repair. Most gas stations probably will have some sort of  
7 facilities to fix a tire running from, you know, wholesale  
8 reconstruction of an automobile, resumably and all I'm saying is  
9 that the activities prohibited under the definition of repair  
10 garage, it's my understanding that they are not taking place and  
11 that there's no evidence indicating that they were taking place.

12 MS. MITTEN: Well, according to your  
13 interpretation, there are gradations of repair that may go on --

14 MR. DAMARI: Yes.

15 MS. MITTEN: -- and the more extreme and onerous  
16 are not permitted in C-3-A and, in fact, were not permitted by  
17 the certificate of occupancy. And the more minor type were  
18 permitted by the certificate of occupancy, but my understanding  
19 is that Mr. Bellos' representation of what an automobile service  
20 center is, is that those kinds of repairs are in fact, secondary  
21 to another function going on at the premises which is sales of  
22 the items that are being installed on the vehicles.

23 And we had testimony and I don't think there was  
24 any -- there was testimony in the record and I don't think it was  
25 refuted, that there were no sales of these items going on at the

1 premises, so how do you respond to that?

2 MR. DAMARI: Well, the way I'd respond to that is  
3 to say that Mr. Bello's testimony was inconsistent at the hearing  
4 itself. I mean, he acknowledged that he -- he was the one, from  
5 what I can recall from, I believe this point is raised in our  
6 brief, he was the one who directed Mr. Hewett, I believe it was,  
7 to obtain a repair license.

8 He was aware that certain repair functions were  
9 being taken -- taking place at the premises. There's no  
10 indication that -- I have failed to find any indication that Mr.  
11 Euon or anyone else of appellants made any misrepresentation to  
12 Mr. Bello. I don't even think Mr. Bello testified to that that  
13 effect.

14 MS. MITTEN: Well, and I think -- I don't think  
15 there was a misrepresentation but clearly when the applicant came  
16 to -- or the occupant of the property came to Mr. Bello and said,  
17 "This is what I'm doing at the premises, auto repair", Mr. Bello  
18 said, "No, that's not permitted here. What is permitted is this  
19 other function", and they, in fact, were as you have said, doing  
20 the same thing that they've done for a long time and he said, at  
21 that point, "No, that's not permitted, we must adjust what you're  
22 doing".

23 MR. DAMARI: That is not my understanding of -- I'm  
24 not -- that is not my reading of his testimony. My reading of  
25 his testimony and I'm sure the Board, if I'm incorrect, will duly

1 find in that manner, is that Mr. Bello at the hearing itself, was  
2 saying, "Okay, here's what the automobile service -- I believe  
3 it's automobile service center is", and I think he defined that  
4 as being -- as you aptly pointed out, at the hearing itself he  
5 defined an automobile service center as being sales of  
6 automobiles and certain ancillary functions relating to  
7 installation of parts.

8 But I don't think he said that he advised at the  
9 time that these C of O's were issued he advised Mr. Hewett of  
10 that.

11 MS. MITTEN: Well, the applicant came in and I  
12 believe on the application the applicant had written automobile  
13 repair and there was a lot of discourse about him putting it in  
14 parenthesis and writing in -- Mr. Bellow writing in this  
15 alternative use. So what the applicant had been doing and  
16 represented that they had been doing, Mr. Bello overtly told them  
17 that's no permitted and there was this other category of use that  
18 was introduced at that point in time.

19 MR. DAMARI: Well, I think that maybe we're -- I'm  
20 trying to look at it actually as --

21 CHAIRPERSON GRIFFIS: Was there a piece in the  
22 record that Mr. Bello had filled in the automobile service  
23 center?

24 MS. MITTEN: Yes.

25 MR. DAMARI: That's my understanding, correct.

1 CHAIRPERSON GRIFFIS: And the use remained the  
2 same, though, in the application which read auto repair.

3 MR. DAMARI: And my question to that -- my response  
4 to that is in effect a rhetorical question. If I understand the  
5 record correctly, it was Mr. -- again, Mr. Bello who directed Mr.  
6 Hewett, I believe, to get a repair license. So he must have  
7 known, he must have known that some sort of repair was going on  
8 at that premises.

9 If it was merely installation of windshield wipers  
10 or what have you, he wouldn't have directed Mr. Hewett to do  
11 that. The way I read the record, is that --

12 CHAIRPERSON GRIFFIS: Are you saying then that his  
13 reference to a licensing branch supersedes his statement on the  
14 certificate of occupancy? I mean, I don't see how strongly that  
15 -- you know, who knows in a fit he was referring to every window  
16 in DCRA to make sure that he was accomplishing things. I don't  
17 see that -- that's what you seem to be saying to me, that by the  
18 mere fact that there was an official action of approval of a use  
19 based on the referral to a licensing branch.

20 MR. DAMARI: Well, he said that -- this is actually  
21 -- I don't have the -- there's a reference here of an application  
22 for a certificate of occupancy and unfortunately that doesn't  
23 appear to be attached to our brief but what we do reference in  
24 our brief is that Mr. Bello testified that he approved the  
25 applications for the C of Os based upon his review of the

1 applications themselves and previously issued certificates of  
2 occupancy.

3 And that furthermore, he acknowledged that the  
4 application itself indicated that auto repairs would be performed  
5 on the premises.

6 CHAIRPERSON GRIFFIS: That's 10 minutes. Do you  
7 want to continue? Or you have 10 minutes left rather.

8 MR. DAMARI: I'll go a little bit further.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. DAMARI: Probably five minutes probably I'll  
11 cut off. I think Mr. Bello further stated that he caused the  
12 designation automobile service center to be placed on the  
13 certificate of occupancy as a reflection of the previous  
14 permitted use on the premises.

15 MS. MITTEN: That's not what Mr. Bello testified to  
16 and if we could go to page 95 of the transcript, this is the  
17 ongoing discussion about the handwriting on the application and  
18 it says, "What about the parenthesis placed beside it, did you do  
19 that or did they do it"? And these are questions being posed to  
20 Mr. Bello. "The applicant would have done it but under  
21 directions from me".

22 "And why would you give instructions", I'm at the  
23 bottom of page 94 now. "And why would you give instructions like  
24 that"?

25 "Well, the instructions, given the history of

1 previous use on the premises and the proposed use of business,  
2 wherein the underlying zone does not allow an auto repair  
3 function would have necessitated me telling the applicant that he  
4 couldn't have an auto repair use in that zone", and then it goes  
5 on to explain how the language on the application was altered.

6 MR. DAMARI: Well, to me that seems rather self-  
7 serving after the fact. I mean, if he's saying that he put it in  
8 parenthesis, he told -- you know, he saw the application which  
9 said that repair functions were going to be performed on the  
10 premises and he acknowledges that he reviewed it and that he  
11 said, "Well, I told him to put it in parenthesis", which is how I  
12 read that, and that somehow after the fact he's saying that,  
13 well, by virtue of those parenthesis, he somehow -- it somehow  
14 becomes magically -- the phrase -- the phrase auto repair  
15 magically gets erased, I don't see that.

16 I think the fact that he did acknowledge that he  
17 did review it, whether or not he told him to put it in  
18 parenthesis, clearly indicates that he was aware of what this was  
19 being used for.

20 MS. MITTEN: Well, if you think Mr. Bello's  
21 representations of what he did after the fact were self-serving,  
22 what is your explanation for why there was a modification made to  
23 the application? What is the alternative explanation that we  
24 should believe?

25 MR. DAMARI: As -- when you say modification, you

1 mean --

2 MS. MITTEN: The applicant wrote auto repair and no  
3 one is disputing that the applicant then was instructed to put  
4 that in parenthesis and add automobile service center, if you  
5 don't believe Mr. Bello's explanation after the fact, what is the  
6 explanation that you would have us believe.

7 MR. DAMARI: Well, clearly Mr. Hewett nor any --  
8 nor any representation of appellant was present at the hearing,  
9 so I'm not going to testify on his behalf or surmise. All I'm  
10 saying is the -- all I'm saying is again, it is the government's  
11 burden and Mr. Bello's statement that -- if he thought that auto  
12 repair was ipso facto, per se, inappropriate me, and I think any  
13 other -- I'm not going to surmise about other people, but it  
14 would seem to me that the appropriate course of action was simply  
15 to tell Mr. Hewett to white it out, to cross it out, or something  
16 like that.

17 Putting it in parenthesis doesn't simply make any  
18 sense to me. In terms of giving you -- I'm not going to guess as  
19 to you know, why those parenthesis were put in there. I'm not  
20 going to because obviously I can't and I won't. But I'm saying  
21 that Mr. Bello's representation, if in fact, he became aware that  
22 auto repair functions were going to take place on the premises  
23 and was apprised of that and was concerned about that, it would  
24 seem to me the logical course of action would be to eliminate  
25 that reference entirely rather than tell him to put it in

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1 parenthesis, it seems that Mr. Bello being somewhat cute, either  
2 at the front end, when this C of O was written up or at the back  
3 end, during the hearing.

4 I'm going to actually reserve my remaining time for  
5 rebuttal.

6 CHAIRPERSON GRIFFIS: Good, we'll stop the clock  
7 there.

8 MR. DAMARI: Thank you.

9 CHAIRPERSON GRIFFIS: And on my time, let me just  
10 make a correction that I think came from the testimony. It's  
11 Toye, first name, Bello, not T-o-r-r-e. It's T-o-y-e.

12 MR. DAMARI: I'm certainly well aware of people  
13 butchering names from my own personal experience.

14 CHAIRPERSON GRIFFIS: Well, I was a bit dismayed  
15 looking at some of your writings until I was reading the entire  
16 testimony and realized that that's how he's recorded. So, the  
17 mistake is understandable.

18 But, to that, Mr. Green, you are welcome to begin.

19 MR. GREEN: Thank you, Mr. Chairman.

20 CHAIRPERSON GRIFFIS: I just need you to turn on  
21 your mike.

22 MR. GREEN: Again, for the record, thank you, Mr.  
23 Chairman, Matthew J. Green, Jr. What we have here is a  
24 respondent who was determined by the Administrative Law Judge to  
25 have an invalid certificate of occupancy for a quote "auto

1 service center". Now, I would point out that this term is not a  
2 defined or recognized term under the DC zoning regulations. And  
3 the term denotes the same type of activity which is prohibited in  
4 C-3-A zoned area.

5 In effect, we have a repair garage. The primary  
6 standard before this body is to present on the part of the  
7 appellant how the Administrative Law Judge was clearly erroneous,  
8 abused his discretion and arrived at a decision against the  
9 manifest weight of the testimony and evidence presented. Thus  
10 far, that has not been the case.

11 The primary issue is, whether the appellant was  
12 operating an automobile repair business on April the 27th, 1999  
13 at 4221 Connecticut Avenue without a certificate of occupancy in  
14 violation of 11 DCMR 3203.1 and the answer to that, of course, is  
15 yes, they were, in fact, operating a repair facility.

16 The question then becomes, how was this determined?

17 In this particular instance, Inspector Yvonne Rocket entered the  
18 premises and she noticed certain things going on. Those things  
19 that she observed were repairing of automobiles; headlights,  
20 people working under the hood of the vehicle.

21 Now --

22 CHAIRPERSON GRIFFIS: Is it not true, though, the  
23 testimony that she didn't take any photographs or have any notes  
24 regarding her visit at that point?

25 MR. GREEN: That's absolutely correct, Mr.

1 Chairman, but I would also point out that a policeman, who sees  
2 you going through a red light is observed and his testimony is  
3 taken by the Judge and he is deemed to be telling the truth --

4 CHAIRPERSON GRIFFIS: Yeah, and --

5 MR. GREEN: -- because he's under oath as Ms.  
6 Rocket was under oath.

7 COMMISSIONER HOOD: And that analogy, however, the  
8 policeman could probably describe the car that I'm in, perhaps  
9 the direction I was going, the location at the intersection, the  
10 timing, the other circumstances around it. Am I incorrect in  
11 reviewing the testimony that Ms. Rocket was fairly light in some  
12 of the documentation, even in the description of what was  
13 happening with a person under the hood of the car. Outside of the  
14 specifics of repairing a headlight, I didn't see other  
15 substantiation to that; is that correct?

16 MR. GREEN: It is correct that Ms. Rocket described  
17 what she saw and she saw people under the hood making repairs.  
18 Now, whether they were taking a carburetor out and putting in  
19 another one or putting in a thrush exhaust system, Ms. Rocket was  
20 not that specific. Ms. Rocket is not a trained automotive  
21 expert. If that were the case, then I think that she perhaps  
22 would have made that sort of description, but she saw what she  
23 saw and she described it as she saw it.

24 Now, she's a zoning inspector. She's not an  
25 automotive trained individual but she knows a repair when she

1 sees someone working on something and she can make that kind of  
2 distinction.

3 CHAIRPERSON GRIFFIS: Okay. Please proceed.

4 MR. GREEN: Thank you. Again, the question that  
5 we're dealing with is a bit of history. Now, in a previous  
6 decision and order issued November 22nd, 1992, Administrative Law  
7 Judge Raholooman Quanda (phonetic) made a finding that the lessor  
8 at that particular time was a Mr. Hune (phonetic) with this Van  
9 Ness Incorporated entity. And they operated an automobile repair  
10 garage in the basement of the property without a valid  
11 certificate of occupancy.

12 This decision that is of Mr. Quanda was  
13 subsequently affirmed by the District of Columbia Board of Zoning  
14 Adjustment in an opinion written March the 30th, 1998. Now, I  
15 say that to say this; what we have in this particular situation  
16 is a determination that was made by an individual who was the  
17 lessor. Kuri Brothers represents the lessee. What they are  
18 doing is essentially the same thing.

19 They have elected to piggyback upon this concept of  
20 automobile service center used by Mr. Hewett when he sought to  
21 make changes in an earlier effort. So what we're talking about  
22 is the same set of facts, the same operation but a different  
23 individual. That's what we have. The Administrative Law Judge  
24 recognized this. The Administrative Law Judge ruled that Kuri  
25 Brothers was essentially the successor in terms of activity that

1 is automotive repair, that had been engaged in by Mr. Hewett.

2 The ALJ concluded that the subject building is  
3 zoned C-3-A which permits specific things to go on. Now, those  
4 specific things are not a repair garage -- too bad we don't have  
5 any water here. A repair garage is defined in the zoning  
6 regulations as a building or other structure or part of a  
7 building or structure with facilities for the repair of motor  
8 vehicles including body and fender repair, painting, rebuilding,  
9 reconditioning, upholstering, equipping, or other motor vehicle  
10 maintenance or repair activities. That goes back to what the  
11 chairman was talking about in which Ms. Rocket said she was  
12 observing individuals working under the hood.

13 That would fall within the scope of this  
14 definition. So would replacing a light, so would a tire  
15 replacement, so would any accessories that were added to a  
16 vehicle or repaired would fall within the scope of automotive  
17 repair which is an impermissible activity within this particular  
18 zone. Now, if they wanted to operate in an area that permitted  
19 such activity, they would then go to an industrial area, the CM  
20 area and do their automotive repair work there.

21 MS. MITTEN: Let's talk about the use for a minute,  
22 which is you have an applicant who has an ongoing use of the  
23 property and they're instructed to go and get a certificate of  
24 occupancy, and they're instructed to modify --

25 MR. GREEN: Thank you.

1 MS. MITTEN: -- the terminology on the application  
2 for their certificate of occupancy to something called automobile  
3 service center, which is only defined in the mind of Toye Bello.

4 Inspector Rocket did not know what the definition of that term  
5 is. It's not available to anyone because it's not written  
6 anywhere.

7 MR. GREEN: You're right, absolutely right.

8 MS. MITTEN: So how is it that this applicant would  
9 know that whatever their intended use of the property was when  
10 they made application that that did not meet the standard for  
11 automobile service center given that they were given a  
12 certificate of occupancy, it's just we'll call it something  
13 different? How is anybody to know? I know that Mr. Bello cited  
14 that the ordinance allows him to basically create uses where  
15 there's no specific language in the ordinance to do that. I  
16 don't -- I would ask you to give us the citation for where that  
17 power originates, and also to explain it in this more specific  
18 context which is, how is anyone other than Mr. Bello to know what  
19 an automobile service center is?

20 MR. GREEN: Well, an automotive service  
21 perhaps would fall within the category of one of the various  
22 automotive sales accessory places, maybe a J.C. Whitney  
23 (phonetic).

24 MS. MITTEN: Well, that's an articulated use in the  
25 zoning ordinance but Mr. Bello chose not to give them a

1 certificate of occupancy for that. That's an articulated use.  
2 So talk to us about the propriety of creating this customized use  
3 that is not defined anywhere.

4 MR. GREEN: The only thing that we can do is to  
5 stay within the confines of what is defined by the statutes.  
6 Now, if someone makes an observation in an effort to try to help  
7 someone operate a business and he says to the person, "We'll call  
8 it one thing, but remember, you cannot do any automotive repairs  
9 there. You can sell auto accessories. If you wanted to sell --  
10 open your own J.C. Whitney or your Cars U Us enterprise to sell  
11 accessories for automobiles, that's okay, but in terms of the  
12 installation and repair and maintenance of vehicles, that is an  
13 impermissible activity and if you should do that, then first of  
14 all you have to do two things.

15 One, you have to go to the Board of Zoning  
16 Adjustments, if you want to run this type of activity in this  
17 particular area and get a variance. And two, if you're going to  
18 do automotive repairs, you have to have a consumer goods repair  
19 license in order to make automotive repairs. You can't do any of  
20 the things that you purport to do in terms of automotive repair  
21 in this particular zoned area without a variance".

22 MS. MITTEN: So Mr. Damari's point, though, is that  
23 Mr. Bello behaved inconsistently which he did half of what you  
24 said. He sent them to get this license but he didn't send them  
25 to the BZA. So how do you reconcile the fact that he instructed

1 or directed them to go get a license but didn't instruct them to  
2 go to the BZA? How do we reconcile that?

3 MR. GREEN: Well, the only way that we can  
4 reconcile that is to indicate that -- we have to look at the  
5 individuals. We have to look at what it is they were doing  
6 beforehand. We have to look at the history of the enterprise in  
7 existence. In this particular case, Mr. Hewett had already gone  
8 to the BZA, been denied. Mr. Hewett understood what was  
9 involved. The Kuri Brothers knew this history also because this  
10 particular enterprise had in it all of the accoutrements for  
11 automotive repair. Now, if you're going to make a request that's  
12 different and if you don't go to the BZA, then you have to have  
13 another type of business enterprise for operation, which in this  
14 case would be the sale of the -- use my J.C. Whitney example.

15 You could not conduct automotive repairs in this  
16 particular area without this variance. Now, none of the parties  
17 were strangers to one another. Mr. Hewett knew the Kuri Brothers  
18 and they knew him. They were familiar with the operations as it  
19 existed going back to the decisions of Mr. Quanda, the Court of  
20 Appeals, and the Board of Zoning Adjustments. They knew what  
21 could or could not be done here.

22 I submit what we have going on is at attempt to  
23 mislead someone, in this instance, the District government  
24 through its representatives, in this case Mr. Bello, were misled,  
25 were misled. They were misled into believing that what was going

1 on was an attempt to operate an accessory business, the sale of  
2 accessories, when, in fact, the real purpose was to continue a  
3 business as usual which was an automotive garage.

4 MS. MITTEN: If there was this longstanding history  
5 of a use that was illegal and had been adjudicated in the past to  
6 be impermissible in the zone, why did they process this  
7 application over the counter? I mean, you're talking about the  
8 District being misled. Well, they relied on the representations  
9 of the applicant. So don't they bear some responsibility?

10 MR. GREEN: Bureaucracies always bear the  
11 responsibility to look behind those who are making applications.

12 But I think that Ms. Mitten, you should understand that in every  
13 bureaucracy, particularly in one like the District of Columbia  
14 government, which at that time was under-staffed and going  
15 through some furloughs and other things, that it's quite possible  
16 that some things will and do slip through the cracks.

17 However, Ms. Rocket, went on the premises and  
18 observed that there was a violation of the law and issued a  
19 citation pursuant to that. The Administrative Law Judge, Mr.  
20 Lenox Simons recognized that there was this violation of the law  
21 and that it continued and rendered a decision accordingly.  
22 Consequently, I'm here to say to you that the decision rendered  
23 by Mr. Simons based on his observations, based on the testimony  
24 and evidence presented, should be sustained because we have a  
25 continual violation of the law, that's what we have here. That's

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1 why I'm here. That's why Mr. Simons rendered the decision that  
2 he did.

3 We have a garage in an area that's zoned not for  
4 that particular purpose. If they want to have -- we're not  
5 against people having garages, but they ought to be in the  
6 appropriately zoned area, the commercial area. Why? Because  
7 we're talking about the health, welfare and safety of the  
8 citizens involved. The whole concept goes toward keeping fumes  
9 down, noise and the other things that go to the quality of a  
10 human's existence. That's what we're talking about. That's why  
11 we're here.

12 CHAIRPERSON GRIFFIS: And that's laid out well in  
13 your argument, but at the end of the paragraph actually that goes  
14 to let's say impact of why areas are zoned and what use should be  
15 in there, you state that repair garages and automobile centers,  
16 are interchangeable terms. You've just indicated that somehow  
17 there was misleading in the application process but I clearly see  
18 and it's been discussed auto repair noted. If repair garages,  
19 automobile service centers are interchangeable and they have a  
20 certificate of occupancy for automobile service center, aren't  
21 they in compliance with their certificate of occupancy?

22 MR. GREEN: In this particular case, what we're  
23 getting stuck on are words of art. The law talks about repair  
24 garages. The law is very clear on what a repair garage is. If  
25 it sees it, it knows it, it describes it. The problem is that

1 automobile service centers are not stated in the law. They're  
2 not described, so consequently, the Administrative Law Judge took  
3 the position that there is no difference. It's a distinction  
4 without a difference.

5 What we're doing here today is -- maybe we should  
6 use the term automobile accessory store, maybe if you had an  
7 automobile accessory store then one could walk in there and you  
8 know you're going to J.C. Whitney type place. You know it from  
9 the start.

10 CHAIRPERSON GRIFFIS: But without moving in that  
11 direction, if we go on exactly your point, that the judge stated  
12 which was repair garages and automobile service centers are  
13 analogous, they're identical. We can throw one out. They have a  
14 certificate of occupancy for an auto service center which is  
15 interchangeable. They have a certificate of occupancy for repair  
16 garage. Are they not in operation under their C of O?

17 MR. GREEN: They are not in operation under their C  
18 of O in that they are performing acts, they have a body of work  
19 in this case motor vehicle maintenance and repair activities  
20 going on, which are impermissible. That's not what you're  
21 supposed to do.

22 CHAIRPERSON GRIFFIS: Yeah, but aren't you then  
23 questioning the viability of the C of O or whether it may have  
24 been granted in error, not whether they're operating under their  
25 certificate of occupancy?

1 MR. GREEN: Say that one more time.

2 CHAIRPERSON GRIFFIS: What your statement said to  
3 me was that the -- looking at direct operations, they are -- your  
4 statement says that they are doing things that are not  
5 permissible in the zoning for that area. However, what's at  
6 question and my question is going to is the actual certificate of  
7 occupancy which was labeled for automobile service center which  
8 your statement and you seem to be supporting, that repair garages  
9 and automobile service centers are interchangeable, which is  
10 actually your word.

11 My question to you is, how is the operation not  
12 legally being -- how is the function not legally operating under  
13 the current C of O automobile service center?

14 MR. GREEN: Well, you know, an automobile service  
15 center and a garage as is currently being utilized by the  
16 appellant, that's the only thing we can go with, is an  
17 impermissible activity. What they are doing is impermissible.

18 CHAIRPERSON GRIFFIS: Under the zoning.

19 MR. GREEN: Under zoning.

20 CHAIRPERSON GRIFFIS: But is it impermissible under  
21 the certificate of occupancy that they hold?

22 MR. GREEN: Yes, because the definition they gave  
23 Mr. Bello led Mr. Bello to believe was that they were going to be  
24 involved in the sale of accessories.

25 CHAIRPERSON GRIFFIS: And where do we go to flush

1 out that, that there was actually no auto repair which is the  
2 reverse of what you're saying? That there's accessories auto  
3 sales and no auto repair?

4 MR. GREEN: Well, Ms. Rocket, who made the  
5 inspection, noted auto repairs were underway when she was there.

6 CHAIRPERSON GRIFFIS: I understand that.

7 MR. GREEN: Now, that's the activity that's  
8 impermissible.

9 CHAIRPERSON GRIFFIS: I understand that but it's  
10 impermissible under the zoning regulations.

11 MR. GREEN: Right.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. GREEN: It is not permitted and this auto  
14 service center, I guess you would say that that gives them a  
15 license to do this. My contention is, no, it does not. That  
16 what they have done is they've taken a word, they've taken a  
17 twist of the language the purpose of which was to confuse the  
18 original purpose.

19 CHAIRPERSON GRIFFIS: But who is twisting the  
20 language? I mean, isn't Mr. Bello the one that actually wrote  
21 automobile service center?

22 MR. GREEN: Mr. Bello wrote what was described to  
23 him based on the representations made to him by the Kuri  
24 Brothers, that's my contention. I contend that Mr. Bello was  
25 told an activity and the activity, as it was described to him,

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1 did not denote garage repair, which would have been  
2 impermissible. Based on what was said to Mr. Bello, he said,  
3 "Well, how can we fashion some type of certificate of occupancy  
4 to accommodate what you are doing", which as it was described to  
5 him was not impermissible.

6 CHAIRPERSON GRIFFIS: And I follow you there. So  
7 you're saying that in fact, automobile service center was a  
8 hybrid between perhaps a garage and an auto sales area, but here,  
9 in fact, where I'm going and I'll just state it one more time,  
10 that repair garages and automobile service centers are  
11 interchangeable terms that mean the same thing.

12 MR. GREEN: That's what Judge Simon said in the  
13 end.

14 CHAIRPERSON GRIFFIS: Indeed.

15 MR. GREEN: Judge Simon said, what we have going on  
16 here is repair garage and automotive service centers and they are  
17 interchangeable terms and mean the same thing.

18 CHAIRPERSON GRIFFIS: Right.

19 MR. GREEN: That was his interpretation based on  
20 the presentation of Ms. Rocket and the other documentation.

21 CHAIRPERSON GRIFFIS: Right, okay. I'm clear on  
22 that. You're welcome to continue if there's more.

23 MR. GREEN: No, I don't have any other primary  
24 statements to make. I'll stand on my brief that's been submitted  
25 and I do stand to any questions that you might have, Mr.

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1 Chairman.

2 CHAIRPERSON GRIFFIS: Any other questions, Board  
3 members? I'll give a moment just to stretch in case questions  
4 come up. Okay, not seeing anything, we can go back to rebuttal  
5 and I believe we have five minutes on that, is that --

6 MR. GREEN: Do I get an opportunity for rebuttal,  
7 too, Mr. Chairman?

8 CHAIRPERSON GRIFFIS: You know, my assumption is  
9 no, but let me just verify with my corporation counsel who's also  
10 indicating that.

11 MR. GREEN: I just thought I'd ask.

12 CHAIRPERSON GRIFFIS: Yeah, indeed. It's a good  
13 thing. Okay, so we'll set the clock again for we had give  
14 minutes remaining.

15 MR. DAMARI: I think it was five minutes and 30  
16 seconds.

17 CHAIRPERSON GRIFFIS: I do remember that.

18 MR. DAMARI: I would ask a slight bit of leeway  
19 given the colloquy regarding Mr. Brown's participation in the --  
20 and the added discussion with him about whether he had the  
21 opportunity to intervene.

22 CHAIRPERSON GRIFFIS: Well, and the fact that I  
23 think he whispered in the ear, it had to have been when I looked  
24 down and looked back up because I saw him return to his chair.

25 MR. DAMARI: Then he interrupted you if you recall

1 correctly.

2 CHAIRPERSON GRIFFIS: I did -- in fact, we may have  
3 lost some time on that. I will grant time on that.

4 MR. DAMARI: A minute or whatever. I mean, I'm not  
5 --

6 CHAIRPERSON GRIFFIS: A minute is quite a bit, but  
7 --

8 MR. DAMARI: Do you want to give me 30 seconds,  
9 I'll take that.

10 MS. MITTEN: It's going to take us longer to figure  
11 out how much time he gets.

12 CHAIRPERSON GRIFFIS: Right.

13 MR. DAMARI: All I'm asking -- it doesn't have to  
14 be set --

15 MR. GREEN: Is the time running, Mr. Chairman,  
16 because if it's not, I'd like to have the opportunity to be  
17 heard.

18 CHAIRPERSON GRIFFIS: Well, you had six minutes  
19 left. You had plenty of time to be heard. It is on my time  
20 because we did have some questions and I was trying to establish  
21 the time left. I think we were correctly at 5:38.

22 MR. HART: That's correct.

23 CHAIRPERSON GRIFFIS: Okay, with the interruption  
24 that was made and the whisper, I think that's appropriate. We  
25 can make it an even six minutes for rebuttal on that and call it

1 a day. So as soon as that's set.

2 MR. DAMARI: I have to confess, given the NCAA  
3 tournament, I feel like I'm a basketball player. I'll try and do  
4 the run and gun so to speak.

5 CHAIRPERSON GRIFFIS: Exactly. Once that starts we  
6 will --

7 MR. DAMARI: You can just put it at 5:38. If I'm  
8 in the middle of a sentence, just let me finish, that's all I  
9 want.

10 CHAIRPERSON GRIFFIS: There it is.

11 MR. DAMARI: Thank you. Just briefly a matter of,  
12 I guess bullet points; you know, there's been a kind of portrait  
13 portrayed of Mr. Hewett that he's someone who wants to violate  
14 the law. I would point out this; that certainly there is a  
15 problem with this prior C of O and that's not really -- it's not  
16 really directly at issue here, but I would note that within, I  
17 believe a couple of weeks, that after the original determination  
18 by this Board, the original unfavorable determination, Mr. Hewett  
19 did not flaunt that determination and say, "Well, I'm just not  
20 going to get a C of O or I'm not going to get a new C of O. I'll  
21 operate under the old C of O, whatever, who cares, they'll never  
22 catch me again, ha, ha, ha".

23 He went out and tried to find a way to reconcile  
24 his use of the property with the zoning recs. He went out and  
25 got a new C of O and he -- you know, what the record seems clear

1 is that this -- again, this property had been used for a long,  
2 long period of time to do different repair functions and he --  
3 for all he knows and from all the record suggests, it's always  
4 been used like that. He just wanted a legal way, a way that was  
5 in conformance with the zoning regs, to use the premises in a way  
6 it's always been used and within a couple of weeks of the earlier  
7 decision, he runs out and he tries to figure out a way to do it.

8 Now, there's been the representation made that he,  
9 in effect, tried to play some sort of semantical game that of  
10 course lawyers are adept at but I would submit to you that Mr.  
11 Hewett isn't, by using the phrase "automobile service center",  
12 and I think the Board adequately addressed that. This was not a  
13 phrase that was created by Mr. Hewett. This was something that  
14 was created by Toye Bello and if, in fact, Mr. Bello was wrong or  
15 improper or whatever, you know, impropriety in him doing that, I  
16 would submit to the Board that that is as a matter of just  
17 general agency principles as we've noted in our brief, that's a  
18 matter of estoppel and that's binding upon the government.

19 And I'm going to get to that very briefly again in  
20 a second. Latches becomes very important here and estoppel  
21 become very important issues here. Again, if as my worthy  
22 opponent indicates, that, you know, practically anything, working  
23 under the hood, replacing a light, fixing a tire, everything is -  
24 - anything and everything falling within those parameters is  
25 considered a quote, unquote "repair garage" which you would not

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1 have a matter -- as a matter of right to have in this zone, then  
2 this particular premises has been in violation of the zoning  
3 regulations for now it's over 40 years.

4 And there is a very, I think, compelling latches  
5 and estoppel argument to be made here. I mean, this is assuming  
6 and I'm not conceding that the -- that anything that's been done  
7 on this premises has been wrong. It's been that way for 40 years  
8 and it has been as property owners like to say, quote, unquote,  
9 "open and notorious". And you know, and you would have  
10 principles of latches and estoppel apply here and we've cited to  
11 those issues in our brief.

12 Again, similarly, if Toye Bello was somehow wrong,  
13 his mistake, based upon, I think just general principles of  
14 common law as well as you know principles articulated in the  
15 cases we cited, his mistake is attributable to the government.  
16 If he was trying to come up with some way to -- even if he did it  
17 for the purest of motives, because I don't really -- I'm not  
18 trying to slam him, but even if he did it for the purest of  
19 motives and said, "Let me see if I can figure out a way to help  
20 Mr. Hewett out. Hey, I think if we call this an automobile  
21 service center, we won't have a problem", it's still attributable  
22 to the DC government.

23 A couple more points. I don't think there's any  
24 real evidence indicating that Mr. Bello was misled by anyone.  
25 There is no indication in the application or anywhere else that

1 Mr. Hewett would be doing any sort of the installation type  
2 facilities that are supposedly encompassed, you know, within this  
3 mythical concept of an auto repair service center. The one thing  
4 that is clear, as I pointed out earlier, is that in his  
5 application, parenthesis or no parenthesis that Mr. Bello  
6 reviewed, there was the indication that this premises was going  
7 to be used for repair and that is in writing.

8           Again, similarly, I don't mean to beat a dead  
9 horse, if in fact, and this is a point that was raised by the  
10 Board, but I'm going to just take it one step further, if in  
11 fact, as Judge Simon indicated, an automobile repair garage and a  
12 service center are interchangeable concepts, then what you would  
13 have -- and assuming that the activities taking place on the  
14 premises do in fact, rather than being service center activities  
15 are actually repair garage activities, which would then be  
16 presumably violative of the regs, but if in fact, those two are  
17 interchangeable, you would have a situation that is nearly  
18 identical or at the bare minimum rather similar to the Cahill  
19 (phonetic) case that we cited to, where there is a mistake of  
20 fact attributable solely to a government representative where  
21 inadvertently a C of O that maybe should not have been issued  
22 was, in fact, issued and they tried to say, "Well, it was a  
23 mistake, let's rescind it", and what, in fact happened there I  
24 believe it was the DC Court of Appeals said, "No, you're now  
25 bound to that", and that's where estoppel again comes in.

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1 I thank you.

2 CHAIRPERSON GRIFFIS: Thank you very much and  
3 ladies and gentlemen, I thank you. The hearing on this appeal is  
4 now concluded and I would excuse the parties. This Board is  
5 going to take a 15-minute break and then resume its afternoon  
6 business.

7 (Off the record at 4:03 p.m.)

8 (On the record at 4:30 p.m.)

9 CHAIRPERSON GRIFFIS: Okay, I call this hearing to  
10 order and I appreciate your patience with us. We've had an  
11 interesting and long afternoon already but we are ready to move  
12 forward. This is the 19th of March 2002 public hearing of the  
13 Board of Zoning Adjustments for the District of Columbia. My  
14 name is Geoff Griffis. I am the Chairperson. Joining --  
15 actually, not joining me today is Vice Chair, Ms. Anne Renshaw.  
16 She is out on personal matters. Curtis Etherly will be sitting  
17 to my right and will be out momentarily. Mr. Levy, to my left is  
18 representing the National Capital Planning Commission and joining  
19 us today is Ms. Carol Mitten, representing the Zoning Commission.

20 Copies of today's hearing are available to you.  
21 They're located at the table at the door that you did enter into.

22 Please be aware that these proceedings are being recorded. So,  
23 two things we must ask you, of course, to refrain from any  
24 disruptive noises or actions in the hearing room. Secondly, I  
25 will probably be advising on technical aspects of turning

1 microphones on and off, et cetera.

2           When presenting information to the Board you must  
3 speak into the microphone, state your name and home address when  
4 you begin presenting your testimony. All persons planning to  
5 testify either in favor or opposition are to fill out two witness  
6 cards. These cards are located at the end of the table in front  
7 of us. They're also on the table where you did enter into.

8           Upon coming forward to speak to the Board, please  
9 give both cards to the reporter, who is sitting to my right. The  
10 order for this afternoon will be first, statement of witnesses of  
11 the applicant; second would be government reports; third is going  
12 to be the report from the ANC, Advisory Neighborhood Commission;  
13 fourth is parties or persons in support; fifth would be parties  
14 or persons in opposition and of course, finally, sixth, we will  
15 have closing remarks by the applicant.

16           Cross examination of witnesses is permitted by the  
17 applicant or parties. The ANC within which the parties are  
18 located are automatically a party in the case. The record will  
19 be closed at the conclusion of each case except for any material  
20 specifically requested by the Board. The Board and the staff  
21 will specify at the end of the hearing what is expected and the  
22 date when persons must submit evidence to the Office of Zoning.

23           After the record is closed, of course, we will have  
24 no other information that's accepted by the Board. The Sunshine  
25 Act requires that the public hearing on each case be held in the

1 open before the public. The Board, consistent with its rules and  
2 procedures under the Sunshine Act, enter executive session during  
3 or after the public hearing on a case for purposes of reviewing  
4 the record or deliberating on the case. The decision of the  
5 Board in these contested cases must be based exclusively on the  
6 public record. To avoid any appearance to the contrary, the  
7 Board requests that persons present not engage the Board in  
8 conversation.

9 I will say it again for those who weren't here for  
10 our civil infraction this afternoon, please turn off all your  
11 cell phones and beepers, so that we don't disrupt any of the  
12 proceedings. We will make every effort to conclude the afternoon  
13 session by 6:00 o'clock. I believe we will be losing a Board  
14 member close to that so I will keep everyone informed as to the  
15 schedule and our anticipation.

16 At this time, the Board will consider any  
17 preliminary matters. Preliminary matters are, of course, those  
18 that relate to whether a case will or should be heard today such  
19 as requests for postponement, continuance or withdrawal or  
20 whether proper and adequate notice of the hearing has been given.

21 If you are not prepared to go forward with a case today or if  
22 you believe that the Board should not proceed, now is the time to  
23 raise such a matter.

24 However, before I go to the audience, I will ask  
25 staff if they have any preliminary matters for us this afternoon.

1 MS. BAILEY: Mr. Chairman, I do. It has to do with  
2 application number 16847, of Landbreeze LLC. That application  
3 was withdrawn and no further action is required by the Board at  
4 this time.

5 CHAIRPERSON GRIFFIS: Great, thank you very much.  
6 Do you have other preliminaries, or is that it?

7 MS. BAILEY: I do, Mr. Chairman, but it concerns  
8 the last case and I'm not sure of the appropriate time to do it  
9 is now or when the case is called.

10 CHAIRPERSON GRIFFIS: Okay. Are there any other  
11 preliminary matters regarding this afternoon before we call the  
12 case? Indeed, let me start on my far right.

13 MS. POLIVY: Thank you.

14 CHAIRPERSON GRIFFIS: You're going to need to turn  
15 on your microphone and give me your name and home address.

16 MS. POLIVY: Will do. My name is Margot Polivy.  
17 My home address is 1611 Riggs Place NW. I have a preliminary  
18 matter. The DC notice that was given in the Register for this  
19 case which appeared on December 14th, 2001, and which is set  
20 forth in the hearing notice that was handed out today, recites  
21 the application of Humberto Gonzalez for variance from the use  
22 provisions to allow expansion of existing bed and breakfast.

23 CHAIRPERSON GRIFFIS: If I can interrupt you for a  
24 second.

25 MS. POLIVY: Yes.

1 CHAIRPERSON GRIFFIS: I'm sorry, just give me the  
2 bullet point of what the preliminary matter is because you're  
3 actually going to a case that we haven't called yet.

4 MS. POLIVY: Oh, I'm sorry.

5 CHAIRPERSON GRIFFIS: So you're indicating this  
6 case and that's the point.

7 MS. POLIVY: I thought that was the case that was -  
8 -

9 CHAIRPERSON GRIFFIS: Well, it may well be but --

10 MS. POLIVY: Well, then why don't I stand down and  
11 wait until you call the case?

12 CHAIRPERSON GRIFFIS: You can take up your  
13 preliminary matter when the case is called which is the Gonzalez  
14 case.

15 MS. POLIVY: Be glad to, yes, it is.

16 CHAIRPERSON GRIFFIS: Okay, yes, ma'am and you need  
17 to turn on your --

18 A VOICE: I have a preliminary matter on the  
19 Gonzalez case, too, about why the case should not be heard.

20 CHAIRPERSON GRIFFIS: Okay, I'll tell you what,  
21 because it's the only case in the afternoon, let's be all clear  
22 and straightforward. Let's call the case and we'll get to the  
23 preliminary matters and we'll start right there and not waste any  
24 time. We can call the afternoon case.

25 MS. BAILEY: Application number 16823 of Humberto

1 Gonzalez, pursuant to 11 DCMR 3103.2 for a variance from the use  
2 provisions to allow the expansion of an existing bed and  
3 breakfast from six sleeping rooms to 11 sleeping rooms under  
4 subsection 203.8 in the Dupont Circle Overlay District 5-D the  
5 site is zoned. It's located at 1720 16th Street NW, Square 178,  
6 lot 800.

7 All those wishing to testify, please stand.

8 (Witnesses sworn)

9 MS. BAILEY: Thank you.

10 CHAIRPERSON GRIFFIS: Thank you, Ms. Bailey. Okay,  
11 now we're ready.

12 MS. POLIVY: Mr. Chairman, I have a preliminary  
13 matter on the case you've just called. The public notice that  
14 was given of this hearing relates to variance for bed and  
15 breakfast. Mr. Gill represents Mr. Gonzalez and he has in his  
16 pre-hearing memorandum sought to bring before you not only the  
17 variance for bed and breakfast but a variance to permit functions  
18 or events to take place in the facility, which are not normally  
19 permitted in R-5-D.

20 I would ask, Mr. Chairman, for a preliminary ruling  
21 that such a hearing is improper, no notice has been given and  
22 that matter should not be heard today.

23 CHAIRPERSON GRIFFIS: Okay. As it hasn't been  
24 proposed to us at this point an additional variance to the relief  
25 sought for this case, what I'd like to do is hold that and we can

1 pick that up as the case proceeds as it may be answered or  
2 addressed during the hearing.

3 MS. POLIVY: Mr. Chairman, the problem is, that  
4 that is a requirement of the DC regulations that you give notice,  
5 not that the party give notice and the only notice that appeared  
6 in the DC Register --

7 CHAIRPERSON GRIFFIS: No, I understand your point.

8 MS. POLIVY: -- related to the bed and breakfast. I  
9 don't understand how we can do this as we go along.

10 CHAIRPERSON GRIFFIS: Well, because what we've done  
11 is call an application that has an advertised relief of a  
12 variance of a use provision to allow expansion of existing bed  
13 and breakfast. What you're indicating is that you anticipate as  
14 this case proceeds, an additional variance request; is that  
15 correct?

16 MS. POLIVY: Well, Mr. Chairman, Mr. Gell has put -  
17 - has in his pre-hearing memo, said to you that that is the  
18 variance that he brings before you, to variances, and if you look  
19 at the introduction on his pre-hearing memo, the first sentence  
20 explains that he is seeking a variance to permit functions and a  
21 variance to enlarge 11 guest rooms and 13 staffs for bed and  
22 breakfast, two variances.

23 I'm asking you to rule at this juncture that any  
24 discussion, evidence, or anything else dealing with events is  
25 improper because it should be noticed. Mr. Chairman, I would

1 also suggest that if Mr. Gonzalez wants this to be considered as  
2 one, which I assume that there's some relevance for and makes  
3 some sense, that this matter be continued and be properly noticed  
4 and then come back and handle the whole thing.

5 CHAIRPERSON GRIFFIS: Okay, Mr. Gell, did you want  
6 to speak to that?

7 MR. GELL: Yes, Mr. Chairman, thank you very much.  
8 I'm Stephen Gell. I'm an attorney representing Mr. Humberto  
9 Gonzalez who purchase the Tutorski (phonetic) Mansion at 16th  
10 Street and Riggs Place. Mr. Gonzalez had filed the original  
11 application and in that actually he asks specifically for two  
12 variances, although it was not, perhaps, as apparent from the  
13 front of the application.

14 But the materials associated with the application  
15 do indicate that he also needs a variance for 13 employees, only  
16 six employees at any one time. And so that's a second variance  
17 which could have been a special exception but because we have  
18 more special exceptions than are permitted, I guess they all  
19 become variances.

20 The third variance would be to have events, which  
21 was something which became an issue, became something that he  
22 realized he would need to do after the application was filed and  
23 came up, of course, in our negotiations with the ANC and other  
24 neighbors. So we are, indeed, asking for three variances today.

25 We believe because at the ANC meeting it was well understood

1 what we were asking for, that all three of these things were  
2 discussed at some length, that the community did, in fact,  
3 understand exactly what was going on.

4 I would also -- well --

5 CHAIRPERSON GRIFFIS: Go ahead.

6 MR. GELL: No, that's fine.

7 MEMBER ETHERLY: If I may, Mr. Chairman, just to  
8 clarify, I believe the issue is the December 13th notice,  
9 correct, for the public hearing date?

10 MS. POLIVY: Yes, and it is my understanding that  
11 no further notice was given although a continuance did occur.

12 MEMBER ETHERLY: Okay, and just for the benefit of  
13 my colleagues, that would be Exhibit Number 20 in the file, the  
14 notice dated December 13th which refers to the application for a  
15 variance from the use provisions. So once again, the concern is  
16 that we're looking at potentially additional components to the  
17 application that weren't appropriately noticed and you're  
18 expressing some significant concern about whether those  
19 additional components or aspects are properly the subject of our  
20 conversation today.

21 MS. POLIVY: That's correct, Mr. Etherly. I would  
22 be a little bit more specific. I objected to the events portion  
23 of it being noted. The variance as goes to the bed and  
24 breakfast, there are a number of them that I have no objection,  
25 if you want to set those and discuss the bed and breakfast. I'm

1 asking that the events portion which is a separate -- totally  
2 separate variance not be discussed because this Board has not  
3 given the proper notice.

4 CHAIRPERSON GRIFFIS: Well, when we talk about  
5 notice and this Board takes very seriously because that's where  
6 obviously, people find out about the case and get involved, and  
7 we do have several ways of noticing an application, my question  
8 to you would be, you do not believe by the notification of a  
9 variance on this site, that there would have been proper  
10 information or ability for someone to come in and look at the  
11 case and see what was actually involved?

12 MS. POLIVY: Mr. Chairman, when this case was  
13 noticed on the December date there was no such -- the only  
14 information that the applicant had given which is appended -- I  
15 believe it's Exhibit 7 and it's appended to the City Planning  
16 Office statement. The amendment regarding events was elaborated  
17 and made far after the notice was given, and indeed, far after  
18 the initial ANC meeting was had where the community was, in fact,  
19 present.

20 CHAIRPERSON GRIFFIS: So you're representing that  
21 in fact the use variance wasn't addressed for the community.

22 MS. POLIVY: No, sir, the people who negotiated  
23 with Mr. Gonzalez' attorney subsequent to the meeting have not  
24 presented -- in fact, didn't even have an agreement in time for  
25 the last ANC meeting and the fact of the matter is, that the

1 representations that Mr. Gonzalez made to the community at both  
2 that meeting and when we met at his house were far different from  
3 what's being proposed now with respect to the events.

4 Again, I'm trying to keep the events portion and  
5 the bed and breakfast portion separate.

6 MR. GELL: Mr. Chairman --

7 CHAIRPERSON GRIFFIS: One quick question then, so  
8 what you're saying then, any representation from the ANC we have  
9 today is without any discussion or knowledge of the additional  
10 variances; is that correct?

11 MS. POLIVY: I'm not speaking for the ANC, Mr.  
12 Chairman. I'm speaking as a member of the community who attended  
13 those meetings and the fact of the matter is the reason I suspect  
14 that that this Board did not give notice of those events was  
15 because they were not aware of the time that notice was printed  
16 in the Register that that was a consideration.

17 Now, I've spoken to the --

18 CHAIRPERSON GRIFFIS: I don't know if that's  
19 correct.

20 MS. POLIVY: Well, I've spoken to the staff and  
21 they said as far as they were concerned, the gentlemen inside and  
22 he said he so informed Mr. Gell that this was strictly a bed and  
23 breakfast variance as far as he was concerned and that's what he  
24 gave notice of.

25 CHAIRPERSON GRIFFIS: Okay. I cut somebody off.

1 Mr. Gell, was that you?

2 MR. GELL: I was just going to say that Mr.  
3 Gonzalez has been talking to neighbors, many neighbors for some  
4 time. Initially he had been talking to them about having events  
5 but these would be limited to weddings, to fund raisers and the  
6 like. The need to expand the events to other than weddings and  
7 fund raisers came up in the course of the negotiations but the  
8 fact that there would be some events was, I believe, understood.

9 Now, I don't know if it was understood at the time  
10 of the first ANC meeting but it certainly was when the ANC voted  
11 to approve -- to go forward and to file a -- to reach an  
12 agreement and then to be able to approve the project. I don't  
13 know at what point Ms. Polivy first learned about the events, but  
14 I know that they have been discussed for some time with the  
15 neighbors, many of the neighbors and it is my understanding that  
16 she was given an opportunity to meet with Mr. Gonzalez because he  
17 met with many of the neighbors and she has not done so or chose  
18 not to do so.

19 MS. POLIVY: I hate to interrupt, Mr. Gell, but I  
20 did meet with Mr. Gonzalez.

21 MR. GONZALEZ: Mr. Chairman, if I may, I actually -  
22 -

23 CHAIRPERSON GRIFFIS: If you're going to speak you  
24 have to come to the table and be on a microphone. Give me your  
25 name and address.

1 MR. GONZALEZ: My name is Mr. Gonzalez, Humberto  
2 Gonzalez. I am the owner of the property at 1720 16th Street NW.

3 CHAIRPERSON GRIFFIS: Yes.

4 MR. GONZALEZ: And I have attended the December and  
5 the January meeting of the ANC as well as the last meeting also.

6 And at all three of the meetings I stated exactly what we're  
7 here to bring in today. And the -- my fellow neighbor at the end  
8 here, attended both the December and January meeting also. And  
9 so I have to say that she, as far as I'm concerned, was aware of  
10 all my intents.

11 From the very beginning I stated in the public at  
12 the ANC meeting exactly what I'm here to state today, and we have  
13 been making very, very much progress and trying to understand  
14 each other and we have made some changes because not everybody  
15 was in accordance with what we -- with what I had to say at the  
16 very beginning.

17 So we have worked on this for the past two months.

18 She attended the first and --

19 CHAIRPERSON GRIFFIS: And I appreciate that. I  
20 think we have what we need. I'm not going to go in to establish  
21 who knew what when. I think we have a serious issue in that even  
22 if you look back at the application that came in, it is a  
23 variance for bed and breakfast. I think the question then goes  
24 to, as this evolved, as you're talking about, as often  
25 applications do evolve, have we added on to this application more

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1 than would be through common sense understandable by the initial  
2 and following notifications and that's where I kind of -- that's  
3 where I want to establish if, in fact, what's being notified  
4 misleads or doesn't give an understanding of what someone would  
5 be concerned with and then come down and look at the actual  
6 application.

7 I would feel very strongly that we need to somehow  
8 remedy that. I'm not convinced that that's the case at this  
9 point but I think I can hear others on that point.

10 MS. MITTEN: Mr. Chairman --

11 CHAIRPERSON GRIFFIS: Yeah.

12 MS. MITTEN: -- a few thoughts. One is that we  
13 know that from a case that went to the Court of Appeals that with  
14 a relatively narrow scope of special events, that special events  
15 are sometimes considered to be accessory uses for bed and  
16 breakfast. And clearly in this case by requesting a variance for  
17 special events, the scope is beyond that and so I think from the  
18 public's perspective, I think it's important that it be clear  
19 that the scope is beyond that.

20 And so in asking for advertising a variance that it  
21 be clear that there is, in fact, a variance for special events,  
22 that we're not -- this is not an accessory use being proposed to  
23 a bed and breakfast; point number one.

24 Point number two is when we often -- not often but  
25 when we sometimes have issues of notice, you know, we have the

1 three forms of notice and sometimes one of those forms fails, but  
2 one or two of the other forms are intact. In this case we have  
3 none of the three forms of notice intact because the variance was  
4 simply just not advertised and it's very -- we don't have the  
5 mailing to the property owners within 200 feet, we don't have the  
6 proper notice in the DC Register or the proper notice being  
7 posted.

8 So I think that that also suggests that it's  
9 important that proper notice be given because not even one of the  
10 typical forms of notice has been proper.

11 CHAIRPERSON GRIFFIS: And where do you see the  
12 discrepancy in the noticing, just by the fact that it just states  
13 one variance?

14 MS. MITTEN: Correct.

15 CHAIRPERSON GRIFFIS: I see. And so what I'm going  
16 to do is interpret in that you're asking -- actually, proposing a  
17 motion of continuance and readvertising; is that correct?

18 MS. MITTEN: Yes, sir.

19 CHAIRPERSON GRIFFIS: Okay, so let's speak to that  
20 then. Ms. Mitten, you're in support of that.

21 MS. MITTEN: Yes, and I -- just from a practical  
22 perspective, I would suggest perhaps that we could decide parties  
23 and you're not going to get a lot accomplished today anyway  
24 because unfortunately the civil infraction case went much longer  
25 than we anticipated, so I don't think there's going to be -- you

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1 know, it's going to be highly prejudicial to continue this  
2 because the bulk of this case is going to be heard another day  
3 anyway.

4 MEMBER ETHERLY: Mr. Chair, I would to an extent  
5 associate myself with the remarks of Ms. Mitten. I believe -- I  
6 felt that -- I feel that there's going to be a substantial amount  
7 of discussion that we're going to have on this particular  
8 question and we were not even going to get within a width of some  
9 type of decision posture today on this matter.

10 That kind of left me feeling that we would be in a  
11 position to move forward because we're just going to scratch the  
12 surface here today but I believe Ms. Mitten hit on that point  
13 appropriately. Notice is an extraordinarily important threshold  
14 step for this Board. I'm sure everyone shares in that belief,  
15 but I'm inclined for us to resolve the party issue at least today  
16 and see where we stand from a scheduling standpoint after that.

17 CHAIRPERSON GRIFFIS: Okay, yes, you had a comment.

18 MS. HUBBARD: Yes.

19 CHAIRPERSON GRIFFIS: And I'm going to have you  
20 turn on the mike and the mikes flanking you to be turned off. Go  
21 ahead.

22 MS. HUBBARD: My name is Harriet B. Hubbard and I  
23 expect to apply for a party status as a representative of the  
24 Residential Action Coalition and I have a preliminary which may -  
25 - I am asking that this case be dismissed with prejudice for the

1 following reasons and I will now read them.

2 In the record there is a license issued by the DC  
3 government to Mr. Gonzalez for a six-room bed and breakfast.

4 MR. GELL: Excuse me, Mr. Chairman, I don't know  
5 how you dismiss a case you haven't heard yet.

6 MS. HUBBARD: Wait till I tell you -- I'm telling  
7 you why you must --

8 CHAIRPERSON GRIFFIS: Well, we haven't decided to  
9 do that yet, but that's a good point. Let me just be clear on  
10 what we're doing here.

11 MS. HUBBARD: I know what you are -- I'm asking  
12 that this be dismissed because --

13 CHAIRPERSON GRIFFIS: Actually, let me speak and I  
14 may be clarification.

15 MS. HUBBARD: Excuse me, Mr. Griffis. I'm saying  
16 that the zoning --

17 CHAIRPERSON GRIFFIS: I'm sorry, I do need to speak  
18 now. I can recess and we can reconvene in a moment, but let me  
19 just reiterate, what we're doing for my own consideration and for  
20 my Board members, we have a motion that is to continue this case  
21 and readvertise. What I want to do --

22 MS. HUBBARD: This is to the point, to the point.

23 CHAIRPERSON GRIFFIS: Ma'am, really, if you allow  
24 me a few moments.

25 MS. HUBBARD: All right.

1 CHAIRPERSON GRIFFIS: It's late in the afternoon  
2 and we've had a very long day. So I like to repeat quite a bit  
3 of what we're doing so I don't lose the attention of my Board  
4 members and myself, frankly. I do not want to lose fact of the  
5 matter that we have one motion which I will put aside because I  
6 will now here the rest of any other motions or preliminary  
7 matters.

8 We will then return to all the preliminary matters  
9 in and order of which I decide and we will take them up at that  
10 point. So all in all, you're now free to continue with your  
11 motion.

12 MS. HUBBARD: Thank you very much, Mr. Griffis. My  
13 motion is to dismiss this case with prejudice or in the  
14 alternative postpone it to a later date for the following  
15 reasons. I believe the administration presented this case to you  
16 in error. The notice says there is an existing bed and  
17 breakfast. There is no such thing as an existing bed and  
18 breakfast.

19 The only evidence in the file of an existing bed  
20 and breakfast is a license. However, you cannot get a license if  
21 you do not have an occupancy permit. The premises has no  
22 occupancy permit for a bed and breakfast. The last occupancy  
23 permit in existence is for a rooming house and it's over 12 years  
24 old. Now, these are facts that would be easily ascertainable by  
25 your staff. They know an occupancy permit is required with a

1 license.

2           Furthermore, even if you were to hear this case,  
3 under the Clean Hands Act passed by the City Council, he could  
4 not get a license or an occupancy permit because he's delinquent  
5 in his taxes for last year and you can check that out with the  
6 corporation counsel.

7           CHAIRPERSON GRIFFIS: Well, that's beyond the  
8 jurisdiction of --

9           MS. HUBBARD: No, it's not. You are required to go  
10 by the most restrictive thing in the DC Code. That is what the  
11 zoning regulations are to abide by, the most restrictive of all  
12 the things and the Clean Hands Act was passed specifically to  
13 prevent the issuance of any type of thing. So that the very  
14 basis from the DC government, that license, there is no occupancy  
15 permit. The only occupancy permit for this building is for a  
16 rooming house and it's very old and you know that an occupancy  
17 permit is required for a license, don't you?

18           CHAIRPERSON GRIFFIS: Haven't you just stated that  
19 they have a license but you're refuting the fact that --

20           MS. HUBBARD: They have no license, they have no  
21 occupancy permit. The DC government issued in error a license.

22           CHAIRPERSON GRIFFIS: Okay.

23           MS. HUBBARD: So the thing is, why did the Zoning  
24 Administration accept a case to be heard when there was no  
25 occupancy --

1 CHAIRPERSON GRIFFIS: But on the basis of that fact  
2 you --

3 MS. HUBBARD: Well, that's just one of my points,  
4 one point. In other words, that this is not an existing bed and  
5 breakfast as you advertised. They have nothing.

6 CHAIRPERSON GRIFFIS: Well, I have in my hand  
7 actually Exhibit Number 9 which has home occupation permit.

8 MS. HUBBARD: Where is the -- for what, an  
9 occupancy permit?

10 CHAIRPERSON GRIFFIS: Yeah, occupation permit for  
11 one employee, six rooms --

12 MS. HUBBARD: No, no, that's a license.

13 CHAIRPERSON GRIFFIS: No, I understand that.

14 MS. HUBBARD: That's not an occupancy permit.  
15 That's not an occupancy permit.

16 CHAIRPERSON GRIFFIS: That's what you just said.

17 MS. HUBBARD: Yes, you have to have an occupancy  
18 permit to get a license.

19 CHAIRPERSON GRIFFIS: Well, that's my whole point,  
20 how does he have a license --

21 MS. HUBBARD: Why didn't they check that? You  
22 know you've got to have an occupancy permit.

23 CHAIRPERSON GRIFFIS: Okay, I think we get the  
24 point.

25 MS. HUBBARD: That's point one. It is not an

1 existing bed and breakfast. All right. And there is no  
2 occupancy permit for this building except for a rooming house and  
3 it's very old. So as far as the public record goes, the use of  
4 this building right now is as a rooming house. So if you're  
5 going to advertise, an existing rooming house.

6 All right, now this is for additional value uses  
7 which are not stated in the advertisement but according to my  
8 study of the record, would have to be considered. 208B says that  
9 the breakfast -- it must be the only meal served and is served  
10 only to overnight guests. Yet, Mr. Gonzalez has stated that he  
11 will have special events in which meals and liquor will --

12 CHAIRPERSON GRIFFIS: Let's get into the merit of  
13 the whole case.

14 MS. HUBBARD: Okay, I'm just saying that I agree  
15 with her, that the thing is that they will be serving meals that  
16 the very fact that you're even considering that means that they  
17 will have to have --

18 CHAIRPERSON GRIFFIS: We're not considering that  
19 because we're not to the case yet.

20 MS. HUBBARD: No, but you should consider special  
21 events.

22 CHAIRPERSON GRIFFIS: Right.

23 MS. HUBBARD: All right, that you would have to  
24 have a variance from 203.8.

25 CHAIRPERSON GRIFFIS: Okay, so your point is

1 there's a use variance required for the special events.

2 MS. HUBBARD: Yes.

3 CHAIRPERSON GRIFFIS: Okay.

4 MS. HUBBARD: Now Mr. Gonzalez has not sought a  
5 variance for 203.8, so that the meals and liquor can be served at  
6 special events. Now, this goes to another thing that's very,  
7 very important. The planning report states that the floor area  
8 of the Tutorski Mansion is 12,000 feet. Real estate tax records,  
9 on the other hand, which have been going on for years with this  
10 property, show that the floor area of that building is 9690.

11 CHAIRPERSON GRIFFIS: Okay, now without going --

12 MS. HUBBARD: Now, wait a second, I want to tell  
13 you what you have to --

14 CHAIRPERSON GRIFFIS: Let me tell you what you need  
15 to do.

16 MS. HUBBARD: -- on the variances, I have it all  
17 written out.

18 CHAIRPERSON GRIFFIS: You know, I'm ready for a 10-  
19 minute. I think you ought to think about the decorum of what's  
20 happening here.

21 MS. HUBBARD: Pardon me.

22 CHAIRPERSON GRIFFIS: If I interrupt you it is for  
23 a purpose and I'd appreciate that, but frankly, I need to have 10  
24 minutes.

25 (Off the record at 5:02 p.m.)

1 (On the record at 5:10 p.m.)

2 CHAIRPERSON GRIFFIS: Actually, I'd love to have  
3 this on the record, so you could turn your mike on.

4 MS. HUBBARD: I mean, I don't want to upset you.  
5 Remember, I'm 88 and I've been down here a million times.

6 CHAIRPERSON GRIFFIS: And I appreciate that and I  
7 appreciate your experience down here.

8 MS. HUBBARD: And I only have a couple more points.  
9 My entire testimony written out was only two handwritten pages.

10 CHAIRPERSON GRIFFIS: And we're not even at the  
11 testimony phase.

12 MS. HUBBARD: Well, I mean to say my support for my  
13 request for dismissal with prejudice.

14 CHAIRPERSON GRIFFIS: Okay. And this is what we're  
15 going to do --

16 MS. HUBBARD: I want to ask for two more minutes.

17 CHAIRPERSON GRIFFIS: Let me just explain, Ms.  
18 Hubbard, what we're going to do because that seems to move things  
19 on in the normal circumstance. I'm going to let you speak and  
20 I'm going to give you three minutes and just lay it all on us.  
21 I'm going to take copious notes and then we're going to move on.

22 At the end of three minutes, I am going to stop you  
23 because we do have a schedule of time.

24 MS. HUBBARD: Okay.

25 CHAIRPERSON GRIFFIS: And then we're going to go

1 through what we can accomplish today and what we cannot, what we  
2 need to do and what we cannot do. And so with that, I will --  
3 there was something else but I'm going to let it go. So, Ms.  
4 Hubbard, it is yours for a couple of minutes.

5 MS. HUBBARD: All right. The applicant may need a  
6 variance to 203.4, that is why the correct number of square feet  
7 in the building must be known by the Planning Office. And as I  
8 tell you, there's a discrepancy with what the Planning Office  
9 says and what the Real Estate Tax Office says and that must be  
10 ascertained.

11 You can -- you know from studying the applicant and  
12 the Board of Zoning Adjustment in postponing the last hearing on  
13 this case, stated that special events will occur at the bed and  
14 breakfast. That's when you postponed the hearing. If these  
15 include meals of any kind, a variance to Section 203.8B must be  
16 advertised and also a variance of Section 203.8 must be exercised  
17 (sic).

18 I do -- now, this is something I do not understand  
19 myself. You know, the Board of Zoning Adjustment is prohibited  
20 from writing zoning laws and making -- creating new uses.

21 CHAIRPERSON GRIFFIS: We're often reminded by our  
22 commission on that.

23 MS. HUBBARD: A special event, that does not -- in  
24 a residential area -- suppose I owned a big house in Georgetown  
25 in residential zoning, and I decided that it's a permitted use in

1 a residential zone to have a special event for --

2 MS. MITTEN: Ms. Hubbard, that's actually speaking  
3 to the merits of the case.

4 MS. HUBBARD: All right, I'm saying that you have  
5 no right even to consider special events. Therefore, this hearing  
6 should be dismissed with prejudice. That's my opinion.

7 CHAIRPERSON GRIFFIS: Okay, so the use variance for  
8 230.8, which you talked about and also 203.8B, you're actually  
9 saying --

10 MS. HUBBARD: 203, yeah.

11 CHAIRPERSON GRIFFIS: -- we shouldn't hear at all.

12 MS. HUBBARD: You shouldn't hear anything with  
13 regard to special events because you have no authority to do it.  
14 You're not authorized to say what is special events. You're  
15 creating a use that never existed before. And you can't write  
16 the regulations yourself.

17 CHAIRPERSON GRIFFIS: Okay. Anything else?

18 MS. HUBBARD: No, that's it.

19 CHAIRPERSON GRIFFIS: That was smooth. I bet it  
20 was the clock that actually --

21 MS. HUBBARD: Thank you.

22 CHAIRPERSON GRIFFIS: I didn't realize that they  
23 were going to turn that on but -- good, thank you. Any others?  
24 Do we have any other preliminaries? Mr. Gell, did you want to  
25 speak to the list?

1 MR. GELL: Mr. Chairman, I take very seriously the  
2 fact that some neighbors now say that they did not have adequate  
3 notice of the extent of the variances that we have now asked for.

4 Part of that is because it was an evolving process. I must say  
5 that I'm totally surprised having spent weeks talking with ANC  
6 and neighbors, Mr. Gonzalez has had meetings and for us not to  
7 realize that there was this -- that there were some neighbors  
8 that were going to come and oppose us. Until last night when we  
9 put the final touches on the agreement that we have with the  
10 Advisory Neighborhood Commission and DCCA and some of the  
11 neighbors, we were not aware of any opposition, at least  
12 opposition by close neighbors.

13 And I'm -- what I think I would like to ask you to  
14 do because Mr. Gonzalez has a very, very strong need to at least  
15 get the ability to have 11 rooms and extra employees, and both of  
16 those were in the original -- in the application, the original  
17 application that he filed. In fact, he detailed precisely how  
18 many employees and what they would do and so forth, and the way I  
19 refer to it as six employees at all -- I mean, at one time, 13  
20 employees on staff, just to make it clear what we're asking you  
21 do to.

22 We would ask you not to consider the events at this  
23 time. If we can come back and do that, we would prefer, of  
24 course, to be able to do that. If you want us to refile for that  
25 portion of it at a later time, we will do that and withdraw that

1 portion of the request, but I don't think there has been an  
2 indication that there was not adequate notice about the employees  
3 and the 11 rooms.

4 MS. POLIVY: Oh, yes, there is.

5 MR. GELL: Unless I misheard.

6 CHAIRPERSON GRIFFIS: Let me just get some  
7 clarification, Mr. Gell, on your point that the original  
8 application listed the employees and the rooms?

9 MR. GELL: It did. It listed the 11 rooms on the  
10 face of the application.

11 CHAIRPERSON GRIFFIS: Right, on the Form 2.

12 MR. GELL: The supporting material also showed that  
13 he needed to have 13 employees.

14 CHAIRPERSON GRIFFIS: Okay. I don't -- I mean, I  
15 don't necessarily -- I don't see the employee number. I just see  
16 the 11 on Form 2, which is Exhibit 1, it does list -- see, this  
17 brings up an interesting point. The present use of property, bed  
18 and breakfast, six rooms; proposed use of the property bed and  
19 breakfast, 11 rooms and then it briefly gives the description.  
20 Okay.

21 MR. GELL: And I might add that it's even possible,  
22 if we're only talking about two variances, I mean, two changes,  
23 from what is permitted in a home occupation used as a bed and  
24 breakfast, this could also be considered as a special exception.  
25 However, we're willing to meet the needs of proving that a

1 variance is required as well to assure that that does not become  
2 an issue that could hinder us on appeal.

3 MS. POLIVY: Mr. Chairman, I have tried not to  
4 interrupt Mr. Gell because I would like to keep the focus on the  
5 initial procedural question that's raised and that I've raised  
6 and not get into how many variances he needs under the prevailing  
7 regulations.

8 In fact, if we got to that, the way I counted, he  
9 needs at least seven. But that's, I don't think, a matter to be  
10 discussed at this point. I think at this point, perhaps the time  
11 is best used by focusing on the procedural questions that have  
12 been raised and if there are procedural matters that can be  
13 discussed now and resolved and I don't know how late you normally  
14 go but perhaps that's the best way to spend what time we have.

15 CHAIRPERSON GRIFFIS: Well, I'm assuming everyone  
16 is prepared to stay till 10:00 tonight, so we'll let you know if  
17 that's different. And that is a joke for the record, so you can  
18 put that there was humor and laughter in the crowd. Okay, well,  
19 for procedural, well I think one, we're not going to finish this  
20 today and so we are going to pick another date. Now the date  
21 then in order for -- I think one way to look at this is actually  
22 to establish now what we need to advertise for and pick a date  
23 that coincides with the scheduling of some sort of readvertising.

24

25

Secondly, would be that we as a Board feel that the

1 advertising that was done, was sufficient and that any changes or  
2 manipulations to the relief sought can happen by this Board  
3 within the hearing and as we proceed. Either way, we're picking  
4 a new date on this.

5 I think, if I'm not mistaken, for readvertising to  
6 allow time, we would have to be at probably the first week of  
7 June. Any comments, members?

8 MS. MITTEN: If I may and I don't know that it goes  
9 specifically to what you just said but I think it's part of the  
10 package which is on what we're going to be advertising for  
11 whether we -- if we readvertise or not, I think we're clearly in  
12 a use variance mode and I say that because in spite of the fact  
13 that there's only two specific areas that Mr. Gell has  
14 articulated that they're seeking to depart from, which is the  
15 number of guest rooms and the number of employees.

16 I think in addition to that there's the notion that  
17 the home occupation is secondary to the primary use of the  
18 property as a home and I think we clearly are departing from  
19 that, so that would, in my mind, throw it over the hurdle of two  
20 specific areas of departure from the section on bed and  
21 breakfast.

22 So just to clarify, I think we're clearly in a  
23 variance mode and I think it would be -- I think given the timing  
24 that you suggested, and the fact that, you know, it would be much  
25 more efficient to hear this all together, I think readvertising

1 and just consolidating this into one proceeding is really the way  
2 it's going to end up because of the timing.

3 CHAIRPERSON GRIFFIS: Okay, and how did you want to  
4 establish what we readvertise for? I mean, what we have is some  
5 motions and oral presentation today regarding quite a bit. We  
6 have, even in Mr. Gell's submission and pre-hearing statement an  
7 and/or provision for special exception or variance. Do we need  
8 to ask Mr. Gell to, in fact, submit exactly what is to be  
9 advertised at this point?

10 MS. MITTEN: I think that's appropriate. I think  
11 that -- and I think it's not a good use of the Board's time to  
12 try and sort that out. I think that Mr. Gell is well aware of  
13 some of the issues regarding the advertisement that have been  
14 raised, regarding specific sections of the ordinance, I think,  
15 working with staff they can craft what should be an all inclusive  
16 advertisement for whatever is needed based on whatever agreement  
17 has been reached, you know, since from the time of the original  
18 advertisement, things clearly have evolved.

19 Well, whatever that is, let's let Mr. Gell work  
20 with staff to figure out what proper advertisement should be  
21 made.

22 CHAIRPERSON GRIFFIS: Good, and I would propose the  
23 same and I would instruct Mr. Gell, first of all, to be very  
24 decided in exactly what will be advertised and obviously, that  
25 will parallel with the hearing and the information that the Board

1 will review and deliberate on. I think your client wants to  
2 speak.

3 MR. GELL: Mr. Chairman, he can speak. I think  
4 what he's going to say is that I've been instructed to ask you to  
5 proceed with those items that can be proceeded with that were  
6 given notice, the 11 rooms in the bed and breakfast and the  
7 employees if that's permissible, and we would then withdraw the  
8 other and reapply for the additional events and whatever at a  
9 later time.

10 He really needs to have an answer on the 11 rooms  
11 and nobody has said that that has not been advertised.

12 MEMBER ETHERLY: Mr. Chair, if I may just add a  
13 little, not necessarily a clarification but just to kind of  
14 complete the picture a little bit here, I'm sure Mr. Gell and the  
15 applicant appreciate the difficulty when we run into the  
16 application process and perhaps not necessarily hit the  
17 specificity that would, I think, help everyone understand  
18 precisely what's happening, but just to kind of complete our  
19 record a little bit, I don't want to call it a hodge-podge; one,  
20 my colleagues will note that we have Exhibit Number 1, which is  
21 the application itself and we've been talking about that at some  
22 length.

23 We have what's referred to as Exhibit Number 3 but  
24 it may actually have been some type of appendix to the  
25 application which is labeled "Existing use and intended purpose".

1 It's labeled as Exhibit 3 in our exhibit log. It has a B on the  
2 upper right-hand corner of the document which suggests that it  
3 might have been an exhibit and it does note under intended use 11  
4 rooms, nightly rental.

5 It does reference with some measure of specificity  
6 the number of staff members totalling 13. This document, once  
7 again, Exhibit 3, is dated November 19th, 2001 which does match  
8 the date which is noted on the application that appears to have  
9 been completed by Mr. Gonzalez. Once, again, it perhaps is not  
10 the specificity or clarity that we want -- that we would  
11 otherwise like to see on the face of the document but there is  
12 some indication there at least with those two documents dating  
13 back to November 19th that there was some effort to give some  
14 clarity to what we were looking at in terms of the project.

15 I don't know necessarily where that leaves me, and  
16 I apologize for just kind of putting it out there and leaving it  
17 there, but once again, just to add a little bit of clarity to the  
18 picture, as of November 19th there were a number of things that  
19 were in our files speaking to what ultimately is becoming a much  
20 clearly application.

21 And, of course, we all noted that Mr. Gell joined  
22 the process after that starting point and often times counsel has  
23 to play catch-up and work with what you have. So I appreciate  
24 that, Mr. Gell, but I just wanted to note for my colleagues that  
25 we did have those documents which appear to have been in the file

1 on November 19th, but once again, whether that's sufficient from  
2 the noticing standpoint, that might be a little difficult to say,  
3 but I wanted to just add that additional piece to conversation  
4 and dialogue.

5 MR. GELL: May I just add that on the face of the  
6 application, it also indicates the business will create jobs in  
7 the area and bring tourism. The creation of jobs is, indeed, the  
8 13 people that he had on the exhibit. It's simply --

9 CHAIRPERSON GRIFFIS: That's indirect, though,  
10 isn't it?

11 MR. GELL: It is but I must say Mr. Gonzalez, the  
12 form was a bit confusing where it said proposed use of the  
13 property. He did not equate use with numbers of employees.

14 CHAIRPERSON GRIFFIS: I see.

15 MR. GELL: And he thought by adding that as an  
16 exhibit that that would cover it.

17 CHAIRPERSON GRIFFIS: Okay.

18 MS. POLIVY: Mr. Chairman, may I inquire on the  
19 renoticing, would Mr. Gonzalez be required to specify every  
20 variance that he's seeking under the provisions of 203.4, which  
21 is the laundry list of things that he could -- exceptions that he  
22 could seek, two or more of which constitute a variance?

23 CHAIRPERSON GRIFFIS: Yeah, there would have to be  
24 a clear statement of what relief was sought.

25 MS. POLIVY: Would there be an opportunity for

1 others to seek additions to the variance that he's seeking? In  
2 other words, is he the one who puts the parameters and if he goes  
3 beyond those parameters, he can't get the approval or is the  
4 question of the noticing and what is to be noticed something that  
5 is subject to the community coming in and saying, this is also  
6 something he needs a variance for?

7 The reason I ask is I understand the time frames  
8 involved in readvertising and I understand Mr. Gonzalez' hope to  
9 get this show on the road. And I think that it would be very  
10 unfortunate if we came back and did it again and then there were  
11 things that he didn't ask and we do it again and before we know  
12 it, we're past Christmas.

13 CHAIRPERSON GRIFFIS: Well, I think it would  
14 behoove the applicant to have the correct documentation that  
15 supports their case. So obviously, if they don't have that  
16 coming in, then that would in large part, go to the notification  
17 but if they didn't then it would -- it could do numerous things,  
18 but it could, in fact, hurt their case or could get us involved  
19 in a situation like this where we're trying to find clarity and  
20 decide whether we actually readvertise.

21 So do you want to bring this up now?

22 MS. HUBBARD: Could I ask for something, too, Mr.  
23 Griffis?

24 CHAIRPERSON GRIFFIS: Yes, Ms. Hubbard.

25 MS. HUBBARD: That the Planning Office be

1 instructed to ascertain all of the facts in writing that I have  
2 adduced in my plea to have the case -- because their job on this  
3 case, in my opinion, was very poor.

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. HUBBARD: And I mean to say the mistakes they  
6 have made about now ascertaining the correct use and the amount  
7 of square footage and so forth and so on. If you would ask them  
8 to write a new report for you when you have the case come ahead  
9 again.

10 CHAIRPERSON GRIFFIS: I'll take that under  
11 consideration. I think that one, the points that you bring up  
12 are perfect for, in fact, questioning, if you become a party and  
13 cross examining the Office of Planning.

14 MS. HUBBARD: Oh, please don't make me do that.

15 CHAIRPERSON GRIFFIS: I'll take that under  
16 consideration also. Let's stick to the issue at hand here  
17 because the time is ticking down and I want to figure out where  
18 we're going from this, so I need to hear from the Board members  
19 again, and what we are interesting in doing. We have two  
20 options, I will put it up to this.

21 We can set a new date for this as quickly as  
22 possible. We can set a date that accommodates the readvertising,  
23 ask the applicant to submit those specifics and move with that.  
24 I think that would remedy all the concerns at this point. A lot  
25 of what has been brought up this afternoon will actually have to

1 be remedied or discussed and heard in the case itself and so  
2 we'll start with whoever wants.

3 MS. MITTEN: Mr. Griffis, I guess I'm not going to  
4 repeat what I had suggested earlier. I am the Board member who  
5 needs to leave first, so I can be here for another 15 minutes and  
6 I don't know how long the rest of the Board members were planning  
7 on staying but I just don't know how much ground you're going to  
8 be able to cover today if you proceed with just the variances  
9 that were advertised.

10 CHAIRPERSON GRIFFIS: Right.

11 MS. MITTEN: So --

12 CHAIRPERSON GRIFFIS: No, I'm sorry if I'm not  
13 clear. I want to set a new date now which means we just continue  
14 this or do we readvertise which sets us a different date and you  
15 had spoken of readvertising.

16 MS. MITTEN: Well, it does give us a different  
17 date? I thought the earliest date was June no matter what.

18 CHAIRPERSON GRIFFIS: Well, I'm kind of assuming  
19 that we could be flexible on our schedule but maybe I should  
20 actually figure that out.

21 MS. MITTEN: I didn't get that impression earlier.

22 MS. BAILEY: Mr. Chairman?

23 CHAIRPERSON GRIFFIS: Yeah.

24 MS. BAILEY: The dates we're looking at is June  
25 4th.

1                   MEMBER ETHERLY:   And Ms. Bailey, that's under any  
2                   circumstance.

3                   MS. BAILEY:   Yes.

4                   CHAIRPERSON GRIFFIS:   Any circumstance, okay.

5                   MR. MICONE:   Mr. Chair, Vince Micone, Chair of the  
6                   Dupont Circle Advisory Neighborhood Association.   I would ask the  
7                   Board's consideration that when this is rescheduled for the  
8                   benefit of the neighbors who are involved, that it be first on  
9                   the docket that day or first on the afternoon schedule. It's  
10                  always very educational to sit in BZA hearings.

11                  CHAIRPERSON GRIFFIS:   That's very kind of you to  
12                  say.

13                  MR. MICONE:   But certainly on behalf of my  
14                  constituents, in DCCA who worked in negotiating would ask that we  
15                  be first on the docket.

16                  CHAIRPERSON GRIFFIS:   Yeah, and we absolutely  
17                  appreciate that and I'm glad you bring that up. We do and will  
18                  make all accommodations possible to do that, although the early  
19                  afternoon was a nail biter, so I know you enjoyed the show, the -  
20                  - I think that would be absolutely appropriate and we do give  
21                  priority as best as possible to things that are continuing and  
22                  have been in the pipeline so to speak.

23                  So that being said, I -- we don't have a choice at  
24                  this point, so I think what we'll do is set this for June 4th.  
25                  And are we talking afternoon? I'm sorry if you said that.

1 MS. BAILEY: June 4th is one of your meeting days  
2 so it will be in the afternoon. It will be the first case in the  
3 afternoon.

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. MITTEN: Could we write something on the  
6 schedule that makes it the only case of the afternoon because,  
7 you know, it's going to be lengthy and just to kind of make up  
8 for whatever we don't get to today, if we were, you know, not to  
9 schedule anything else that day, we could cover a significant  
10 amount of ground that afternoon.

11 CHAIRPERSON GRIFFIS: I would absolutely agree with  
12 that and I would suggest that we do mark the entire afternoon for  
13 this case at that point.

14 MS. BAILEY: Mr. Chairman.

15 CHAIRPERSON GRIFFIS: Hold on just a second. Yes,  
16 sir.

17 MR. GONZALEZ: Mr. Chairman, I'm sorry, I  
18 apologize. I know that it is late, it's been a long day and that  
19 we do want to get home. I wanted to just make a quick statement  
20 and the statement is that when I actually filled out this  
21 application, I obtained help from somebody here at this office.  
22 A gentleman helped me that worked here to fill out this  
23 application and I filled it out according to his guidance here  
24 when I turned it in.

25 And I had all my intentions as I added the

1 information that Mr. Etherly found in there and even if my  
2 neighbor states that we should not consider the rest of the  
3 things that were not properly advertised, I know that it's late  
4 but I would like to ask you to please at least consider the 11  
5 bedrooms tonight.

6 CHAIRPERSON GRIFFIS: Well, and I absolutely  
7 appreciate that. If we even started, we will lose one of our  
8 Board members in a matter of moments. We would not continue  
9 passed -- I mean, even if I pushed to 7:00 o'clock, there's no  
10 way we would accomplish the entire case. We just couldn't  
11 conceivably get through it, so I think it is actually more  
12 beneficial although it's harder to push this to June, it is more  
13 beneficial for your entire application to take it all up at once.

14 As you're seeing right now, we will probably be  
15 bogged down in a lot of questions of how we differentiate one  
16 variance from another and where it goes. I think it would be a  
17 heck of a lot cleaner and maybe even more expeditious if we do  
18 this all together.

19 MR. GONZALEZ: All right.

20 CHAIRPERSON GRIFFIS: And if I thought that we  
21 could get something accomplished and a bench decision on  
22 something today, I would move ahead. I would even keep Board  
23 members even later than that, but I don't see that happening.

24 MR. GONZALEZ: Is there no way to give everybody a  
25 time limit to express their --

1 CHAIRPERSON GRIFFIS: I most certainly will in  
2 June.

3 MR. GONZALEZ: Okay. All right, thank you.

4 MS. POLIVY: Mr. Chairman, may I request that you  
5 recognize the City Planning report was made strictly on the basis  
6 of bed and breakfast.

7 CHAIRPERSON GRIFFIS: Yeah, and we'll take care of  
8 that. And frankly, the Board and the staff, which is very able,  
9 and the Office of Planning representative have been through this  
10 entire afternoon hearing this. You know, once we have  
11 readvertising, Office of Planning will have ample time for  
12 revisions to any of their memo. It goes without saying but now  
13 that you've said it, we can reiterate.

14 Certainly Office of Planning will be relooking at  
15 this and if there is revisions needed or required, it will take  
16 place as in all other of the information and if there are other  
17 government agencies that then need to weigh in, they will do so  
18 also. Ms. Mitten?

19 MS. MITTEN: I did want to just for the benefit of  
20 the applicant go back to something that Ms. Hubbard raised, which  
21 her view is that it is outside the purview of the BZA to grant a  
22 use variance because it, you know, on its face violates the  
23 spirit of the zoning regulations but for the benefit of the  
24 applicant, the test for a use variance is a very difficult test  
25 to meet for the reason that Ms. Hubbard articulated.

1                   So I would recommend that you spend quite a bit of  
2 time focusing on that test and trying to meet the burden because  
3 it's a very difficult burden to meet and I just wanted to give  
4 you the benefit of that thought.

5                   CHAIRPERSON GRIFFIS: And I appreciate that, okay.

6                   MR. GELL: Mr. Chairman --

7                   CHAIRPERSON GRIFFIS: Yes, Mr. Gell.

8                   MR. GELL: -- I really haven't heard a decision on  
9 whether the Board is willing to go forward only with the question  
10 of the 11 rooms and the employees and I realize you have limited  
11 dates, but I think the June 4th may have been a date which  
12 reflected the fact that there would need to be advertising.  
13 There would not need to be readvertising on --

14                   CHAIRPERSON GRIFFIS: No, and I should be clear on  
15 that. I actually -- it was my assumption and I thought that  
16 perhaps we could squeeze it in, but my Board members corrected me  
17 and the staff has indicated that there is no other time although  
18 -- hold on just a second.

19                   If there's any good news, we have no room in our  
20 schedule which means business must be booming but that is not  
21 good news for this. At best case scenario, we would have an hour  
22 or less in an afternoon to even start this up again, if you were  
23 not to readvertise and just go ahead with what is advertised.  
24 I'm not prepared to do that because I think it would not be  
25 efficient and it would be essentially continued to be heard again

1 close to or on the 4th of June in which case I would suggest and  
2 I think that I would like to, if there aren't strong objections,  
3 Mr. Gell, set this for June 4th and give you the opportunity to  
4 work with staff for the readvertising of this application.

5 And I mean, I'll be fairly forceful. I think you  
6 need to readvertise but -- well, there it is.

7 MEMBER ETHERLY: Mr. Chair, if I may just add a  
8 little bit of meat to that without going too far because Ms.  
9 Mitten has to leave, essentially, Mr. Gell, what you're looking  
10 at is you can water this down to the most basic, most fundamental  
11 element that you and your client can agree upon, potentially get  
12 squeezed in as the Chair said for possibly an hour if you're  
13 lucky and still have the very significant possibility that that's  
14 going to have to get continued because, of course, we still have  
15 the party issue to deal with.

16 Or you look at the June 4th date where you have  
17 some fair certainty, more than fair certainty that you have a  
18 chance to get your whole basket in front of the Board and you get  
19 everything dealt with. That's not a great time table, I  
20 understand and I think this Board understands from the  
21 applicant's standpoint but that's probably -- that's your choice  
22 and it's not a great one.

23 MR. GELL: Well, thank you, Mr. Etherly. Could I  
24 ask what date you were looking at?

25 CHAIRPERSON GRIFFIS: Oh, I'm sorry, oh, you mean

1 for the next --

2 MR. GELL: For the hour.

3 CHAIRPERSON GRIFFIS: -- squeezed in?

4 MR. GELL: Or was that -- perhaps you were thinking  
5 of several possibilities but --

6 CHAIRPERSON GRIFFIS: Well, yeah, it was several.  
7 I mean, they were out towards end of April, possibly mid-May. I  
8 mean, you know, when you get into that scenario, it's not that  
9 far away and I'm going to have to confirm these dates because I'm  
10 looking at a schedule that may not be totally updated and there's  
11 other things that are happening. Okay.

12 MR. GELL: I guess we'll go for June 4th.

13 CHAIRPERSON GRIFFIS: Okay.

14 MS. POLIVY: Would that be at 1:00 o'clock?

15 CHAIRPERSON GRIFFIS: Yes. June 4th it is set for  
16 the first and the only in the afternoon and we'll start at 1:00  
17 o'clock and we will start everything at that point. We will not  
18 go through party status today as we would anticipated or we would  
19 hope that perhaps through readvertising and also through the  
20 neighborhood agreement that I understand has been signed and  
21 drafted that we may lose parties or change the party status.

22 Yes.

23 MR. MICONE: That is one question that I had, in  
24 terms of the readvertising, do neighbors need to reapply for  
25 party status on the second case? Is this de facto? Is a

1 withdrawal on the original case? What are the standards that the  
2 neighbors need to be aware of to obtain party status?

3 CHAIRPERSON GRIFFIS: That's an excellent point.  
4 I'm going to actually turn to corporation counsel to corporation  
5 counsel to give us an indication of if this is readvertised is  
6 this an entirely new case or can we hold the basis of what we  
7 have now?

8 MS. SANSONE: I think, Mr. Chairman, there would be  
9 an opportunity for persons that haven't requested party status to  
10 do so with respect to the new relief and the ones that have  
11 applied would continue over, although if they've entered into  
12 some settlement agreement, perhaps they could withdraw their  
13 request which would simply our housekeeping. That would help a  
14 lot.

15 CHAIRPERSON GRIFFIS: Okay, in which case, if  
16 you're in now, you're okay. Is that fairly clear for everybody?

17 MR. MICONE: Yes, thank you. Thank you, Mr. Chair.

18 CHAIRPERSON GRIFFIS: Okay. Let me be clear on  
19 that. If you have made a request for party status, then you  
20 don't need to make a new request and that request will be  
21 addressed by the Board on June 4th. Does that answer?

22 MS. BAILEY: Mr. Chairman, should we get some dates  
23 for when submissions are to be made or -- normally the ANC report  
24 is due seven days before the hearing. Are we sticking with that  
25 policy? OP report is due seven days before the hearing. Are we

1 sticking to that policy, the same policy would apply?

2 CHAIRPERSON GRIFFIS: Yeah, I think we'll stick to  
3 the set schedule on this.

4 MS. BAILEY: Okay.

5 CHAIRPERSON GRIFFIS: Thank you for that. Anything  
6 else? Good, well, I appreciate your time this afternoon and  
7 sorry we couldn't move on further. And this would the adjourn  
8 the 19 March 2002 afternoon public hearing.

9 (Whereupon, at 5:48 p.m. the above-entitled matter  
10 was concluded.)

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