

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY,  
FEBRUARY 23, 2010

+ + + + +

The Regular Public Hearing convened in Room 220 South, 441 4<sup>th</sup> Street, N.W., Washington, D.C. 20001, pursuant to notice at 12:00 a.m., Marc D. Loud, Chairman, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC D. LOUD	Chairman
SHANE L. DETTMAN	Vice Chairman (NCPC)
MERIDITH MOLDENHAUER	Board Member
NICOLE SORG	Board Member

ZONING COMMISSION MEMBERS PRESENT:

MICHAEL G. TURNBULL, FAIA, Commissioner  
(AOC)

OFFICE OF ZONING STAFF PRESENT:

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

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.  
LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

PAUL GOLDSTEIN  
MATT JESICK  
STEPHEN MORDFIN

This transcript constitutes the minutes from the Regular Public Hearing held on February 23, 2010.

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

2 12:02 p.m.

3 CHAIRMAN LOUD: We will now call  
4 the Public Hearing for this morning. Our  
5 intention this morning, for those of you in  
6 the audience, is to try to make it through the  
7 three cases that were on the calendar,  
8 February 23<sup>rd</sup> hearing calendar, by 1:00 p.m.  
9 and then we will take a break for the  
10 afternoon calendar.

11 This hearing will, please, come to  
12 order. Ladies and gentlemen, this is the  
13 February 23<sup>rd</sup> Public Hearing of the Board of  
14 Zoning Adjustment of the District of Columbia.

15 My name is Marc Loud, Chairperson.

16 Joining me today is Vice Chair Shane Dettman,  
17 representing the National Capital Planning  
18 Commission, Mr. Michael Turnbull, representing  
19 the Zoning Commission and to my left Ms.  
20 Meridith Moldenhauer and Ms. Nikki Sorg,  
21 Mayoral Appointees, Mr. Clifford Moy,  
22 Secretary of BZA, Ms. Sherry Glazer, Office of

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1 the Attorney General and to my far left, Ms.  
2 Beverley Bailey, Zoning Specialist here in the  
3 Office of Zoning.

4 Copies of today's hearing agenda  
5 are available to you and are located to my  
6 left in the wall bin near the door.

7 Please, be advised that this  
8 proceeding is being recorded by a Court  
9 Reporter and is also webcast live.  
10 Accordingly, we must ask you to refrain from  
11 any disruptive noises or actions in the  
12 hearing room.

13 When presenting information to the  
14 Board, please, turn on and speak into the  
15 microphone, first, stating your name and home  
16 address. When you are finished speaking,  
17 please, turn your microphone off, so that your  
18 microphone is no longer picking up sound or  
19 background noise.

20 All persons planning to testify  
21 either in favor or in opposition are to fill  
22 out two witness cards. These cards are

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1 located to my left on the table near the door  
2 and on the witness tables. Upon coming  
3 forward to speak to the Board, please, give  
4 both cards to the reporter sitting to my  
5 right.

6 The order of procedure for special  
7 exceptions and variances is: First, statement  
8 and witnesses of the applicant; Government  
9 reports, including the Office of Planning, the  
10 Department of Public Works, etcetera; The  
11 report of the ANC; Parties or persons in  
12 support, they are given 3 minutes; Parties or  
13 persons in opposition, they are also given 3  
14 minutes; and closing remarks by the applicant.

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

20 The appellee, persons and parties, except an  
21 ANC, in opposition, including witnesses, 60  
22 minutes collectively. Individuals 3 minutes.

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1           These time restraints do not  
2 include cross examination and/or questions  
3 from the Board. Cross examination of  
4 witnesses is permitted by the applicant or  
5 parties. The ANC within which the property is  
6 located is automatically a party in a special  
7 exception or variance case.

8           Nothing prohibits the Board from  
9 placing reasonable restrictions on cross  
10 examination, including time limits and  
11 limitations on the scope.

12           The record will be closed at the  
13 conclusion of each case, except for any  
14 material specifically requested by the Board.

15           The Board and staff will specify at the end  
16 of the hearing exactly what is expected and  
17 the date when the persons must submit the  
18 evidence to the Office of Zoning. After the  
19 record is closed, no additional information  
20 will be accepted by the Board.

21           The decision of the Board in  
22 contested cases must be based exclusively on

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1 the public record. To avoid any appearance to  
2 the contrary, the Board requests that persons  
3 present not engage Members of the Board in  
4 conversation.

5 Please, turn off all beepers and  
6 cell phones, at this time, so as not to  
7 disrupt these proceedings.

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

18 Does the staff have any  
19 preliminary matters?

20 MS. BAILEY: Mr. Chairman, Members  
21 of the Board, and to everyone, good afternoon.

22 Yes, Mr. Chairman, it has to do with a

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1 postponement of one of the cases. Is that  
2 something that you would like to take up at  
3 this time?

4 CHAIRMAN LOUD: No, Ms. Bailey.  
5 Why don't we do this? Why don't we swear the  
6 witnesses in and then let's call the calendar  
7 for this morning's hearing schedule and let's  
8 call the calendar in this order: The  
9 postponement case, then the Lonsdale case and  
10 then finally the Union case.

11 MS. BAILEY: Thank you.

12 CHAIRMAN LOUD: Thank you.

13 MS. BAILEY: All those persons  
14 wishing to testify, would you, please, stand  
15 to take the oath?

16 (Whereupon, the witnesses were  
17 sworn.)

18 MS. BAILEY: Thank you.

19 Mr. Chairman, the request for  
20 postponement concerns Application 17978, Diana  
21 Embrey, and it is pursuant to 11 DCMR '  
22 3104.1, for a special exception to construct a

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1 new accessory garage under section 223, not  
2 meeting the lot occupancy requirements of  
3 section 403. The property is located at 612 A  
4 Street, N.E. It is Zoned R-4. It is located  
5 in Square 867 and Lot 98.

6 As I indicated, Mr. Chairman, this  
7 is the second request for postponement. The  
8 applicant's architect, Mrs. Fowler, has  
9 indicated that the postponement would allow an  
10 opportunity to meet with the ANC and also the  
11 abutting neighbor who appears to have some  
12 concern about the project.

13 CHAIRMAN LOUD: Thank you, Ms.  
14 Bailey. Are the parties here for the Lonsdale  
15 case that Ms. -- I'm sorry, not the Lonsdale  
16 case, the Embrey case that Ms. Bailey just  
17 mentioned? They not being here, Ms. Bailey,  
18 is there an indication of a date that they  
19 have requested?

20 MS. BAILEY: Yes, until May. I'm  
21 assuming sometime after May. The request  
22 indicated that they were asking for

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1 postponement until May.

2 CHAIRMAN LOUD: Okay.

3 MS. GLAZER: Mr. Chair, pardon me  
4 for interrupting. I thought I saw somewhere  
5 they asked for May 11 specifically.

6 CHAIRMAN LOUD: Okay. And, Ms.  
7 Bailey, as you look at May 11, does that  
8 appear to be a date that we will have an  
9 opening on the calendar?

10 MS. BAILEY: Actually, my calendar  
11 doesn't go up until May. I stop at April  
12 20<sup>th</sup>, so I'm assuming so. The answer would be  
13 yes, Mr. Chairman.

14 CHAIRMAN LOUD: Okay. I see Mr.  
15 Moy agreeing with you that apparently he has  
16 got a calendar with additional dates and it  
17 looks like May 11 is available.

18 So why don't we continue it to  
19 that date? Make sure that we notify the  
20 parties in the case.

21 MS. BAILEY: We're going to be  
22 doing that in the morning, Mr. Chairman, May

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1 11<sup>th</sup> in the morning session?

2 CHAIRMAN LOUD: Yes.

3 MS. BAILEY: Since it is open as  
4 of this point?

5 CHAIRMAN LOUD: Yes.

6 MS. BAILEY: Okay. Then that's  
7 it, Mr. Chairman.

8 CHAIRMAN LOUD: Thank you. If  
9 there is nothing further in this case, why  
10 don't we then call the second case on this  
11 morning's calendar?

12 MS. BAILEY: Application 18033,  
13 Leon Morse and Amanda Lonsdale, and it's  
14 pursuant to 11 DCMR ' 3104.1, for a special  
15 exception for a two-story rear addition to an  
16 existing one-family detached dwelling under  
17 section 223, not meeting the side yard  
18 requirements, that's section 405. The  
19 property is located at 2723 36<sup>th</sup> Place, N.W.  
20 It is Zoned R-1-B. It is located in Square  
21 1933 on Lot 8.

22 Would you, please, have a seat at

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1 the table, sir?

2 CHAIRMAN LOUD: Good morning.  
3 Yes, if you have not turned in your witness  
4 card, you should do that to the Court  
5 Reporter. And then you can take a seat.

6 MS. BAILEY: Mr. Chairman, while  
7 the applicant is taking his seat, I just  
8 wanted to mention that we did not receive the  
9 Affidavit of Posting for this property, sir.

10 CHAIRMAN LOUD: Thank you, Ms.  
11 Bailey. And why don't you introduce yourself  
12 for our record? And then we will take up the  
13 issue that Ms. Bailey just referenced.

14 MR. MORSE: Yes, good morning. My  
15 name is Leon Morse and I'm a resident at 2723  
16 36<sup>th</sup> Place, N.W.

17 CHAIRMAN LOUD: Good morning, Mr.  
18 Morse. Let me ask if the ANC is present in  
19 this case? I don't believe they are, but just  
20 for our record, this would be ANC-3C, which  
21 has submitted a letter in support. And they  
22 are not present.

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1           And also let me ask the audience  
2 members that raised their hand to testify, is  
3 there anybody in the audience who is going to  
4 testify in this case? Okay. Very good.

5           Mr. Lonsdale, Ms. Bailey just  
6 mentioned that there is no Affidavit of  
7 Posting in our record. And our rules require  
8 that an Affidavit of Posting be submitted into  
9 the record a certain number of days before the  
10 hearing.

11           And I wanted to ask you to expound  
12 on the absence of one in your case.

13           MR. MORSE: Yes. This came up  
14 this morning as I was rereading the letter and  
15 Ms. Bailey also approached me about this.  
16 When we received our letter back in December,  
17 it was copied to us. It was sent to our  
18 architect that filed the application on our  
19 behalf.

20           And unfortunately, it seems as  
21 though there must have been a lack of  
22 communication between our two parties.

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1 CHAIRMAN LOUD: Okay.

2 MR. MORSE: We did not receive  
3 signs and we did not post them. And hence, we  
4 did not file an affidavit as a result.  
5 However, I would ask that the Board consider  
6 the other outreach efforts that my wife and I  
7 took with our neighbors. And if you would  
8 like, I can explain those.

9 CHAIRMAN LOUD: Just very briefly  
10 if you could just state them for the record.

11 MR. MORSE: For the record, as you  
12 have seen before you, we have a resolution  
13 from the ANC. The ANC put this matter on  
14 their January meeting. We went there and  
15 received a resolution of support.

16 In preparation of receiving this  
17 resolution of support, I discussed the matter  
18 with the two neighbors that are opposite the  
19 alley on the side yard, which requires the  
20 special exception. I shared with them details  
21 of the plans and they both signed a memo in  
22 support to this project.

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1 I also submitted -- well, first of  
2 all, I know that the D.C. Government sent to  
3 all of our neighbors a letter informing them  
4 of this hearing. And with several of those  
5 neighbors I shared similar details of those  
6 plans.

7 CHAIRMAN LOUD: Thank you, Mr.  
8 Lonsdale. Colleagues, I think that Mr.  
9 Lonsdale has indicated that he would seek a  
10 waiver from the requirement for Affidavit of  
11 Posting. Our Rule Section 3100.5 allows us to  
12 do that for good cause shown, no prejudice to  
13 other parties.

14 Mr. Lonsdale has testified that he  
15 has gotten the consent of both of his  
16 neighbors, surrounding neighbors regarding the  
17 application as well as the ANC notifying the  
18 community and the attestation letter from the  
19 Director of OZ, which is our Exhibit 22.

20 So I think in light of all of  
21 that, it appears to me that we should waive.  
22 And let me open it up for your comments or

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1 feedback.

2 MEMBER MOLDENHAUER: Chairman  
3 Loud, I don't know if we -- we usually have  
4 the authority to waive the Affidavit of  
5 Posting, but to actually waive the full  
6 posting in general, since he never actually  
7 received or provided any posting to the  
8 public, I would not be in favor of waiving the  
9 posting overall.

10 I mean, in the past, as I said, we  
11 have waived the affidavit where they are  
12 certifying that they have posted it. But  
13 usually in those cases, they have also posted  
14 the property at some point in time. And I  
15 think that, you know, even though he has done  
16 a very positive outreach out to the neighbors,  
17 I think he should still post it conforming  
18 with our regs.

19 CHAIRMAN LOUD: I find myself in a  
20 difficult spot, because I tend to agree with  
21 you 99.9 percent of the time. But I think  
22 3100.5 does allow us to actually waive the

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1 posting. It's one of the rules that pretty  
2 much allows us to waive almost all of our  
3 other rules, not all of them. But I think the  
4 actual posting is something that can be  
5 waived.

6 I think as well that the  
7 regulatory framework contemplates that on a  
8 given occasion, one of these might not be  
9 completed successfully and so it requires  
10 publication of the notice in the Register,  
11 which I think happened in this case.

12 Also that members of the community  
13 that live within 200 feet get notice, which I  
14 think happened in this case.

15 And I don't see necessarily any  
16 prejudice or harm, because the ANC did have a  
17 meeting in January and they did some outreach,  
18 I'm sure, to get folks to the meeting.

19 And as Mr. Lonsdale testified,  
20 they spoke to the two neighbors that would be  
21 impacted the most, the adjacent neighbors. So  
22 I normally would agree with you. I mean, I

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1 think that there really needs to be an effort  
2 on the part of the applicant to meet the  
3 requirements that the rules require.

4 But given the circumstances and  
5 the context, I think that word probably got  
6 out sufficiently regarding the application.  
7 And with that, let me open it up to other  
8 Board Members.

9 COMMISSIONER TURNBULL: I just had  
10 a question. You had said that both your  
11 neighbors had signed or written letters?

12 MR. MORSE: That's correct. They  
13 signed a memo that I had prepared and it  
14 should be appended to the ANC resolution. At  
15 the very least, I provided it to the ANC and  
16 they --

17 COMMISSIONER TURNBULL: I didn't  
18 see anything in the file, that's why I was  
19 asking. I'm not doubting you. We just don't  
20 have a written record of it.

21 CHAIRMAN LOUD: By chance, did you  
22 bring copies of that?

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1 MR. MORSE: I don't actually have  
2 a copy of the memo. I expected that it was  
3 submitted. I have a copy of the ANC  
4 resolution.

5 CHAIRMAN LOUD: Well, we have  
6 that.

7 MR. MORSE: Right.

8 CHAIRMAN LOUD: Our Exhibit 21.

9 MR. MORSE: I understand that.

10 CHAIRMAN LOUD: But we don't have  
11 appended to it --

12 MR. MORSE: Correct.

13 CHAIRMAN LOUD: -- letters from  
14 the neighbors.

15 MR. MORSE: Unfortunately, I do  
16 not have a copy of that with me, at this time.

17 CHAIRMAN LOUD: Mr. Turnbull, did  
18 you have any follow-up for Mr. Lonsdale?

19 COMMISSIONER TURNBULL: No. I  
20 just was trying to sort of deal with part of  
21 what Ms. Moldenhauer was talking about and the  
22 fact that there was no posting, but it was

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1 also we don't have the letters. I'm just  
2 commenting that it would have been nice to  
3 have them to go along with the way you are  
4 leaning as far as accepting it.

5 CHAIRMAN LOUD: I think, you know,  
6 we have got a couple of options. I would  
7 still be in favor of waiving the requirement  
8 under section 3100.5.

9 On the other hand, if the Board  
10 feels out of an abundance of caution that  
11 perhaps we should keep the record open and  
12 allow for at least those letters to come in as  
13 sort of middle ground between not posting at  
14 all and at least demonstrating communication  
15 and outreach to the immediate neighbors, I  
16 would be open to that as well.

17 Let me ask Board Member Sorg and  
18 Dettman if they have any reflections that they  
19 would like to put into the record regarding  
20 this issue and then we can move on.

21 MEMBER SORG: I think in this  
22 case, I would tend to agree with Ms.

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1 Moldenhauer that if we had, you know, the  
2 letters from the actual neighbors and  
3 everything else, you know, related to the  
4 outreach was, you know, in our file, then I  
5 would -- I think that we could do away with  
6 the posting.

7 But in this case, I think that we  
8 should wait and allow those to come in.

9 CHAIRMAN LOUD: Okay. Anything  
10 from you, Mr. Dettman?

11 VICE CHAIRMAN DETTMAN: Mr.  
12 Chairman, given the relative small addition  
13 that is being contemplated and since the ANC  
14 has reviewed this and is in support of the  
15 application, I would be in favor of simply  
16 waiving the posting requirement under 3100.5.

17 CHAIRMAN LOUD: Okay. Thank you.  
18 So we have got a couple of choices. We can  
19 vote on that and preliminarily it looks like  
20 it might be 3-2 or we can proceed with the  
21 case on the merits, leave the record open for  
22 the subsequent filing of those letters,

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1 postpone a decision perhaps for a week until  
2 we get those letters.

3 And I think in the interest of  
4 moving us forward, I would be well in favor of  
5 the latter instead of pushing for the former.

6 Okay.

7 So why don't we do that then? Is  
8 that acceptable to the Board? It looks like  
9 it is. Is that acceptable, Ms. Moldenhauer  
10 and Ms. Sorg?

11 MEMBER MOLDENHAUER: Yes. And I  
12 would just simply say that we should leave the  
13 record open then for any additional letters  
14 that would potentially come in prior to our  
15 final deliberation.

16 CHAIRMAN LOUD: Okay. Why don't  
17 we do that? And as we were discussing this  
18 issue of the Affidavit of Posting, I did  
19 notice that two persons came into the  
20 audience. And I just wanted to make sure that  
21 they were not present to participate in this  
22 case. Very well. Thank you. And I'm seeing

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1 heads nod in the negative.

2 So why don't we move forward then?

3 I think where we are, Mr. Lonsdale, is that  
4 we have all reviewed the file. We think a  
5 strong case for section 223 relief has been  
6 presented.

7 I don't want to speak for other  
8 Board Members. I'll let them weigh in as  
9 well. And we think that but for this issue  
10 surfacing of the Affidavit of Posting, that it  
11 is probably a case that could, what we call,  
12 rest on the record. That based on what you  
13 have submitted, what the Office of Planning  
14 has submitted at their Exhibit 25, which walks  
15 through section 223 analysis, the support of  
16 ANC-2A, which is our Exhibit 22, which is  
17 entitled to great weight and which also  
18 supports the application, that we could  
19 probably, but for that issue, vote on this  
20 today.

21 So in lieu of you making a full  
22 blown presentation, if there is anything that

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1 you would like to say by way of just a really  
2 quick recap, I think we can then turn to the  
3 Office of Planning for the same, a very quick  
4 recap and then we can probably set this for  
5 decision. We'll let you know what we need  
6 further in the record and then close the  
7 record and set it for decision.

8 MR. MORSE: Okay. Other than the  
9 matter discussed previously, I am prepared to  
10 simply stand on the record.

11 CHAIRMAN LOUD: Okay. Very well.  
12 Board Members are there any questions for the  
13 applicant?

14 Then why don't we turn to the  
15 Office of Planning? And again, another  
16 outstanding report. It walks through the  
17 relief, it's side yard relief, 8 feet is  
18 required, 4.9 is provided. And I think it is  
19 an addition to the north. And the property is  
20 adjacent to an alley. The neighboring  
21 property is setback pretty significantly.

22 But is there anything in addition

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1 to what is in your report that you would like  
2 to emphasize or highlight?

3 MR. JESICK: Good afternoon, Mr.  
4 Chairman and Members of the Board. My name is  
5 Matt Jesick. The Office of Planning is fine  
6 to rest on the record, on our report. And we  
7 are happy to recommend approval of the  
8 application.

9 CHAIRMAN LOUD: Very well. Thank  
10 you, Mr. Jesick.

11 And again, if there are any  
12 persons in the audience who have arrived that  
13 are either in favor or in opposition, now  
14 would be the time to show up. There do not  
15 appear to be any. We do have our ANC report,  
16 as I indicated, our Exhibit 22, which is in  
17 full support.

18 And I believe what we are going to  
19 do is request this supplementation in our  
20 record from you regarding the outreach to the  
21 neighbors. And once we get that -- how long  
22 do you think you will need to get us that?

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1                   MR. MORSE: I should be able to  
2 get that to you by tomorrow.

3                   CHAIRMAN LOUD: Okay. So we will  
4 leave the record open for another, what is  
5 today, the 23<sup>rd</sup>, how about we leave the record  
6 open until the 25<sup>th</sup>?

7                   MR. MORSE: Sure.

8                   CHAIRMAN LOUD: For you to supply  
9 that. And then, Ms. Moldenhauer, you  
10 indicated that we would also leave the record  
11 open for any additional responses that came  
12 from concerned, okay, I guess, neighbors in  
13 the 200 feet.

14                   With that, is there anything else  
15 that needs to be done right now before we set  
16 this for decision?

17                   COMMISSIONER TURNBULL: Mr. Chair,  
18 could I? I just had one question.

19                   CHAIRMAN LOUD: Sure.

20                   COMMISSIONER TURNBULL: And I was  
21 wondering if Mr. Morse could either -- in  
22 looking at the plan. I mean, your set of

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1 documents, the submittal. We all know there  
2 is one -- we have one survey, one site plan.  
3 And we don't really have a floor plan or a  
4 grade plan.

5           And I'm just a little bit paranoid  
6 from other cases we have had dealing with --  
7 and your lot slopes. It would be, I think,  
8 good for the record, especially in this deck  
9 area where you are adding something to the  
10 back, that you could somehow indicate to us or  
11 have your architect indicate to us that the  
12 movement of the soil is such that any  
13 rainwater, water is staying on your site and  
14 not going -- that the grade is not such that  
15 it would either -- go over to your neighbor's  
16 side.

17           I think we have had some instances  
18 where neighbors get very concerned about that.

19           And I just want to make sure that we -- and  
20 as I said, the survey doesn't really show  
21 anything or the site plan. And I think it  
22 would be simply we need something that would

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1 show that the grading is keeping whatever  
2 rainwater is coming on your site and not going  
3 off your site.

4 MR. MORSE: Okay. Well, I can  
5 certainly submit or have our architect submit  
6 something that shows more of the floor plan.

7 COMMISSIONER TURNBULL: Or the  
8 swale. Something to show swales, whatever is  
9 happening --

10 MR. MORSE: Okay.

11 COMMISSIONER TURNBULL: -- in your  
12 backyard. I mean, it looks like your property  
13 slopes from the front to the back.

14 MR. MORSE: That's correct.

15 COMMISSIONER TURNBULL: And it  
16 slopes from your neighbor on the south, which  
17 way am I looking? It looks like it is sloping  
18 from the house adjacent to you to the alley.

19 MR. MORSE: That's about right.  
20 It's fairly even.

21 COMMISSIONER TURNBULL: Fairly  
22 even, but I'm looking at on A0-6, the east

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1 elevation just shows just a little bit of a  
2 slope to it. So I think you are probably  
3 going to be fine, but it would be nice to have  
4 it indicated either on a take-off, a little  
5 site plan or survey that sort of shows that  
6 the water is being retained on your own site,  
7 that you are not -- nothing is being diverted  
8 over to your neighbors.

9 CHAIRMAN LOUD: Thank you, Mr.  
10 Turnbull. Anything further?

11 COMMISSIONER TURNBULL: That's it.

12 CHAIRMAN LOUD: Okay. Given the  
13 additional request of Mr. Turnbull, do you  
14 think you will need more than a couple of days  
15 to pull that together?

16 MR. MORSE: I suspect that that  
17 would take, could take a little bit more time.  
18 I suspect that Monday is probably, March 1<sup>st</sup>,  
19 I believe that is, better.

20 CHAIRMAN LOUD: Okay.

21 MR. MORSE: A better date.

22 CHAIRMAN LOUD: Then why don't we

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1 do this? Why don't we leave the record open  
2 until March 1<sup>st</sup> to get all of the requested  
3 information in and then I believe we can set  
4 this then not for Tuesday, but for the  
5 following. Not March 2<sup>nd</sup>, but for March 9<sup>th</sup>.  
6 Unless there is some urgency around the  
7 application and we need to set it for March  
8 2<sup>nd</sup>.

9 Set it for March 9<sup>th</sup> and we'll make  
10 a decision and deliberate on it on March 9<sup>th</sup>.

11 So can we set this as a decision in the  
12 morning for March 9<sup>th</sup>?

13 MS. BAILEY: Yes, Mr. Chairman.

14 CHAIRMAN LOUD: Okay. Is there  
15 anything further from Board Members? Then if  
16 there is nothing further, anything further  
17 from you, Ms. Bailey, on this?

18 MS. BAILEY: No, Mr. Chairman.

19 CHAIRMAN LOUD: Okay. Then thank  
20 you. We appreciate your time this morning and  
21 your patience. And we look forward to getting  
22 the additional information and being able to

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1 move toward relief on March 9, depending on  
2 how Board Members feel.

3 Ms. Bailey, if you could call our  
4 final case for this morning?

5 MS. BAILEY: Mr. Chairman, the  
6 next case is Application 18028 of United  
7 Unions, Inc., and it is pursuant to 11 DCMR '  
8 3014.1 and 3103.2, for a special exception to  
9 allow retail and service uses under section  
10 518, and variances to allow an addition to a  
11 nonconforming office building exceeding the  
12 allowable floor area ratio limitations under  
13 subsection 531.1 and 2001.3. The property is  
14 located at 1750 New York Avenue, N.W. It is  
15 Zoned SP-2. It is also known as Square 171,  
16 Lot 33.

17 CHAIRMAN LOUD: Good morning. How  
18 is everyone doing this morning?

19 MR. FREEMAN: Good morning.

20 CHAIRMAN LOUD: Very well. Thank  
21 you for your patience this morning. If we  
22 could have each of you introduce yourselves

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1 for our record? And let me just double check  
2 and see if ANC-2A is here this morning? Okay.  
3 They are not here.

4 MR. FREEMAN: Kyrus Freeman with  
5 the Law Firm of Holland & Knight.

6 MR. GEORGE: Robert George with  
7 United Unions.

8 MR. SPRINGUEL: Yves Springuel,  
9 the architect with Mancini Duffy.

10 CHAIRMAN LOUD: Very well. And  
11 you have one witness that did not join you at  
12 the table. So I think he is now taking that  
13 as an invitation to join you at the table.

14 MR. SHER: For the record, Steven  
15 E. Sher, Director of Zoning and Land Use  
16 Services with the Law Firm of Holland &  
17 Knight.

18 CHAIRMAN LOUD: Good morning again  
19 to all of you.

20 And let me just say that your  
21 application has also been briefed very well  
22 and the record is pretty full. There is some

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1 gaps by way of questions that Board Members  
2 have for specific information.

3 So I think what we would like to  
4 do is sort of get our questions out first and  
5 have you tailor your presentation specifically  
6 to the questions that we have.

7 And I'll begin myself. I think  
8 with respect to the special exception that the  
9 applicant makes a strong case through your  
10 Exhibit 24 and, of course, through the Office  
11 of Planning's Exhibit 25 report, your plans,  
12 the ANC support letter.

13 But as I read your application,  
14 you are seeking flexibility to take advantage  
15 of all of the uses in 701.1 through 701.5?  
16 That's the way I read the application. I  
17 could have been wrong. That includes over  
18 about 45 different uses.

19 And some of those uses, I think,  
20 potentially have adverse traffic impacts.  
21 Most of them don't. Specifically, 350.4(b),  
22 child development center, would be a use that

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1 typically when we hear those cases, there is a  
2 drop-off and pick-up plan submitted and  
3 sometimes transportation impacts.

4 So I guess the first question, the  
5 bottom line question is are you seeking carte  
6 blanche for all of those uses to be allowed or  
7 if we were to specifically eliminate the ones  
8 that would tend to have some potential traffic  
9 impact, would you be willing to accept that  
10 condition?

11 And it's relevant, because 518.6  
12 is a criteria you would have to meet and  
13 that's the one that talks about adverse  
14 impacts. That would be my first question  
15 under the special exception.

16 I think that Mr. Turnbull has a  
17 question regarding some of the design details,  
18 which he will get into. And I think Ms. Sorg  
19 has some questions regarding the alternate  
20 designs that were submitted, the CFA,  
21 preliminary approval and then which of these  
22 designs you will be going forward with.

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1           And then I guess, I talked a  
2 little bit about this sort of with staff, in  
3 your pleadings, which are dated February 9<sup>th</sup> I  
4 believe, Mr. Freeman, you indicated that  
5 Zoning Commission Order 09-11 had not been  
6 published yet and that you thought by the time  
7 that we decided the case it would be  
8 published.

9           And I just want to get on the  
10 record whether that has, in fact, been  
11 published and gone into effect. And it looks  
12 like one of your witnesses is showing  
13 something. But for our record, we would need  
14 to get something from you on that.

15           Those are the only questions that  
16 I would have, both regarding the special  
17 exception and the variance. And I'll now  
18 allow other Board Members to ask you their  
19 questions. You may want to jot these  
20 questions down, so that you can answer each of  
21 them as they have been presented to you.

22           Board Members, are there

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1 additional questions?

2 COMMISSIONER TURNBULL: I just had  
3 a couple of issues on the design questions.  
4 In looking through or looking at the existing  
5 building with the signage and graphics that  
6 are there, basically, looking at page 02 of  
7 your submittal, No. 24, on the face of the  
8 building by the entry it says "1750 United  
9 Unions."

10 And then there is a rather large  
11 sculptural sign down below that at grade. You  
12 have your handicap ramp with your symbols on  
13 it, your different member organizations and  
14 your two flags.

15 When I look at the drawings by the  
16 architect, I simply see 1750 New York, which  
17 sort of sits back behind the extension, the  
18 canopy or whatever. Is that the extent? I  
19 mean, I'm assuming the Union is still owns the  
20 building. Are you still going to have  
21 something that says United Unions?

22 It doesn't show. I'm just

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1 wondering, because I don't want to have  
2 anybody coming back with an amendment that you  
3 are changing that. I would like to see a  
4 complete packet. So I'm just wondering if  
5 what we are seeing on the architectural  
6 drawings represents adequately all of the  
7 graphics and signage that is going to be  
8 there? Anybody?

9 MR. FREEMAN: We were going to go  
10 through all of the questions at one time.

11 COMMISSIONER TURNBULL: Okay.

12 MR. FREEMAN: If that's how the  
13 Board would like us to proceed.

14 COMMISSIONER TURNBULL: And the  
15 only other thing is I just want to make sure  
16 that the ramp, the handicap ramp is shown very  
17 clearly on the existing drawings. On the new  
18 ones, I can make it out, but it's not clear to  
19 everybody. I think we might want to go  
20 through that and make sure the handicap  
21 accessibility is there.

22 And maybe just explain that whole

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1 area of the plaza, how that really works for  
2 us and go through that. Thank you.

3 MR. FREEMAN: Again --

4 CHAIRMAN LOUD: Thank you, Mr.  
5 Turnbull. Let's see if additional Board  
6 Members have questions, so that you can take  
7 them all down and proceed accordingly. Thank  
8 you. Ms. Sorg?

9 MEMBER SORG: I just had a couple  
10 of additional questions about the design. We  
11 can see in the package that Option A2 and B2  
12 are approved by CFA, but I wanted to know  
13 whether the other concept that sort of the  
14 Richard Serra themed look is also approved.

15 And then also I think if you can  
16 walk us through the changes on this ground  
17 floor and lower level plans that we received  
18 today, that would be lovely.

19 CHAIRMAN LOUD: Thank you, Ms.  
20 Sorg. Unless there are additional questions,  
21 and, of course, some may surface as a result  
22 of the information you do provide, I think

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1 that you can begin with what will probably be  
2 a more truncated presentation on your part.

3 MR. FREEMAN: Good morning,  
4 Members of the Board. Again, I'm Kyrus  
5 Freeman with the Law Firm of Holland & Knight.

6 Just to kind of go through the easiest  
7 questions first:

8 The order was published on  
9 February 5, 2010 in the DC Register. A copy  
10 of that, as published, is attached to Steve  
11 Sher's report, which we distributed.

12 With respect to your first  
13 question, Chairman Loud, regarding the uses, I  
14 think Mr. George on behalf of the United  
15 Unions can confirm that it won't be a child  
16 day care center and is mostly likely to be  
17 some form of retail and/or restaurant use.

18 MR. GEORGE: He is correct. We  
19 are totally interested in a restaurant in that  
20 area. We know we need one. The area needs  
21 one and it can support it. We have no desire  
22 to have a day care or any other use of that

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1 sort.

2 CHAIRMAN LOUD: Your pleadings  
3 suggest that part of it would be a restaurant.  
4 Let me see if I can pull it out. It was a  
5 little south of 5,000 square feet and you  
6 clearly identified as restaurant. The balance  
7 of it you just sort of left in that general  
8 retail category.

9 And your testimony a second ago  
10 suggested that you are talking about all of it  
11 being a restaurant. I'm not certain if that  
12 is what you are saying or not, so perhaps you  
13 can clarify that?

14 MR. FREEMAN: We should put a  
15 board up. But the western most portion is  
16 likely to be a restaurant. The two retail  
17 portions facing the street are likely to be  
18 retail. We don't anticipate that restaurant  
19 portion becoming all retail, but we will get  
20 into that as requested.

21 (Whereupon, off the record for a  
22 recess.)

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1 CHAIRMAN LOUD: Are we back on the  
2 record? Okay. So we are officially back on  
3 the record.

4 MR. SPRINGUEL: Thank you. Yves  
5 Springuel with the architectural firm Mancini  
6 Duffy. What I would propose to do is just  
7 take a few minutes to walk you through the  
8 plans with the purpose of addressing the  
9 specific questions.

10 CHAIRMAN LOUD: Thank you very  
11 much. Ms. Bailey, is there a microphone  
12 available for the witness? Okay. We're going  
13 to get you a microphone, so that you don't  
14 have to -- okay.

15 MR. SPRINGUEL: Thank you. This  
16 is the first floor. The site is a little bit  
17 tricky. New York Avenue, and I'm just  
18 abbreviating, but is the north face of the  
19 site. E Street is the south face. 18<sup>th</sup>  
20 Street is the west face.

21 The east face beyond this property  
22 line is the Corcoran. The site slopes from

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1 the north to the south by pretty much a full  
2 floor, so that this, what we call the first  
3 floor, is at grade facing New York Avenue.  
4 And then there is a ground floor beneath that,  
5 which is at grade for its entrance portion  
6 facing E Street.

7 And in a nutshell, it is that the  
8 perimeter test revision that caused us to  
9 revise the drawings. The submission that you  
10 have today, I don't have the larger forms up,  
11 really retabulates the square footage having  
12 done a perimeter test to account, more  
13 accurately, for that grade change.

14 So the tabulations are different  
15 and the labeling of these drawings is a little  
16 different to more generalize what was  
17 exclusively labeled as restaurant in the  
18 original submission as restaurant or retail.

19 The occupancies that are planned,  
20 there is a restaurant in the blue area with a  
21 new entrance piece here, which I'll address in  
22 a moment. There is an existing lease for a

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1 Sun Trust Bank, which we are slightly moving  
2 over to make room for this restaurant, but  
3 that's the piece of retail that is there today  
4 is a bank that serves the United Unions.

5 The piece of retail that is here  
6 today under lease is for the AFL-CIO Credit  
7 Union. And then this is a small office. So  
8 when we call it retail, we're simply using the  
9 broader uses, the broader definition of retail  
10 for all of its different uses.

11 As Mr. George pointed out, there  
12 are some retail that we could certainly  
13 forego. I don't think child care is actually  
14 a retail though. I think it might be another  
15 use for this purpose.

16 On the basement level, the change  
17 was also on the labeling to make clear that we  
18 are making this piece of storage space  
19 available as a service piece to the restaurant  
20 above. We are putting in a dumbwaiter,  
21 putting in a street entrance and giving it  
22 access to the loading functions.

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1           So that's the extent of the  
2 revision that we submitted. And then the  
3 first page, of course, gives you the revised  
4 tabulation to both give you the areas of these  
5 different functions on the ground and the  
6 second floor. And to revise the FAR  
7 calculation having more correctly applied the  
8 room density.

9           On the issue of signage, the truth  
10 is that we have not completed our development  
11 of the signage plan. I think it is highly  
12 likely that the building will continue to bear  
13 the moniker of the United Unions. It is still  
14 owned by three of the four unions that used to  
15 own the building. They intend to stay in the  
16 building. They are renovating the building  
17 for its long-term occupancy.

18           I think that is perhaps -- we  
19 still have to sort out with our client in  
20 terms of being very clear about the  
21 distinction between the building name United  
22 Unions and the building address 1750 New York

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1 Avenue. But those pieces of signage will be  
2 cleared up and comply.

3 Let me get the other board with  
4 the site plans.

5 COMMISSIONER TURNBULL: Is it your  
6 understanding that the signage will be no  
7 larger or no more different than the signage  
8 that is currently on the building?

9 MR. SPRINGUEL: That's correct.

10 COMMISSIONER TURNBULL: Okay.

11 MR. SPRINGUEL: With the exception  
12 of the signage that would be required for this  
13 retail potentially restaurant entrance --

14 COMMISSIONER TURNBULL:  
15 Restaurant.

16 MR. SPRINGUEL: -- being an actual  
17 addition to the signage that is displayed on  
18 the building.

19 COMMISSIONER TURNBULL: Okay.  
20 Thank you.

21 MR. SPRINGUEL: But the building--  
22 the underlying notion of these additions is to

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1 create two additions that identify entrance  
2 more clearly. In the case of the New York  
3 Avenue building entrance, we are rather far  
4 from the property line, because of the  
5 triangular nature of the site.

6 In addition, New York Avenue is  
7 very wide. We have a very wide sidewalk,  
8 because New York Avenue isn't many lanes wide.

9 So we are trying to bring the building  
10 entrance more forward to the street. This  
11 entrance is for the restaurant or retail. And  
12 that's where you might find a new piece of  
13 signage.

14 I agree with the statement that  
15 the ramps are not completely clearly  
16 delineated as they access. We will fully  
17 comply with ADA.

18 This is an earlier design to  
19 address the question. This design was not  
20 approved by CFA. And they asked us to restudy  
21 it. We have been back to CFA with two  
22 different designs, both of which were

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1 approved.

2 This is what is called B2 in your  
3 package. A2 in your package. This has been  
4 approved by the CFA. They only wish to see us  
5 one more time to review landscaping in this  
6 plaza on private property and this fountain.

7 But the basic concepts are the  
8 same. There is an entrance piece pulled  
9 forward of the building, all within our  
10 property line. And a new entrance piece for  
11 the retail.

12 The other option that is still  
13 under consideration, which was also approved  
14 by CFA, is this one which we call B2. The  
15 elements are the same. Their forms are  
16 different.

17 Did I get all the architectural  
18 questions?

19 CHAIRMAN LOUD: A couple of quick  
20 follow-up questions. In the application as a  
21 result of submitting alternate designs  
22 approved by CFA, you had indicated support for

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1 BZA conditioning relief on the final FAR not  
2 exceeding, I guess, the 5.51 in the original  
3 application 3,900 additional square feet.

4 I thought I heard you say that  
5 with the submission this morning that the FAR  
6 numbers changed?

7 MR. SPRINGUEL: That's correct.  
8 When we reapplied the perimeter test, the  
9 original calculations presumed that 50 percent  
10 of the perimeter was cellar. It is actually  
11 70 percent of the lower level, which is cellar  
12 under the perimeter test.

13 And I can show you an illustration  
14 of that briefly.

15 CHAIRMAN LOUD: As you do that,  
16 just help me out. With the revised submission  
17 tabulations, I'm looking on the first page  
18 under proposed, and it still has an FAR of  
19 5.51. Am I misunderstanding something or did  
20 it not change?

21 MR. SPRINGUEL: I'm sorry. If we  
22 redid the calculation below, we would find

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1 that the table above was not corrected. The  
2 numbers in the tabulation in the two tables  
3 below were corrected and I believe that that  
4 5.51 should have been revised.

5 CHAIRMAN LOUD: Okay. And so what  
6 would it be?

7 MR. SPRINGUEL: It would be under  
8 5.5.

9 CHAIRMAN LOUD: It would be under  
10 5.5. Okay. Thank you.

11 MR. SPRINGUEL: The difference in  
12 the perimeter test, as you can see, perhaps  
13 you can see there is a lot of soil bermed on  
14 every face of this building, including a long  
15 retaining wall on this long face. So the  
16 building really has only one ground floor and  
17 has a -- well, I'll call it a service entrance  
18 on the backside.

19 COMMISSIONER TURNBULL: I wonder  
20 you talked about on the revised ground floor  
21 the storage room for the restaurant up above  
22 being accessible from the loading dock. Could

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1 you go through that on the plan? I'm looking  
2 at doors here and it doesn't really show doors  
3 that can get immediately to it. So I'm just  
4 curious.

5 MR. SPRINGUEL: There are  
6 currently two areas of loading, as you  
7 probably know. We all live in the District  
8 and E Street is the only loading for the  
9 Corcoran and for major events. There are no  
10 loading docks on that street to speak of at  
11 that end of the street.

12 We do have a conforming loading  
13 dock at the top of our ramp, but it is a ramp.

14 COMMISSIONER TURNBULL: Okay.

15 MR. SPRINGUEL: And so rather than  
16 off-load down the ramp and into the bowels of  
17 the building, we would prefer to have our  
18 restauranteur off-load onto the ramp at the  
19 back of this truck, down the sidewalk and in  
20 this door. Because if we go the other way --

21 COMMISSIONER TURNBULL: Okay.

22 MR. SPRINGUEL: -- then we are

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1 dropping into the bowel of the lobby.

2 COMMISSIONER TURNBULL: I was  
3 going to say I didn't see an internal  
4 connection.

5 MR. SPRINGUEL: Right. There is  
6 not an internal door.

7 COMMISSIONER TURNBULL: Okay.

8 MR. SPRINGUEL: But there is a  
9 street door, so they don't have to come  
10 through the lobby itself.

11 COMMISSIONER TURNBULL: Have you  
12 read the Exhibit 27 from the Department of  
13 Transportation?

14 MR. SPRINGUEL: Yes.

15 COMMISSIONER TURNBULL: With the  
16 bikes, you know, bike racks. Have you looked  
17 at that on your site plan? Does that fit in?

18 MR. SPRINGUEL: We think that, you  
19 know, given that the New York Avenue property  
20 line of this property is really along these  
21 Pepco vaults, we have a very large triangle of  
22 land on our property. And we have a very --

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1 you know, easily double width sidewalk in  
2 public space.

3 We are very comfortable that we  
4 can find locations for these bike racks,  
5 either in public space or going through the  
6 public space process or quite possibly within  
7 our own property line also.

8 COMMISSIONER TURNBULL: Okay.  
9 Thank you.

10 CHAIRMAN LOUD: Thank you, Mr.  
11 Turnbull. Are there any additional questions  
12 for this witness? Okay. Mr. Freeman, did you  
13 have additional witnesses to speak to some of  
14 the other questions or had you responded?

15 MR. FREEMAN: I think we covered  
16 all of the questions, unless there were more.

17 I did have a couple of things I wanted to  
18 clarify in terms of the DDOT report and, you  
19 know, the flexibility with respect to final  
20 CFA approval, in terms of what a condition  
21 might say. We could talk about that now or  
22 after OP does its report.

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1                   CHAIRMAN LOUD:       Why don't we  
2 perhaps hold the conditions off until after  
3 OP's report? But if you wanted to talk about  
4 the DDOT, one of their recommendations, I  
5 think, was completion of a Transportation  
6 Impact Study. Just on the record address that  
7 recommendation.

8                   MR. SPRINGUEL:    I think they had  
9 what I would read as four conditions. I think  
10 the first sentence the applicant has not  
11 submitted a Transportation Impact Study was  
12 just an acknowledgment in terms of the  
13 paragraph that begins with DDOT, the last line  
14 we are fine with agreeing that all loading --  
15 that the unloading of freight will occur  
16 through the loading dock located on E Street.  
17 We're fine with that.

18                   We are fine with providing a  
19 minimum of 20 covered bike parking spaces  
20 inside the building. We would view that as a  
21 second condition. As we just talked about, we  
22 are fine with locating four bike racks at some

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1 point, at some place near the main entrance of  
2 the building as a third -- subject to CFA  
3 approval as a third condition.

4 And with respect to benches in  
5 public space, I think that that would take  
6 care of itself, as you went through the permit  
7 process.

8 Those are the three things we are  
9 happy to agree with. Their last comment  
10 regarding installing some type of, as I read  
11 it, landscaping on the wall, we are not sure  
12 what the intent or what the issue is there.  
13 But there is some landscaping already at  
14 grade, which we will maintain, which we will  
15 keep and maintain, but we are not inclined to  
16 put like vines or anything on the wall due to  
17 kind of just deterioration and maintenance of  
18 that wall nor, frankly, are we -- let's kind  
19 of our position on that fourth point.

20 CHAIRMAN LOUD: Thank you.  
21 Unfortunately, they are not here to go into  
22 that. Do you have any objection to their

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1 report being submitted late?

2 MR. FREEMAN: No, sir.

3 CHAIRMAN LOUD: Okay. Then we  
4 will deal with this report a little bit later  
5 when we come to the part of the hearing for  
6 the transportation report.

7 If there are no additional  
8 questions and if you have concluded, Mr.  
9 Freeman, we will turn to the Office of  
10 Planning.

11 MR. GOLDSTEIN: Good morning, Mr.  
12 Chairman and Members of the Board. For the  
13 record, my name is Paul Goldstein. I'm with  
14 the Office of Planning.

15 The Office of Planning recommends  
16 approval of the applicant's request for  
17 special exception and variance relief. As you  
18 have heard, the property in question actually  
19 is at 1750 New York Avenue, N.W., identified  
20 as Lot 33 in Square 171 and is Zoned SP-2.

21 Generally, the proposal would  
22 allow for some small additions and new retail

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1 and service uses in an existing building.

2 I'll highlight a few things from  
3 my report and then, of course, you can ask me  
4 any follow-up questions.

5 The applicant has satisfied the  
6 special exception test under the recently  
7 approved section 518. The Board didn't seem  
8 to have too many concerns about this, so I  
9 just leave it for any follow-up questions, but  
10 we believe that the criteria were satisfied.

11 Concerning the area variance  
12 relief request, the sections 531 and 2001.3,  
13 OP believes that the applicant has satisfied  
14 the three part variance test. The property  
15 has exceptional features as laid out in my  
16 report. The strict application would, of the  
17 Zoning Code, impose practical difficulties  
18 that are unnecessarily burdensome to the  
19 applicant.

20 And finally, relief could be  
21 granted without substantial detriment to the  
22 public good, which is evidenced in part by the

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1 ANC's letter in support and without any  
2 detriment to the Zone Plan.

3 To conclude, the Office of  
4 Planning recommends approval and I'm now  
5 available for any questions that you may have.

6 CHAIRMAN LOUD: Thank you, Mr.  
7 Goldstein. Let's start with Mr. Freeman. Did  
8 you review the report of the Office of  
9 Planning?

10 MR. FREEMAN: We did. We worked  
11 with Mr. Goldstein, answered his questions.  
12 He has been very helpful and supportive  
13 throughout this process, so we just want to  
14 thank him on the record for his support and  
15 OP's support.

16 CHAIRMAN LOUD: Okay. And, Board  
17 Members, are there any questions for Mr.  
18 Goldstein?

19 I have one question regarding the  
20 uses in 701.1 through 701.5. I think it is  
21 701.2, it allows you to go backwards to the  
22 uses in section 350 and then forward to the

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1 uses in section 501.

2 Do you have any, does the Office  
3 of Planning have any, concerns regarding  
4 allowing transportation -- allowing uses that  
5 could have transportation-related impacts to  
6 be included as a part of the relief? For  
7 example, child development center.

8 MR. GOLDSTEIN: Thank you.

9 CHAIRMAN LOUD: I think that would  
10 be the principal use that this appears to  
11 cover.

12 MR. GOLDSTEIN: Yes.

13 CHAIRMAN LOUD: It could just be  
14 an oversight in the regulations.

15 MR. GOLDSTEIN: Sure. My  
16 understanding is that child development  
17 centers are actually permitted as a right in  
18 SP Districts. So that actually isn't affected  
19 at all by the special exception request.

20 The request really gets to the C-1  
21 neighborhood type serving commercial uses.  
22 Admittedly, it is a long list, but these are

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1 uses that are deemed compatible for  
2 neighborhoods at the lowest intensity of  
3 commercial use.

4 So I didn't see too many problems  
5 with the list as it exists.

6 COMMISSIONER TURNBULL: Isn't  
7 there a laundry listed in that?

8 MR. GOLDSTEIN: I think there is a  
9 laundry use.

10 COMMISSIONER TURNBULL: Day care?

11 MR. GOLDSTEIN: Well, day care, I  
12 think, again is permitted by right in SP Zones  
13 as it is.

14 COMMISSIONER TURNBULL: But I'm  
15 saying in this particular case, dropping off  
16 kids and picking up would be a little bit  
17 awkward. I think we might be a little bit  
18 reluctant to okay a use that might be  
19 dangerous to the occupants who are going to be  
20 moving in there.

21 MR. GOLDSTEIN: I would hope that  
22 there would be a study. I guess I'm -- they

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1 could without relief come in and gotten a  
2 child development center without coming before  
3 the Board at all, is my understanding. So I  
4 certainly would prefer that there be transit  
5 accommodations for it, but I'm not sure that  
6 that is as relevant in this case.

7 CHAIRMAN LOUD: Thank you, Mr.  
8 Goldstein, and thank you for that  
9 clarification. Let me ask both Mr. Freeman  
10 regarding what Mr. Goldstein has said as well  
11 as Ms. Glazer, because it would affect the  
12 suggested, one of the suggested, conditions  
13 that we were going to talk about for the case.

14 Because if it is matter-of-right,  
15 then they wouldn't have to come before us and  
16 submit a drop-off plan anyway.

17 MR. FREEMAN: We are not proposing  
18 a day care. If you want to impose a condition  
19 that said the area can only be used for retail  
20 or restaurant use, I think United, the  
21 applicant, is fine with that language.

22 CHAIRMAN LOUD: Thank you. And,

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1 ms. Glazer, did you want to weigh in at all?

2 MS. GLAZER: My only thought is  
3 that I believe that this was a self-certified  
4 application. And if the applicant was  
5 requesting permission for very specific uses,  
6 retail and restaurant, then that was the  
7 extent of it.

8 COMMISSIONER TURNBULL: Mr. Chair,  
9 I mean, I wonder if I could ask the applicant?  
10 The fitness center, is that basically an  
11 internal facility for occupants in the  
12 building, not open to the public or is it?

13 MR. GEORGE: Robert George  
14 representing United Unions. Yes, sir, it is  
15 for our tenants only, owner-tenants. And then  
16 we open that up to any new and future tenants  
17 also. It's non-published, non-public.

18 COMMISSIONER TURNBULL: Okay.

19 MR. GEORGE: Private only.

20 COMMISSIONER TURNBULL: I was just  
21 curious. I don't see that as a listed use in  
22 701.

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1                   MR. SHER:       Mr. Turnbull, we  
2 believe that would be permitted as an  
3 accessory use, incidental to the office space,  
4 otherwise, in the building. It's not going  
5 beyond that.

6                   COMMISSIONER TURNBULL:       Yes,  
7 that's why I was asking if it's just for the  
8 building use only.

9                   MR. SHER:    Right.

10                  COMMISSIONER TURNBULL:        Okay.  
11 Thank you.

12                  MR. SHER:    And I just want to  
13 clarify one other point. When we use the term  
14 retail and restaurant, when you look at the  
15 way uses are broken out in the C-1 District,  
16 you have retail uses, service uses, so we want  
17 to make sure it's just retail and service,  
18 because service includes a bank and other  
19 things like that.

20                  All of those listed within those  
21 sections cited in the regulations.

22                  CHAIRMAN LOUD:    Thank you, Mr.

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1 Sher. If we have no additional questions for  
2 the Office of Planning, we would now go to the  
3 additional Government reports.

4 We do have a report submitted by  
5 the Department of Transportation, which we  
6 alluded to earlier. I believe our rules  
7 require they report 14 days before the  
8 hearing, correct me if I'm wrong somebody, I  
9 may be a few days off.

10 It's 14 days and we did receive  
11 this on February 22<sup>nd</sup>. We have discussed it  
12 with the applicant who is not in opposition to  
13 it being admitted into our record. I don't  
14 see personally where it makes a great deal of  
15 difference one way or the other.

16 I think the applicant has agreed  
17 to most of what the Department recommended.  
18 It would be great if they would start getting  
19 these reports in a little bit earlier and also  
20 appeared here to explain why these reports are  
21 late.

22 But that being said, I don't think

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1 that there is a great deal of prejudice for  
2 letting it in our record. And it looks as  
3 though Board Members agree with me. So we  
4 will allow this exhibit into our record and  
5 make it a part of what we deliberate on in the  
6 case.

7 Did anyone from ANC-2A show up for  
8 this case? Good afternoon. Why don't you  
9 come forward, please, and introduce yourself  
10 for the record?

11 MS. CODER: Rebecca Coder. Thank  
12 you. I'm Rebecca Coder. I'm Chair of ANC-2A,  
13 which includes the West End neighborhood and  
14 Foggy Bottom and, obviously, East Foggy Bottom  
15 where the United Unions is located.

16 CHAIRMAN LOUD: Good afternoon,  
17 Commissioner Coder. We do have a copy of the  
18 ANC's report supportive of the application.  
19 We have identified it as Exhibit 22 in our  
20 record. And if you would like to briefly  
21 highlight the report, feel free to do that.

22 MS. CODER: Yes. The United

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1 Unions came before the Commission and reviewed  
2 the relief requested. And the neighborhood  
3 was fully supportive of what they put forward.

4 Actually --

5 CHAIRMAN LOUD: I'm sorry, let me  
6 interrupt you for one second. It just  
7 occurred to me, were you sworn in earlier as a  
8 witness?

9 MS. CODER: I was not.

10 CHAIRMAN LOUD: Okay.

11 MS. CODER: No.

12 CHAIRMAN LOUD: So maybe we should  
13 do that. Ms. Bailey will administer the oath  
14 to you.

15 MS. CODER: Okay.

16 CHAIRMAN LOUD: And then that will  
17 make it very official.

18 MS. BAILEY: Would you, please,  
19 stand?

20 (Whereupon, the witness was  
21 sworn.)

22 MS. BAILEY: Thank you.

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1                   CHAIRMAN LOUD:    And if you don't  
2 mind starting all over again?

3                   MS. CODER:    Sure.  As I said, the  
4 applicant came before the ANC and we approved  
5 of their relief that was requested.  And we  
6 actually complimented the applicant on this,  
7 because this is in an SP-2 Zone.  And  
8 originally, retail was not kind of something  
9 that was matter-of-right.

10                  However, we are very supportive as  
11 a Commission as far as seeing the neighborhood  
12 and the streets activated.  And so this really  
13 is a case that went before the Zoning  
14 Commission as far as a Text Amendment with SP-  
15 2.  Not this specifically, but some other  
16 cases and we were really happy to see that put  
17 in place as far as being able to support what  
18 this applicant is trying to do for that area.

19                  CHAIRMAN LOUD:           Thank you,  
20 Commissioner.

21                  MS. CODER:    Thank you.

22                  CHAIRMAN LOUD:           Are there any

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1 questions for the ANC, either from the Board  
2 or parties? And there don't appear to be any.

3 Again, thank you and thanks for your patience  
4 this afternoon.

5 Now, if there are any persons in  
6 our audience who are either in support or  
7 against the application, now would be the time  
8 to come up and you would be given three  
9 minutes. And seeing none, we turn back to the  
10 applicant for closing remarks.

11 MR. FREEMAN: Thank you, Mr.  
12 Chairman, Members of the Board. I think I'll  
13 just quickly conclude by saying I think we  
14 answered all of the questions presented or  
15 raised today.

16 If the Board is inclined to move  
17 forward with our application, we would  
18 definitely appreciate that, so that we could  
19 move forward in terms of going back to CFA,  
20 marketing the space and finalizing our plans.

21 In terms of conditions, if the  
22 Board decides to impose conditions, I think

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1 the things that we talked about today: One,  
2 that the new use shall be exclusively retail,  
3 service or restaurant.

4 Two, and the flexibility regarding  
5 CFA approval, I'm going to read from -- there  
6 are other cases in which the Board has granted  
7 that flexibility.

8 So the condition should probably  
9 say something like the applicant may modify  
10 the design of the building as may be approved  
11 by CF -- as approved by the Commission of Fine  
12 Arts provided that those changes do not  
13 increase any of the areas of relief granted by  
14 the Board of Zoning Adjustment.

15 What we presented today in terms  
16 of numbers is a worst case scenario. The  
17 other options are smaller. So it wouldn't add  
18 any new relief and it wouldn't increase the  
19 size of the building.

20 In terms of the DDOT conditions,  
21 the three things that we -- if you are  
22 inclined to add those as conditions, I'm not

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1 suggesting that you have to, but if you are,  
2 the three things would be that loading should  
3 occur through the loading dock. Two, we will  
4 provide 20 covered bike spaces inside the  
5 building. And three, that we will provide  
6 four bike racks near the main entrance subject  
7 to CFA approval.

8 That concludes my closing. Thank  
9 you.

10 CHAIRMAN LOUD: Thank you, Mr.  
11 Freeman. Let me ask one quick question to see  
12 if Board Members have questions and then we  
13 will make a decision on whether to deliberate  
14 right now or schedule it for a separate  
15 decision meeting.

16 With respect to the flexibility to  
17 modify the design, you have presented two  
18 designs today, A2 and B2, which you have  
19 indicated the CFA has already approved. And I  
20 thought I heard something different in your  
21 closing remarks regarding the ability to  
22 modify the design further, even from A2 and

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1 B2. Did I hear that incorrectly?

2 MR. FREEMAN: Ultimately, they are  
3 going to have to go back to CFA to kind of  
4 work out the details, signage, for example,  
5 the location of the bike racks. So  
6 ultimately, one of those plans might be  
7 further modified to incorporate some of the  
8 things we talked about today.

9 And this was kind of at the CFA  
10 level in terms of approval. They have to go  
11 back to work with the staff to figure out  
12 things like how the new addition is going to  
13 connect to the existing building and those  
14 kind of technical things which we did not kind  
15 of go through today.

16 CHAIRMAN LOUD: Okay. Let me see  
17 if Board Members have any final questions  
18 before we move forward. There do not appear  
19 to be any.

20 So I think we have a full record.  
21 I think we might be in a position to  
22 deliberate this case. I'm more than happy to

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1 start us off on it. But before I do, let me  
2 get a sense from fellow Board Members whether  
3 you think you've got enough information in the  
4 record to be able to move forward.

5 Okay. It appears as if everyone  
6 is in agreement. So let me start us off.  
7 This is essentially an application where the  
8 applicant is proposing a ground floor and  
9 below retail uses in the neighborhood of about  
10 9,900 square feet, give or take.

11 The building is existing,  
12 nonconforming. It's nine stories, 168,000,  
13 give or take, square foot office building. It  
14 is in the SP-2. It has been there for about  
15 35 years roughly.

16 Per Zoning Commission Order 09-11,  
17 which we heard testimony today, that became  
18 official on February 5, the BZA can grant a  
19 special exception for any of the section 701.1  
20 through 701.5 uses, provided the requirements  
21 of section 518 are met.

22 And in the Office of Planning

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1 report, which is our Exhibit 25, there is an  
2 excellent walk-through of the section 518  
3 requirements. And I'm not going to repeat all  
4 of those elements here.

5 As testified to this morning, the  
6 applicant seeks restaurant, exclusively  
7 retail, service or restaurant use on the  
8 ground floor, that is the subject of the  
9 application.

10 In addition, both by the pleadings  
11 and somewhat to some extent the testimony, to  
12 better accommodate the proposed new retail  
13 uses and to upgrade the building to Class A,  
14 the plans call for a new retail entrance, sort  
15 of to highlight the retail, a new main  
16 building entrance and then an additional 2,000  
17 square foot of area under proposed new  
18 restaurant canopy. And I'm assuming that is  
19 going to remain in the plans.

20 The net effect of the proposed  
21 additions increase the existing FAR from about  
22 5.39 to what will be less than 5.5, as I

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1 understand. And of course, the SP-2 only  
2 allows a cap of 3.5 for nonresidential  
3 structure.

4 As a result, the applicant seeks  
5 the special exception relief that I mentioned.

6 He also seeks variance relief from sections  
7 531 and 2001.3.

8 With respect to the special  
9 exception test, as indicated, the Office of  
10 Planning did an excellent report outlining the  
11 elements of 518. I'm not going to reference  
12 those here. I will say that the applicant has  
13 agreed that the uses that it would contemplate  
14 are only retail, service or restaurant.

15 Secondly, the variance test is  
16 also addressed in the Office of Planning  
17 report. And there is an excellent walk-  
18 through of the three prongs of the variance  
19 test. And I'm not going to reference each of  
20 those as well. What I'm going to do is by  
21 incorporation just note Exhibit 25 and its  
22 excellent walk-through of what is exceptional

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1 about the property, the practical difficulties  
2 for this applicant in trying to conform to the  
3 present zoning.

4 And then the lack of substantial  
5 detriment to the public good as to which in  
6 addition to the OP report, there is the ANC  
7 report at Exhibit 22, as well as the testimony  
8 today of Commissioner Coder with regard to  
9 that.

10 Colleagues, in light of that, I am  
11 in favor of granting the relief on the  
12 application and just would propose several  
13 conditions that we have talked about earlier  
14 this morning.

15 The first would be that we limit  
16 the use to exclusively retail, service or  
17 restaurant.

18 The second would be that the  
19 applicant would agree to provide 20 covered  
20 bike spaces inside of the building and four  
21 bike racks near the main entrance and that  
22 would be subject to CFA approval.

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1           The third would be that we grant  
2 the applicant flexibility to modify the design  
3 of A2 or B2 subject to final CFA approval,  
4 provided that the final design does not result  
5 in any increases of FAR beyond the 5.5.  
6 represented to us here today.

7           And so with that, I open it up to  
8 colleagues for any further thoughts or  
9 refinements.

10           VICE CHAIRMAN DETTMAN:       Mr.  
11 Chairman, I'm in full support of the  
12 application as you just laid out for us. Only  
13 one comment and perhaps an exception to what  
14 you proposed is the condition that deals with  
15 the provision of bike parking spaces, I think  
16 that when the Board conditions something, it  
17 has to go directly to the relief that is being  
18 requested or mitigating some element of the  
19 relief being requested.

20           So the question here is, you know,  
21 can the relief be granted, the FAR relief be  
22 granted without causing substantial detriment?

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1       If we see something there that might need to  
2       be mitigated, we would entertain something  
3       like that.

4               I think the applicant under 2119  
5       is required to provide bike parking spaces. I  
6       think the requirement is 5 percent of the  
7       required parking spaces, vehicle parking  
8       spaces, that number has to be provided.

9               And then for buildings existing  
10      prior to 1985, they can convert 1 percent of  
11      their parking spaces to bike parking spaces.  
12      And so I think they are required to do it  
13      anyway.

14              And I think that DDOT's goal of  
15      having these things is well-grounded,  
16      absolutely, but if they are required to do it  
17      and it's not mitigating anything, I don't  
18      really see a place for it in the order.

19              I know it has been proffered, but  
20      typically it has to go towards the relief that  
21      is being sought.

22                              COMMISSIONER       TURNBULL:               Mr.

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1 Dettman --

2 CHAIRMAN LOUD: Thank you, Mr.  
3 Dettman.

4 COMMISSIONER TURNBULL: -- do you  
5 think the number changes from what is in the  
6 regs to what --

7 VICE CHAIRMAN DETTMAN: I'm not  
8 sure. I'm not sure. I know that according to  
9 their filings, they are required to provide 99  
10 parking spaces. I think they are providing  
11 195 now. So they are over-parking the thing.

12 So I think DDOT would be very happy if they  
13 were to take advantage of that provision that  
14 says 1 percent of your parking spaces can be  
15 converted to bike parking spaces.

16 They would be covered. So, yes, I  
17 haven't actually done the math.

18 COMMISSIONER TURNBULL: Okay.

19 CHAIRMAN LOUD: Thank you, Mr.  
20 Dettman. Further? Mr. Dettman, I kind of  
21 agree with you. I mean, I did not see what  
22 the excess bike racks mitigated against and I

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1 think in their initial presentation to us,  
2 they included some bike racks. Anyway, I  
3 don't know if it was the full 20.

4 But given that they sort of  
5 consented to what DDOT had to say, I didn't  
6 raise a big stink about it. But it's not a  
7 line in the sand issue for me and I'm more  
8 than happy and I think this applicant wouldn't  
9 mind at all if that were not a condition. I  
10 think that's a very reasonable suggestion that  
11 you made to back that condition out.

12 As I indicate, it is not something  
13 that I feel very strongly about one way or the  
14 other. Is there further? All right.

15 So then what I would like to do is  
16 without having to go over the entire recap of  
17 the facts and all of the conditions again,  
18 back out of what I just said, the requirement  
19 that the applicant provide 20 covered bike  
20 spaces inside of the building and four bike  
21 racks near the main entrance.

22 With that clarification then, I

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1 would like to move approval of Application No.  
2 18028 for special exception relief under  
3 section 518 and variance relief under sections  
4 531, 2001.3 as conditioned. Is there a  
5 second?

6 VICE CHAIRMAN DETTMAN: Second.

7 CHAIRMAN LOUD: The motion has  
8 been made and seconded. Is there further  
9 deliberation?

10 Hearing none, all those in favor  
11 say aye.

12 ALL: Aye.

13 CHAIRMAN LOUD: All those who are  
14 opposed? And are there any abstentions? And,  
15 Ms. Bailey, can you read back the vote,  
16 please?

17 MS. BAILEY: Mr. Chairman, the  
18 vote is recorded as 5-0-0 to grant the  
19 application. Board Member Loud made the  
20 motion, Vice Chairman Dettman seconded, Mrs.  
21 Moldenhauer, Mrs. Sorg and Mr. Turnbull  
22 support the motion.

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1           And there are three conditions  
2 that are to accompany the Board's approval.

3           CHAIRMAN LOUD: I believe there  
4 are only two.

5           MS. BAILEY: Two.

6           CHAIRMAN LOUD: I believe we  
7 backed one of those conditions out.

8           MS. BAILEY: You took away the  
9 bicycle racks.

10          CHAIRMAN LOUD: That's correct.

11          MS. BAILEY: Okay.

12          CHAIRMAN LOUD: All right.

13          MS. BAILEY: I'm glad I said that.

14          CHAIRMAN LOUD: Thank you, Ms.  
15 Bailey.

16          MS. BAILEY: Yes.

17          CHAIRMAN LOUD: And is there  
18 anything further?

19          MS. BAILEY: Summary order, Mr.  
20 Chairman?

21          CHAIRMAN LOUD: There is no  
22 opposition, so I believe a summary order would

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1 be appropriate.

2 Let me thank the applicants this  
3 morning for an excellent presentation, an  
4 excellent effort on behalf of your counsel in  
5 submitting what was submitted to us. And also  
6 thank Commissioner Coder for your excellent  
7 testimony and report this morning.

8 MR. FREEMAN: Thank you.

9 CHAIRMAN LOUD: Thank you. Is  
10 there anything further on this morning's  
11 hearing calendar?

12 MS. BAILEY: No, Mr. Chairman. I  
13 don't have anything else.

14 CHAIRMAN LOUD: Okay. Then if the  
15 Board Members are up to it, I think we can  
16 perhaps call the first case of the afternoon,  
17 if not, we can probably delay for a while.  
18 But I believe that Mr. Dettman is going to  
19 leave for this afternoon and was available for  
20 the first hearing case this afternoon, the  
21 Basiliko case.

22 So again, just for those of you in

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1 the audience who are listening to this, we are  
2 running a little behind schedule. We did work  
3 through the lunch hour. Some Board Members  
4 are probably restless and a little hungry.

5 We are discussing right now going  
6 forward with one of our afternoon hearing  
7 cases, which would be the first case,  
8 Basiliko.

9 Are the Basiliko parties here?  
10 I'm sorry, they are or they -- yes, okay.  
11 They are here.

12 So again, I would perhaps suggest  
13 we just go through this case and then we can  
14 take -- we're going to take a break after that  
15 case, so before we call the remainder of the  
16 afternoon calendar, which would be West End  
17 and Francis Field.

18 So I'll tell you what, we're going  
19 to take a two minute break and then we will  
20 come back and we'll do Basiliko. But those of  
21 you that are in the audience for West End and  
22 Francis, if you want to go out and get some

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1 lunch, we are probably going to reconvene  
2 close to about 2:00, 2:15 for that case.

3 We are adjourned.

4 (Whereupon, at 1:15 p.m. a recess  
5 until 1:25 p.m.)

6 CHAIRMAN LOUD: This hearing will,  
7 please, come to order. Good afternoon, ladies  
8 and gentlemen. This is the February 23<sup>rd</sup>  
9 Public Hearing of the Board of Zoning  
10 Adjustment of the District of Columbia.

11 My name is Marc Loud, Chairperson.

12 Joining me today are Vice Chair Shane Dettman  
13 representing the National Capital Planning  
14 Commission, Michael Turnbull representing the  
15 Zoning Commission and to my left Ms. Meridith  
16 Moldenhauer and Ms. Nikki Sorg, Mayoral  
17 Appointees, BZA.

18 Mr. Cliff Moy, Secretary of the  
19 BZA, Ms. Lori Monroe, Office of the Attorney  
20 General and Beverley Bailey, Zoning Specialist  
21 here in the Office of Zoning.

22 Copies of today's hearing agenda

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1 are available to you and are located to my  
2 left in the wall bin near the door.

3 Please, be aware that this  
4 proceeding is being recorded by a Court  
5 Reporter and is also webcast live.  
6 Accordingly, we must ask you to refrain from  
7 any disruptive noises or actions in the  
8 hearing room.

9 When presenting information to the  
10 Board, please, turn on and speak into the  
11 microphone, first, stating your name and home  
12 address. When you are finished speaking,  
13 please, turn your microphone off, so that your  
14 microphone is no longer picking up sound or  
15 background noise.

16 All persons planning to testify  
17 either in favor or in opposition are to fill  
18 out two witness cards. These cards are  
19 located to my left on the table near the door  
20 and on the witness tables. Upon coming  
21 forward to speak to the Board, please, give  
22 both cards to the reporter sitting to my

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1 right.

2 The order of procedure for special  
3 exceptions and variances is as follows:  
4 Statement and witnesses of the applicant;  
5 Government reports, including the Office of  
6 Planning, the Department of Public Works,  
7 etcetera; The report of the Advisory  
8 Neighborhood Commission; Parties or persons in  
9 support; Parties or persons in opposition; and  
10 finally, Closing remarks by the applicant.

11 We have two appeal cases on the  
12 calendar this afternoon and I'm going to go  
13 through the order of procedure for appeal  
14 cases: Statement and witnesses of the  
15 appellant; The Zoning Administrator or other  
16 Government official's case; Case for the  
17 owner, lessee or operator of the property  
18 involved, if not the appellant; The ANC within  
19 which the property is located; The  
20 intervenor's case, if intervention is  
21 permitted by the Board; Rebuttal and closing  
22 statement by the appellant only.

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1 Pursuant to Sections 3117.4 and  
2 3117.5, the following time constraints will be  
3 maintained: The applicant, appellant, persons  
4 and parties, except an ANC, in support,  
5 including witnesses, 60 minutes collectively.

6 The appellee, persons and parties, except an  
7 ANC, in opposition, including witnesses, 60  
8 minutes collectively. Individuals 3 minutes.

9 These time restraints do not  
10 include cross examination and/or questions  
11 from the Board. Cross examination of  
12 witnesses is permitted by the applicant or  
13 parties only. The ANC is automatically a  
14 party in a special exception or variance case,  
15 provided it's the ANC in which the property is  
16 located.

17 Nothing prohibits the Board from  
18 placing reasonable restrictions on cross  
19 examination.

20 The record will be closed at the  
21 conclusion of each case, except for any  
22 material specifically requested by the Board

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1 only. The Board and staff will specify at the  
2 end of the hearing what is expected and the  
3 date when the persons must submit the  
4 additional information to the Office of  
5 Zoning. After the record is closed, no  
6 additional information will be accepted by the  
7 Board.

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

14 Please, turn off all beepers and  
15 cell phones, at this time, so as not to  
16 disrupt these proceedings.

17 The Board will make every effort  
18 to conclude the Public Hearing this afternoon  
19 as near as possible to 6:00 p.m. Let me  
20 repeat, the Board will make every effort to  
21 conclude the Public Hearing this afternoon as  
22 close as possible to 6:00 p.m.

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1           If for some reason we are not able  
2 to do that, then at 6:00 p.m., the Board will  
3 assess where we are in today's calendar,  
4 whether it can complete the case or a  
5 significant portion thereof and whether or not  
6 the case will need to be continued to the  
7 first available date on our calendar.

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

19           Does the staff have any  
20 preliminary matters?

21           MS. BAILEY: Mr. Chairman, no, we  
22 do not.

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1                   CHAIRMAN LOUD:     Thank you, Ms.  
2     Bailey.  If not, then, and you said we don't,  
3     we can proceed with the agenda.  And let's  
4     start by having all individuals who wish to  
5     testify, please, rise to take the oath and Ms.  
6     Bailey will administer the oath to you.

7                   (Whereupon,  the  witnesses  were  
8     sworn.)

9                   MS. BAILEY:  Thank you.

10                  CHAIRMAN LOUD:  Thank you.  And  
11     good afternoon to everyone.  Let me ask before  
12     we get started by a show of hands, how many of  
13     the witnesses who just stood and were sworn in  
14     are here for the first case this afternoon,  
15     the Basiliko case?  I mean, it's obvious, if  
16     you are at the table you're here.

17                  All right.  And how many of the  
18     witnesses are here for the Francis Field case?

19                  Two witnesses.  Very well.  Thank you.

20                  And then the remaining witnesses,  
21     which I believe would be about four, if you  
22     could just raise your hands?  You're for the

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1 West End case. Very well. Very well. Thank  
2 you very much.

3 Ms. Bailey, if you could call our  
4 first case?

5 MS. BAILEY: Thank you, Mr.  
6 Chairman. Application 18034 of William  
7 Basiliko and it is pursuant to 11 DCMR '  
8 3104.1 and 3103.2, for a variance from the lot  
9 occupancy requirements under section 403, a  
10 variance to enlarge a structure devoted to a  
11 nonconforming use under subsection 2002.5, and  
12 a special exception to change a nonconforming  
13 use, that is a beauty salon, to another  
14 nonconforming use, an art gallery and  
15 community center, under section 2003. The  
16 property is located at 1916 9<sup>th</sup> Street, N.W.,  
17 Square 361, Lot 122, and it is Zoned R-4.

18 CHAIRMAN LOUD: Thank you, Ms.  
19 Bailey. And let me welcome the parties and  
20 thank you for your patience in waiting for  
21 this afternoon's calendar to be called.

22 If everyone at the table can just

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1 introduce yourselves for our record? And is  
2 ANC-1B here? A representative of ANC-1B here?  
3 If not, we will proceed without them.  
4 Certainly, if they show, we will call them to  
5 the table. I don't believe that they  
6 submitted a report.

7 MR. HUGHES: Good afternoon, Mr.  
8 Chair. My name is Dennis Hughes with the firm  
9 of Holland & Knight.

10 MR. BASILIKO: My name is Bill  
11 Basiliko. Am I on? Bill Basiliko. Do you  
12 want my address, too?

13 CHAIRMAN LOUD: Yes, sir.

14 MR. BASILIKO: Okay. It's 421 1/2  
15 6<sup>th</sup> Street, S.E., Washington, D.C. 20003.

16 MR. SHER: Mr. Chairman, Members  
17 of the Board, for the record, my name is  
18 Steven E. Sher, the Director of Zoning and  
19 Land Use Services with the Law Firm of Holland  
20 & Knight.

21 MR. WHITESELL: Members of the  
22 Board, my name is Robert Whitesell. And my

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1 address is 1504 Lafayette Drive, Alexandria  
2 22308.

3 CHAIRMAN LOUD: Thank you. And,  
4 Mr. Whitesell, can you -- I'm sorry.

5 MR. WHITESELL: Yes, I'm  
6 representing OPX, which is the architectural  
7 firm.

8 CHAIRMAN LOUD: All right.

9 MR. WHITESELL: I'm employed by  
10 Mr. Basiliko.

11 CHAIRMAN LOUD: And counsel is Mr.  
12 Whitesell being offered as an expert?

13 MR. HUGHES: No, sir.

14 CHAIRMAN LOUD: Okay. Very well.  
15 Is Mr. Sher being offered as an expert?

16 MR. HUGHES: Yes, sir.

17 CHAIRMAN LOUD: Okay. Why don't  
18 we just, as a preliminary matter, qualify Mr.  
19 Sher as an expert. We didn't do it  
20 necessarily in the earlier case we had,  
21 because we had very targeted specific  
22 questions. This case is a little bit

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1 different.

2           You have provided your information  
3 on numerous occasions to the Board. We are  
4 very familiar with your background. And you  
5 have been qualified a number of times to  
6 provide testimony to the BZA.

7           Does the Board have any questions  
8 for Mr. Sher? All right. Given that there  
9 are no questions, you will be accepted as an  
10 expert and your testimony will be given the  
11 weight that is normally accorded to experts.

12           With that, why don't we turn to  
13 then to you, Mr. Hughes, for the opening of  
14 your case?

15           MR. HUGHES: Thank you, Mr. Chair.  
16 Am I being picked up? Okay. You have met  
17 the witnesses. Before I turn the testimony  
18 over to them, I just want to hit some  
19 preliminary matters first. I want to make  
20 sure that the Board is in receipt of our  
21 Statement of the Applicant, which sets forth,  
22 in general terms, the applicant's argument in

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1 support of the special exception and the  
2 variances in this case.

3 I also would like to note the --  
4 confirm that the Board is in receipt of the  
5 report of the Office of Planning. I don't see  
6 Mr. Mordfin here with us yet today, but I take  
7 it that the report has been received as well  
8 as the letter from ANC-1B in unanimous support  
9 of the application.

10 CHAIRMAN LOUD: I know for certain  
11 that we have the Office of Planning report,  
12 Exhibit 27, so you can rest assured we have  
13 that.

14 Let me just double check and make  
15 sure we have the ANC report. I don't believe  
16 that any of the Board Members have the ANC  
17 report. So if you have a copy of that, okay,  
18 if you can present that to Ms. Bailey?

19 Ms. Bailey, do you have a copy of  
20 the ANC report? Oh, it's Exhibit No. 29. So  
21 apparently it is a part of our record. None  
22 of us have it, so Ms. Bailey is going to make

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1 a copy and we will be provided with it.

2 We have got a little ways to go in  
3 the presentation before we get to the ANC, so  
4 I think we can start. And by the time we get  
5 to that part, we will have it.

6 MR. HUGHES: And I just request at  
7 the outset that both the Office of Planning  
8 and the ANC be granted the great weight that  
9 they are due.

10 CHAIRMAN LOUD: Excellent. Thank  
11 you, Mr. Hughes.

12 MR. HUGHES: I'm getting a little  
13 feedback it seems.

14 Mr. Chair, we arrive before you in  
15 a bit of a roundabout fashion. And as I think  
16 the statements set forth in general terms and  
17 I'm going to ask Mr. Basiliko to expand upon,  
18 Mr. Basiliko bought the property last year.  
19 And it appeared to be a commercial use.

20 It has been a beauty parlor for 50  
21 years. The building is, approximately, 110  
22 years-old. It is in the U Street Historic

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1 District. And it was shown on the Zoning Map  
2 as C-M-1. The Certificates of Occupancy for  
3 the building issued as recently as 2008  
4 suggest industrial zoning of the property.

5 He proceeded with what was an  
6 exciting redevelopment of the property, and he  
7 is going to talk about that just momentarily,  
8 for an art gallery and a community living  
9 room, community center.

10 And all that renovation involved  
11 bringing the property up to code. It also  
12 involved working with Historic Preservation  
13 Office. And I'm going to ask Mr. Whitesell to  
14 briefly discuss that.

15 In the course of that activity,  
16 the permitting, Mr. Basiliko was informed that  
17 the property was, in fact, zoned residential  
18 and required certain special exception and  
19 variance relief. And that's why we are here  
20 before you today.

21 And Mr. Sher will finish up the  
22 testimony with stating -- setting forth how we

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1 meet the various burdens and answer any  
2 questions that you have.

3 So with that, I'll turn it over to  
4 Bill. And could you, please, provide your  
5 testimony?

6 CHAIRMAN LOUD: Thank you.

7 MR. BASILIKO: Mr. Chair and  
8 Members of the Zoning Board, as Dennis was  
9 saying, I purchased the building actually in  
10 January of '09. I was looking specifically  
11 for a commercial building to open up an art  
12 gallery for local D.C. artists.

13 I looked on the multiple listing  
14 under commercial and this building came up.  
15 And in the listing itself it said the zoning  
16 was C-M-1 and also that the building could be  
17 divided into two separate commercial units.

18 On either side of me there is a  
19 restaurant and there is a CD store. And as  
20 Mr. Hughes was saying, as Dennis was saying,  
21 the Zoning Map said it was commercial. The  
22 D.C. Tax Records dates me as still being

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1 commercial, C-M-1.

2 So everyone kind of said it was  
3 commercial, so I believed it was. And again,  
4 we went for permitting and that's when we  
5 found out.

6 So let me tell you a little bit  
7 about the use of the building. There are  
8 three components to this building. The first  
9 one is an art gallery for local D.C. artists.

10 And I'm talking about upcoming D.C. artists.

11 The art community in D.C. in order  
12 to show your work, if you are upcoming, you go  
13 to a cafe. You go to a restaurant. You go to  
14 a gym and show your work.

15 And so I felt like it was -- my  
16 partner actually is an artist and so I have  
17 gone through this process with him. And I  
18 felt like they needed a place to show their  
19 work where they could feel good about showing  
20 their work. So that's why I wanted to do  
21 this.

22 And they are going to get 80

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1 percent of the profit, so I will only get 20  
2 percent of that profit.

3 The second component is that of  
4 the community living room or the community  
5 center. And the purpose of this was for the  
6 community to be able to use the building for  
7 if they wanted to do classes, if they wanted  
8 to do workshops, if they wanted to have a  
9 birthday party.

10 I have already had people approach  
11 me in the area to do a Yoga class. Somebody  
12 wants to do -- a couple wants to do a  
13 relationship workshop. I saw it as many uses.

14 The fee for that will be a  
15 donation to a program in D.C., a D.C.  
16 education program. So they decide how much  
17 money they are going to give and then they  
18 will provide that money to a program, an  
19 educational program in D.C.

20 Now, they need to provide me with  
21 a receipt and information about the program  
22 itself, so I know that it was done and also

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1 give that information to other people who may  
2 want to donate to that program also.

3 The third component of this  
4 building is that we are going for platinum  
5 certification under the LEED Program. Now,  
6 for those of you who know the LEED Program,  
7 even if you go platinum, it is really not  
8 green. You are greener.

9 So we are taking it the next step  
10 farther. Our goal is to make it as green as  
11 we can. Actually, our goal is to make it one  
12 of the greenest commercial buildings in D.C.

13 And with that comes  
14 responsibility. And so we felt like if we  
15 were able to achieve our goal in that area, we  
16 would offer some kind of educational program  
17 associated with the building where we could  
18 bring students in to teach them about green  
19 buildings, where we could bring other  
20 architects in, where we could bring businesses  
21 in and show them how you can be a green  
22 building.

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1           Actually, to develop a green  
2 building, but also be green after you have  
3 your green building. A lot of buildings might  
4 be green, but afterwards they are not. They  
5 still -- so our goal is to utilize as many  
6 green products and services as possible.

7           So that's it, that's the building.

8           MR. HUGHES:       Thank you, Mr.  
9 Basiliko.    Next, I want to introduce Bob  
10 Whitesell from OPX. Bob, could you quickly go  
11 through what you are proposing for the  
12 building? Thanks.

13          MR. WHITESELL:    Mr. Chairman,  
14 Members of the Board, when we undertook the  
15 design of the gallery for Bill, it was a  
16 building program that was very simple. He  
17 needs an office. There is a small pantry.  
18 And there are restrooms and a stair.

19          And our job, as the designers, was  
20 to maximize gallery space and keep the rest of  
21 what were, essentially, service spaces out of  
22 the way of the gallery.

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1           As Mr. Hughes mentioned, when we  
2           undertook this process, we were operating  
3           under the assumption that it was zoned  
4           commercial. And in our design, we created a  
5           small addition in what is now -- that the  
6           existing condition is a nonconforming court.

7           The project is a two-story  
8           townhouse and like many townhouses, it has a  
9           little setback at the back. And we grabbed  
10          that space and put a restroom in there. And  
11          this enabled us to have, as you can see on the  
12          drawing, an open gallery, a garden to the rear  
13          and a few service elements.

14          Now, a quick comment about the  
15          restrooms. One of the oddities of this  
16          project is we spent many months negotiating  
17          with the permit officials, the Department of  
18          Transportation and the Historic Preservation  
19          folks about accessibility issues.

20          The main one being entrance into  
21          the building. And like many townhouses, there  
22          is about five or six steps up to the entrance.

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1 We did a series of studies providing for a  
2 new stair and a lift for wheelchairs.

3 In discussion with all of these  
4 agencies, it was ultimately determined not to  
5 provide a lift. I think DOT's concerns were  
6 that it would take up too much sidewalk space  
7 and the Historic Preservation Department felt  
8 that it was really not appropriate for this  
9 sort of building.

10 So as part of our design -- of  
11 course the permit officials were hoping that  
12 we would comply with the code, which does  
13 mandate that it be accessible.

14 So we have a situation where on  
15 the inside of the building we are trying to  
16 make everything accessible and provide  
17 handicap accessible restrooms. Yet, when  
18 there is no way to really get into the  
19 building if you are in a wheelchair, other  
20 than some sort of physical assistance, the  
21 site is landlocked. And so there is no  
22 ability to have a rear entrance that would

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1 provide access.

2 That's mostly it. The only other  
3 aspect dealing with Historic Preservation is,  
4 you know, the front facade where, essentially,  
5 you know, just bringing up the quality. We  
6 are replacing the existing wood windows,  
7 painted wood windows with new painted wood  
8 windows in kind and we will paint the  
9 building. The color scheme has yet to be  
10 determined.

11 MR. HUGHES: Could you speak to  
12 the second means of egress into the rear?

13 MR. WHITESELL: Yes. We have, you  
14 know, as part of the normal code requirements,  
15 a second means of egress to the rear. It is a  
16 stair from the upper level. And it comes down  
17 into the garden. We also worked extensively  
18 with the permit officials to make that work.

19 MR. HUGHES: When you say permit  
20 officials, that includes Historic  
21 Preservation?

22 MR. WHITESELL: Yes, although,

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1 they were less involved with the stair in the  
2 rear. Their concerns were primarily the front  
3 of the building.

4 MR. HUGHES: Thank you, Mr.  
5 Whitesell. I'll turn it over to Mr. Sher and  
6 confirm that his report has been received into  
7 the record.

8 MR. SHER: Mr. Chairman, Members  
9 of the Board, the site here is located on the  
10 west side of 9<sup>th</sup> Street between T and U  
11 Streets. It is a site of about 1,689 square  
12 feet. It has frontage of about 18 feet 4  
13 inches on the street. It is rectangularly  
14 shaped and as Mr. Whitesell said, it has no  
15 access at the rear. It is a landlocked lot.

16 It is in the U Street/Shaw area.  
17 And it was zoned industrial up until 1989, at  
18 which point it was rezoned to R-4. And one of  
19 the attachments at the back shows the zoning  
20 pattern in the area and in the block.

21 Unfortunately, the Zoning Map  
22 didn't reflect that until early this year when

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1 the Office of Zoning released its new on-line  
2 Zoning Map, which shows the property correctly  
3 Zoned R-4.

4 As we are indicating, what we are  
5 proposing is to do two things. One is to  
6 change the use of the building and that  
7 requires a special exception. And the other  
8 is to expand the size of the building by a  
9 relatively modest amount and that requires  
10 variances, because the existing building is  
11 over the percentage of lot occupancy for  
12 another use in R-4 and because we are making a  
13 small addition to a structure devoted to a  
14 nonconforming use.

15 Just to put a pin in the size of  
16 that addition, the existing lot occupancy is  
17 949 square feet and that includes the open  
18 court that is less than 5 feet wide.

19 We are adding 22 square feet of  
20 additional lot occupancy, which takes it from  
21 56.19 percent to 57.49 percent. If this were  
22 a row house, if this were a building devoted

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1 to residential use and attached to the  
2 buildings on either side, it would be allowed  
3 to have a 60 percent lot occupancy. But  
4 because it is not a residential, it's other  
5 than row house, therefore it is limited to 40  
6 percent. So we need a variance on the small  
7 addition.

8 With respect to the change of  
9 nonconforming use, those standards are set  
10 forth in section 2003. And I have gone  
11 through those one by one in the outline. The  
12 key point here is, of course, that the  
13 proposed uses will not adversely affect the  
14 present character of future development of the  
15 area.

16 And 9<sup>th</sup> Street in that vicinity is  
17 primarily a commercial looking and feeling  
18 street. But when you look at other  
19 surrounding uses within 300 feet, you've got  
20 commercial uses on the south side of U Street  
21 and Florida Avenue. You've got the office use  
22 in the former D.C. Public School building on

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1 Vermont Avenue. And you have got commercial  
2 uses on the opposite side of 9<sup>th</sup> Street, which  
3 is still zoned commercial.

4 You also note, as did the Office  
5 of Planning in its report, that both the  
6 adopted Duke Small Area Plan and the  
7 Convention Center Strategic Development Plan  
8 provide that 9<sup>th</sup> Street should be a  
9 neighborhood-serving retail district. And I  
10 have attached excerpts from those two plans as  
11 the last two pages of the report and  
12 highlighted those sections which talk about  
13 9<sup>th</sup> Street and the desire that that be a  
14 retail-serving street.

15 The second piece of the change of  
16 nonconforming use status, essentially, is that  
17 the proposed uses will not create deleterious  
18 external effects. These are uses that are  
19 intended to serve the local community. The  
20 expectation is that most persons will either  
21 walk or take public transit to the site.

22 There is a Metrorail Station about

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1 800 feet away, walking distance, there are bus  
2 lines on U, 7<sup>th</sup> and 9<sup>th</sup> Streets. There are  
3 generally -- the uses that are proposed are  
4 generally quiet uses, which would not produce  
5 noise or other effects on the outside of the  
6 building. And of course, the existing  
7 buildings on both the north and the south are  
8 already devoted to commercial uses.

9 So with respect to the addition  
10 again, the building, if it wants to be an art  
11 gallery, wants to, essentially, be a big open  
12 space on the inside. If this were a row  
13 dwelling, if this were an office, it would be  
14 something else.

15 But as for the kind of use that it  
16 is, you want to open up those spaces and you  
17 want to have them be as obstacle-free or  
18 obstruction-free as you can. And that forces  
19 the service uses, the stairs, the restrooms  
20 and so forth to the outer edges of the  
21 building.

22 And as a result of that, what we

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1 have done is we have proposed this relatively  
2 minor square addition that fills in the  
3 corridor and pushes the back wall of the  
4 building back just a little bit.

5 The space has been used for  
6 nonresidential purposes for at least the last  
7 50 years. There will be no change to the  
8 exterior appearance of the building, except  
9 for the minor things which Mr. Whitesell has  
10 already described.

11 So I conclude that we have met the  
12 burden with respect to both the special  
13 exception and the variances, that the relief  
14 can be granted without substantial detriment  
15 to the public good, without impairing the  
16 intent, purpose and integrity of the Zone Plan  
17 and we would suggest that the application  
18 should be approved.

19 MR. HUGHES: Mr. Chairman, that  
20 concludes our testimony for the applicant.

21 CHAIRMAN LOUD: Thank you, Mr.  
22 Hughes. Let's first begin with Board Members

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1 and see if there are any questions for any of  
2 the witnesses.

3 COMMISSIONER TURNBULL: Mr. Sher,  
4 good morning. How many properties on 9<sup>th</sup>  
5 Street in the R-4 adjacent to this property  
6 are nonconforming, other than the restaurant?  
7 Are there more on that same side?

8 MR. SHER: The buildings  
9 immediately abutting on both the north and the  
10 south are devoted to commercial use.  
11 Essentially, when you go further down the  
12 block, that becomes predominantly residential,  
13 as you're going down towards the south towards  
14 T Street.

15 COMMISSIONER TURNBULL: But then  
16 going up the other way, they are commercial?

17 MR. SHER: Yes. But once you --  
18 the abutting house to the north is Zoned R-4.

19 COMMISSIONER TURNBULL: Zoned --

20 MR. SHER: Everything north of  
21 that is C-2-B.

22 COMMISSIONER TURNBULL: -- C-2-B.

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1 MR. SHER: And everything  
2 immediately across the street to the east is  
3 C-2-B.

4 COMMISSIONER TURNBULL: Okay. The  
5 other question I wanted to ask and it's not  
6 really a zoning issue, it goes back to you  
7 were getting into Building Code issues and  
8 accessibility.

9 Obviously, there is no elevator in  
10 this building, because you can't get into it.  
11 You can't get into it anyway. From the  
12 egress standpoint, the second egress into the  
13 garden, that's landlocked.

14 If there was a fire and you exit  
15 out to the back, is this considered an area of  
16 refuge or do you have to do anything? Do you  
17 have to put something out there to make it  
18 safe? I'm just curious how that is looked  
19 upon.

20 MR. WHITESELL: It is an area of  
21 refuge. Again, in working with the Permit  
22 Office, we got two waivers. The area of

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1 refuge is less remote from the rear facade  
2 than is normally allowed under code. And we  
3 worked out a number of things where, you know,  
4 the occupant -- the portion of the occupant  
5 load that is going to the rear, they said it  
6 has to be at least this far away and we got  
7 away with that.

8 The other waiver that we needed to  
9 obtain is that the stair has to be at least 10  
10 feet from either side property line. Our  
11 property is 18 feet wide, so --

12 COMMISSIONER TURNBULL: Hard to  
13 do.

14 MR. WHITESELL: Yes. It was  
15 tough. So we got a waiver to allow us to have  
16 it along the property line.

17 COMMISSIONER TURNBULL: The stair  
18 is noncombustible?

19 MR. WHITESELL: Yes. It's a steel  
20 cast iron tread stair.

21 COMMISSIONER TURNBULL: Okay.  
22 Well, what is your projected occupancy?

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1 MR. WHITESELL: We have a posted  
2 occupancy of 122.

3 COMMISSIONER TURNBULL: So what do  
4 you figure, 60 people going one way, 60 going  
5 another?

6 MR. WHITESELL: I don't recall  
7 exactly. I think we have a little more coming  
8 out the front --

9 COMMISSIONER TURNBULL: The front.

10 MR. WHITESELL: -- than the rear.

11 COMMISSIONER TURNBULL: Is the  
12 building sprinklered?

13 MR. WHITESELL: Yes.

14 COMMISSIONER TURNBULL: Okay.

15 MR. WHITESELL: It will be.

16 COMMISSIONER TURNBULL: It will  
17 be. Okay. Thank you.

18 CHAIRMAN LOUD: Thank you, Mr.  
19 Turnbull. Any additional questions? Let me  
20 ask a couple of quick questions for either Mr.  
21 Sher or Mr. Hughes.

22 In the Office of Planning report,

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1 Exhibit 27, where they talk about the use  
2 variance test, and we can get to that when we  
3 speak with OP as well, but I wanted you to  
4 have a chance to address it, going through the  
5 use variance analysis, they use practical  
6 difficulty instead of undue hardship.

7 And I wanted to give you an  
8 opportunity to speak to that. I think one of  
9 the differences, of course, as you know, is  
10 that you have to show what the undue hardship  
11 that the property can't be put to a use that  
12 complies with the zone, unlike with the  
13 practical difficulty.

14 And so perhaps if you wanted to  
15 address that.

16 And then the second question would  
17 be your understanding of the definition of a  
18 neighborhood facility, as would be captured by  
19 2003.5. I think there is some testimony from  
20 Mr. Basiliko regarding that, but either from  
21 Mr. Hughes or Mr. Sher.

22 MR. HUGHES: Mr. Chair, thank you.

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1 I'll try to answer your first question and  
2 Mr. Sher will answer your second question.

3 With respect to the use variance,  
4 area variance, dichotomy and again reference  
5 to the Office of Planning report, I know this  
6 case has been noticed as a use variance case.

7 And we have referenced it as such and the  
8 Office of Planning referenced it as such.

9 But I was looking back at an  
10 appeal, not the Monaco appeal you mentioned  
11 this morning, Mr. Dettman, but another Monaco  
12 appeal involving a squash facility on Capitol  
13 Hill. The underlying application was the  
14 Application of Frank Gailor. I believe I have  
15 that pronounced correctly.

16 And it seems to be very on point  
17 to what we are doing here. In fact, the most  
18 on point of any case that I have found. And  
19 what was going on there, if you'll give me  
20 just a little bit of indulgence, it was an R-4  
21 District on Capitol Hill.

22 And what that applicant was

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1 proposing to do was to convert a nonconforming  
2 use. The exiting non conforming use was a  
3 moving and storage warehouse. And they wanted  
4 to convert that to a squash court facility.

5 And that involved -- it was an  
6 earlier iteration of the Zoning Regulations,  
7 so the paragraph, the sections don't  
8 necessarily match up. They don't match up.

9 But it requested a special  
10 exception to accomplish that change, much like  
11 we are doing here converting the beauty parlor  
12 to the art gallery and the community center.

13 And because of the nature of this  
14 squash facility, they needed to raise the roof  
15 of the building. And so that was an  
16 accompanying request to allow an enlargement  
17 of a nonconforming structure with a  
18 nonconforming use.

19 And I can provide copies of this  
20 case, if the Board would like that. The Board  
21 in that matter determined that they were  
22 dealing with an area variance. And one reason

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1 they did that is because as we have done  
2 there, we are converting one nonconforming use  
3 by special exception to another, to a more  
4 restrictive nonconforming use.

5 And so that's not -- that wasn't  
6 approached by that Board nor by the Court of  
7 Appeals when it took the case up in the Monaco  
8 appeal as quite the same as you would see just  
9 a pure extension of a nonconforming use.

10 And if I could just quote from the  
11 Monaco appeal, the court says "In the present  
12 case, the change of use from warehouse to  
13 squash court occurs by virtue of a special  
14 exception. Thus, the variance sought is  
15 solely to increase the height of a roof. We  
16 cannot say the BZA improperly characterized  
17 this change as an area variance, simply  
18 because it facilitated a change of use  
19 accomplished fundamentally by special  
20 exception."

21 And so while we do believe that  
22 the case we presented to you in our testimony

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1 and in our statement arguably rises to the  
2 level of an undue hardship upon Mr. Basiliko  
3 based upon what he has been confronted with,  
4 he purchased this building that by all means  
5 seemed to be a zoned property that allowed his  
6 proposed use, it been nonconforming for 50  
7 years, and no indication when he entered the  
8 building that it had been a residential  
9 building.

10 And simply, so he went through  
11 this process. And as I was saying in my  
12 introduction, it was a round -- we come to you  
13 in a roundabout way.

14 We first learned -- I first  
15 touched this case, if you will, over a year  
16 ago when I was asked questions about the  
17 Building Code. And at that time, there was no  
18 indication that there was a zoning issue.

19 And then when we addressed the  
20 zoning issue, the accessibility issue, the  
21 fire suppression issue and egress, then it  
22 became -- at a later stage in the permitting,

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1 it became, and I should say Historic  
2 Preservation, evident that there was an  
3 underlying zoning issue.

4 So Mr. Basiliko has gone through  
5 this process at extreme expense to renovate a  
6 historic building with a very well-received  
7 and creative neighborhood-service center use  
8 of the property.

9 And I hope that I have answered  
10 your question. I'm going to turn it over,  
11 since I'm going to segue, to Mr. Sher and the  
12 neighborhood facility. But if I haven't,  
13 please, feel, you know, free to interrupt any  
14 time.

15 CHAIRMAN LOUD: If you could just  
16 repeat the name of the case that you referred  
17 to?

18 MR. HUGHES: The BZA case is  
19 Application 12725 of Frank R. Gailor. And the  
20 Court of Appeals case is Monaco vs. District  
21 of Columbia, and that is 409 Atlantic.2d,  
22 1067. And if that's okay, I will provide

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1 copies to Ms. Bailey.

2 CHAIRMAN LOUD: That would be  
3 great. I think Monaco, at least I'm very  
4 familiar with that, most of the Board Members  
5 are, it would be good to have the Franklin  
6 case.

7 But as I understand your overall  
8 response, it's that you are prepared -- you  
9 believe it would be an area variance, but you  
10 are prepared to -- you think the evidence is  
11 in the record to support either the area or  
12 the use variance? Okay.

13 And that's kind of where my  
14 question was going, because I think it has  
15 been a beauty salon for a number of years.  
16 And I'm assuming that it has been built-out as  
17 a commercial structure and sort of  
18 reconfigured for residential might prove to be  
19 an undue hardship.

20 But there was nothing in the  
21 record to the effect. So I wanted to make an  
22 effort to tease that out.

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1           Let's see if Board Members have  
2 any follow-up questions for you and then we  
3 will go to Mr. Sher. I don't believe so. So,  
4 Mr. Sher?

5           MR. SHER:       Mr. Chairman, the  
6 second question had to do with neighborhood  
7 facility and the test under section 2003 that  
8 says "If you are changing the use, the new use  
9 must be either a dwelling, flat, apartment  
10 house or if not, a neighborhood facility."

11           Regulations do not define  
12 neighborhood facility and they never have. It  
13 has been a case-by-case judgment on the part  
14 of the Board for as long as I have been  
15 involved with this and I won't say how long  
16 that is.

17           So what we have here are two or a  
18 combination of uses, as Mr. Basiliko has  
19 described them, which essentially are oriented  
20 to serve that local community. This is not  
21 going to be another branch of the Corcoran  
22 Gallery of Art or the Smithsonian or what have

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1 you.

2 Mr. Basiliko's collection of  
3 Renoirs and Degas are going to be exhibited  
4 somewhere else. I'm sorry, I didn't say that.

5 This is going to be deserved for  
6 exhibiting local artists and their work and,  
7 therefore, would not be the kind of facility  
8 that would attract worldwide attention or  
9 bring people from predominantly outside the  
10 neighborhood. It would be a local  
11 neighborhood-serving type establishment.

12 And the same is true for the other  
13 activities as Mr. Basiliko has described them.

14 We do not believe this is the kind of place  
15 where you are going to travel from miles and  
16 miles around to come and hold your Yoga class.

17 This would be something that would be  
18 intended to serve neighborhood residents. And  
19 I think the record would reflect that those  
20 two uses, as he has described them, would  
21 constitute a neighborhood facility within the  
22 meaning of section 2003.

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1 CHAIRMAN LOUD: Although there is  
2 no definition for neighborhood facility, there  
3 is a similar definition for community, I  
4 think, service use, which suggests or actually  
5 defines one of the terms is that it be a not-  
6 for-profit use. And I just wanted you to  
7 respond to that.

8 MS. MONROE: Can I interrupt for a  
9 minute and pose this question? It's a burning  
10 question for Mr. Sher.

11 Because I talked to the Chairman  
12 about it earlier and I just want to know why  
13 and I just want to understand this. I  
14 understand you're getting a special exception  
15 for the change in nonconforming use to another  
16 change of nonconforming use.

17 But there is a community service  
18 center use in section 334 and also in 209  
19 there is a community center use.

20 MR. HUGHES: We are not requesting  
21 a community service center.

22 MS. MONROE: But community center

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1 is in 209 and that's also a special exception  
2 in an R-4. I just want to understand why. I  
3 realize it's a special exception under Chapter  
4 20. But do we have to also meet the  
5 provisions in 209?

6 Because if you follow through from  
7 209 all the way to R-4, they are all special  
8 exceptions. I don't know the answer. I'm  
9 asking Mr. Sher if that's necessary, just to  
10 get it on the record.

11 MR. SHER: The regulations use  
12 these terms and they are slightly different.

13 MS. MONROE: I understand. And  
14 that's what I'm trying to say. What exactly  
15 are you guys after?

16 MR. SHER: Right.

17 MS. MONROE: Because we want to  
18 make sure we get the right relief.

19 MR. SHER: We are --

20 MS. MONROE: That's why I'm going  
21 through this.

22 MR. SHER: -- not after the

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1 community service center special exception  
2 under section 334.

3 MS. MONROE: 334, right.

4 MR. SHER: Which is job training.

5 MS. MONROE: Okay. Right. I  
6 understand that.

7 MR. SHER: Things like that. And  
8 we are not again after the section 209,  
9 community service center under R-1.

10 We are basically saying when you  
11 get to SP, section 501.1(d), "Community center  
12 building is a use permitted as a matter-of-  
13 right." The others are special exceptions.  
14 By the time you get to SP, that's a matter-of-  
15 right use, since the beauty salon is first  
16 permitted as a matter-of-right in C-1, both  
17 the art gallery and the community center  
18 building are also matter-of-right uses in C-1.

19 So we don't have to deal with the  
20 special exception criteria that would  
21 otherwise apply. If this were not a  
22 nonconforming use, then we might -- if it were

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1 a nonconforming use, we wouldn't be here at  
2 all.

3 But we are here under an entirely  
4 different --

5 MS. MONROE: Okay. And community  
6 center building there has no other provisions.

7 MR. SHER: No.

8 MS. MONROE: That's why I wanted  
9 to make sure there is nothing else that has to  
10 be met.

11 MR. SHER: Without conditions.

12 MS. MONROE: Okay. So you're set.  
13 Okay.

14 MR. SHER: Thank you.

15 MS. MONROE: Thank you.

16 MR. HUGHES: Okay.

17 CHAIRMAN LOUD: And thank you, Ms.  
18 Monroe, that was a question that was sort of  
19 in the back of my mind, too.

20 But just in terms of the  
21 definition of a community service use versus  
22 neighborhood facility, there is no definition

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1 I understand in 199 for neighborhood facility.

2 But the closest definition would  
3 seem to indicate that it be a not-for-profit  
4 use. And I know, in this case, we are talking  
5 about a for-profit. It's not a 501(c)(3).

6 MR. BASILIKO: It might be.

7 CHAIRMAN LOUD: Sure.

8 MR. BASILIKO: The art gallery  
9 itself will be for-profit, but the rental  
10 component of it will not be. I'm not making  
11 any money off of the rental component. The  
12 money will be going to educational programs in  
13 D.C.

14 So I haven't actually looked -- I  
15 didn't know where any of this was going. So  
16 to be perfectly honest, I haven't looked into  
17 501(3)(c) yet, because this has been a long  
18 process for me.

19 So but that would be one way that  
20 I would do that part of it, which would be the  
21 community center. Does that make sense?

22 CHAIRMAN LOUD: It does. And I'm

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1 not suggesting that you would have to be a  
2 501(c)(3), but I did want to give the  
3 opportunity to your counsel and to Mr. Sher to  
4 address that issue, so that we have a full  
5 record for deliberation.

6 MR. SHER: I think just under the  
7 change of use within structure, section 2003,  
8 2003.5 "In Residence Districts, the proposed  
9 use shall be either a dwelling, flat,  
10 apartment house or a neighborhood facility."

11 I think there would be many uses  
12 that would qualify as neighborhood facilities  
13 that would not be nonprofit.

14 CHAIRMAN LOUD: Okay.

15 MR. SHER: If I wanted to change  
16 this beauty salon to a coffee shop, the coffee  
17 shop would likely be considered a neighborhood  
18 facility, but it wouldn't be nonprofit in any  
19 sense of the word.

20 So the nonprofit thing only comes  
21 up to the community service center special  
22 exception in R-4, which we don't think is

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1 applicable here.

2 CHAIRMAN LOUD: Okay. I  
3 appreciate that. So conceivably neighborhood-  
4 serving retail could also be a neighborhood  
5 facility and would be distinct from --

6 MR. SHER: Yes. I would --

7 CHAIRMAN LOUD: -- say community--

8 MR. SHER: -- say that is correct.

9 And I think the Board has found that on many  
10 previous occasions.

11 CHAIRMAN LOUD: Okay. Thank you.

12 Let's see if Board Members have any  
13 additional questions. Mr. Turnbull?

14 COMMISSIONER TURNBULL: Thank you,  
15 Mr. Chair. Mr. Sher, I think earlier in your  
16 testimony, I think, you said that the Zoning  
17 Map originally that you relied upon was  
18 inaccurate?

19 MR. SHER: In one of our earlier  
20 submissions, we included copies of the pages  
21 out of the Zoning Map. It showed it as being  
22 Zoned C-M-1. The Map that was published dated

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1 February 2003 and the Map that was on-line on  
2 the OZ website up until January of 2010 when  
3 they introduced the new on-line Map, both of  
4 those Maps showed this as Zoned C-M-1. And we  
5 have got excerpts of that in --

6 COMMISSIONER TURNBULL: Okay.

7 MR. SHER: -- in the statement.

8 COMMISSIONER TURNBULL: So now it  
9 is "corrected?"

10 MR. SHER: Yes. It is correct.  
11 It has been R-4 since 1989. But the Map was  
12 in error and the Permit Department apparently  
13 has been issuing permits based on the  
14 assumption that it was C-M-1 as well.

15 COMMISSIONER TURNBULL: Okay.  
16 Thank you.

17 CHAIRMAN LOUD: Any additional  
18 questions from Board Members? If not -- I'm  
19 sorry, Ms. Sorg?

20 MEMBER SORG: Yes, thank you,  
21 Chairman. On a different topic, we had some  
22 questions in our file about because this is a

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1 landlocked property, trash and servicing, so I  
2 wonder if one of you can address that?

3 MR. WHITESELL: The trash will  
4 just simply be removed across -- in front of  
5 the building during the week. As actually  
6 part of our LEED requirements, we have to  
7 designate a fairly large trash and recycling  
8 area which is going to be in the basement.  
9 But other than that, it will just be taken out  
10 the front.

11 MEMBER SORG: Okay. Thanks.  
12 That's all.

13 CHAIRMAN LOUD: Thank you, Ms.  
14 Sorg. If there are no additional questions  
15 from the Board, certainly we can come back  
16 later. We will turn to the Office of Planning  
17 for your report, which is found at our Exhibit  
18 27. Good afternoon.

19 MR. MORDFIN: Good afternoon,  
20 Chairman and Members of the Board. I'm  
21 Stephen Mordfin with the Office of Planning.

22 And the subject application is in

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1 conformance with the criteria for the granting  
2 of a variance to increase the percentage of  
3 lot occupancy, because the lot is unique in  
4 that it was developed residentially and  
5 converted to a commercial use and does not  
6 conform to current Building Codes.

7 The applicant is not permitted to  
8 expand the building. He would not be able to  
9 provide ADA compliant restrooms without  
10 devoting, approximately, 12 percent of the  
11 building to just this one necessary accessory  
12 use.

13 And the granting of this variance  
14 would allow the applicant to use the building  
15 for an art gallery and community center,  
16 consistent with the recommendations of the  
17 Duke Plan and the Convention Center Area  
18 Strategic Development Plan and because it  
19 would -- and it would contribute to a main  
20 street development pattern on 9<sup>th</sup> Street.

21 The subject application is also in  
22 conformance with the criteria for the granting

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1 of a special exception to enlarge a structure  
2 devoted to a nonconforming use from a beauty  
3 salon to an art gallery and community center,  
4 because the surrounding area consists of a  
5 mixture of residential, commercial and office  
6 uses and the proposed uses are consistent with  
7 the recommendations of the Duke Plan and the  
8 Convention Center Plan.

9 The uses should not result in any  
10 deleterious effect because the art gallery and  
11 community center would cater to local  
12 community groups and the location is well-  
13 served by Metrobus and Metrorail.

14 And the proposed uses would be  
15 neighborhood community facilities that would  
16 cater to the surrounding area.

17 Finally, the application is in  
18 conformance with the provisions for the  
19 granting of a variance to permit a  
20 nonconforming use within a structure, because  
21 the building was developed residentially and  
22 is now used commercially, but does not conform

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1 to current Building Codes.

2 The applicant is required to  
3 provide a secondary means of exit from the  
4 second floor and proposes to provide handicap  
5 accessible restrooms, neither which can be  
6 provided without the expansion of the  
7 building. And the establishment of the  
8 proposed uses would be in conformance with the  
9 Duke and Convention Center Area Plans.

10 Therefore, the Office of Planning  
11 recommends that the Board approve the  
12 applicant's request for a variance to increase  
13 lot occupancy, a variance to enlarge a  
14 structure devoted to a nonconforming use and a  
15 special exception to change the use from a  
16 beauty salon to an art gallery and a community  
17 center. Thank you.

18 CHAIRMAN LOUD: Thank you. Just  
19 two quick questions for you and then we will  
20 see if either Board Members or the applicant  
21 have any questions.

22 The first is you heard the

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1 testimony from Mr. Sher regarding a  
2 neighborhood facility and, in fact, many  
3 neighborhood-serving retail uses would qualify  
4 as a neighborhood facility. And specifically  
5 that this art gallery/community space would  
6 qualify.

7 Do you or does OP have an opinion  
8 on that?

9 MR. MORDFIN: I do think that it  
10 is a neighborhood facility and that it would  
11 serve the local surrounding area. A similar  
12 case recently at 13<sup>th</sup> and Florida Avenue,  
13 N.W., where the Board approved it, where they  
14 were changing the use to a dry cleaner, which  
15 was also then considered a neighborhood  
16 facility, because there are so many dry  
17 cleaners that you would just probably go to  
18 the one nearest you.

19 So I believe that this then too is  
20 a neighborhood facility.

21 CHAIRMAN LOUD: And just on the  
22 latter discussion we had regarding a use

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1 variance versus an area variance, have you had  
2 or has OP had an opportunity to determine  
3 whether or not they are viewing this as a use  
4 variance?

5 I believe your report suggested  
6 that you were viewing it as a use.

7 MR. MORDFIN: We did review it as  
8 a use variance. The application indicates  
9 that the applicant filed for a use variance.

10 CHAIRMAN LOUD: Okay. Would you  
11 then like to update the part of your report  
12 where you use a practical difficulty stand? I  
13 think it might be page 3 when you talk about  
14 the use variance, page 5.

15 MR. MORDFIN: Oh, the practical  
16 difficulty, oh, as opposed to undue hardship.

17 CHAIRMAN LOUD: Correct.

18 MR. MORDFIN: I mean, it would be  
19 an undue -- I do believe it would be an undue  
20 hardship to the applicant to devote 12 percent  
21 of a building to just the restrooms. Usually  
22 you don't have that much that is devoted to

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1 all of your necessary accessory uses like  
2 elevators and staircases and lobby entrances.

3 So for 12 percent just for the  
4 restroom, I think, is excessive. And it, you  
5 know, results from the size of the building,  
6 but I do think that that would be an undue  
7 hardship to the applicant.

8 CHAIRMAN LOUD: And an additional  
9 distinction from the use versus the area  
10 variance on the undue hardship versus  
11 practical difficulty distinction is that the  
12 property cannot be used in compliance with the  
13 zone, I believe. I think some of the case law  
14 has said that.

15 Does OP have an opinion on that?

16 MR. MORDFIN: On whether or not  
17 this property could be used as provided by the  
18 R-4?

19 CHAIRMAN LOUD: Correct. Without  
20 undue hardship to the applicant.

21 MR. MORDFIN: I mean, this  
22 property, part of it, was Zoned C-M-1 for many

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1 years. And even after it was rezoned, the  
2 Maps until recently did not reflect that it  
3 had been rezoned.

4 The surrounding properties are  
5 being used for non-R-4 uses. And the Duke  
6 Plan and the Convention Center Plan, which are  
7 plans that guide development, and the city  
8 recommended this be -- 9<sup>th</sup> Street, this block  
9 of 9<sup>th</sup> Street which is specifically mentioned  
10 be developed with main street type uses.

11 And I think that an art gallery  
12 and a community center really do contribute to  
13 that. And so it is then consistent with those  
14 plans.

15 CHAIRMAN LOUD: Thank you, Mr.  
16 Mordfin. I thought it was a very good report  
17 and appreciate your getting it in.

18 Are there questions for the Office  
19 of Planning from the applicant?

20 MR. HUGHES: The applicant has no  
21 questions, but wants to thank the Office of  
22 Planning for their input.

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1                   MEMBER   MOLDENHAUER:       Chairman  
2 Loud, I just have one question for OP.

3                   CHAIRMAN LOUD:   Yes.

4                   MEMBER   MOLDENHAUER:       I find the  
5 focus of your analysis on the ADA compliance,  
6 especially the restroom, size to be  
7 challenging considering that the applicant  
8 stated that they cannot provide access to  
9 handicap individuals into the building.

10                  With that factor, since then,  
11 obviously, no handicapped individuals can  
12 actually get access into the building or to  
13 the second floor, if you were to take out that  
14 consideration, do you still believe that the  
15 applicant would satisfy the variance test?

16                  MR. MORDFIN:   I do. I don't know  
17 that I would take that out, because just  
18 because you don't have an elevator to get in  
19 or a level walkway to get in doesn't mean that  
20 you aren't necessarily handicapping, even if  
21 you could climb the stairs to get in, that  
22 doesn't mean that all these other uses like

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1 the handicap accessible restroom wouldn't be  
2 of use to you.

3 People have varying degrees of  
4 mobility issues. And so I think to make it  
5 handicap accessible to the extent possible is  
6 a positive.

7 MEMBER MOLDENHAUER: Thank you.  
8 That just provides a more full analysis.  
9 Thanks.

10 VICE CHAIRMAN DETTMAN: Mr.  
11 Mordfin, I still am trying to get my head  
12 around the undue hardship, because when Mr.  
13 Loud inquired about that just now, you  
14 mentioned that it has been historically used  
15 for commercial uses. You mentioned the  
16 surrounding uses are commercial.

17 I mean, I think you clearly  
18 painted the picture that it is exceptional.  
19 But when you went to the undue hardship, you  
20 alluded to the fact that the Duke Plan says  
21 that it should be rezoned.

22 And I'm not -- while the Duke Plan

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1 might be right, the rezoning hasn't happened.

2 So I'm just wondering what is the undue  
3 hardship to put this to a residential use? I  
4 haven't heard it yet.

5 MR. MORDFIN: Well, I think -- I  
6 mean, you know, the Duke Plan might indicate  
7 that it should be rezoned and it hasn't  
8 happened yet. But at the same time, it has  
9 always been -- well, not always, but for at  
10 least the last 20 years or so, used  
11 commercially.

12 And so we have a building that is  
13 no longer configured for residential use. The  
14 applicant has made some changes to the  
15 building already. So to now go back and  
16 convert it to residential use would also be  
17 against what the recent plans that have been  
18 adopted for this area. And there are two of  
19 them that indicate that the use should be on  
20 the street, on this block.

21 And so, therefore, I think the  
22 undue hardship would be that the applicant

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1 cannot -- although the applicant could comply  
2 with the Zoning Regulations, probably there is  
3 no case in which you cannot comply, it's just  
4 whether or not it makes any sense.

5 It would go against these two  
6 plans and it would go against the uses that  
7 have been in the building and on either side.

8 So, therefore, I think that it makes more  
9 sense to permit the applicant to continue the  
10 commercial uses of the property.

11 VICE CHAIRMAN DETTMAN: But  
12 whether or not it makes sense, I mean, really,  
13 I think the test here is whether or not it  
14 creates an undue hardship. It might not make  
15 sense, but the regs are what they are.

16 And the argument that you just  
17 kind of laid out, isn't that an argument that  
18 could be applied to every property that was  
19 rezoned from C-M-1 to R-4 at the time of the  
20 Text Amendment?

21 MR. MORDFIN: You probably could.

22 But also, this property is also surrounded by

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1 commercial uses on both sides, even though  
2 they are Zoned R-4. And then you would also  
3 be inserting a residential use within what  
4 would appear to be a Commercial District, that  
5 commercial uses on either side of you also is  
6 an undue hardship for the people that really  
7 also then have to live there, to live on  
8 either side of commercial uses when you are  
9 Zoned Residentially.

10 It's not a Mixed-Use District  
11 where you would expect, okay, you don't know  
12 what could move in next to you. You have a  
13 much longer list of uses.

14 VICE CHAIRMAN DETTMAN: So the  
15 argument really goes -- the undue hardship  
16 argument really goes to the marketability of  
17 this particular property as a residential use  
18 given its surroundings? Maybe the return on  
19 the investment of converting this to a  
20 residential use and what you would be able to  
21 get out of it.

22 MR. MORDFIN: And maybe also the

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1 usability of it sandwiched between commercial  
2 uses, office and retail or commercial.

3 VICE CHAIRMAN DETTMAN: Thank you.

4 COMMISSIONER TURNBULL: Mr.  
5 Mordfin, it sounds like we need a Map  
6 Amendment to change it to ARTS/2-C-B.

7 MR. MORDFIN: Oh, in conformance  
8 with the Small Area Plans.

9 COMMISSIONER TURNBULL: Right.

10 CHAIRMAN LOUD: Thank you. Mr.  
11 Hughes, did you have, in light of that  
12 exchange, any questions or comments related to  
13 OP's testimony regarding the undue hardship?

14 MR. HUGHES: No questions, Mr.  
15 Chair.

16 CHAIRMAN LOUD: Okay.

17 MR. HUGHES: And I'll save any  
18 comments to closing.

19 CHAIRMAN LOUD: Okay.

20 MR. HUGHES: I think we covered  
21 that before.

22 CHAIRMAN LOUD: All right. Then

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1 why don't we move right along?

2 Is ANC-1B here? They are not  
3 here, but we did get a report from ANC-1B. It  
4 is our Exhibit 29. Most of us on the dias  
5 just got our copy this morning. And it is  
6 dated February 10<sup>th</sup>. And it says that the ANC  
7 met on February 4<sup>th</sup>, proper notice, a quorum  
8 present, and they voted 9-0 to support the  
9 application. So this is now part of our  
10 record and it will be given the great weight  
11 in accordance with our requirements.

12 That being said, now if there are  
13 persons in the audience who are in support of  
14 the application, now would be the time to come  
15 up. And seeing none, if there are persons in  
16 the audience who are opposed to the  
17 application, now would be the time to come up.

18 Again, seeing none, we turn back  
19 to you, Mr. Hughes for closing remarks.

20 MR. HUGHES: Thank you, Mr. Chair.  
21 I believe the record is fairly complete in  
22 this application. I believe we have made the

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1 test. We have satisfied the test for the  
2 special exception to convert one nonconforming  
3 use with a more restricted nonconforming use,  
4 that is the beauty parlor use, which has been  
5 on the property for at least 50 years, to Mr.  
6 Basiliko's art gallery and community center  
7 use.

8 Mr. Sher also spoke to the very  
9 nominal lot occupancy issue that we are  
10 dealing with. It is really a matter of the  
11 building being what it is classified as, it's  
12 a row building, whether or not it's a row  
13 dwelling. And in the R-4, that term dwelling  
14 is critical because if it were a dwelling,  
15 then 60 percent lot occupancy is permitted.

16 Since it's a commercial use, a  
17 continued commercial use only 40 percent is.  
18 So the existing improvements are already in  
19 excess of the permitted 40 percent. And we  
20 are only talking about increasing that,  
21 approximately, 22 square feet or just over 1.5  
22 percent, I believe.

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1                   And then finally, the issue of the  
2 extension of the nonconforming use of a  
3 nonconforming use. I do stand by the fact  
4 that this is very burdensome on Mr. Basiliko.

5                   The process has been -- it is what it is  
6 whether the property was Zoned R-4 for over 20  
7 years. Consecutive Zoning Maps don't reflect  
8 that.

9                   He did reasonable due diligence.  
10 That said, the property is Zoned R-4, that's  
11 why we're here. We have gone through a number  
12 of processes upgrading the building that is a  
13 historic building, doing it in a sensitive  
14 fashion. Nothing will be seen from the  
15 street, other than some improved windows and  
16 some signage.

17                   It is exceptional and -- as Mr.  
18 Sher addressed. So I'm getting in a circular  
19 way to the issue of undue hardship versus  
20 practical difficulty. And I think it is  
21 arguable one way or the other. I believe he  
22 has met the -- we have met the undue hardship

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1 test.

2 As I said, he has -- we have gone  
3 -- Mr. Basiliko has gone through extreme  
4 efforts. He was confronted with a building  
5 that did not appear, once he was inside the  
6 building, to be residential. It has not been  
7 residential for half a century.

8 It is landlocked. The building to  
9 the north and to the building to the south are  
10 both residential. The buildings are  
11 immediately -- I'm sorry, commercial. The  
12 buildings immediately across the street are  
13 commercial.

14 And for him to convert that  
15 building to residential use, it is a very  
16 difficult task not only from the outset, but  
17 especially given the history that he has  
18 experienced on this site.

19 All that said, I looked at the  
20 cases that I could find where the Board has  
21 addressed this particular provision, the  
22 extension of a nonconforming use. I believe

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1 that is 2002.5.

2 And those cases going back to the  
3 late '80s, I think I found six cases maybe  
4 seven cases, some dealt with -- some talked of  
5 practical difficulty, some talked undue  
6 hardship, some don't talk to anything. And  
7 they are all summary orders.

8 So I will say the distinction from  
9 this case to those cases, I didn't see in any  
10 of the other cases the combination that we are  
11 dealing with here that is very similar to the  
12 Gailor case that I presented you where we have  
13 got a conversion from one nonconforming use to  
14 a more restricted nonconforming use.

15 In that case, they went from a  
16 storage and warehouse facility to a squash  
17 facility, which was deemed to be a much more  
18 restrictive use permitted only in the more  
19 restricted district.

20 In this case, what Mr. Basiliko is  
21 doing is going from a C-1 permitted use, which  
22 obviously includes beauty parlor, but also

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1 includes restaurant, can include bar use. He  
2 is going to a, by special exception of this  
3 Board, more restrictive use and won't be able  
4 to go back to that less restrictive use absent  
5 relief from this Board.

6 And so that combination and in  
7 reading the Gailor case and reading the Monaco  
8 appeal, I believe the Board is on solid ground  
9 to address this as an area variance, should it  
10 be so inclined.

11 All that said, I believe we meet  
12 the test both for practical difficulty and  
13 undue hardship. And thank you for your time,  
14 consideration of the case. If the Board is so  
15 inclined, we would -- I know we presented  
16 these cases, so I'm not sure how the Board  
17 feels about that, but if you are inclined to  
18 make a decision from the Bench today, I would  
19 appreciate that.

20 CHAIRMAN LOUD: Thank you, Mr.  
21 Hughes. And I want to thank you for your  
22 presentation today in terms of helping to

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1 simplify some issues that potentially could be  
2 complex.

3 My sense of it is, I think, it's a  
4 very full record. I think it is a full record  
5 on area variance as well as use variance in  
6 the sense of our being able to close the  
7 record today.

8 On the other hand, I would like an  
9 opportunity and would suggest to my colleagues  
10 to have just a little further time to reflect  
11 on some of the things in the record and  
12 perhaps to review some of the cases that you  
13 mentioned.

14 That notwithstanding, I think we  
15 can set this for decision very rapidly,  
16 including next week if we have got some room  
17 on the calendar, we can set it for decision.  
18 I think we will be able to dispose of it. And  
19 I think because you have got the support of  
20 the Office of Planning, you have the support  
21 of the ANC, the decision that we render would  
22 probably be a summary decision.

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1           So that's what I would suggest to  
2 colleagues that we do this next week as a  
3 decision. And we do not intend to delay any  
4 further your client's sought after relief.

5           MR. HUGHES: Thank you, Mr. Chair.  
6 Thank you, Members of the Board.

7           CHAIRMAN LOUD: All right. Thanks  
8 to each of you. We appreciate your patience  
9 and we appreciate your presentation this  
10 afternoon.

11           To those of you that are in our  
12 audience for the West End and Francis cases,  
13 we are running somewhat behind today and we  
14 have worked straight through lunch to try to  
15 get through the first of our afternoon hearing  
16 cases, so that we could focus exclusively on  
17 your two cases for the latter part of the  
18 afternoon.

19           However, Board Members have not  
20 had any break for lunch. And so I'm going to  
21 be killed up here if we try to push this  
22 forward further without allowing everybody to

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1 have a break for lunch.

2           So I think maybe we will need  
3 about 45 minutes. Is that okay? Okay. So I  
4 think they will go for 45 minutes. And so we  
5 will take a break for 45 minutes and we'll be  
6 back out here to resume the calendar. Thank  
7 you.

8           We are adjourned for this part of  
9 the hearing.

10           (Whereupon, the Public Hearing was  
11 recessed at 2:28 p.m. to reconvene at 3:31  
12 p.m. this same day.)

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1 next case.

2 MS. BAILEY: Mr. Chairman, I know  
3 that we have sworn in witnesses, but did any  
4 additional witnesses come in after that need  
5 to be sworn in at this time? Is it  
6 appropriate, Mr. Chairman?

7 CHAIRMAN LOUD: Thank you, Ms.  
8 Bailey.

9 MS. BAILEY: Thank you.

10 CHAIRMAN LOUD: Absolutely.

11 MS. BAILEY: Would you, please,  
12 stand?

13 CHAIRMAN LOUD: If you are  
14 planning on testifying this afternoon and were  
15 not sworn in earlier and you are testifying  
16 for either the Francis case or the West End  
17 case, please, stand, so that Ms. Bailey can  
18 administer the oath.

19 MS. BAILEY: Please, raise your  
20 right hand.

21 (Whereupon, the witnesses were  
22 sworn.)

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1 MS. BAILEY: Thank you. Mr.  
2 Chairman, the first case to start this session  
3 is Appeal No. 18031. It is the Appeal of the  
4 West End Citizens Association and it's  
5 pursuant to 11 DCMR ' 3100 and 3101, from a  
6 November 4, 2009 decision of the Zoning  
7 Administrator, Department of Consumer and  
8 Regulatory Affairs, to issue Certificate of  
9 Occupancy No. CO1000323, for a grocery store  
10 in the Foggy Bottom. The name of the grocery  
11 store is Foggy Bottom Grocery. It is located  
12 at premises 2140 F Street, N.W. It is located  
13 in Square 81 on Lot 811. And it is Zoned R-5-  
14 E.

15 CHAIRMAN LOUD: Thank you, Ms.  
16 Bailey. And it appears as though the parties  
17 are at the table. So if we could have  
18 everyone introduce themselves, starting at my  
19 far left and working your way over?

20 Is your microphone on, Mr. Hart?

21 MR. HART: Sorry, Mr. Chairman.

22 CHAIRMAN LOUD: There we go. All

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1 right.

2 MR. HART: Good afternoon. My  
3 name is Kris Hart and I'm the owner of Foggy  
4 Bottom Grocery and managing partner.

5 CHAIRMAN LOUD: Okay.

6 MS. MILLER: And I'm Constance  
7 Miller with Manning Sossamon and we're counsel  
8 for Foggy Bottom Grocery.

9 MS. MADDUX: I'm Sara Maddux, West  
10 End Citizens Association.

11 MS. KAHLOW: Barbara Kahlow, West  
12 End Citizens Association.

13 ZONING ADMIN. Le GRANT: Matthew  
14 Le Grant. I'm the Zoning Administrator.

15 MR. SURABIAN: Assistant Attorney  
16 General, Jay Surabian on behalf of DCRA.

17 MS. BOLLING: Melinda Bolling,  
18 Acting General Counsel for DCRA.

19 CHAIRMAN LOUD: Good afternoon to  
20 each of you. And we welcome you here. We  
21 want to apologize for running behind somewhat  
22 this afternoon, but we had a long morning

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1 calendar and so that started us in that  
2 direction and we are still trying to make up  
3 for lost ground.

4 I think with respect to how we  
5 begin, there is a motion to dismiss that has  
6 been filed and I think we want to speak a  
7 little bit to some of the issues there. We  
8 have all had the opportunity to read the  
9 motion to dismiss and the responsive pleadings  
10 to the motion to dismiss.

11 Essentially, the motion raises  
12 about four or five different issues, including  
13 that the West End organization has no  
14 standing, that the appeal is factually  
15 incorrect, that the Zoning Administrator acted  
16 properly in its actions. Then an estoppel  
17 argument is raised. And finally, there is  
18 substantial community support for the grocery.

19 I think those are the items that are raised  
20 in the motion to dismiss.

21 With respect to the factually  
22 incorrect or correct allegation, I mean,

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1 that's what the hearing is for and we will  
2 ascertain whether the allegations are factual  
3 or not. So that's not an issue that we will  
4 address.

5 With respect to whether the Zoning  
6 Administrator acted properly, again, that's  
7 the purpose of the appeal and that's why we  
8 are all here and we'll make that  
9 determination. So it would be very  
10 inappropriate to make a ruling like that on  
11 the motion to dismiss.

12 With respect to substantial  
13 community support, I don't think substantial  
14 community support or lack thereof is an  
15 element of the law, of the Rule of Law, in  
16 this case. So where the testimony becomes  
17 relevant, we will certainly allow it, but it  
18 would not go to whether or not a motion to  
19 dismiss is granted.

20 And then with respect to the issue  
21 of estoppel, we are going to hold that in  
22 abeyance, finding the need to hear some

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1 testimony on other issues before and if we get  
2 to that issue at all.

3 And then finally, on the issue of  
4 whether West End has standing, our Rule 3112.1  
5 allows any person that is aggrieved by an  
6 action of the Zoning Administrator relative to  
7 the Zoning Act to file an appeal.

8 In the case before us, we have  
9 representations from the appellant beginning  
10 at our Exhibit 1 regarding being aggrieved by  
11 the action of the Zoning Administrator. The  
12 specific arguments that are made regarding  
13 proprieties or improprieties regarding the  
14 D.C. Corporations Act are not under the  
15 jurisdiction of the Board of Zoning  
16 Adjustment.

17 I think, and I'll let others weigh  
18 in as well, that given that the West End Civic  
19 Association has made these representations on  
20 record, we're going to ask them under oath if  
21 those representations are accurate.

22 Given that there is no one here, I

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1 don't believe we will find out, from the West  
2 End Civic Association who would be in a  
3 position of authority to suggest otherwise. I  
4 think that they meet the test of 3112.1 and so  
5 we would find them to have standing to pursue  
6 this appeal.

7 As I indicated, the balance of  
8 what is in that motion to dismiss we will hold  
9 in abeyance until we proceed further.

10 So why don't we begin with the  
11 counsel and the leadership for West End  
12 regarding your allegations of being aggrieved  
13 by the Zoning Administrator's action?

14 And again, we don't have to spend  
15 a whole lot of time on this issue.

16 MS. KAHLOW: Our testimony, I  
17 believe, will get to all of the relevant,  
18 substantive issues. We clearly are aggrieved.

19 We are the Civic Association and immediate  
20 neighborhood. And we filed a 40 page response  
21 to the motion to dismiss, which should be in  
22 your docket. And I think we covered each of

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1 those issues sequentially, at that point.

2 Do you have that in your docket?

3 CHAIRMAN LOUD: Yes.

4 MS. KAHLOW: Okay.

5 CHAIRMAN LOUD: What I'm going to  
6 ask you to do, Ms., I'm sorry?

7 MS. KAHLOW: I'm sorry. I'm  
8 Barbara Kahlow.

9 CHAIRMAN LOUD: Kahlow, I'm very  
10 sorry. What I'm asking you to do is just for  
11 our record, for the purposes of our  
12 transcript, if you can just indicate just a  
13 few, not all 40, of the ways in which the  
14 appellant has been aggrieved?

15 As I indicated, I don't think we  
16 need to spend a whole lot of time on this  
17 issue before we can get into the merits of the  
18 case.

19 MR. SURABIAN: Mr. Chairman?

20 CHAIRMAN LOUD: Yes.

21 MR. SURABIAN: Before we move  
22 forward, I don't believe the District received

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1 a copy of that filing. Do you have an extra  
2 copy?

3 MS. KAHLOW: Actually, it went to  
4 Mr. Le Grant.

5 CHAIRMAN LOUD: I'm sorry, let's  
6 clarify which file. The motion to dismiss was  
7 filed by Ms. Miller on behalf of the --

8 MR. SURABIAN: The 40 page  
9 response or 40 point response. You just  
10 referred to it.

11 MS. KAHLOW: December 15 --

12 CHAIRMAN LOUD: Okay.

13 MS. KAHLOW: -- '09 filing was  
14 served by the Office of Zoning on Mr. Le Grant  
15 by email, since you were in a different  
16 building. And that was served by Leigh  
17 Johnson. And I had a confirm receipt that he  
18 had received it. I do not have another copy.  
19 I only have my copy. I am terribly sorry.

20 CHAIRMAN LOUD: I think Ms. Bailey  
21 has a copy of what in our records should be  
22 Exhibit 13. Okay. It should be Exhibit 13 in

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1 our record. And it's my understanding that  
2 the opposition should have been filed directly  
3 with DCRA, if I'm not mistaken. It's not  
4 filed through the Office of Zoning, correct?

5 But that notwithstanding, let's  
6 see if we can proceed forward.

7 MS. KAHLOW: I'm sorry. I didn't  
8 have --

9 CHAIRMAN LOUD: And try our best  
10 to reach the merits.

11 MS. KAHLOW: -- the PDA  
12 capability, so I was asked -- ask the Office  
13 of Zoning staff if they could make a PDF  
14 version, since it was 40 pages, and they were  
15 willing to do so.

16 After I brought my 15 copies down,  
17 I just didn't have the ability on my computer.  
18 So they were kind enough to do that for me.

19 CHAIRMAN LOUD: Thank you. We do  
20 appreciate that. And we will turn back to you  
21 for your response to that. Obviously, you  
22 have not had an opportunity to review what is

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1 in this 40 pages or so response.

2 But as I indicated at the outset,  
3 there are a number of things in the motion to  
4 dismiss that are not germane to where we are  
5 going to go today. So I don't know how many  
6 of those 40 pages deal with the issues that we  
7 are not going to be addressing today.

8 Right now, we are only taking a  
9 look at whether or not the West End Civic  
10 Association is aggrieved under section 3112.2.

11 And I think you were going to give us some  
12 testimony, Ms. Kahlow, regarding how the West  
13 End Civic Association is aggrieved.

14 MS. KAHLOW: Yes. I haven't  
15 looked at this document for quite a while, but  
16 if I can turn to it, Attachment A was a copy  
17 of the ABC Board's denial order for a similar  
18 motion where the Foggy Bottom Grocery,  
19 FoBoGro, filed saying what we didn't have  
20 standing and they disagreed and said we did  
21 have standing.

22 Attachment B was an affidavit from

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1 the West End Citizens Association President  
2 who sits behind me, Mr. Batham, and clarified  
3 what actually happened in the proceedings.

4 And Attachment C was some  
5 information about the immediately impacted --  
6 impacts on us, including the three  
7 appropriateness standards in the ABC statute.

8 I can speak to each of those. I  
9 can summarize that one has to do with a peace,  
10 order and quiet. One has to do with safety  
11 for vehicles and for pedestrians. And the  
12 third has to do with effect on real property  
13 values.

14 We made the case in all three  
15 areas in that hearing. I know that is not  
16 today's hearing. So we aren't covering that  
17 material. However, the former case before the  
18 BZA that I will be referencing today for this  
19 particular location, we had extensive  
20 testimony about the adverse impacts on any  
21 expansion.

22 And the BZA, in its order, found

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1 that we had met the burden, that we had made a  
2 convincing case and that the applicant had not  
3 met the burden of proof. That we had made our  
4 case.

5 So there is quite a bit of  
6 evidence in your own records about the  
7 negative effects.

8 CHAIRMAN LOUD: Okay.

9 MS. KAHLOW: Is that enough?

10 CHAIRMAN LOUD: Why don't you just  
11 speak very briefly to the first two points?  
12 And I mean very briefly. You don't have to go  
13 into the real estate values, but you talked a  
14 little bit, I think, about traffic impacts.  
15 And I do mean very briefly, because we want to  
16 get into the merits of the case.

17 MS. KAHLOW: If you will bear with  
18 me just a second, I can read you two  
19 paragraphs from my testimony that I think  
20 would be very helpful. It will be easier if  
21 you will bear with me momentarily.

22 At the end of this document, which

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1 was then called Attachment C, and you look at  
2 pages 4 and 5, they deal with the issues. Let  
3 me just read.

4 "Attachment D are two pages from  
5 G.W.'s 11/20/09 Foggy Bottom Campus Plan  
6 Compliance report which shows community  
7 concerns, complaints by month and year in a  
8 two year period. The latter shows that 78  
9 percent of community complaints relate to  
10 noise.

11 This is especially important  
12 because it just opened dormitories across the  
13 street from the establishment.

14 With respect to parking, the WECA  
15 has repeatedly expressed concern, as Mr.  
16 Turnbull knows, about improper student parking  
17 in the limited on-street residential parking  
18 spaces in this immediate vicinity, including  
19 in the 2100 Block of F Street.

20 As a consequence, the Zoning  
21 Commission's order for the Campus Plan states  
22 'the university shall implement the following

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1 measures to minimize adverse impacts  
2 associated with parking and traffic.'" And  
3 then I go through all the different provisions  
4 in the Campus Plan order about student  
5 parking. And they are substantial, because we  
6 are a broken record about the limited parking  
7 we have and how we try to keep what we can for  
8 the residents.

9 CHAIRMAN LOUD: Okay. Why don't--

10 MS. KAHLOW: Is that enough?

11 CHAIRMAN LOUD: Yes. Why don't we  
12 then proceed from there.

13 MS. KAHLOW: Thank you.

14 CHAIRMAN LOUD: Let's hear from  
15 counsel for the appellee, Foggy Bottom  
16 Grocery. Then we will hear from DCRA. We  
17 will make a ruling and then we will move  
18 forward.

19 MS. MILLER: And you would like us  
20 to specifically address the issues of the  
21 traffic, peace and quiet and safety?

22 CHAIRMAN LOUD: No. As I

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1 understand your motion, you were arguing that  
2 they were not -- they don't have standing to  
3 even be an appellant in this case. Now, if  
4 that's something you are willing to concede  
5 now that we are all here, then we can bypass  
6 this issue all together and go straight into  
7 the merits.

8 But I think what we would be  
9 looking for you to address is your objection  
10 to them having standing and the grounds for  
11 that objection.

12 MS. MILLER: In the motion that we  
13 filed, we indicated that there are a number of  
14 improprieties in the way the issues were  
15 brought before the WECA. And the Board,  
16 itself, acted irregularly in even taking up  
17 the motion to present a case, not only to you,  
18 as the BZA, but also to the ABRA, which was an  
19 earlier proceeding which took place in  
20 December.

21 They excluded Mr. Hart, who is a  
22 member of the board, from the discussion.

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1 They allowed another member who had a conflict  
2 of interest to vote in that setting. There  
3 was some questions about whether or not the  
4 WECA was representing the interests of the  
5 community.

6 This was not brought before the  
7 organization itself. It was brought by Ms.  
8 Kahlow and Ms. Maddux to the Board. And the  
9 vote and the conduct at the meeting was  
10 improper under Robert's Rules of Order.

11 CHAIRMAN LOUD: Okay. Thank you,  
12 Ms. Miller. Is there anything you would like  
13 to add to that?

14 MS. MILLER: No.

15 CHAIRMAN LOUD: Okay. And now,  
16 let's turn to DCRA just on this very narrow  
17 issue of the standing question.

18 MR. SURABIAN: DCRA doesn't have a  
19 position on the substance of the standing.  
20 I'm assuming that West End Citizens  
21 Association's members live in and around 2140  
22 F Street, then DCRA doesn't have an objection

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1 to them being a part of the case.

2 CHAIRMAN LOUD: Okay. Then I  
3 think it is very appropriate for us to make a  
4 ruling. I appreciate the testimony that each  
5 of you have given and perspectives.

6 I think the appellant has  
7 demonstrated that it is an aggrieved person.  
8 The testimony regarding parking impacts are  
9 certainly something that we are all familiar  
10 with from so many of our cases that we review  
11 here at BZA. And that alone, I think, would  
12 certainly, at least on the allegation, give  
13 them standing under section 3112.2.

14 With respect to Robert's Rules of  
15 Order and Parliamentary Procedure and so on  
16 and so forth, I think that those are issues  
17 that are not under the jurisdiction,  
18 necessarily, of the BZA.

19 We look specifically at whether  
20 the person bringing the appeal can demonstrate  
21 that they are aggrieved. And I think the  
22 record is voluminous regarding the impacts

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1 alleged by the appellant here. So the ruling  
2 would be that this appellant does have  
3 standing to press this case forward.

4 Okay. All right.

5 MS. KAHLOW: Thank you.

6 CHAIRMAN LOUD: Thank you guys.

7 And with that being resolved, I'm going to  
8 turn over to Board Member Moldenhauer to set  
9 the framework for how, based on the pleadings  
10 and based on the representations, the Board  
11 will walk through an analysis of the case.

12 Okay. And if you have any  
13 questions, please, feel free to seek  
14 clarification. And, Board Members, following  
15 Board Member Moldenhauer's presentation, if  
16 there are further refinements, please, feel  
17 free to weigh in.

18 MEMBER MOLDENHAUER: Thank you,  
19 Chairman Loud. After reviewing the issues  
20 before us on this appeal and reviewing  
21 additional BZA orders, one, in particular, is  
22 dispositive on a partial issue of the case.

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1           And it was not referenced by any  
2 of the parties. It is Application No. 17906,  
3 Jeong, and it has to do with an application  
4 for a grocery store where they were seeking a  
5 special exception to change a nonconforming  
6 use. And this was a case that was decided on  
7 April 14, 2009.

8           And the Board in this case  
9 specifically stated that the applicant did not  
10 need a special exception because the desire to  
11 have prepared food services was a primary use  
12 and was not something that would be considered  
13 an accessory use of a grocery store.

14           And thus, we said to this  
15 applicant that the case was dismissed and  
16 there was no need for them to seek relief.  
17 That case is dispositive on part of the issues  
18 before us today. Thus, making it clear to us  
19 that this applicant, the Foggy Bottom Grocery,  
20 would not have needed any sort of relief to  
21 provide prepared food services in addition to  
22 their grocery C of O.

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1           And that it is not considered an  
2 accessory use, but rather it's considered part  
3 of the principal use of what is in today's  
4 consideration to be a grocery use.

5           That means that in reviewing our  
6 case and kind of narrowing what is actually  
7 then before us today, the only issue that --  
8 unless a party can provide some sort of  
9 distinction between that case and this case,  
10 which I think will be challenging and  
11 exceptionally narrow, but if they can try to  
12 provide some sort of distinction, we will hear  
13 that.

14           But if we don't feel as though  
15 they meet that requirement, we will continue  
16 to narrow them down to just the issue of  
17 whether or not the C of O had -- the use  
18 currently is beyond the scope of the current C  
19 of O or the prior C of O.

20           Right now, nowhere in our file do  
21 we have the prior owner's C of O. I believe  
22 it is, I'm going to kill her name, Malika

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1 Bekele.

2 MS. MONROE: Bekele, Meseret  
3 Bekele, B-E-K-E-L-E.

4 MEMBER MOLDENHAUER: Thank you.  
5 We do not have a copy of that C of O. And so  
6 we would need to be able to determine -- if  
7 somebody in any of the parties have that,  
8 then, obviously, that would be an issue to,  
9 you know, provide testimony as to what that  
10 prior C of O was, whether or not the '08 or  
11 the '09 C of O expanded that use in some way.

12 And if it did not expand the use,  
13 then, obviously, you know, we won't go any  
14 further. But if it does, then we will have to  
15 go into further deliberation on that specific  
16 issue.

17 Does anybody have any questions as  
18 to the way that we are going to be narrowing  
19 the rest of the hearing?

20 MR. SURABIAN: Yes. I could shed  
21 some light on that. Just based on what you  
22 are saying, I'm guessing that the Board has

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1 not received DCRA's prehearing filing. It was  
2 filed on -- it was filed Friday morning.

3 MEMBER MOLDENHAUER: Beverley, do  
4 we have a copy of that? Do you have a copy?  
5 I know we don't have a copy.

6 MS. KAHLOW: 17?

7 MS. MONROE: DCRA's prehearing  
8 statement is Exhibit No. 17.

9 MS. BAILEY: It's No. 17.

10 MEMBER MOLDENHAUER: Okay. I  
11 don't have that.

12 COMMISSIONER TURNBULL: I think  
13 our files only go up to 16.

14 MEMBER MOLDENHAUER: Yes. No, we  
15 don't have that.

16 MR. SURABIAN: And in that  
17 filing --

18 MEMBER MOLDENHAUER: I think you  
19 referenced that case.

20 MR. SURABIAN: -- the case. And  
21 Exhibit G of that filing is the past 50 years  
22 of C of Os for that property all compiled.

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1                   MEMBER MOLDENHAUER:    What we will  
2 do now, actually, I think Beverley is going to  
3 make a copy and we may just take a few minute  
4 break. We will kind of circle around and go  
5 through this.

6                   Do all of the parties have a copy  
7 of that?

8                   MS. KAHLOW:    Yes, we do.

9                   MEMBER MOLDENHAUER:    Okay. Thank  
10 you.

11                   MS. KAHLOW:    We do and we're going  
12 to be expanding that information a great deal  
13 in the testimony, because we have actual  
14 affidavits and sworn testimony about what  
15 really happened back then, some of the prior  
16 BZA cases.

17                   CHAIRMAN LOUD:    Okay. So what we  
18 will do is as Board Member Moldenhauer  
19 indicated. We will take a five minute break,  
20 so that we can get our copies squared away and  
21 review it. We apologize, but for some reason,  
22 it was a glitch and we don't have that

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1 particular exhibit.

2 And then once we do that, we will  
3 come back out and resume the case. Okay.  
4 Thank you.

5 (Whereupon, at 3:54 p.m. a recess  
6 until 4:22 p.m.)

7 CHAIRMAN LOUD: We're back in  
8 session. And again, I really want to  
9 apologize for the extraordinary delays in  
10 getting to this case. But this Exhibit 17,  
11 which we have just received copies of, is  
12 pretty significant and we wanted to have an  
13 opportunity to review it. So we apologize.

14 I think as we started out sort of  
15 narrowing what we saw as the focus of the  
16 analysis was pretty much what was in the  
17 Exhibit 17 filing by the District of Columbia.

18 And I think that we will proceed in  
19 accordance with that and have a full hearing  
20 on the issues presented by the appeal.

21 However, we are saying that the  
22 very narrow issue presented by the appeal is

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1 the question of whether and what uses were  
2 allowed in the entire building prior to 2008,  
3 prior to the August 21, 2008 C of O that was  
4 issued.

5 So the only testimony that we will  
6 allow this afternoon is testimony that relates  
7 to that issue. And so if we hear testimony  
8 being presented that goes well beyond that  
9 issue, one or more of us may cut you off and  
10 gently try to correct you back to the issue.

11 As Board Member Moldenhauer has  
12 indicated, the issue of the Jeong case that we  
13 have cited for our narrowing of the issue is  
14 something that if the parties want to address,  
15 you can certainly address that.

16 But the time constraints that I  
17 mentioned at the very outset of the hearing  
18 will still be in effect. And those time  
19 constraints would allow one hour to the  
20 appellant, one hour to the appellee and so on  
21 and so forth.

22 And so we will be putting everyone

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1 on the clock, so that we can stick to that  
2 time frame. Of course, you can use your time  
3 as you deem best. But we will continue to try  
4 to focus in on the issues that we think will  
5 help resolve the appeal question.

6 So are we clear on that?

7 MS. KAHLOW: Yes.

8 CHAIRMAN LOUD: Okay. Okay. Let  
9 me turn to Board Member Moldenhauer and the  
10 other Board Members to see if there are any  
11 sort of framework-type issues that we also  
12 need to put out that I may have overlooked.

13 MEMBER MOLDENHAUER: Chairman  
14 Loud, I believe that you summarized it. I  
15 think we can move forward into the case and  
16 just, you know, again trusting that we will be  
17 focusing mostly on the issue of whether or not  
18 there was a prior C of O and whether the C of  
19 O was granted correctly for the entire  
20 building.

21 And whether or not -- you know,  
22 that issue is relevant, but we have already

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1 addressed the issue that it's aggrieved. We  
2 won't be going into any issues of conduct or  
3 anything to that effect, that is no longer  
4 relevant as we proceed forward.

5 MS. KAHLOW: Thank you. I do want  
6 to make one clarification. Our original  
7 appeal emphasized the difference between the  
8 prior one-story use and three-story use.  
9 There is D.C. Law specifically on that point  
10 as well as case law. And I hope that we will  
11 be able to introduce that.

12 CHAIRMAN LOUD: Very well. I  
13 think we are going to begin with you as the  
14 appellant, that would be our normal procedure.

15 And you can cover all of those issues that  
16 you want to raise as a part of your 60  
17 minutes.

18 MS. KAHLOW: Thank you.

19 CHAIRMAN LOUD: Very well. So we  
20 will begin and we can start the clock once the  
21 appellant begins.

22 MS. KAHLOW: Thank you. We handed

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1 in the copies to the BZA and I think, since I  
2 often talk quickly, it will be helpful for you  
3 to have those in front of you.

4 I, Barbara Kahlow, reside at 800  
5 25<sup>th</sup> Street, N.W. in Foggy Bottom. I am  
6 testifying for the West End Citizens  
7 Association, the oldest citizens organization  
8 in the Foggy Bottom/West End area.

9 It was founded in the 1890s and it  
10 is interested in maintaining the quality of  
11 life in the existing residential community.

12 On 11/10, November 10<sup>th</sup>, we filed  
13 the appeal of a Certificate of Occupancy which  
14 was for three stories, instead of one-story,  
15 with a change in use and with a new accessory  
16 prepared food shop use.

17 This area is outside of the Campus  
18 Plan area. It is in the middle of a huge R-5-  
19 E/R-5-D District. If you can turn to the next  
20 page, which is the Office of Zoning's new Map,  
21 and you can see on the left, in Attachment A,  
22 that this whole area is R-5-E and R-5-D.

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1           It is a residential neighborhood  
2 unlike the one you just heard about in the  
3 last case.

4           This site is in the middle of and  
5 very near five or six high-rise apartment  
6 buildings. If you look at the Footnote 2, I  
7 list those buildings, their addresses, the  
8 Monroe House where Ms. Maddux lives, Potomac  
9 Park, The Letterman, The Statesman, The Empire  
10 where Mr. Batham lives and The York.

11           I then present a chart on the --  
12 that I will be using throughout the testimony  
13 that goes through each of the substantive  
14 issues.

15           The first is square feet. The  
16 second is the number of floors. The third is  
17 sandwich shop. The fourth is delicatessen.  
18 The fifth is accessory prepared food shop.  
19 And the sixth is hours of operation.

20           And I'll go through each of them  
21 successively. The most important one is No.  
22 1, square footage. 1,000 square feet was the

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1 old store. They want 1,835 square feet,  
2 that's an 84 percent increase.

3 If you turn to the third page,  
4 which is No. 2, I want to talk about that  
5 first. Enlargement. With respect to the 84  
6 percent increase in square feet, D.C. Law for  
7 nonconforming uses provides that they can be  
8 continued provided that "there is" -- "no  
9 enlargement is made." That is current law.

10 In its conclusions of law and  
11 opinion, the BZA in a denial order for a case  
12 in Georgetown in the Residential District  
13 stated "provided no structure alteration or no  
14 enlargement is made."

15 Finally, the statute makes clear  
16 that a prior existing nonconforming use is to  
17 remain limited to its original dimensions. It  
18 may not be extended throughout the building.  
19 It may not be extended throughout the  
20 building.

21 The BZA order continues by citing  
22 D.C.'s then interpreting regulations. It

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1 shall begin "The intent of this title that  
2 nonconforming use shall not be enlarged upon,  
3 expanded or extended. A nonconforming use  
4 shall not be extended for portions of a  
5 structure not devoted to that nonconforming  
6 use at the time of enactment."

7 And I then cite the current  
8 regulation where the text is very similar for  
9 both provisions.

10 So both current law and current  
11 Zoning Regulations do not allow the  
12 enlargement from 1,000 square feet to 1,835  
13 square feet. The original C of O application  
14 for the old grocery shows the 1,000 square  
15 feet. The application for FoBoGro, the new  
16 space, shows 1,835 square feet.

17 The reason the chart says 1,845  
18 square feet is there are some documents that  
19 say 1,845 square feet.

20 Now, if we could go back to page 1  
21 and number of floors. The old grocery was one  
22 floor only for grocery use. The planned is

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1 basement, first and second. That is three  
2 floors, two more floors.

3 Now, you go back to page 2 of  
4 text. The transcript for the BZA's July 23,  
5 1997 hearing on this site, which resulted in  
6 the BZA denial order -- Mr. Loud, it's the  
7 third page after the Zoning Map. Do you have  
8 it, Mr. Chairman? You found it? Okay.

9 CHAIRMAN LOUD: Yes, thank you.

10 MS. KAHLOW: And in that  
11 transcript, I quote "According to the  
12 information presented at an ALJ hearing  
13 previously this year concerning this location,  
14 the use of the retail grocery was provided for  
15 on the first floor of the structure and did  
16 not include the basement. Documentation  
17 presented during the hearing goes back to the  
18 earliest records maintained by D.C. concerning  
19 this location."

20 A question in the cross  
21 examination by the Board, "Are they required  
22 to go outside to go down to the requested

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1 expansion into the basement pizza?" Let me  
2 just say that the prior case, they wanted to  
3 go from a grocery on the first floor to also  
4 have a pizza joint on the lower floor.

5 So the question is did they have  
6 to go outside? No outside.

7 Question, "So they have to exit  
8 the grocery store to walk down in front of the  
9 building inside the pizza operation in order  
10 to purchase pizza?" The answer, "Correct,  
11 yes."

12 Question, "So you will not have a  
13 structure in which persons can shop in the  
14 grocery store level, go back downstairs? No,  
15 no, they don't."

16 In that same case style, the BZA  
17 case file, there is a letter from the lessee  
18 on her own letterhead stating "The grocery  
19 store operates out of the first full floor of  
20 the building."

21 So in her testimony, her sworn  
22 testimony as well as her letter submitted in

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1 this case, she was clear that there was only  
2 one floor ever.

3 More recently, the January 6, 2010  
4 order by the Alcoholic Beverage Control Board  
5 in its findings stated "The establishment has  
6 been operated since 1946 on one floor of a  
7 three-story building."

8 I just want to speak for myself,  
9 Ms. Maddux will also say, I went into the old  
10 store many times. It operated only on one  
11 floor. There was no basement use. There was  
12 no second floor use. It was a one-story  
13 operation.

14 Now, going back to the first page  
15 and the sandwich shop. This is important  
16 because of the intent is not as it appears on  
17 the C of O. Sandwich shop. The old grocery  
18 had prepackaged sandwiches only. They were  
19 prepared off-site. The planned store has  
20 freshly prepared sandwiches to be prepared on-  
21 site.

22 In August '07 and October '09, the

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1 Zoning Administrator said both require a BZA  
2 variance, a variance from the -- that the  
3 owner would have to meet, not the lessee.

4 Now, if we turn again to page 2  
5 and go into sandwich shop, the transcript from  
6 the same BZA hearing confirms that the old  
7 grocery did not prepare sandwiches on-site.  
8 BZA Member King, who was one of the BZA  
9 Members back then, "Now the sign that is by  
10 the front door in this photograph that you  
11 have just given us that says we sell  
12 sandwiches and subs made fresh daily, sandwich  
13 place is required that you have a deli license  
14 in order to sell sandwiches and subs made on  
15 premise." The owner said "yes, that is  
16 sandwiches prepared."

17 The Chairman back then, Ms.  
18 Hinton, said "Now, we haven't seen a C of O  
19 for a deli. We have C of Os for grocery."  
20 The lessee's lawyer, Mr. Boykin, said "If I  
21 may clarify, Ms. King, the sandwiches that Ms.  
22 Bekele referenced are prepackaged sandwiches

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1 that she purchases from a supplier." Ms.  
2 King, "Made fresh daily?" Ms. Bekele, "Yes."  
3 Ms. King, "I see." Mr. Boykin, "They are  
4 made fresh daily from the supplier and are  
5 sold by Ms. Bekele."

6 And then the Zoning Commission  
7 Member, who was the Zoning Commission float,  
8 like Mr. Turnbull today, Ms. Bennett, said  
9 "May I just mention, this is a license issued  
10 by the Business Regulation Administration,  
11 which was" the prior, now called, "DCRA, which  
12 is different from a C of O. Even when one has  
13 a license to operate a deli, in order to  
14 locate that deli in a place specific, it would  
15 then need to have a C of O that permits that."

16 MR. SURABIAN: Excuse me, Chairman  
17 Loud, I think we are going into --

18 CHAIRMAN LOUD: Yes, sir.

19 MR. SURABIAN: -- detail about the  
20 issue that the Board instructed the parties  
21 not to go into.

22 CHAIRMAN LOUD: Yes.

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1 MR. SURABIAN: The deli prepared  
2 food use. I think that's where she is going.

3 MS. KAHLOW: Actually --

4 MR. SURABIAN: That is where she  
5 has been.

6 MS. KAHLOW: -- I'm trying to  
7 explain what is the intent behind this  
8 applicant and why DCRA was duped. And if you  
9 will bear with me, you will see in the  
10 evidence that DCRA has been duped. And we  
11 don't want the BZA to be duped.

12 CHAIRMAN LOUD: Ms. Kahlow, just a  
13 really quick clarification question. Is the  
14 argument that you are making, and I think, you  
15 know, you are proceeding appropriately so far,  
16 is that --

17 MS. KAHLOW: Okay.

18 CHAIRMAN LOUD: -- notwithstanding  
19 what the C of O may have had on it for the  
20 entire building, that the intent of the  
21 operator was something less than what the C of  
22 O use?

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1 MS. KAHLOW: I'm sorry if I was  
2 unclear. The C of Os in the document you got  
3 today, that was late, said that there has been  
4 a mixture of C of Os for one or two stories.  
5 The second story being for storage. There has  
6 never been a C of O for three stories.

7 In addition, the Zoning  
8 Administrator, I believe, received that  
9 information from the FoBoGro about their  
10 intent. And I'm going to be presenting what  
11 they intend to do with actual evidence at the  
12 site. It is not an accessory prepared food  
13 shop. It is something that requires either a  
14 special exception or a variance by the BZA,  
15 because it is a real change in use, not  
16 something accessory to a normal grocery store.

17 The T Street case, I'll be  
18 discussing at length about what actually  
19 happened there, the case that you referenced,  
20 because that is an entirely different story.  
21 It was the exact same footprint. They never  
22 had sandwiches, etcetera.

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1           So I want to discuss that. Your  
2 order in that case was extremely limited. And  
3 in this case, you need the full context of  
4 what happened in the past, that's why I went  
5 to the old transcript, got it out of your  
6 archives, and what is intended now.

7           And I want to give DCRA the  
8 benefit of the doubt that they may not know  
9 some of this and --

10           MR. SURABIAN: I object. I'm  
11 objecting to the issue of the intent. The  
12 issue for the Board is really as a matter of  
13 law can Foggy Bottom Grocery sell prepared  
14 food at that location. And all of the other  
15 issues as to what -- that may be raised as to  
16 what they may actually do there can be  
17 addressed by DCRA as an enforcement agency.

18           But as a matter of law, can they  
19 sell prepared food? The Board just answered  
20 that question.

21           MS. KAHLOW: I don't think that is  
22 the issue.

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1 MR. SURABIAN: If the actual use  
2 turns out to be something different, DCRA  
3 would have to enforce the regulations.

4 MS. KAHLOW: I'm sorry. The first  
5 issue in the law is clear. It can only be one  
6 floor. The second issue is would we need BZA  
7 review? And since we are going to be talking  
8 about a delicatessen use, which is really what  
9 this is, and pizza, which, of course, is also,  
10 I'm going to prove, one of the uses, both of  
11 those require BZA review.

12 MEMBER MOLDENHAUER: Wait. Can I  
13 just jump in there because I think that you  
14 are actually incorrect on that first issue.  
15 You say that a delicatessen needs BZA. There  
16 is no longer an '07. There was a change in  
17 regs, so there is no longer a need or rather  
18 even a use called a delicatessen. So if you  
19 are going to -- just so that there is no  
20 confusion on our end or on your end in regards  
21 to any parties making any references, you  
22 know, obviously, you are reading out of a

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1 transcript previously that was before that  
2 change in regs.

3 But currently, you know, there  
4 would be no such use as a delicatessen. So I  
5 just wanted to make sure that we are clear on  
6 that. And that if you make any other  
7 references, that it is conforming to the  
8 current regs.

9 MS. KAHLOW: I am completely  
10 current. Mr. Le Grant was kind enough to  
11 provide me those regulations. I have read  
12 everything in great detail. So I'm aware of  
13 that. But there is very limited -- those  
14 regulations are very specific, very limited  
15 about what can be done in a prepared food shop  
16 and I will get into that.

17 Because this intent here is to do  
18 something much more than what is in a prepared  
19 food shop under those regulations. And we  
20 have photographs to show it.

21 CHAIRMAN LOUD: All right. Let me  
22 just sort of repeat, I think, what we took

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1 some time to establish at the outset. That  
2 the appeal from the November 2009 C of O, as  
3 we understand it, based on the pleadings that  
4 were submitted, challenges the authority of  
5 the Zoning Administrator to issue that C of O  
6 for the grocery that had these sort of  
7 component uses of a prepared food shop.

8 We said at the outset that if a  
9 prepared food sandwich shop is a part of the  
10 principal use of a grocery store, so that  
11 there would not be the need for the applicant  
12 in that case to obtain BZA approval to operate  
13 a grocery store that had that component.

14 So now, what we are focused on is  
15 when the C of O was issued, the nonconforming,  
16 getting back to the nonconforming use, it  
17 identified whether it was for the entire  
18 building, whether it was for, what we are  
19 calling, the basement and the second floor,  
20 the basement and the first floor. It  
21 identified that.

22 And, you know, the November 2009 C

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1 of O went beyond the most recent lawful or  
2 series of lawful C of Os. That's all that we  
3 are dealing with.

4 MS. KAHLOW: That's correct.

5 CHAIRMAN LOUD: On the appeal. We  
6 are not dealing with the intent of the  
7 operator of Foggy Bottom Grocery, that's not  
8 something that is before us. We are focused  
9 specifically on the C of O, its lawful use,  
10 its authorized use for all of the building or  
11 part of the building and whether the November  
12 2009 C of O, as a result of what the earlier C  
13 of O would have authorized, was issued  
14 erroneously.

15 MS. KAHLOW: And we believe it  
16 was. I can speak --

17 CHAIRMAN LOUD: I understand.

18 But --

19 MS. KAHLOW: -- to Attachment F.

20 CHAIRMAN LOUD: -- what we are --  
21 Ms. Kahlow?

22 MS. KAHLOW: Yes?

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1                   CHAIRMAN LOUD:  What we are doing,  
2   I mean, we spent some time sort of  
3   establishing the framework.

4                   MS. KAHLOW:  Yes.

5                   CHAIRMAN LOUD:  And we established  
6   the framework, so that we could make sure that  
7   just the relevant evidence goes in and becomes  
8   a part of our record.

9                   So we are really trying to keep,  
10  not just you, but DCRA to that as well as the  
11  Foggy Bottom party.  And I'm really going to  
12  have to insist that --

13                  MS. KAHLOW:  Okay.

14                  CHAIRMAN LOUD:  -- we focus in on  
15  just that issue.

16                  MS. KAHLOW:  All right.

17                  CHAIRMAN LOUD:  And I think we are  
18  starting to go a little bit beyond that issue.

19                  MS. KAHLOW:  All right.  Okay.

20                  CHAIRMAN LOUD:  So --

21                  MS. KAHLOW:  Okay.  I --

22                  CHAIRMAN LOUD:  -- we will note

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1 your continuing objection to narrowing it like  
2 that, but I think --

3 MS. KAHLOW: That's fine.

4 CHAIRMAN LOUD: -- we have  
5 narrowed it like that and we want to proceed  
6 forward.

7 MS. KAHLOW: I'll go into your  
8 current regulations. You can see in my  
9 testimony, they will go into the record,  
10 discussion of sandwich shop, delicatessen and  
11 accessory prepared food shop. And you can see  
12 the various attachments.

13 If you move on to, you will have  
14 to skip quite a number of pages, I'm sorry to  
15 say, what is numbered page 5 in the bottom, in  
16 terms of text, in addition to Attachment F is  
17 a photograph of some of FoBoGro's new kitchen  
18 equipment, including a Panini Press, which is  
19 not allowed under the new regulations you  
20 cited, the 9/28/07 Zoning Order.

21 The order defines prepared foods,  
22 food that is assembled, but not heated by

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1 means of a microwave or toaster or on the  
2 premises of a prepared food shop.

3 So if you look at Attachment F,  
4 which is a few pages beyond that, you can see  
5 extensive heating equipment, which extends  
6 beyond that which is allowed in the Zoning  
7 Commission's latest order, which is only a  
8 microwave or a toaster.

9 And if you move back, you can see  
10 the menus that clearly demonstrate that you  
11 are going to need a Panini Press. And we were  
12 just trying to give you the evidence besides  
13 the photographs. You can look at the last  
14 page of the menus where they talk about  
15 grilled chicken breast. You can't do it  
16 without a Panini Press.

17 And as a consequence, this is not  
18 a prepared food operation, which is what the  
19 old zoning order is.

20 So the reason I discussed the  
21 others is so we could go back and what is this  
22 if it is not? It is definitely as the C of O

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1 says a change in use. And the question is is  
2 it a change in use that requires BZA review or  
3 not? We believe it is, because it is not that  
4 which is allowed as a prepared food shop or an  
5 accessory prepared food shop under your own  
6 regulations.

7 CHAIRMAN LOUD: And just so I  
8 understand, some of this is new to me.

9 MS. KAHLOW: Yes, of course.

10 CHAIRMAN LOUD: The Panini Press  
11 that you are talking about, you would not  
12 consider that some form of toaster?

13 MS. KAHLOW: It is not considered  
14 that.

15 CHAIRMAN LOUD: Okay.

16 MS. KAHLOW: It actually is a  
17 grilling operation. It is not.

18 CHAIRMAN LOUD: Okay. All right.  
19 At least I understand the argument being  
20 made.

21 MS. KAHLOW: Yes. And --

22 CHAIRMAN LOUD: Okay.

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1 MS. KAHLOW: -- what I was trying  
2 to do is provide you the context of each of  
3 these different things and the order -- and  
4 the articles as well as yesterday saying that  
5 this had every intention of being a  
6 delicatessen not a prepared food shop.

7 CHAIRMAN LOUD: Okay. Well, just  
8 on the issue that we decide that we sort of  
9 wanted to focus on, for the purpose of the  
10 hearing, is it your position that you're going  
11 to get to that shortly after you exhaust this  
12 issue or is it your position that you are sort  
13 of retreating away from that issue all  
14 together?

15 MS. KAHLOW: No. I'm going to get  
16 to it.

17 CHAIRMAN LOUD: Okay.

18 MS. KAHLOW: I was trying to give  
19 you all the context and the history. And I  
20 thought being an old Government bureaucrat  
21 that you would want -- myself, I always want  
22 to know the whole history of who struck John

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1 and what has been said and this and that. So  
2 it's all here, so that you can read it before  
3 you do an order.

4 But I --

5 CHAIRMAN LOUD: We certainly  
6 appreciate that. But I think that we have  
7 tried to help you along and help DCRA as well  
8 as Foggy Bottom Grocery by saying at the  
9 outset what we thought would be the most  
10 helpful to us for our review.

11 And that is focusing on the very,  
12 very, very specific question of what the C of  
13 Os have authorized historically on-site. And  
14 that's pretty much all we are interested in.  
15 And whether or not the 2009 C of O relates  
16 back to the previous C of Os in a lawful way  
17 or extended the use impermissibly.

18 MS. KAHLOW: And we will --

19 CHAIRMAN LOUD: We understand the  
20 offer to go beyond that.

21 MS. KAHLOW: -- use impermissibly.

22 CHAIRMAN LOUD: So are you going

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1 to be getting into that issue?

2 MS. KAHLOW: I'm going to.

3 CHAIRMAN LOUD: Now?

4 MS. KAHLOW: I will move over some  
5 of these other issues.

6 CHAIRMAN LOUD: Very well.

7 MS. KAHLOW: And go right to  
8 Certificate of Occupancy.

9 CHAIRMAN LOUD: Thank you.

10 MS. KAHLOW: At the bottom of page  
11 -- if you look at the six on the bottom, which  
12 is after the Panini Press, DCRA's Regulations  
13 for Certificate of Occupancies provide for a  
14 change in ownership that there -- there is one  
15 thing, if there is no proposed change in use.

16 Since this has proposed change in  
17 use, a different set of rules apply. And  
18 specifically, because there was extensive  
19 renovation, there is a requirement under  
20 118.3.5 construction completion required, "If  
21 the erection or alteration of the structure or  
22 part thereof is contemplated, a C of O for

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1 that structure or part thereof shall not be  
2 issued until the erection or alteration is  
3 completed."

4 Just so you know, the alteration  
5 is still not completed. The store is not  
6 open. So the C of O from November 4, '09 was  
7 issued before it was allowed to be.

8 It says to the point that "The  
9 structure or part thereof is deemed by the  
10 Code Official to be available for occupancy  
11 and compliance with the requirements of the  
12 applicable law and regulations."

13 Since the construction was -- is  
14 still underway, we believe that the seven --  
15 11/4/09 C of O was issued improperly and is,  
16 in fact, invalid.

17 Then we talk about permits, that  
18 they didn't have the right permits. Now, I  
19 would like to go to the case law, because I  
20 think this is -- the BZA reviews in case law  
21 about this particular thing.

22 If you can turn to page 7 bottom

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1 on my testimony, and that will get to the T  
2 Street case as well.

3 In October '97 in BZA Appeal No.  
4 16154, the BZA denied an appeal of the Acting  
5 Zoning Administrator's decision that a special  
6 exception was needed to change a nonconforming  
7 use to another nonconforming use or variance  
8 for another use in the R-3 District at 1659 to  
9 61 35<sup>th</sup> Street, that's the Papa John's case.

10 And above I talked about the laws,  
11 the applicable law and regulations. In the  
12 order, I think, it is important for you -- in  
13 the context of what the BZA had in its order.

14 Ms. Ellen McCarthy, who was later Director of  
15 the Office of Planning, cited the Zoning  
16 Regulations and the enabling act, which  
17 indicate that nonconforming uses are to be  
18 construed narrowly, with the goal they  
19 eventually will be phased out.

20 And the grandfathering of the  
21 nonconforming use does not permit a change to  
22 a new primary use, which is not permitted in

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1 the Zone District.

2 The BZA further stated that the  
3 D.C. Court of Appeals has ruled that  
4 nonconforming uses are not favored and must be  
5 regulated strictly so that the goals of the  
6 District and scheme established by the Zoning  
7 Commission not undercut, and I give you the  
8 case law citation.

9 The BZA further states as the  
10 Courts have repeatedly recognized any  
11 interpretation of the Zoning Rules which seeks  
12 to expand the prerogatives of owners'  
13 structures containing nonconforming uses  
14 defeats one of the major purposes of the  
15 Zoning Rules, namely the gradual elimination  
16 of existing nonconforming structures. And I  
17 give three case law cites.

18 The BZA order further states nor,  
19 of course, may a C of O issue merely on the  
20 declaration of an appellant, but its proposed  
21 use is the continuation.

22 Lastly, and this is really

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1 important to you, the BZA order states "Where  
2 there is a doubt as to whether the change in  
3 use is substantial, rather than insubstantial,  
4 the Courts have consistently declared that is  
5 to be resolved against the change in use."

6 So the first case was Papa John's.

7 The second was the Old Foggy Bottom Grocery  
8 that the BZA denied. And the third is the  
9 case that Ms. Moldenhauer, I'm not sure I'm  
10 pronouncing that right, excuse me, talked  
11 about, the April '09 case. BZA dismissed an  
12 application for a special exception for a  
13 nonconforming use for a grocery to a grocery  
14 of deli in an R-4 District at 321 T Street,  
15 N.E.

16 The conclusions of law states the  
17 Board concludes the addition of the sale of  
18 prepared sandwiches, donuts, hot coffee, tea  
19 and cooked hot dogs is not an expansion of  
20 grocery use, but an inherent part of that use.

21 Therefore, if the Board concludes that the  
22 addition of those five items, and this is the

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1 key language, "and nothing more," and nothing  
2 more to the applicant's grocery store does not  
3 require zoning relief.

4 This case, unlike the Foggy Bottom  
5 Grocery, FoBoGro menu included no soups,  
6 grilled chicken breast, etcetera. In fact, no  
7 sandwiches are available in this store and  
8 have not been. I actually know. The  
9 nonprofit on whose board I sit is a block  
10 away. It is a small mom and pop one-story  
11 grocery that was not expanded. I talked to  
12 the owner and he said that's the way it is.

13 Then I talk about the BZA's Rules  
14 for granting variances require the property  
15 owner, not the lessee, to meet a stringent  
16 three part test.

17 In sum or let me just say that if  
18 the property owner were to obtain a variance,  
19 what would stop other commercial users from  
20 expanding their uses for small grandfathered  
21 groceries?

22 The bottom line, the precedent

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1 would be harmful, not only to the Foggy  
2 Bottom/West End, but also to the entire city.

3 That's how we won the last case when we  
4 talked about the precedent. And that's how  
5 Georgetown won when we talked about the  
6 precedent.

7 If you look back at the Map, you  
8 see that that this is a huge residential  
9 neighborhood with a sliver of nonconforming  
10 use.

11 In sum, the bottom line is that  
12 FoBoGro's statement that the grocery is not  
13 changing the more than 60 year use of the  
14 property as a grocery store is patently  
15 untrue.

16 D.C. Law forbids any enlargement  
17 of the nonconforming grocery use, i.e., no  
18 additional square footage for grocery use and  
19 no additional floors for grocery use, not  
20 counting storage.

21 BZA case law does not allow the  
22 addition of a use change to a grandfathered

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1 nonconforming grocery store, especially not a  
2 store like a delicatessen masquerading as an  
3 accessory prepared food shop.

4 D.C.'s Regulations reveal that the  
5 11/4/09 C of O was prematurely issued before  
6 the extensive alteration was completed. And  
7 interior alteration construction began before  
8 the necessary DCRA permits were issued.

9 As a consequence, we ask the BZA  
10 to revoke, to order revocation of the 11/4/09  
11 C of O. In addition, the BZA should require  
12 FoBoGro to not expand its grocery operations  
13 beyond a one-story grandfathered grocery use.

14 Ms. Maddux who is also on the  
15 WECA's Board is going to provide some  
16 historical context which I think is absolutely  
17 critical to understanding what is going on at  
18 this location. And her testimony will  
19 compliment mine and not duplicating in any  
20 way.

21 Thank you for your consideration.

22 CHAIRMAN LOUD: Thank you, Ms.

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1 Kahlow. And before you begin, Ms. Maddux, I  
2 just wanted to see if DCRA, first, and then we  
3 will turn to the store operator, have any  
4 cross examination of Ms. Kahlow?

5 MR. SURABIAN: I do. Ms. Kahlow,  
6 your testimony was that Foggy Bottom Grocery  
7 has always been a one-story grocery. Is that  
8 right?

9 MS. KAHLOW: That is correct. And  
10 Ms. Maddux is going to actually go through all  
11 the history from the beginning.

12 MR. SURABIAN: Okay. And in the  
13 statement that you filed today, you indicate  
14 that the first -- one story was grocery, and  
15 I'm on the second page, the third page. No,  
16 I'm not, I'm sorry.

17 Okay. I'm on the second page of  
18 the December 15, 2009 filing of West End  
19 Citizens Association.

20 MS. KAHLOW: I'm sorry, you're on  
21 the second page of text?

22 MR. SURABIAN: Of the December 15,

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1 2009, yes.

2 MS. KAHLOW: Sorry. Let me find  
3 that.

4 MR. SURABIAN: I'm sorry.

5 MS. KAHLOW: Sorry.

6 CHAIRMAN LOUD: Do you have an  
7 exhibit number, Mr. Surabian?

8 MR. SURABIAN: It's 13.

9 CHAIRMAN LOUD: Okay. That would  
10 have been the West End Citizens Association's  
11 response to the motion to dismiss.

12 MS. KAHLOW: That was the 40  
13 pager.

14 CHAIRMAN LOUD: Correct. Okay.

15 MR. SURABIAN: Okay. And the  
16 second page indicates that, it says, the  
17 grocery had -- "Grocery on one floor, one  
18 floor of storage and one floor of offices."  
19 Is that your understanding of what the use  
20 was?

21 MS. KAHLOW: It is. And that's  
22 what was testified at the Alcohol -- the

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1 recent Alcoholic Beverage Control Board  
2 hearing, that's what is in their findings of  
3 fact. That is what is in your transcripts.  
4 And that's what is in my testimony today that  
5 I had to skip over.

6 MR. SURABIAN: Okay. So --

7 MS. KAHLOW: And I alerted the  
8 Zoning Administrator in an email that that was  
9 the prior use and had been found so.

10 MR. SURABIAN: Okay. So I just  
11 want to make sure that it is clear, because  
12 saying that the -- it was only one floor was  
13 used, I want to make it clear for the Board  
14 that your actual testimony is that there was  
15 grocery one floor, one floor of storage and  
16 one floor of offices?

17 MS. KAHLOW: Yes. Most of the  
18 time it was only one floor of grocery and one  
19 floor of storage. But we understand that  
20 occasionally they use the office upstairs. We  
21 aren't certain with that, that's what was  
22 testified. We know it was definitely not

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1 grocery use.

2 MR. SURABIAN: Okay. On what  
3 floor was the storage?

4 MS. KAHLOW: Basement.

5 MR. SURABIAN: And the office was  
6 upstairs, I presume?

7 MS. KAHLOW: If there was one at  
8 any time, it was upstairs.

9 MR. SURABIAN: Okay. Have you  
10 ever been upstairs?

11 MS. KAHLOW: I have not.

12 MR. SURABIAN: Have you ever been  
13 in the basement?

14 MS. KAHLOW: Absolutely yes.

15 MR. SURABIAN: You have been?

16 MS. KAHLOW: Yes, I have.

17 MR. SURABIAN: And what was -- and  
18 when? Do you remember what year you were  
19 there?

20 MS. KAHLOW: I've been there  
21 repeatedly, including recently. And I've  
22 looked through the windows. There is a window

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1 to look through the first floor and the  
2 basement. I looked through constantly and I  
3 can affirm and testify under oath, as I am  
4 today, that there was never any retail sales  
5 going on, except for during the time when they  
6 wanted to do a pizza and, as Ms. Maddux will  
7 testify, there was an ALJ proceeding. They  
8 were fined, monetary fine. And they had to  
9 shut it down.

10 So at one point, a very limited  
11 point, there was something going on downstairs  
12 and they had to walk outside for, but it was  
13 never allowed and DCRA found it was not  
14 allowed, so it was a very short time. I never  
15 saw that, but I've seen everything else going  
16 on.

17 MR. SURABIAN: Do you remember  
18 when that time was?

19 MS. KAHLOW: She will be  
20 testifying about that, '95/97.

21 MR. SURABIAN: Okay.

22 MS. KAHLOW: Is when the ALJ

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1 hearing cases are, if that helps.

2 MR. SURABIAN: And have you ever  
3 observed any other business or tenant  
4 occupying either the basement or the first --  
5 or the second floor?

6 MS. KAHLOW: I'm not sure. I  
7 think over the -- I have not observed, but I  
8 believe over the years, there was residential  
9 use on the top floor, but I have not  
10 personally observed it. Ms. Maddux has been  
11 in the neighborhood such a long time, she will  
12 be able to know more about that than I do.

13 MR. SURABIAN: Okay. How long  
14 have you lived in the neighborhood?

15 MS. KAHLOW: This immediate  
16 neighborhood since 1988.

17 MR. SURABIAN: Okay. So since  
18 1988, you don't know if there was any other  
19 business occupying the space?

20 MS. KAHLOW: There was 100 percent  
21 definitely no other business use. Only the  
22 ground floor, a grocery. There was definitely

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1 no other business use whatsoever on the second  
2 or basement floor. That I can say with  
3 certainty, since I have asked when I was there  
4 multiple times and the answer is definitely  
5 not.

6 MR. SURABIAN: Okay. Could you  
7 describe what you saw on the first floor?

8 MS. KAHLOW: The grocery?

9 MR. SURABIAN: Yes.

10 MS. KAHLOW: You walked up some  
11 stairs and you saw typically grocery-type  
12 food, candy bars, soup cans, etcetera,  
13 etcetera. I don't know precisely what it is  
14 you are interested in. I would buy candy bars  
15 before a hearing, but they had a variety of  
16 cereal bars, things like that.

17 MR. SURABIAN: Okay. Did they  
18 store inventory on the first floor?

19 MS. KAHLOW: I don't know.

20 MR. SURABIAN: Okay. I just need  
21 a second here. I don't have any further  
22 questions.

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1 MS. KAHLOW: Thank you.

2 CHAIRMAN LOUD: Thank you. And  
3 now, to you, Ms. Miller. Do you have any  
4 questions, cross examination rather for the  
5 witness?

6 MS. MILLER: Thank you. So you  
7 would agree then that the entire building had  
8 been used in one way or another to support the  
9 grocery retail business. Is that correct?

10 MS. KAHLOW: No, it is not.

11 MS. MILLER: So you wouldn't  
12 consider the office or the storage to be  
13 relevant to the grocery store?

14 MS. KAHLOW: The storage was the  
15 office. I'm not even sure it happened,  
16 residential or office and it may have been  
17 used for other purposes. I don't know, but it  
18 wasn't for the grocery. And that's what she  
19 testified to in the transcript.

20 MS. MILLER: And you have never  
21 been on the second floor. Is that correct?

22 MS. KAHLOW: That is correct.

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1 MS. MILLER: And are you aware  
2 that all three floors are connected?

3 MS. KAHLOW: Connected, meaning  
4 with stairways?

5 MS. MILLER: Yes.

6 MS. KAHLOW: I am aware.

7 MS. MILLER: Okay. So these  
8 interior stairways connect the grocery area to  
9 whatever was used for storage and whatever was  
10 used for office. And so your testimony is  
11 that the first floor or, excuse me, the  
12 basement level and the second floor have no  
13 bearing on the business itself? Is that  
14 correct?

15 MS. KAHLOW: They have no business  
16 -- they have no bearing on the sales of  
17 grocery products or prepared foods or anything  
18 else.

19 MS. MILLER: And yet, if they were  
20 used as storage for the store or for an office  
21 for the store, these were used, essentially,  
22 in support of the business, correct?

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1 MS. KAHLOW: As I said earlier, I  
2 don't know that the office use was in -- for  
3 the store. I don't know that. All I know is  
4 what I have heard and read in all of the  
5 transcripts. No one ever said that. But as  
6 for the storage, as Ms. Maddux will testify,  
7 there was equipment that was from prior owners  
8 that was stashed in the basement and not used.

9 So it has been storage. We have  
10 seen it. We looked through the windows. We  
11 have seen the first floor. We have not seen  
12 the second floor.

13 MS. MILLER: Now, you would not  
14 disagree with the Zoning Office's records,  
15 would you?

16 MS. KAHLOW: I don't know if they  
17 are complete. Is that what you are asking?

18 MS. MILLER: No. For example, the  
19 history of the Certificates of Occupancy that  
20 have been issued, at least since 1958, you  
21 agree that the records that were submitted  
22 with the Attorney General's prehearing

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1 statement are correct?

2 MS. KAHLOW: I don't know. As I  
3 said, they may or may not be complete. I  
4 don't know the answer to that question.

5 MS. MILLER: And are you aware  
6 that in 1977 a Certificate of Occupancy was  
7 issued for the first floor and the second  
8 floor to be used as a grocery?

9 MS. KAHLOW: As carefully  
10 explained in the DCRA submission, and I'll be  
11 cross examining them on that, there was a  
12 misunderstanding about does storage count when  
13 they have grocery, including storage, and that  
14 may have been the time when that was for  
15 storage only, since it definitely was not for  
16 grocery use.

17 So there -- if you read there more  
18 carefully, you will see that that is not what  
19 they say. If I can read you what they say?

20 MS. MILLER: You know, I'm going  
21 to excuse you, because the question was would  
22 you disagree with the Certificate of

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1 Occupancy, for example, that was issued in  
2 1977, that allowed the grocery to occupy the  
3 first and second floor?

4 MS. KAHLOW: I don't know. I  
5 don't know.

6 MS. MILLER: And would you  
7 disagree with the Certificate of Occupancy  
8 that was issued in 1958 for the first floor?

9 MS. KAHLOW: I don't know.

10 MS. MILLER: And would you  
11 disagree with the Certificates of Occupancy  
12 that were issued in 1994 and 2000 for the  
13 basement and the second floor?

14 MS. KAHLOW: As I said, that was  
15 after the BZA decision that said you can only  
16 use, only use, the first floor. So I don't  
17 understand the circumstances in which that C  
18 of O was issued. I don't know those  
19 circumstances. All I know is what the BZA had  
20 determined in its order.

21 MS. MILLER: And would you  
22 disagree then that in 1982 the Certificate of

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1 Occupancy was issued for the second floor?

2 MS. KAHLOW: As I said, I don't  
3 know.

4 MS. MILLER: Thank you. That's  
5 all the questions I have.

6 CHAIRMAN LOUD: Thank you,  
7 counsel.

8 (Whereupon, at 5:00 p.m. the  
9 Public Hearing continued into the evening  
10 session.)

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1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 5:00 p.m.

3 CHAIRMAN LOUD: Do Board Members  
4 have any questions for the witness?

5 MEMBER MOLDENHAUER: Just a point  
6 of clarification. When you are referring to  
7 the basement, you are referring to the on-  
8 grade lower level?

9 MS. KAHLOW: It's below-grade. If  
10 you are at the street level, you walk up  
11 several stairs to the first or you walk down  
12 several stairs to the basement.

13 MEMBER MOLDENHAUER: Okay.

14 MS. KAHLOW: There is a window  
15 looking into the basement. There is a window  
16 looking in to the first.

17 MEMBER MOLDENHAUER: Okay. So  
18 there is the basement and then there is the  
19 first floor, which you walk up to?

20 MS. KAHLOW: Yes, that's right.

21 MEMBER MOLDENHAUER: And then  
22 there is the second floor?

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1 MS. KAHLOW: That's correct.

2 MEMBER MOLDENHAUER: I want to  
3 make sure we are all on the same page with  
4 that. Okay. Thank you.

5 CHAIRMAN LOUD: Thank you, Board  
6 Member Moldenhauer. I believe we are ready to  
7 go to you, Ms. Maddux, for your testimony.  
8 Thank you for your patience and welcome this  
9 afternoon.

10 And again, I want to suggest that  
11 we are looking principally, and I think your  
12 testimony may get into this, to the historical  
13 C of O authorized uses. Any history beyond  
14 that, I don't think would necessarily be the  
15 most helpful to us.

16 And so to the extent you can --

17 MS. MADDUX: Sure.

18 CHAIRMAN LOUD: Okay.

19 MS. MADDUX: Good afternoon, Mr.  
20 Chairman, Members of the Board of Zoning. I'm  
21 Sara Maddux before you as a member of the West  
22 End Citizens Association, WECA.

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1           And I would like to add a little  
2 history. The reason it is called West End is  
3 100 years ago that neighborhood west of the  
4 White House with its mixed housing and  
5 manufacturing and things like that was called  
6 the West End.

7           And then the Foggy Bottom portion  
8 of it grew up later after they put the gas  
9 works down there and had some workers' housing  
10 built in there. So that's part of the history  
11 of our neighborhood.

12           I live at 522 21<sup>st</sup> Street, N.W.,  
13 and have lived there since February 1970.  
14 Before that, beginning in 1965, I lived in  
15 another residential building and neighborhood  
16 and before that I was a student at Georgetown  
17 University.

18           I've been an active resident of  
19 this neighborhood, as I have worked in the  
20 neighborhood during my career. I have  
21 participated in civic organizations, served as  
22 an Advisory Neighborhood Commissioner for six

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1 years, two as a chairman, and I worship in a  
2 neighborhood church.

3 I have always walked throughout  
4 the neighborhood and have a strong familiarity  
5 with it. Mrs. Kahlow has presented some very  
6 detailed and well-documented reviews of our  
7 issues of appeal. And I would like to add  
8 some of, what I would call, the real life  
9 descriptions to go with her testimony.

10 As described, the location at 2140  
11 F Street is a grandfathered one floor grocery  
12 store. This is a kind of place that's a  
13 vestige old neighborhood surrounding the  
14 District of Columbia before there were large  
15 grocery stores or extensive drug stores  
16 serving the communities.

17 And today the residents are served  
18 by home delivery of groceries by Safeway and  
19 Giant.

20 In keeping with the zoning  
21 authority and the Regulations of the District  
22 of Columbia, as these small grocery stores

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1 phase out, the structures revert to the  
2 underlying zoning, which is residential.

3 And if you are driving around  
4 town, an outstanding example of that is right  
5 across from the Ellington School at the corner  
6 of 34<sup>th</sup> and Reservoir Road that is now  
7 somebody's residence. When I was in college,  
8 a long time ago, that was a drug store,  
9 partially grocery store.

10 I have watched the changes in the  
11 entity at 2140 F Street. When I first saw it  
12 and entered the store, it was owned by an  
13 Italian family and had a small variety of  
14 groceries and drinks were sold there.

15 The Italian family also owned and  
16 operated a restaurant on the south side of the  
17 2100 Block of Pennsylvania Avenue, a few  
18 blocks north of this site. Any catering which  
19 might be mentioned as associated with the  
20 owner was done from the restaurant, which had  
21 the appropriately approved facilities.

22 There were no cooking or

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1 preparation facilities at 2140 F Street.  
2 After the death of the owner, the family sold  
3 the business, which was in a lease situation  
4 in the townhouse, to another person who  
5 continued to operate the business in the same  
6 manner as a small one-story, one floor grocery  
7 store.

8 Most of the people in the  
9 neighborhood that used it principally picked  
10 up bottles of milk or other small purchases to  
11 tide them over until they went to the Safeway  
12 at Watergate or the Safeway on L Street or  
13 other grocery stores in nearby neighborhoods.

14 Also during this era, the  
15 People's, which was People's Drug Store, and  
16 those of us who are old enough to remember,  
17 which is now CVS on E Street, which was behind  
18 this location, had a lunch counter, which  
19 served the neighborhood residents as well as  
20 the federal employees who are out during the  
21 day.

22 After that owner was held up at

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1 gunpoint twice, he sold the business to Mrs.  
2 Bekele trading as Mesco, Inc. Mrs. Bekele  
3 decided to expand her business by trying to  
4 open a pizza option for carryout and delivery.

5 However, this was in violation of  
6 the zoning cases and I cite those: 95-246E  
7 and 97-1089E and were brought before the  
8 District of Columbia.

9 During that time, I was the ANC  
10 Commissioner for that area and Chair of the  
11 ANC. The ANC passed resolutions against the  
12 expansion. There were hearings before an  
13 Administrative Law Judge.

14 The ALJ ruling, as previously  
15 described, were against the pizza operation  
16 and appropriation and sale of sandwiches and  
17 salads and monetary fines were imposed.

18 Mrs. Bekele continued the business  
19 by selling groceries on the first floor only  
20 and selling prepackaged sandwiches, which were  
21 delivered from a vendor in Virginia.

22 By the summer of 2008, the Foggy

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1 Bottom Grocery was closed and there was no  
2 active service to residents of the  
3 neighborhood, construction crews or other  
4 passers-by.

5 The next paragraph does discuss  
6 the issue about parking, the fact that there  
7 is a vacant lot next door, because the  
8 building had to be torn down. I don't want to  
9 aggrieve the Commissioners with a description.

10 But we are still having a problem  
11 with people driving over the curb, which is  
12 one of those newly installed federally paid  
13 for granite curbs in our neighborhood and  
14 there will be no curb cut.

15 There is in front of the grocery  
16 store a commercial sign for parking for  
17 delivery and loading during the business day  
18 hours.

19 As is the practice in our Advisory  
20 Neighborhood Commission 2A, the issue of this  
21 operation was on the agenda two times which  
22 allowed presentations and questioning and the

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1 current Chair is here in the audience.

2 Given that this hearing is about  
3 the process of the appropriate issuance of the  
4 Certificate of Occupancy under DCMR  
5 Regulations, requirements and definitions, the  
6 ANC took no position in a formal resolution,  
7 only passing the resolution after the most  
8 recent meeting in support of the business and  
9 not involving itself in any germane issue.

10 The history of this kind of  
11 grandfathered operation in the District of  
12 Columbia is well-developed and documented.  
13 But the changing nature of neighborhoods and  
14 the development of properly zoned commercial  
15 areas adjacent to neighborhoods, the expansion  
16 of grandfathered one-story grocery stores in a  
17 residential area consistent with the District  
18 of Columbia Law.

19 Thank you for your consideration.

20 I would be pleased to answer any questions  
21 you may have.

22 CHAIRMAN LOUD: Thank you, Ms.

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1 Maddux, for your testimony. And let's turn to  
2 DCRA first and then we will turn to Ms. Miller  
3 and then to see if the Board has any  
4 questions.

5 MR. SURABIAN: Ms. Maddux?

6 MS. MADDUX: Yes, sir?

7 MR. SURABIAN: Did I understand  
8 you right that you lived in the West End since  
9 1965? Is that what you said?

10 MS. MADDUX: Yes, I did.

11 MR. SURABIAN: Okay.

12 MS. MADDUX: Yes.

13 MR. SURABIAN: And there has been  
14 a grocery store at that location since you  
15 have lived there?

16 MS. MADDUX: Yes, one floor.

17 MR. SURABIAN: One floor. And Ms.  
18 Kahlow's testimony was that there was storage  
19 in the basement, grocery on the first floor  
20 and then an office on the second floor. Is  
21 that your understanding as well?

22 MS. MADDUX: I think it would be

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1 intermittent usage on the top floor and the  
2 basement from walking by and looking in and  
3 out through the years. Because the row of  
4 buildings down the block to the corner until  
5 recently were all long-term elderly residents.

6 So I would walk along and visit my residents  
7 in the neighborhood and that's how I saw what  
8 was going on in the store.

9 MR. SURABIAN: So is your  
10 testimony that since 1965 there has been  
11 intermittent usage of those two floors?

12 MS. MADDUX: I can't give you a  
13 continuous citing of what happened for those  
14 stores. I can just talk about when I walked  
15 by and seen things. But the continual usage  
16 of it, I'm sorry, I can't provide that. I can  
17 provide the one story grocery operation, after  
18 you go up the steps, but that's --

19 MR. SURABIAN: Okay. But  
20 understandably, because you're not in there  
21 every day or whatever, but so you don't know  
22 then what may have been happening on the

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1 second floor over that period of time?

2 MS. MADDUX: Well, I can tell you  
3 a lot of times there weren't any lights on up  
4 there. You know, you are asking for an  
5 answer, sir, as I understand it, but I would  
6 have to have a daily observation of it. And I  
7 don't think that would be fair.

8 MR. SURABIAN: No, I'm just asking  
9 you whether you knew. Well, I'll ask you a  
10 different question.

11 Have you ever been on the second  
12 floor?

13 MS. MADDUX: No. It was always  
14 closed off. That used to be a house and those  
15 stairs upstairs went to the bedrooms and the  
16 residential area, because it is like the other  
17 houses in that row of houses.

18 MR. SURABIAN: Do you know when  
19 the -- was there -- has there been someone  
20 living there, to your knowledge?

21 MS. MADDUX: Not to my knowledge,  
22 no.

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1 MR. SURABIAN: Okay. And have you  
2 ever been in the basement?

3 MS. MADDUX: No. I was at the  
4 front door of the basement when we had the  
5 pizza investigation.

6 MR. SURABIAN: Okay. Was the  
7 pizza sold in the basement?

8 MS. MADDUX: Yes.

9 MR. SURABIAN: All right. And  
10 what about the prepackaged sandwiches? Were  
11 those sold in the basement as well?

12 MS. MADDUX: No. Prepackaged  
13 sandwiches were delivered by a truck that came  
14 in from Virginia and the guy carried them up  
15 the steps and delivered them upstairs. I had  
16 seen that actually happen.

17 MR. SURABIAN: Okay. And since  
18 1965, have you ever seen any other type of  
19 business that is not a grocery operating in  
20 that building?

21 MS. MADDUX: No.

22 MR. SURABIAN: Okay. And could

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1 you describe has the use of the first floor  
2 always been the same?

3 MS. MADDUX: Yes. It's just what  
4 you would see typically in a small grocery  
5 store with shelves like canned goods. There  
6 was a cooler for milk, for soft drinks. There  
7 has been some sale of beer and some wine.  
8 There was a counter. There was a place you  
9 could buy candy and gum. Their terrible error  
10 was having the cash register by the door,  
11 that's how they were so easily held-up.

12 MR. SURABIAN: Did they ever use  
13 the first floor as storage? Did you ever see  
14 boxes or inventory stored there?

15 MS. MADDUX: As I told you, I only  
16 noticed that when I was doing the pizza  
17 investigation.

18 MR. SURABIAN: What did you notice  
19 about it?

20 MS. MADDUX: When we went in to  
21 see what -- we were at the door about when she  
22 was doing the pizza.

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1 MR. SURABIAN: Yes. What did you  
2 see?

3 MS. MADDUX: Sort of an old oven.  
4 It wasn't even very modern equipment. And  
5 there was a small work surface.

6 MR. SURABIAN: In the basement?

7 MS. MADDUX: Yes.

8 MR. SURABIAN: Okay. So there was  
9 some food preparation equipment in the  
10 basement?

11 MS. MADDUX: Illegally so.

12 MR. SURABIAN: Okay. And this was  
13 1995 or so?

14 MS. MADDUX: '95 to '97, in that  
15 area, yes.

16 MR. SURABIAN: Okay.

17 MS. MADDUX: Not for long though.

18 MR. SURABIAN: And the question I  
19 asked you initially was did you ever see any  
20 kind of inventory stored on the first floor?

21 MS. MADDUX: No. I wasn't inside  
22 of it.

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1 MR. SURABIAN: On the first floor?

2 MS. MADDUX: Excuse me, the first  
3 floor?

4 MR. SURABIAN: Right. The  
5 grocery, yes, right.

6 MS. MADDUX: You mean things boxed  
7 up like they are in inventory?

8 MR. SURABIAN: Right.

9 MS. MADDUX: No, because they had  
10 fairly frequent deliveries from their vendors.  
11 They don't have room for stuff.

12 MR. SURABIAN: So they don't have  
13 any room for storage on the first floor?

14 MS. MADDUX: I would not be a  
15 grocery expert well enough to answer that.

16 MR. SURABIAN: Well, you know, I'm  
17 just asking you what you saw, if you ever saw  
18 any --

19 MS. MADDUX: I described what I  
20 saw. It was a grocery store with shelves with  
21 canned goods and flour and, you know, stuff  
22 like that, bottles of milk. People come in

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1 and buy for short-term usage.

2 MR. SURABIAN: Okay. But no  
3 inventory?

4 MS. MADDUX: Inventory could be a  
5 second third or fourth can on a shelf and the  
6 first one would be what you are purveying. I  
7 don't know. I'm not a grocery store expert,  
8 sir.

9 MR. SURABIAN: Okay. I'll accept  
10 that as an answer. And I don't have any  
11 further questions.

12 CHAIRMAN LOUD: Thank you. And,  
13 Ms. Miller?

14 MS. MILLER: Ms. Maddux, have you  
15 ever been to the second floor of the Foggy  
16 Bottom Grocery building?

17 MS. MADDUX: No. It was closed  
18 off and that would be trespassing to do that.

19 MS. MILLER: So you really don't  
20 know what was up there, do you?

21 MS. MADDUX: No.

22 MS. MILLER: And you have only

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1 looked in the window of the basement area?

2 MS. MADDUX: When we were doing  
3 the pizza investigation.

4 MS. MILLER: And you know from  
5 that investigation that there is kitchen  
6 equipment in that area, but your contention is  
7 that the activity of selling and delivering  
8 pizza was what was illegal, correct?

9 MS. MADDUX: There was a stove  
10 down there which was used for the preparation  
11 of pizza, as I have previously explained and a  
12 small work area where she was making pizza. I  
13 would not know if it had been there before and  
14 I would not know if it were there afterwards.

15 MS. MILLER: And when you were at  
16 the grocery store, did you ever observe any  
17 postings such as their Certificate of  
18 Occupancy for Mesco?

19 MS. MADDUX: They had all those  
20 things thumbtacked up on the side of the wall  
21 beyond the, I think it was, cash register  
22 area. I don't know if they were valid, if

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1 they were timely or what.

2 MS. MILLER: And would it surprise  
3 you to find out that Mesco had a Certificate  
4 of Occupancy for the basement and the second  
5 floor?

6 MS. MADDUX: I did not crawl over  
7 the counter to read the Certificates of  
8 Occupancy.

9 MS. MILLER: That's all the  
10 questions I have.

11 CHAIRMAN LOUD: Thank you, Ms.  
12 Miller. And thank you, Ms. Maddux. It's my  
13 understanding that that would conclude the  
14 testimony for the appellant, unless Board  
15 Members have any questions for either of those  
16 witnesses. And there are not appearing to be  
17 any.

18 I want to thank you, Ms. Kahlow.

19 MS. KAHLOW: Thank you.

20 CHAIRMAN LOUD: And you, Ms.  
21 Maddux. We will now turn to the Zoning  
22 Administrator for its case.

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1           And let me remind the Zoning  
2 Administrator and the owner of the property  
3 that you are allotted 60 minutes collectively.

4           And given that we have narrowed the issue  
5 that we think is germane to the case, I would  
6 like to encourage the two of you not to  
7 introduce or enter duplicative evidence, since  
8 we are talking about basically the same issue,  
9 that is the prior years' C of Os and what they  
10 authorized or did not authorize.

11           And so kind of with that caveat, I  
12 think we can go into the Zoning  
13 Administrator's case. And I suppose kind of  
14 what I'm saying to the owner, in the case for  
15 the owner, is that as you get into your case,  
16 there probably is no need to duplicate or  
17 repeat everything that the Zoning  
18 Administrator presents in its case.

19           Yes, sir.

20           MR. SURABIAN: Thank you, Mr.  
21 Chairman. My witness is Matthew Le Grant,  
22 sitting next to me. And I'll ask Mr. Le Grant

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1 to give his name for the record.

2 ZONING ADMIN. Le GRANT: It's  
3 Matthew Le Grant, L-e capital G-R-A-N-T.

4 MR. SURABIAN: And where are you  
5 employed, Mr. Le Grant?

6 ZONING ADMIN. Le GRANT: The  
7 Department of Consumer and Regulatory Affairs  
8 for the Government of the District of  
9 Columbia.

10 MR. SURABIAN: And your position  
11 title?

12 ZONING ADMIN. Le GRANT: I am the  
13 Zoning Administrator.

14 MR. SURABIAN: Okay. Could you  
15 give a quick summary of your educational and  
16 professional background?

17 ZONING ADMIN. Le GRANT: Yes. I  
18 have two degrees in city and regional  
19 planning, a bachelor's of science in city and  
20 regional planning from California Polytechnic  
21 State University, San Luis Obispo, a master's  
22 of urban planning from University of

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1 California at Berkeley, that was 1984. I  
2 have, approximately, 22 years experience in  
3 planning, current planning and zoning matters.

4 MR. SURABIAN: And I would ask the  
5 Board to recognize Mr. Le Grant as an expert  
6 in zoning matters.

7 CHAIRMAN LOUD: Thank you, Mr.  
8 Surabian. I think that we have recognized Mr.  
9 Le Grant on previous occasions as an expert  
10 and we do, in fact, authorize that D.C. Court  
11 of Appeals allows fact witnesses, who are so  
12 qualified, to also be expert witnesses.

13 Let me just ask for our record the  
14 appellant and Ms. Miller for any response to  
15 the proffer of Mr. Le Grant as an expert  
16 witness.

17 MS. MILLER: I have no objection.

18 CHAIRMAN LOUD: Thank you.

19 MS. KAHLOW: He is an expert  
20 witness on D.C. possibly, but I wouldn't know  
21 if he is in other jurisdictions, so it's a  
22 limited, yes.

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1 CHAIRMAN LOUD: Okay. Objection  
2 noted. I think we will move forward. And I  
3 think the gravamen of the testimony will  
4 probably be on D.C. And very, very  
5 specifically, as we have said over and over  
6 again, on the C of Os dated from, I guess,  
7 1958 to 2008.

8 MR. SURABIAN: And I'll ask Mr. Le  
9 Grant to turn to Exhibit A of the District's  
10 filing.

11 ZONING ADMIN. Le GRANT: Yes, yes.

12 MR. SURABIAN: Okay. Did you  
13 approve the issuance of this C of O?

14 ZONING ADMIN. Le GRANT: I did.

15 MR. SURABIAN: Okay. And who is  
16 the C of O issued to?

17 ZONING ADMIN. Le GRANT: This C of  
18 O, just to be specific, Exhibit A is C of O  
19 No. 1000323, dated November 4, 2009, for 2140  
20 F Street, N.W. It was issued to Foggy Bottom  
21 Grocery, LLC trading as FoBoGro.

22 MR. SURABIAN: And what does the C

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1 of O authorize Foggy Bottom to do?

2 ZONING ADMIN. Le GRANT: It  
3 authorizes a retail grocery store with the  
4 sales of cigarettes and medicine with an  
5 accessory prepared food shop use.

6 MR. SURABIAN: And the C of O  
7 authorizes Foggy Bottom Grocery to utilize all  
8 three floors. Is that right?

9 ZONING ADMIN. Le GRANT: Yes. The  
10 number of the floors calling out or as  
11 occupied are listed as three.

12 MR. SURABIAN: Okay. And I'll ask  
13 Mr. Le Grant to turn to Exhibit C of my  
14 prehearing statement.

15 ZONING ADMIN. Le GRANT: Yes,  
16 Exhibit C.

17 MR. SURABIAN: And about two pages  
18 into Exhibit C are a series of plans.

19 ZONING ADMIN. Le GRANT: That's  
20 correct.

21 MR. SURABIAN: Okay. And did you  
22 review these plans prior to issuing the

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1 November 4<sup>th</sup> C of O?

2 ZONING ADMIN. Le GRANT: Yes, I  
3 did.

4 MR. SURABIAN: Okay. And these  
5 plans were provided to you by Foggy Bottom  
6 Grocery, I assume?

7 ZONING ADMIN. Le GRANT: Yes, they  
8 were.

9 MR. SURABIAN: Okay. And what did  
10 you determine after reviewing these plans?

11 ZONING ADMIN. Le GRANT: I asked  
12 for these plans to be submitted for my review  
13 for the Certificate of Occupancy application  
14 to illustrate the uses that would be put into  
15 the building, to confirm that the use that was  
16 being applied for was, in fact, illustrated in  
17 the plans.

18 I looked at each floor of the  
19 three levels to see (A) that the principal use  
20 for the grocery store was, in fact,  
21 illustrated by that layout seen in those plans  
22 and (B) that the accessory food -- accessory

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1 prepared food shop component was an accessory  
2 to the overall use in terms, at least in these  
3 illustrations, to be of 50 percent or less in  
4 the total square footage.

5 MR. SURABIAN: And then please  
6 turn to my Exhibit F.

7 ZONING ADMIN. Le GRANT: I'm  
8 getting there.

9 MR. SURABIAN: Okay.

10 ZONING ADMIN. Le GRANT: Yes.

11 MR. SURABIAN: What is this  
12 document?

13 ZONING ADMIN. Le GRANT: This is a  
14 document from -- it's a letter from the  
15 previous business operator of the Foggy Bottom  
16 Grocery. I'm going to probably butcher the  
17 name, Meseret Bekele, dated October 28, 2009.

18 MR. SURABIAN: And did you review  
19 this letter before issuing the November 4<sup>th</sup> C  
20 of O?

21 ZONING ADMIN. Le GRANT: I did.

22 MR. SURABIAN: And does this

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1 letter -- what does this letter indicate to  
2 you with respect to the use of the property?

3 ZONING ADMIN. Le GRANT: The  
4 letter describes the use. She describes the  
5 use that was occurring under the previous C of  
6 O to the assumption of the property's leasing  
7 by FoBoGro as to what was occurring there.  
8 And it denotes that it was a grocery store.  
9 And it also talks about the preparation and  
10 sale of sandwiches.

11 It makes note of the fact that  
12 there was a period of time in which pizzas  
13 were prepared, but that it was discontinued  
14 after the BZA ruled that that is not a  
15 permissible use.

16 And so the specifically, they  
17 noted that they had maintained a delicatessen  
18 license and sold and advertised sandwiches,  
19 subs and salads from the store.

20 MR. SURABIAN: Okay. Did this  
21 letter indicate to you whether or not the  
22 basement was used as part of the business?

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1                   ZONING ADMIN. Le GRANT: It makes  
2 reference to the downstairs kitchen which I  
3 assumed was consistent with the other  
4 information that I saw to be what was  
5 basically known as the basement level.

6                   MR. SURABIAN: Okay. And then  
7 turn to Exhibit G, which are the Certificates  
8 of Occupancy.

9                   ZONING ADMIN. Le GRANT: Yes.

10                  MR. SURABIAN: And did you conduct  
11 a search of DCRA's records, Certificate of  
12 Occupancy records with respect to this  
13 property?

14                  ZONING ADMIN. Le GRANT: Yes, I  
15 did. And what that entailed, the DCRA  
16 maintains records of past C of Os,  
17 Certificates of Occupancy in a scanned format.

18                  So these documents are scanned into a  
19 computer program that is called File Net. It  
20 is searchable upon many different ways to  
21 search, including address.

22                  For this particular address, I

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1 searched for 2140 F Street, N.W., and then  
2 produced or found that illustrated to me and  
3 then I had printed out the 12 C of Os in that  
4 record database, starting in 1958 through  
5 1994.

6 MR. SURABIAN: Okay. And does  
7 Exhibit G constitute the Certificates of  
8 Occupancy that you found?

9 ZONING ADMIN. Le GRANT: Yes. And  
10 I'm sorry, to clarify, 1958 through the year  
11 2000. Yes, yes, it does.

12 MR. SURABIAN: Okay. And after  
13 reviewing these Certificates of Occupancy, did  
14 you make any conclusions with respect to the  
15 use of the property?

16 ZONING ADMIN. Le GRANT: Yes.  
17 Looking throughout these 12 C of Os issued to  
18 various parties through this period of time,  
19 they denote a grocery store use that was in  
20 continuous operation. Because the District,  
21 the zone that this is located in, is an R-5-D  
22 District, it is a -- that is a District that,

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1 of course, does not normally allow a grocery  
2 store use.

3 So this information tells me that  
4 it is a legal nonconforming use. It was in  
5 continuous operation. The way the use is  
6 referred to is grocery store or retail sale of  
7 grocery. The terminology changed a little bit  
8 throughout the years, but it was, to me, in  
9 summary continuous as a grocery store use.

10 MR. SURABIAN: And do the C of Os  
11 indicate if any other use had ever been  
12 established there?

13 ZONING ADMIN. Le GRANT: I found  
14 no -- no, there is no other use ever listed  
15 for this address, other than the grocery store  
16 or retail grocery store use.

17 MR. SURABIAN: And does that apply  
18 to all floors?

19 ZONING ADMIN. Le GRANT: Well, the  
20 C of Os throughout this period of time,  
21 frankly, are inconsistent about the reference  
22 to the floors.

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1           The first C of O that was noted in  
2 1958 did say the first floor. And we have to  
3 go until 1977 where it now -- then it is  
4 changed and says first and second floors.  
5 Then if you go on to 1994, yes, 1994, it makes  
6 note of the basement and the second floor.

7           MR. SURABIAN:       And did you  
8 conclude that at one time or another all of  
9 the floors have been used as a grocery?

10          ZONING ADMIN. Le GRANT:    Yes.  
11 Given the layout of the building, based on the  
12 plans and the photographs that I have  
13 reviewed, it, frankly, looks like DCRA's  
14 reference to the levels of this building was  
15 inconsistent.

16          Nonetheless, because of the fact  
17 that all floors had been mentioned and because  
18 of the lack of any other use ever being  
19 brought to my attention, the database didn't  
20 show any other uses being authorized, and the  
21 fact that my understanding of the grocery  
22 store business often has areas not accessible

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1 to the public, such as an office or a storage  
2 area, I concluded, based on all of the  
3 information, that all the levels of the  
4 building had, at one point or another, been  
5 used for this business use as a retail grocery  
6 store.

7 CHAIRMAN LOUD: Excuse me. Mr. Le  
8 Grant, could you just repeat your very last  
9 statement that you made? I did not get it and  
10 I want to get it.

11 ZONING ADMIN. Le GRANT: I'll try  
12 again.

13 CHAIRMAN LOUD: Okay. Just the  
14 very last part.

15 ZONING ADMIN. Le GRANT: Okay.  
16 The very last part that I concluded that all  
17 three levels of this building had -- are  
18 associated with the retail grocery store  
19 business.

20 CHAIRMAN LOUD: Well, before that,  
21 you said something about the office?

22 ZONING ADMIN. Le GRANT: Oh, okay,

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1 I'm sorry.

2 CHAIRMAN LOUD: Yes.

3 ZONING ADMIN. Le GRANT: That  
4 during my review of the application and my  
5 knowledge of looking at applications for  
6 grocery stores throughout my career, that  
7 there are aspects of grocery stores that  
8 include areas that are not accessible to the  
9 customers. And those include offices and  
10 storage areas.

11 CHAIRMAN LOUD: Okay.

12 MR. SURABIAN: Did the C of Os  
13 indicate to you where inventory for the  
14 grocery was stored?

15 ZONING ADMIN. Le GRANT: No.

16 MR. SURABIAN: And based on your  
17 experience, do applicants for a C of O  
18 typically mention storage space in their  
19 application?

20 ZONING ADMIN. Le GRANT: No. For  
21 many, many uses, and especially commercial  
22 uses where, for example, a restaurant, a

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1 restaurant has an area devoted to storage or  
2 inventory. They have accessory or ancillary  
3 uses related to that that support the primary  
4 use, storage, employee lunch rooms, restrooms,  
5 offices. So it is recognized in Land Use  
6 Regulation that these ancillary or accessory  
7 uses that support a primary use need not to be  
8 enumerated on, in this case, a Certificate of  
9 Occupancy.

10 MR. SURABIAN: And so I want to  
11 explore this. You mentioned that there were  
12 areas that may not be accessible to the  
13 public. So under your view, would a storage  
14 be a part of a retail grocery use?

15 ZONING ADMIN. Le GRANT: I'm  
16 sorry, you said food storage?

17 MR. SURABIAN: Would -- no. Would  
18 the inventory storage be a part of the grocery  
19 store use?

20 ZONING ADMIN. Le GRANT: Yes.  
21 Well, the way I look at it is this. I  
22 consider, let's say, just to office and

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1 storage aspects as ancillary to a primary use.

2 And as long as they are supporting that use  
3 and the demonstration would have to be that  
4 they do not constitute, for example, the  
5 majority of the floor area. They don't  
6 constitute a function that would compete or  
7 supersede the function listed on the C of O.

8 So for a grocery store, if the  
9 areas devoted for those uses are not exceeding  
10 the primary customer serving area of a grocery  
11 store, that customers access, then indeed  
12 those are allowable aspects of the primary  
13 grocery store use.

14 MR. SURABIAN: Would your  
15 testimony be different if the office was used  
16 independently for an insurance agent, say, or  
17 another type of business?

18 ZONING ADMIN. Le GRANT: Yes, yes.

19 When I say office, it's an office for the  
20 grocery, for the business that is there. If  
21 it was an office for, I'm going to say a  
22 travel agent, let's say that was not related

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1 to the business, then there would be an issue  
2 with the use that is enumerated on the  
3 Certificate of Occupancy.

4 MR. SURABIAN: And in your career,  
5 have you issued Certificates of Occupancy for  
6 other grocery stores?

7 ZONING ADMIN. Le GRANT: Yes.

8 MR. SURABIAN: And have you  
9 reviewed their plans and applications as part  
10 of that process?

11 ZONING ADMIN. Le GRANT: I have.  
12 I have.

13 MR. SURABIAN: And how many years  
14 experience do you have reviewing Certificate  
15 of Occupancy applications?

16 ZONING ADMIN. Le GRANT: Well, for  
17 the District of Columbia, I've been with the  
18 District now, approximately, four years in my  
19 capacity as First Deputy Zoning Administrator  
20 and then as Zoning Administrator. So I did  
21 review in my employment with the District  
22 applications for grocery store use.

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1           For my work with other employers,  
2 including the City of Alexandria, the City of  
3 Berkeley, I do recall reviewing applications  
4 for other grocery store uses.

5           MR. SURABIAN:   And did you find  
6 that those other grocery stores had perhaps an  
7 employee break room?

8           ZONING ADMIN. Le GRANT:   In many  
9 cases, yes. Larger ones.

10          MR. SURABIAN:   And did they have  
11 manager's offices?

12          ZONING ADMIN. Le GRANT:   In some  
13 instances.

14          MR. SURABIAN:   And would they have  
15 a loading dock space?

16          ZONING ADMIN. Le GRANT:   After a  
17 certain size, yes, there were stores. I'll  
18 give an example, the City of Alexandria, the  
19 Whole Foods Market in Old Town was an  
20 application that I issued a Certificate of  
21 Occupancy on.

22                           And in reviewing those plans, it

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1 was the ground -- a one floor of a multi-story  
2 building with residential above, parking  
3 below. And they had components including  
4 storage, offices and I can't recall if there  
5 was employee lunch room or not.

6 MR. SURABIAN: And would they also  
7 perhaps have a storage room?

8 ZONING ADMIN. Le GRANT: Yes,  
9 storage or inventory.

10 MR. SURABIAN: And would they have  
11 perhaps maybe closet space?

12 ZONING ADMIN. Le GRANT: Yes, yes,  
13 yes. Well, in the case of the Whole Foods in  
14 Alexandria, they had an employee's storage  
15 area. Because they encouraged bicycle use,  
16 they had even showers for the employees.

17 MR. SURABIAN: And have you ever  
18 seen a retail establishment, including a  
19 grocery, that maybe had like a security room  
20 that had the security monitors or anything of  
21 that nature?

22 ZONING ADMIN. Le GRANT: Yes, I

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1 believe so in maybe one instance.

2 MR. SURABIAN: And were any of  
3 these areas accessible to the public?

4 ZONING ADMIN. Le GRANT: No.

5 MR. SURABIAN: Okay. And, in your  
6 mind, all of those uses are -- they are  
7 ancillary to the retail grocery?

8 ZONING ADMIN. Le GRANT: Right.  
9 The key is the proportion of those areas to an  
10 area that is accessible for customers to  
11 engage in retail and grocery shopping.

12 MR. SURABIAN: Okay. Let's say  
13 there was a grocery store that on one floor  
14 was strictly for retail and then on the second  
15 floor was used specifically for storage and  
16 they wanted to reconfigure their layout, so  
17 that half of the first floor was used for  
18 storage and half of the second floor was used  
19 for storage and the other half of both floors  
20 was used for retail, would that be  
21 permissible, in your mind?

22 ZONING ADMIN. Le GRANT: Yes, yes.

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1 If an aspect of the storage changed from one  
2 floor to another, but there was still -- that  
3 storage function was still ancillary and  
4 supportive of the overall retail grocery store  
5 use, I wouldn't see any problems with that.

6 MR. SURABIAN: So there would be  
7 no change of use?

8 ZONING ADMIN. Le GRANT: No.

9 MR. SURABIAN: No intensification  
10 of --

11 ZONING ADMIN. Le GRANT: No.

12 MR. SURABIAN: -- the use?

13 ZONING ADMIN. Le GRANT: No.

14 MR. SURABIAN: Do you believe that  
15 Foggy Bottom's Grocery Plans that you reviewed  
16 intensify the grocery store use?

17 ZONING ADMIN. Le GRANT: No.

18 MR. SURABIAN: And under the  
19 regulations, if there is no change in use,  
20 must the Zoning Administrator wait until the  
21 construction is completed to issue the C of O?

22 ZONING ADMIN. Le GRANT: No. And

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1 to clarify, if in those cases where there is a  
2 new construction of a building or a change of  
3 use, the protocol that DCRA has set forth is  
4 that those would trigger the need for a  
5 building permit. Once the building permit was  
6 issued and the construction commenced, we  
7 would look to the final inspection to -- it  
8 would be subject to an inspection to ensure  
9 that the construction was in compliance with  
10 the approved permitted plans.

11 That happens in the case of a  
12 change of use or new construction of a new  
13 building where a new space is being created.

14 Where there is no change of use,  
15 it's a change of ownership, as is the case  
16 here, it's not subject to a "change of use or  
17 new construction inspection."

18 MR. SURABIAN: Did Foggy Bottom  
19 Grocery's Plans result in an increase in the  
20 square footage of the property?

21 ZONING ADMIN. Le GRANT: No.  
22 Looking at the history of the Certificates of

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1 Occupancy as well as the photographs, I did  
2 not see that any new floor area was being  
3 added or created.

4 MR. SURABIAN: I don't have any  
5 further questions.

6 CHAIRMAN LOUD: Thank you, Mr.  
7 Surabian. Why don't we turn first to the  
8 appellant for cross examination? And the  
9 appellant designating one of the two of you to  
10 do the lead cross examination, thank you, and  
11 then we will turn to Ms. Miller.

12 MS. KAHLOW: Thank you. Mr. Le  
13 Grant, before issuance of the 11/4/09 C of O,  
14 did you have the opportunity to review the  
15 transcript of the prior BZA hearing for the  
16 previous licensee at 2140 F Street, as I  
17 recommended?

18 ZONING ADMIN. Le GRANT: I don't  
19 believe I reviewed the transcript. I believe  
20 I did review the order that you brought to my  
21 attention.

22 MS. KAHLOW: Were you aware in

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1 that hearing that the prior licensee under  
2 oath testified that she only operated the  
3 grocery on one floor?

4 ZONING ADMIN. Le GRANT: I was not  
5 aware that that operator had stated that.

6 MS. KAHLOW: Were you aware that  
7 she also testified to only selling prepackaged  
8 sandwiches made by a wholesaler off-site and  
9 then brought into the store, nothing prepared  
10 on-site, no prepared foods on-site?

11 ZONING ADMIN. Le GRANT: I was not  
12 aware that she had stated that.

13 MS. KAHLOW: Were you aware of the  
14 previous D.C. Administrative Law Judge  
15 hearings in 1995 and 1997 on her attempts to  
16 sell pizza and the resulting D.C. monetary  
17 fines?

18 ZONING ADMIN. Le GRANT: Well, I'm  
19 aware of the BZA order that when the BZA  
20 looked into the issue of selling and  
21 delivering pizzas and that the conclusion of  
22 the Board was that that was an impermissible

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1 expansion of the use. And so I was certainly  
2 aware of that history that you had pointed out  
3 to me and brought to my attention.

4 MS. KAHLOW: I wonder if you were  
5 aware of the Freedom of Information Act  
6 request by the West End Citizens Association,  
7 DCRA to get the full transcripts and orders  
8 from the 1995 and 1997 ALJ cases and the  
9 series of fines? Were you aware of that FOIA?

10 ZONING ADMIN. Le GRANT: I can't--  
11 truthfully, I cannot recall that specific FOIA  
12 request. I get many FOIA requests, so perhaps  
13 I have forgotten that particular FOIA request.

14 MS. KAHLOW: Were you aware that  
15 the 1994 C of O of the 10 C of Os that you  
16 presented, two of them are duplicates. So the  
17 10 you presented, there are only three of them  
18 that have two stories and one of which was in  
19 '94. Are you aware that the '94 one is what  
20 the ALJ said was improper? And that it only  
21 could be one floor, it could not be extended  
22 on the other floors, and that's what ended up

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1 in the ALJ hearing records and orders.

2 MR. SURABIAN: Objection. I'm  
3 sorry, what was the question where he was  
4 aware that the ALJ made that decision? Is  
5 that the question?

6 MS. KAHLOW: The question was was  
7 he aware when he looked at the '94 C of O for  
8 the two floors that that was part of the  
9 subject of the ALJ proceedings in '95 and '97,  
10 which were then negated? Was he aware of that  
11 whole history? Because the zoning case didn't  
12 happen until several years later.

13 MR. SURABIAN: I think he said  
14 that he was not aware of that proceeding.

15 MS. KAHLOW: All right. Okay. I  
16 just wanted to establish it.

17 Although this is a rather exotic  
18 piece of D.C. Law, have you seen other cases  
19 in addition to this one prohibiting any  
20 increase in the original square foot  
21 dimensions for a grandfathered, nonconforming  
22 use for the actual use of grocery sales? Not

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1 storage, not office, just grocery sales. Are  
2 you aware of any other cases besides this one  
3 which would go from one to three floors?

4 ZONING ADMIN. Le GRANT: I don't  
5 understand your question.

6 MS. KAHLOW: Are you aware of the  
7 D.C. Law that I cited in the beginning of my  
8 testimony? I'll give you the citation again.

9 It is D.C. Code 6-641.06A about nonconforming  
10 uses. Are you aware of that statute? It says  
11 "No enlargement shall be made of the  
12 nonconforming use itself."

13 ZONING ADMIN. Le GRANT: I'll say  
14 that I'm not aware of that particular law. I  
15 am certainly aware of the Zoning Regulations  
16 governing nonconforming uses.

17 MS. KAHLOW: In DCRA's prehearing  
18 statement that we have just been talking  
19 about, it states "Certificates often reveal  
20 inconsistencies to which floors are for food  
21 use or storage use."

22 Are you aware that the Foggy

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1 Bottom Grocery's intent to use all three  
2 floors for food sales, not one floor or not  
3 half of one floor and half of another, but all  
4 three floors fully?

5 ZONING ADMIN. Le GRANT: Well, in  
6 my conversations with the representatives from  
7 Foggy Bottom Grocery, as well as my review of  
8 the plans that were submitted, I concluded  
9 after my review that the intention is to use  
10 all three levels for the grocery store  
11 business.

12 And I believe that there would be  
13 customer service access to the second or top  
14 floor, the main or first floor and that the  
15 basement or lowest floor would also have  
16 customer access, including that to have for  
17 the accessory prepared food shop component of  
18 the grocery store use.

19 MS. KAHLOW: And I don't  
20 understand the term you used was intensity?  
21 Is this not an increase in intensity if it  
22 goes from one floor to three stories for food

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1 sales, using your term?

2 ZONING ADMIN. Le GRANT: I would  
3 disagree, no. It's not an increase in  
4 intensity. As I stated earlier, my conclusion  
5 of the review of the application, the history  
6 of this use is that all three levels had, for  
7 this building, been used for a retail grocery  
8 store. And when the plans were brought to my  
9 attention showing the continuation of that  
10 building as a grocery store use, when I issued  
11 the Certificate of Occupancy, I felt very  
12 comfortable that there was no expansion.  
13 There was no floor area being added to this  
14 building, no new -- that would increase this  
15 use.

16 MS. KAHLOW: So in the old  
17 Certificate of Occupancy that the old Foggy  
18 Bottom Grocery filed with the BZA in the last  
19 case said 1,000 square feet only for retail  
20 sale use. And this one, the newest  
21 application says 1,835, an 84 percent  
22 increase. How do you reconcile that? If they

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1 only use 1,000 square feet and this one wants  
2 to be an 84 percent increase, how is that  
3 consistent with the law and how is that not an  
4 increase in intensity?

5 ZONING ADMIN. Le GRANT: What I  
6 did in my analysis was to look at whether,  
7 again, there was new construction of new floor  
8 area being added to this building. I reviewed  
9 the plans and the photographs for this  
10 building. And my question of the applicant,  
11 was there going to be any either floor area  
12 added that building volume increased, because  
13 there is a basement level, is the basement  
14 being dug out further? Is there more floor  
15 area being added? And I concluded no.

16 Yes, my own experience, not only  
17 in this case, but in other cases of  
18 Certificates of Occupancy, unfortunately, in  
19 many cases, the reference to the square  
20 footage was inconsistent. It wasn't very  
21 clear.

22 So I had to do analysis to come to

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1 the conclusion if those previous C of Os did  
2 not accurately describe this square footage of  
3 the building, then I used the new C of O as an  
4 opportunity to correct that to associate that  
5 number with a set of plans that can be scaled  
6 and tested to come to that conclusion.

7 I did not believe in this case  
8 that here was any expansion of the building or  
9 a new floor area being added.

10 MS. KAHLOW: Are you familiar with  
11 the case law that we cited, I cited on page 7  
12 of my testimony, where the BZA order quotes it  
13 and says "Where there is doubt as to whether  
14 the change in use is substantial versus  
15 insubstantial, the Courts have consistently  
16 declared is to be resolved against change in  
17 use."

18 Are you familiar with that  
19 finding, that case?

20 ZONING ADMIN. Le GRANT: No, I'm  
21 not.

22 MS. KAHLOW: Thank you. I will

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1 get back to the change in use. Let me just  
2 move on to some of these other things.

3           Could you, please, share your  
4 guidance or that of your staff to a typical  
5 applicant such as in this case, what DCRA's  
6 Regulations are of governing the timing of C  
7 of Os for long shut facilities under when --  
8 major renovation, in this instance, this  
9 facility has been closed in fall '08, has not  
10 yet reopened. What would have been the timing  
11 of when a C of O should have been issued?

12           ZONING ADMIN. Le GRANT: Well, if  
13 I understand your question, it speaks to the  
14 length of time that a space may have been  
15 vacant. What my office does and my  
16 instruction to my staff is that we have  
17 guidance from section 2005.1, which speaks to  
18 the continuation of uses, determination of  
19 lapse of uses.

20           And the standard is if after three  
21 years of vacancy, the burden goes on the  
22 applicant to demonstrate what both what has

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1 happened in that space and what is the  
2 intention of the use of that space.

3 So I tell my staff if an  
4 application comes in for a long vacant  
5 property, that we sometimes ask for additional  
6 documentation. We ask for a business license  
7 history. We look at -- sometimes I would ask  
8 for an inspection. This Board is aware of a  
9 lot of cases having to do with questions about  
10 the continuation of use.

11 We have even looked at leases and  
12 utility records to try to get a picture of  
13 what has happened in this space. The three  
14 years is the guideline set forth in the Zoning  
15 Code. In this particular case, 2008 to 2010  
16 has been two years. So it is -- plus by  
17 virtue of the information you have brought to  
18 my attention in this last few months about  
19 this application, conversations with you,  
20 conversations with the business owner, you  
21 know, I have become aware of what has happened  
22 in this space and a pretty good idea of the

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1 history.

2 MS. KAHLOW: So I guess my  
3 question wasn't exactly clear. What I was  
4 asking about was what your guidance is to  
5 applicants, typical applicants, when they are  
6 making major alterations, when they are  
7 changing basically the entire inside of the  
8 structure? When do you get a C of O? What do  
9 you advise them what to do? When do --

10 ZONING ADMIN. Le GRANT: Well, the  
11 key is this. If any construction is  
12 occurring, they need to check to see if they  
13 need a building permit. Minor things such as  
14 painting and carpeting, do not need a building  
15 permit.

16 But you start moving walls around,  
17 changing electrical, plumbing, mechanical --

18 MEMBER MOLDENHAUER: I'm going to  
19 jump in here, because I don't know, maybe, Ms.  
20 Kahlow, you can explain kind of where this is  
21 going, because, obviously, you know, we'll  
22 give you latitude, but I don't think this is

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1 really relevant to the main point nor was this  
2 something that he testified to on direct. And  
3 I'm just trying to make sure that we are  
4 cautious of time.

5 MS. KAHLOW: All right. I'm  
6 sorry. I will move on. I thought it was  
7 relevant, but that's okay.

8 If we can move on to the T Street  
9 case, the 31 T Street, N.E., did it involve  
10 any increase in original square feet  
11 dimensions for their grandfathered  
12 nonconforming use? That's the case that Ms.  
13 Moldenhauer --

14 ZONING ADMIN. Le GRANT: One  
15 moment, please.

16 MS. KAHLOW: -- mentioned.

17 MEMBER MOLDENHAUER: Moldenhauer.

18 MS. KAHLOW: I'm sorry.

19 ZONING ADMIN. Le GRANT: I was not  
20 aware of any increase in the floor area.

21 MS. KAHLOW: Did it involve an  
22 extensive menu change, other than basically

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1 hot dogs and coffee?

2 ZONING ADMIN. Le GRANT: I'm not  
3 aware that there was any change in menu.

4 MS. KAHLOW: Were you aware that  
5 it continues to operate from 8:00 to 8:00  
6 daily and offers no sandwiches or any other  
7 prepared foods other than hot dogs?

8 ZONING ADMIN. Le GRANT: Well,  
9 I'll have to say that the hours of operation  
10 is not a matter that is subject to Zoning  
11 Ordinance Regulation.

12 MR. SURABIAN: If I could  
13 interject? Are we discussing what happened at  
14 -- what is happening at 321 T Street, N.E.?

15 MS. KAHLOW: That case, yes. It  
16 was a case mentioned by -- in all of our  
17 different things. We all mentioned it. I  
18 wanted to see if --

19 MR. SURABIAN: Is Mr. Le Grant --  
20 I mean, were you involved in that case?

21 MS. KAHLOW: He was the Zoning  
22 Administrator.

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1                   ZONING ADMIN. Le GRANT: I was  
2 not. I did not look at that application  
3 directly myself.

4                   MS. KAHLOW: Okay. Moving along,  
5 did your staff or any other D.C. staff bring  
6 to your attention other cases related to the  
7 same regulatory issue for grandfathered uses  
8 in Residential Zones, such as the Papa John's  
9 case, which, as Ms. Maddux said, was limited  
10 to grandfathered commercial use. It is now  
11 residential use.

12                   So are there any other cases like  
13 that that were brought to your attention in  
14 Residential Zones?

15                   ZONING ADMIN. Le GRANT: Let me  
16 say this, I'm aware from my own review of  
17 applications as well as applications that my  
18 staff bring to my attention instances of  
19 nonconforming uses specifically like  
20 nonconforming commercial uses in Residential  
21 Zones.

22                   I also speak with my counsel about

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1 information they find about other cases that  
2 the Board may have ruled on that maybe I  
3 wasn't aware of. So that's my general answer  
4 to your question.

5 MS. KAHLOW: Okay. To further  
6 develop an issue that I didn't get to discuss  
7 in great length, but you and I have discussed,  
8 if FoBoGro's website includes pizza, is that  
9 determined to be an allowable use in an  
10 accessory prepared food shop?

11 ZONING ADMIN. Le GRANT: Well --

12 CHAIRMAN LOUD: Ms. Kahlow, I do  
13 want to remind you that cross is limited to  
14 what was brought out on direct. And I  
15 understand the question, but moving forward,  
16 anything outside of that conversation that you  
17 may have had with the witness outside --

18 MS. KAHLOW: Okay.

19 CHAIRMAN LOUD: -- of this forum  
20 are not appropriate for cross.

21 MS. KAHLOW: Is there any foods in  
22 the accessory prepared food shop that would be

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1 no-nos?

2 ZONING ADMIN. Le GRANT: Well, the  
3 Zoning Code has a definition of prepared food  
4 which I believe the Board is aware and I  
5 brought to the applicant's attention and I  
6 furnished to you that describe the extent of  
7 preparation that can occur for prepared food.

8 And it is limited to a certain set of  
9 standards.

10 MS. KAHLOW: All right. Do you --  
11 have you looked at the FoBoGro menu? And does  
12 it meet those standards?

13 ZONING ADMIN. Le GRANT: I  
14 communicated to the applicant what --

15 MR. SURABIAN: Again, I'm going to  
16 quickly object. This is going back to this  
17 intention, an issue the Board has already set  
18 aside.

19 MS. KAHLOW: Okay. All right.

20 MR. SURABIAN: The C of O just  
21 approves prepared food. It doesn't approve  
22 anything beyond that.

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1 MS. KAHLOW: Since the prepared  
2 food order that we have talked about is very  
3 restrictive for heating equipment, what about  
4 the -- our Exhibit F on the Panini Press? Is  
5 that allowed in a prepared food shop?

6 MR. SURABIAN: Again, this is not  
7 part of the --

8 MS. KAHLOW: Okay.

9 MR. SURABIAN: -- issues before  
10 the Board right now.

11 MS. KAHLOW: Okay. All right.  
12 Now, let me get to the C of O. If we could  
13 turn to that again? On the C of O right  
14 before you have 1,835 square feet, you have  
15 type of occupancy use change. What had you  
16 meant, intended by that characterization of  
17 this as a use change?

18 ZONING ADMIN. Le GRANT: Well, I  
19 should have stated ownership change.

20 MS. KAHLOW: I see. So that's an  
21 error, you're saying?

22 ZONING ADMIN. Le GRANT: A better

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1 descriptor would have been ownership change.

2 MS. KAHLOW: Is there any use  
3 change?

4 ZONING ADMIN. Le GRANT: Not that  
5 I'm aware of.

6 MS. KAHLOW: Did you visit the old  
7 grocery before it closed in fall '08?

8 ZONING ADMIN. Le GRANT: No.

9 MS. KAHLOW: Did you visit the not  
10 yet open FoBoGro? And if not you, somebody  
11 else for DCRA? And if so, when?

12 ZONING ADMIN. Le GRANT: No. I  
13 have not visited the site. I don't believe it  
14 is open. I believe the proprietor has offered  
15 for me to look at the space, but I have not.

16 MS. KAHLOW: How about any other  
17 DCRA employees, have they made site visits?

18 ZONING ADMIN. Le GRANT: I'm  
19 sorry, about this case?

20 MS. KAHLOW: Yes.

21 ZONING ADMIN. Le GRANT: I believe  
22 in the course of the construction that -- from

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1 the renovations that there have been some  
2 inspections. I don't believe it is by -- it  
3 has not been any of my staff. It has been  
4 inspectors associated with the Inspection  
5 Division looking at their construction issues.

6 MS. KAHLOW: Thank you very much  
7 for your patience and my many questions.

8 CHAIRMAN LOUD: Thank you, Ms.  
9 Kahlow. Ms. Miller?

10 MS. MILLER: I just have a few.  
11 You testified, Mr. Le Grant, that you had  
12 taken into consideration how the entire  
13 building had been used. And you were  
14 convinced that the entire building has been  
15 used as a grocery store and for the ancillary  
16 support that was necessary to run that  
17 business, correct?

18 ZONING ADMIN. Le GRANT: That's  
19 correct.

20 MS. MILLER: And from your  
21 examination of the records that you had  
22 available to you, as well as information

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1 provided by Ms. Kahlow and as well as the  
2 owner of Foggy Bottom Grocery and Mr. Hart,  
3 you did not find any evidence that the store  
4 had been used for anything else, including  
5 residential purposes, at least in the history  
6 that you were able to review, correct?

7 ZONING ADMIN. Le GRANT: That's  
8 correct.

9 MS. MILLER: Now, in the plans  
10 that you reviewed, you probably had an  
11 opportunity to determine, you know, what was  
12 actually retail space, what was storage space,  
13 which was serving space. But the  
14 configuration of the entire building was for  
15 grocery store, correct?

16 ZONING ADMIN. Le GRANT: That's  
17 correct.

18 MS. MILLER: And did you consider  
19 that a most efficient use of the space as  
20 well?

21 ZONING ADMIN. Le GRANT: Well, I  
22 did not try to judge the efficiency of the use

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1 of space. I don't pre-judge designs that  
2 people bring to me about efficiency. I look  
3 at the floor plan. I want to see what is  
4 being illustrated and then is it consistent  
5 with the use that is being applied for.

6 MS. MILLER: But there is really  
7 no question in your mind that the -- all  
8 floors, at some point, have been used in a way  
9 that is for the grocery business, for the  
10 grocery store, correct?

11 ZONING ADMIN. Le GRANT: At least  
12 in the history that I have examined.

13 MS. MILLER: One of the issues  
14 that has been raised is the square footage.  
15 And you mentioned that from the plans you  
16 determined independently that there had been  
17 no increase in the actual size of the  
18 building. Is that correct?

19 ZONING ADMIN. Le GRANT: That's  
20 correct, based on the plans that I have seen,  
21 the photographs that there has not -- that the  
22 application associated with the Certificate of

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1 Occupancy did not have an increase in the  
2 floor area of the building.

3 MS. MILLER: And that's relevant  
4 to determining what the FAR is for that  
5 particular property. Is that correct? The  
6 area square footage as opposed to the lot  
7 square footage.

8 ZONING ADMIN. Le GRANT: Right.  
9 The FAR being the ratio of the floor area to  
10 the lot area, that would be relevant. The  
11 square footage, obviously, would be relevant  
12 to that figure.

13 MS. MILLER: And in this case,  
14 there is no change to the building that would  
15 put this particular structure, however it is  
16 being used, in violation of those FARs that  
17 you are aware of?

18 ZONING ADMIN. Le GRANT: Can you  
19 restate your question?

20 MS. MILLER: I'll try. In this  
21 case, there is no increase to the FAR that  
22 exceeds what is allowable for this particular

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1 property, is there?

2 ZONING ADMIN. Le GRANT: Right.  
3 There is no increase in FAR at all, because  
4 there's no floor area being added.

5 MS. MILLER: And just out of  
6 curiosity, did you ultimately decide how many  
7 square feet were in the entire building? Was  
8 it 1,835 square feet or 1,845 square feet?

9 ZONING ADMIN. Le GRANT: Frankly,  
10 I don't recall. I think in the course of the  
11 review, there was a discussion of those two  
12 different figures, but I believe at the end I  
13 concluded 1,835, that was put on the  
14 Certificate of Occupancy.

15 MS. MILLER: Okay. Thank you. I  
16 have no more questions.

17 CHAIRMAN LOUD: Thank you. Let me  
18 see if Board Members have any questions. And  
19 then if you have any rehab, we can do that.

20 COMMISSIONER TURNBULL: Thank you,  
21 Mr. Chair. Good evening, Mr. Le Grant.

22 ZONING ADMIN. Le GRANT: Good

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1 evening, Mr. Turnbull.

2 COMMISSIONER TURNBULL: Going back  
3 to the document that we just had, Exhibit No.  
4 17, with the C of Os and everything.

5 ZONING ADMIN. Le GRANT: Yes.

6 COMMISSIONER TURNBULL: And on  
7 page 6, you sort of summarize what you said in  
8 your statement about that we have seen  
9 inconsistencies in the C of Os. We have seen  
10 basement, we have seen second floor, first  
11 floor and the last two specifically 2000 and  
12 1994 have basement and second.

13 ZONING ADMIN. Le GRANT: Yes.

14 COMMISSIONER TURNBULL: Now, there  
15 is inconsistencies that happen. And I think  
16 your comment is storage space would not  
17 principally be shown in something like this.  
18 So if there was a floor that had it, it would  
19 not necessarily be called out per se.

20 ZONING ADMIN. Le GRANT: Well, I  
21 can see at the time that if an applicant came  
22 to DCRA and was explaining to perhaps a

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1 predecessor, one of my current staff or one of  
2 the permits at our clerical staff, what floors  
3 are you using here?

4 Well, I'm using the first floor.  
5 Well, what's up on the second floor? Storage.

6 Okay. And it was some decision or  
7 determination you made perhaps not correctly  
8 that should have included that level as being  
9 included in that C of O description for the  
10 entire building.

11 COMMISSIONER TURNBULL: The latest  
12 C of O, and I don't know whether you are just  
13 being cautious, but now it specifically says  
14 three floors occupied.

15 ZONING ADMIN. Le GRANT: That's  
16 correct.

17 COMMISSIONER TURNBULL: Okay.  
18 And, you know, I can see how you are  
19 interpolating from all the past C of Os. I  
20 mean, there is a logic at the way the C of Os  
21 have been issued. And there is the internal  
22 stair that is connecting all. So I can see.

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1 I can read the logic.

2 ZONING ADMIN. Le GRANT: Okay.

3 COMMISSIONER TURNBULL: And I  
4 understand how that is going. I guess what --  
5 and I know your comment was now even if there  
6 -- as long as there was still some storage on  
7 the additional floors, even though they may be  
8 expanding the retail sale, that's not really  
9 expanding the grocery operation beyond a  
10 reasonable or manageable amount that could be  
11 expected?

12 ZONING ADMIN. Le GRANT: Well, I  
13 guess the way I look at it is different  
14 business models of operating a business, in  
15 this case a grocery store, may change the area  
16 devoted to an office, a dedicated separated  
17 office function or a dedicated separated  
18 storage function.

19 Some grocery stores that I  
20 patronize, what used to be in a back room  
21 separated off is now pulled out to a customer  
22 accessible area. I'll just say Cosco for

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1 example.

2 COMMISSIONER TURNBULL: Right.

3 ZONING ADMIN. Le GRANT: Also, the  
4 need for a separate office, I may be surmising  
5 here with modern technology, that need to  
6 separate to minimize -- to separate that  
7 function in a separate space maybe has  
8 diminished or gone away.

9 So in the end, as I believe I  
10 testified earlier, I look at the totality of  
11 the use. Is there an expansion,  
12 intensification of the use that maybe  
13 historically had areas separated off or  
14 separate storage functions or separate office  
15 functions?

16 By virtue of just making the area  
17 accessible to customers, to me, does not  
18 constitute a change or intensification of that  
19 use.

20 COMMISSIONER TURNBULL: No, I can  
21 see how the business model changes for a small  
22 grocery store. I can follow the logic on

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1 that.

2 One thing that I'm a little bit  
3 confused or troubled in trying to look at is  
4 on the FoBoGro's plans for the basement, I'm  
5 looking at Drawing A2, which shows all three  
6 floor plans.

7 ZONING ADMIN. Le GRANT: Let me  
8 get that in front of me.

9 COMMISSIONER TURNBULL: And then  
10 maybe there is a blow-up, I'm not sure. There  
11 is elevations that follow also. It would  
12 appear -- and maybe that's not the best plan.

13 I think there is another. Well, I guess you  
14 would have to look at it. You would have to  
15 go back and forth to the drawings.

16 ZONING ADMIN. Le GRANT: Okay.

17 COMMISSIONER TURNBULL: Go back  
18 and forth to different plans. But it almost  
19 would appear that you can't use the internal  
20 stair to go down to the basement. That you  
21 enter the basement as a separate operation  
22 from the outside. That there are stairs --

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1 that there is doors up at the top of the  
2 stairs.

3 This looks to be exclusively a  
4 carryout operation. And I don't -- I mean,  
5 without getting to -- I don't want to get into  
6 the business of the food preper, what's that,  
7 but this looks to be a significant operation.

8 But again, looking at business models, I'm  
9 not -- it's up -- I'm not looking to you for  
10 guidance. I'm looking at the basement.

11 ZONING ADMIN. Le GRANT: Well,  
12 it's true that the way it appears here that  
13 the customers could not walk in the door at  
14 the basement level and ascend to the upper  
15 floors.

16 The issue for me is is this use  
17 connected to the main use? And there is an  
18 interior stair. Perhaps it is reserved for  
19 employees. The ability of a customer to  
20 purchase goods that perhaps would come down  
21 the stairs, like I would like to get a quart  
22 of milk, I'm surmising that there is that

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1 ability to connect the retail grocery aspect  
2 to the bottom level.

3 COMMISSIONER TURNBULL: So you're  
4 not uncomfortable with the size of what looks  
5 to be this food preparation area?

6 ZONING ADMIN. Le GRANT: No. If  
7 the -- well, again, when I looked at the time,  
8 I looked at the portion of the floor area --

9 COMMISSIONER TURNBULL: Yes.

10 ZONING ADMIN. Le GRANT: -- which  
11 the customer-serving area for this basement  
12 level was I think 12.86 percent or less than  
13 15 percent. So in my mind, it would still be  
14 accessory to the grocery store use. And  
15 that's how it was listed in the C of O.

16 I was not uncomfortable with this  
17 area with the proportionality for the overall  
18 use.

19 COMMISSIONER TURNBULL: Okay.  
20 Yes, I guess I just -- it looks like there was  
21 two cash registers in this small area. I just  
22 throw that out. I hadn't noticed that before

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1 until going through some of these plans today  
2 and looking at the elevations and the floor  
3 plans. And I didn't catch that it was not  
4 connected totally, that people aren't coming  
5 in from the outside. So thank you.

6 ZONING ADMIN. Le GRANT: Thank  
7 you.

8 MEMBER MOLDENHAUER: So I'm  
9 looking at this and I'm a little confused just  
10 by reading this diagram. The customers would  
11 be coming in from the outside, not coming in  
12 from the inside. It looks like it could be  
13 either way. The customers may not be in the  
14 section with the mop sink and the HVAC unit or  
15 are they?

16 ZONING ADMIN. Le GRANT: Well, the  
17 way I read this, the floor plan, and I  
18 understood it in my discussions with the  
19 applicant, in the basement floor plan the door  
20 that opens out on the right side opens to the  
21 exterior. And the customers would access that  
22 area.

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1           And there is that area that,  
2           although there is the wording condiment  
3           station on the overhead storage, speaks to  
4           that proportion of area that would be customer  
5           accessible. The counter below that area would  
6           not be accessible beyond that. It would not  
7           be accessible is my understanding of the floor  
8           plan.

9           MEMBER MOLDENHAUER:        Is that  
10          correct? Mr. Hart? I just want to make sure  
11          that we are all on the same page.

12          MR. HART:        I'm sorry, I missed  
13          that --

14          MEMBER MOLDENHAUER:        Is that a  
15          correct --

16          MR. HART:        -- part of what he  
17          said. I was looking down at this myself.

18          MEMBER MOLDENHAUER:        Okay. Well,  
19          in general, from before even that last section  
20          is it not correct the way that Mr. Turnbull is  
21          understanding the floor plan?

22          MR. HART:        It is to a certain

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1 extent. I can probably clarify that better  
2 when I give my testimony. But for security,  
3 safety and flow reasons is the reason why we  
4 don't have the internal staircase to be where  
5 customers can go off route, because to be  
6 honest, as a businessman and somebody wants to  
7 run a business like this, it would be much  
8 easier for everybody to buy everything all at  
9 one location.

10 So for that part, you can come in  
11 from the outside.

12 MEMBER MOLDENHAUER: Okay. I  
13 think that's --

14 MR. HART: And also buy the  
15 sandwiches, salads upstairs and groceries  
16 downstairs.

17 MEMBER MOLDENHAUER: I just want  
18 to make sure that we are all reading the plans  
19 correctly. Thank you.

20 CHAIRMAN LOUD: Thank you. Are  
21 there additional questions?

22 COMMISSIONER TURNBULL: That candy

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1 section up on the second floor looks awful  
2 inviting for a guy like me to go back there  
3 and sneak something out. I don't know.

4 CHAIRMAN LOUD: Mr. Surabian, did  
5 you have any redirect, rehab of the witness?

6 MR. SURABIAN: No, Chairman.

7 CHAIRMAN LOUD: Okay. Then what I  
8 think we will do is we are at about 6:15 p.m.  
9 and I said earlier that if we reached 6:00,  
10 that we would assess where we are this  
11 evening. We still have a case after your  
12 case, the Francis Field case.

13 And just by a show of hands, how  
14 many persons in the audience are for the  
15 Francis case? And are all of the persons who  
16 are raising their hands now, I can see  
17 counsel, but apart from counsel, witnesses  
18 that have been sworn in and are going to  
19 testify?

20 How many witnesses do we have? We  
21 have three witnesses, five witnesses for the  
22 case and counsel. Okay. And we are going to

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1 do our level -- are any of the five witnesses  
2 who just identified yourselves, do you have an  
3 urgency around leaving by a certain time?

4 Okay. Then we are going to do our  
5 level best to get into that case and get  
6 started with that case. Just depending on how  
7 it proceeds, we don't know if we will get  
8 through with it tonight, but we will do our  
9 level best.

10 I think what I would like to  
11 suggest now, colleagues, is that we take a  
12 five minute break and then we will come back  
13 out and proceed with this case as appropriate.

14 (Whereupon, at 6:17 p.m. a recess  
15 until 6:46 p.m.)

16 CHAIRMAN LOUD: Okay. We are now  
17 back in session. And I believe where we left  
18 off was that the Zoning Administrator had  
19 concluded its case. Okay. And typically, we  
20 would now turn to the case for the owner or  
21 the lessee, in this case, the Foggy Bottom  
22 Grocery store.

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1           Let me say before we get into  
2 that, to the extent we do get into it, that we  
3 stated at the outset a framework for our  
4 review and analysis of the case. And in  
5 setting that forth at the outset, one of the  
6 things we said we would be looking at and we  
7 would narrow the focus to is this question of  
8 whether the C of O appealed in November 4,  
9 2009 that was CO1000323, whether that C of O  
10 exceeds the scope of the lawful prior C of Os,  
11 which we have come to learn through Exhibit 17  
12 begin in 1958 and go through to the year 2000.

13           I think given that that was the  
14 focus of our inquiry and given that the  
15 appellant has the burden to demonstrate error  
16 on the part of the Zoning Administrator in  
17 that regard, the record up to this point of  
18 the proceeding has been very, very full.

19           And proceeding forward, I think  
20 that it would be very fruitful for the Board,  
21 particularly after the appellant represented  
22 their case, the ZA has presented its case, to

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1 perhaps see what the evidence is out there by  
2 way of rebuttal to the Zoning Administrator's  
3 evidence.

4 That's not to suggest, and of  
5 course the owner of the property has the  
6 opportunity to present its case as well, but  
7 so much of what may come forward from the  
8 owner's case, given the narrow issue that we  
9 are dealing with, seems to have come out  
10 during the Zoning Administrator's case.

11 So that's a long winded way of  
12 saying that we believe we have a very, very,  
13 very full record on the narrow issue that was  
14 presented before us. I think the part that  
15 may be missing the most is the potential  
16 rebuttal of the testimony of the Zoning  
17 Administrator.

18 So in light of that, I would like  
19 to suggest, and it's only a suggestion, that  
20 moving forward, we zero in on whatever  
21 rebuttal evidence there may be as to the  
22 Zoning Administrator's testimony.

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1           And of course, the closing by the  
2 appellant and leave to the owner discretion in  
3 terms of presenting a case and to what extent  
4 it wants to present a case.

5           MS. MILLER: I think I understand  
6 what you are saying, but I don't think we have  
7 any rebuttal to the Zoning Administrator, at  
8 this point.

9           CHAIRMAN LOUD: Okay. And given  
10 what I am saying, do you feel that you are  
11 going to call any witnesses at all?

12          MS. MILLER: Yes, we will be  
13 calling Mr. Hart.

14          CHAIRMAN LOUD: Okay. And can you  
15 give a proffer on Mr. Hart's testimony? Of  
16 course, you have the right to call Mr. Hart.

17          MS. MILLER: He will also address  
18 his knowledge, firsthand knowledge and  
19 experience with this particular building. He  
20 has spent about three years not only working  
21 with Ms. Bekele, who is the former owner, in  
22 understanding the business, but it is also

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1 relevant to the issue of estoppel.

2 And so there will be testimony  
3 offered on that issue as well.

4 CHAIRMAN LOUD: Well, let me  
5 suggest a bifurcation of the issues. I think  
6 going forward on the merits of the appeal and  
7 whether or not the appellant meets the burden,  
8 because, of course, the appellant has to meet  
9 its burden, we can exhaust that issue and make  
10 a determination on that issue.

11 And if it is necessary to go  
12 forward beyond that, we can certainly do that  
13 and hear additional testimony on any  
14 subsequent issues. But I think to go directly  
15 into an estoppel argument and evidence may be  
16 beyond what this part of the proceeding would  
17 argue for.

18 MS. MILLER: Then perhaps what  
19 would probably be best would be to have Mr.  
20 Hart testify in addition to or add to the  
21 testimony that may fill in a few of the blank  
22 spaces that have been left by the prior

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1 parties, by the parties.

2 CHAIRMAN LOUD: And would that  
3 relate to the whole issue of the C of Os  
4 issued between '58 and 2000 and the scope of  
5 those C of Os? Because I think that's really  
6 where we are sort of trying to target a lot of  
7 the evidence and testimony.

8 MS. MILLER: There will be a  
9 limited amount of that, yes.

10 CHAIRMAN LOUD: Okay. And beyond  
11 that specific issue, what else would the  
12 witness cover?

13 MS. MILLER: Is there anything  
14 that the Board would like to hear from Mr.  
15 Hart that will clarify any of the testimony  
16 that you have already heard?

17 CHAIRMAN LOUD: That's a very good  
18 question. Why don't we solidify, I think,  
19 what we are definitely going to hear from him,  
20 which would be only evidence regarding the C  
21 of Os and the prior scope of the C of Os, to  
22 the extent that he has something to add to

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1 that.

2 And then beyond that, we can open  
3 it up to Board Members and see if there is  
4 anything specific that they would like to get  
5 from the witness. Does that sound like an  
6 appropriate manner in which to proceed? Okay.

7 Why don't we do that then and we will start  
8 with Board Members in terms of specific  
9 questions, if any there be.

10 And again, just doubling back with  
11 the Board Members, is there any specific  
12 question for this witness that would help him  
13 be clear on the evidence that we think is most  
14 appropriate to the standard we are looking at?

15 And yes, please.

16 MEMBER SORG: I'll just ask one  
17 question. In your time learning the business  
18 with the previous owner, did you witness her  
19 operating the grocery store on more than one  
20 level of the building?

21 MR. HART: I frequented the Foggy  
22 Bottom Grocery since 2001 and I had an

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1 interest in purchasing it over the last three  
2 years. To answer your question, I have been  
3 on all three levels and I can tell you under  
4 oath that on the second floor, there is a  
5 desk, storage, office space, storage of  
6 receipts from downstairs, basically all of her  
7 back office stuff.

8 And on the basement floor, there  
9 was also storage, kitchen equipment that was  
10 not being used at the time. I have seen all  
11 three floors and all three floors related to  
12 the commercial business that she ran.

13 MEMBER SORG: Okay. Thanks.

14 COMMISSIONER TURNBULL: The  
15 storage in the basement was geared to  
16 replenishing the dry goods upstairs?

17 MR. HART: Yes, sir, to the extent  
18 that she did. Unfortunately, over the last  
19 couple of years, as I have been interested in  
20 buying the business, she became more and more  
21 lackluster about that.

22 And to clarify something, the

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1 business was not shut in the fall of 2008. I  
2 can testify under oath that I stood behind  
3 that counter as a clerk when I was interested  
4 in buying it in the spring of 2009. But  
5 directly, it was not open the full hours,  
6 because she was tired of running it and she  
7 really wanted out.

8 And the business was in very, very  
9 ill repair. It was basically falling apart.  
10 But the storage that she had was -- there were  
11 things that were not directly related. She  
12 had some personal items downstairs, but she  
13 also had storage of canned goods.

14 When we cleaned it out, there was  
15 a lot of back inventory that a lot of it was  
16 expired, because she wasn't running on top of  
17 it. Yes, it was all related to the Foggy  
18 Bottom Grocery. There was nothing else that  
19 was going on in that business insofar as I  
20 have ever seen in the three years that I have  
21 been involved in all three floors.

22 COMMISSIONER TURNBULL: Okay.

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1 Thank you.

2 CHAIRMAN LOUD: Thank you, Mr.  
3 Turnbull. So we will turn back to your  
4 witness, Ms. Miller, I believe Mr. Hart. And  
5 you can walk him as appropriate through his  
6 testimony. You can voir dire him or if he has  
7 got a prepared statement.

8 MS. MILLER: Thank you very much.  
9 For those of you who may not be familiar with  
10 where it is located and the neighborhood  
11 itself, I know you have heard about it, but  
12 sometimes a picture paints a thousand words.

13 MS. KAHLOW: Excuse me, do you  
14 have copies for all of us of all the handouts?

15 MS. MILLER: This isn't a handout.

16 MS. KAHLOW: Any of the visuals,  
17 do you have a copy of the visuals for all of  
18 us, so we can see them?

19 MS. MILLER: Yes, you have them in  
20 a packet that was sent to you.

21 MS. KAHLOW: I have never got a  
22 packet from you.

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1 CHAIRMAN LOUD: Do you have  
2 another copy with you right now, Ms. Miller?

3 MS. MILLER: I probably do.

4 CHAIRMAN LOUD: Okay. Why don't  
5 you get that for Ms. Hartman -- I'm sorry --

6 MS. KAHLOW: Sorry to interrupt, I  
7 just wanted to follow.

8 CHAIRMAN LOUD: -- Ms. Kahlow.

9 MR. HART: I have one copy.

10 CHAIRMAN LOUD: Ms. Bailey, thank  
11 you. That would be very helpful and sort of  
12 expedite us along.

13 MS. KAHLOW: Thank you.

14 CHAIRMAN LOUD: She is going to  
15 give you that, Ms. Kahlow, and as she is doing  
16 that, you can proceed, Ms. Miller, with your  
17 witness.

18 MS. MILLER: The exhibit that you  
19 will want to look at will be Exhibits 1 and 2.  
20 Okay.

21 MR. SURABIAN: I'm sorry, counsel,  
22 can you clarify what we are looking at? Which

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1 Exhibit 2 is it?

2 MS. MILLER: In the -- it would  
3 have been our submission that was made last  
4 Tuesday.

5 MR. SURABIAN: Okay. So the  
6 February 16<sup>th</sup> --

7 MS. MILLER: That would be --

8 MR. SURABIAN: -- submission?

9 MS. MILLER: Yes.

10 MR. SURABIAN: Okay.

11 CHAIRMAN LOUD: That looks like  
12 our Exhibit --

13 COMMISSIONER TURNBULL: It's our  
14 Exhibit No. 16.

15 CHAIRMAN LOUD: -- No. 16. OZ has  
16 marked it as Exhibit 16. Are we ready to  
17 proceed? Okay.

18 MS. MILLER: Mr. Hart, before we  
19 start, would you just briefly state your name  
20 and where you live?

21 MR. HART: Kris Hart, 2326 L  
22 Street, N.W., in the West End.

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1 MS. MILLER: And your relationship  
2 to Foggy Bottom Grocery?

3 MR. HART: I'm the owner and  
4 managing partner.

5 MS. MILLER: And how long have you  
6 been a resident of the District of Columbia?

7 MR. HART: I have lived in the  
8 District of Columbia for 10 years.

9 MS. MILLER: And other business  
10 experience that you have?

11 MR. HART: I also own a tanning  
12 salon that opened four years ago next week.  
13 It will be our fourth anniversary at 2112 F  
14 Street. It's on the same block and I opened a  
15 spa two years ago.

16 MS. MILLER: Could you orient the  
17 panel to where Foggy Bottom Grocery is in  
18 relationship to this overhead map?

19 MR. HART: It's right here where  
20 my finger is.

21 MS. MILLER: And just briefly  
22 point out some of the, you know, locating or

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1 other features around that building.

2 MR. HART: I'm going to be  
3 extremely brief and then let you dictate any  
4 questions.

5 There is a row of townhouses here,  
6 mainly they are owned by George Washington  
7 University. Two of which are vacant. A  
8 couple of which are fraternity houses. All of  
9 these members signed the petitions. All of  
10 these residents signed the petitions to  
11 support the business that we have going.

12 As you come around on 22<sup>nd</sup> Street  
13 there are two buildings, which are both State  
14 Department Annex Buildings. Next to that  
15 right behind Foggy Bottom Grocery is a 24 hour  
16 CVS. And then a Riverside Liquor Store owned  
17 by an individual who is on the West End Board.

18 This building here is the State  
19 Plaza Hotel and it's the next closest building  
20 east of Foggy Bottom Grocery. There is a park  
21 in between us and the hotel. This building  
22 here in the center is a Pepco building.

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1                   And then down here you have a  
2 couple of apartment buildings, The Dakota,  
3 which is a dormitory in the corner, and the  
4 next building around the corner from that is  
5 the Metropolitan Medical Facility, which is  
6 where my spa and tanning salon is.

7                   MS. MILLER: And so as far as you  
8 know, Foggy Bottom Grocery has served this  
9 area for 60 years?

10                  MR. HART: Amply, I hope. And the  
11 one thing I didn't point out was right across  
12 the street where you see this construction,  
13 that's South Hall, which is the School Without  
14 Walls' project, the new dormitory, George  
15 Washington University. I believe Square 80,  
16 but I might be wrong, so don't hold me to  
17 that. That's 474 senior dorms. There is no  
18 retail in those -- that new resident hall.

19                  There are kitchens in all of the  
20 rooms. I think it's a good opportunity for  
21 our grocery store.

22                  MS. MILLER: When you decided to

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1 purchase the business, you originally had  
2 thought that you wanted to actually change the  
3 store from a grocery store to a sandwich shop,  
4 correct?

5 MR. HART: Yes, that was the  
6 original Certificate of Occupancy application  
7 that I submitted in February 2007.

8 MS. MILLER: And that was  
9 ultimately -- whatever happened to that?

10 MR. HART: What happened was I  
11 submitted it in February 2007 when I initially  
12 took an interest in Foggy Bottom Grocery. I  
13 wanted to actually change it to a cheesesteak  
14 place. I'm from Philadelphia. I thought it  
15 was a great idea.

16 I didn't hear from the Zoning,  
17 DCRA for about six months. And finally, under  
18 the advice of somebody in the Office of  
19 Zoning, he told me that if we didn't -- that  
20 was -- Mr. Crews was then the Zoning  
21 Administrator and he is the individual I wrote  
22 to.

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1           This individual in the Office of  
2 Zoning told me that the only way to elicit a  
3 response from DCRA is they either approve it  
4 and you can move forward or they deny it and I  
5 can go in front of the BZA, but I can't go in  
6 front of the BZA without a denial, is what I  
7 was informed.

8           At that time, I believe it was  
9 July of 2007, I wrote a letter to the Zoning  
10 Administrator requesting that he deny it, so I  
11 could proceed.

12           MS. MILLER:       What particular  
13 features about the premises were you aware of  
14 at the time you became interested in it?

15           MR. HART:   Well, there was -- you  
16 could see on any photos the outside. You  
17 walked up a brick staircase. Outside there  
18 was benches around that you could sit on,  
19 welcoming you to sit on. Then of course you  
20 walked in, the building was really run down.  
21 I knew the grocery store had been there for  
22 about 60 years.

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1           And you know, I saw that they were  
2           utilizing the whole building. She did not  
3           live there. She did not have another business  
4           out of there. She didn't use it very  
5           efficiently, so I thought that there was a  
6           great opportunity that this neighborhood  
7           facility could do a better job of serving the  
8           community, if somebody came in with a stronger  
9           business sense of what could be done.

10           And so that's why I approached  
11           DCRA and the City Government to see what  
12           exactly would work within the law, because I  
13           didn't want to put the cart before the horse.  
14           We thought that would be the way to go.

15           MS. MILLER: So the record shows  
16           that you went back to the Zoning Office and  
17           applied for a Certificate of Occupancy then in  
18           August of 2008, correct?

19           MR. HART: Yes.

20           MS. MILLER: And after you  
21           received that Certificate of Occupancy, what  
22           steps did you take then in moving towards

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1 establishing your business?

2 MR. HART: I'll be very brief, but  
3 that was a very, very long process. We  
4 started in negotiations with the George  
5 Washington University to enter into a lease  
6 with them.

7 CHAIRMAN LOUD: Excuse me, let me  
8 just ask for a proffer on the overall  
9 connection of where we are in the testimony to  
10 the overriding issue that we said at the  
11 outset would sort of guide our review of the  
12 record.

13 And a lot of this is in the  
14 pleadings, the lease negotiations and so on  
15 and so forth. But are you tying this  
16 specifically to all of the previous lawful or  
17 not lawful C of Os and how the November C of O  
18 proceeding from that was either appropriate or  
19 inappropriate? Because that's kind of what we  
20 are looking for the most.

21 MS. MILLER: Yes. We will tie it  
22 together.

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1                   CHAIRMAN LOUD:   Okay.   And just a  
2   proffer as to how you are going to do it.

3                   MS. MILLER:       The issue in the  
4   first C of O was that -- I believe the  
5   objection was to it having been designated as  
6   a sandwich shop.   And after going through the  
7   steps of applying for and entering into all  
8   the negotiations for the business and  
9   presenting all of this information to the  
10   Zoning Administrator, the Certificate of  
11   Occupancy was reissued then with the  
12   limitations for the accessory food shop.

13                  CHAIRMAN LOUD:       Okay.   I  
14   understand.   But you didn't -- you have an  
15   appeal from the revocation of that C of O,  
16   0800102.   So we are not really here, at this  
17   posture, for whether that was a legitimate or  
18   not legitimate C of O.

19                   The issue here is more how you are  
20   tying the -- how you are supporting the Zoning  
21   Administrator's decision to issue the November  
22   4, '09 C of O, given the history of C of Os on

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1 the site.

2 MS. MILLER: Yes.

3 CHAIRMAN LOUD: Correct?

4 MS. MILLER: I see what you are  
5 saying.

6 CHAIRMAN LOUD: Because you are  
7 not protesting or appealing from that earlier  
8 2008 revocation, right?

9 MS. MILLER: No.

10 CHAIRMAN LOUD: Okay.

11 MS. MILLER: No. As part of your  
12 looking into the business and entering into  
13 the business arrangements that you have, what  
14 information did you find out about prior  
15 ownership and prior use of the premises as a  
16 grocery?

17 MR. HART: There was only two or  
18 three ways you could really go about doing  
19 that. First being the knowledge that I have  
20 of the business and the firsthand knowledge  
21 being on all three floors, I could tell that  
22 all three floors, the only purpose that they

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1 had related was that towards the support or  
2 operations of the grocery store.

3 The second was we did go to DCRA,  
4 pulled up all the former Certificate of  
5 Occupancies and looked at how it had been used  
6 before. We have already established what that  
7 tells us.

8 And lastly, through talking to the  
9 former owner and other individuals in the area  
10 that lived in the area and through the  
11 information they gave us, that's where we had  
12 the basis for what we moved forward with.

13 MS. MILLER: Now, in the process  
14 of renovating the building, which has been  
15 taking place since July of 2009, what did you  
16 discover about the size or the placement of  
17 the areas that had been used for storage and  
18 what had been used for actual sales and  
19 retail?

20 MR. HART: I think this is the one  
21 that I really wanted to address, Mr. Chairman,  
22 when you came back and asked us for what

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1 information we could give you.

2 I'll say this, like I said, I  
3 absolutely know that the three floors had no  
4 other purposes besides that of either direct  
5 correlated -- direct purposes of the grocery  
6 store or supporting services.

7 When we went to take it over, one  
8 of the things we wanted to do was really  
9 maximize the efficiency of the space. I think  
10 Mr. Le Grant brought up the Cosco concept of  
11 bringing a lot of the inventory from the back  
12 and putting it on the shelves.

13 And so there was no -- or a  
14 question was asked earlier about the first  
15 floor. There was no inventory stored on the  
16 first floor. I've been in that store. Unless  
17 there was a box here or a box there, all of  
18 her stuff she kept on the other two floors.

19 We cleaned that all out. It was a  
20 mess. And now we have an employee locker room  
21 on the second floor. And by locker room, it  
22 is not a big locker room. We don't have the

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1 space for that. But I'm basically talking  
2 about an employee bathroom, obviously, some  
3 lockers for their personal items.

4 We have an office up there. I  
5 have storage on the first floor where there  
6 used to never be any storage there. And we do  
7 have storage on all three floors. So we have  
8 moved around a lot of things and really  
9 cleaned it up. But everything that we are now  
10 doing is also either supporting the grocery  
11 store or part of the operations of the grocery  
12 store.

13 We also did remove the benches  
14 that were out front. The 1997 case mentioned  
15 that you shouldn't have delivery service of  
16 over 50 percent with pizza. We won't be doing  
17 that. That's not something that we are  
18 interested in doing.

19 And also, we removed the benches,  
20 so there is no -- we are no longer welcoming  
21 the incidents that were faced in front of this  
22 Board 10 years ago.

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1 MS. MILLER: In your examination  
2 of the record and in your research that you  
3 did respecting the use of the prior -- by the  
4 prior owners of the building, did you ever  
5 encounter a use other than a grocery store?

6 MR. HART: Besides that of the  
7 pizza delivery shop, never. I do believe she  
8 did pizza before she really moved to pizza  
9 delivery, but I could not testify to that.

10 MS. MILLER: And the space that is  
11 allocated for the upper floor, the second  
12 floor, do you know how much the square footage  
13 is?

14 MR. HART: With or without the  
15 deck?

16 MS. MILLER: Without the deck.

17 MR. HART: I want to say it is  
18 600. I'm not certain off the top of my head.

19 MS. MILLER: The --

20 MR. HART: It's not as big as the  
21 first floor.

22 MS. MILLER: -- plans would show

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1 that?

2 MR. HART: Yes, the plans would  
3 show that.

4 MS. MILLER: And at this point,  
5 the building has been outfitted for commercial  
6 purposes, correct?

7 MR. HART: Yes. We will actually  
8 be open in the next week, if it weren't for  
9 the snow, we would have already been opened.  
10 But, yes, we have finally come to the point  
11 where we can serve the community again.

12 MS. MILLER: And as a result of  
13 the renovations to the building, has it been  
14 brought up to code?

15 MR. HART: Yes.

16 MS. MILLER: And were some of the  
17 code issues fairly serious?

18 MR. HART: Yes.

19 MS. MILLER: If I could ask the  
20 panel, is there additional information that  
21 you need about the Certificates of Occupancy,  
22 at this point?

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1                   CHAIRMAN LOUD: My personal sense  
2 is that the record is pretty full. I mean,  
3 obviously, if you have something relevant that  
4 is not already in the record, this would be a  
5 good time to put it in. And I'll defer to  
6 other Board Members on their thoughts.

7                   MEMBER MOLDENHAUER: Chairman  
8 Loud, I agree with you. I think that the  
9 record is very full. I think that Mr. Le  
10 Grant and DCRA have provided sufficient  
11 information. I don't believe there is any  
12 additional information I would need, at this  
13 point.

14                   MS. MILLER: And then as far as  
15 the Certificate of Occupancies issues are  
16 concerned, then we have no more to present.

17                   CHAIRMAN LOUD: Thank you. Let's  
18 turn to DCRA and see if there is any  
19 examination of the witness. And then we will  
20 turn to Ms. Kahlow.

21                   MR. SURABIAN: I just have a  
22 couple of questions.

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1                   In what year did you purchase the  
2 property?

3                   MR. HART: I'm sorry?

4                   MR. SURABIAN: In which year did  
5 you purchase the property?

6                   MR. HART: We didn't purchase the  
7 property, but I purchased the assets of the  
8 business in 2009.

9                   MR. SURABIAN: Okay.

10                  MR. HART: The George Washington  
11 University owns the property.

12                  MR. SURABIAN: Oh, I'm sorry. And  
13 how was the second floor configured at that  
14 time? What was up there? What did it look  
15 like?

16                  MR. HART: There was -- when you  
17 walked in, there was a desk and there was a  
18 bunch of boxes of receipts from the last 8 or  
19 10 years. There was files. There was a  
20 closet. It was pretty haphazardly kept  
21 together. There was a bathroom. She used as  
22 her personal office. Besides that, there was

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1 nothing else. There was a couple of chairs  
2 that you could have a meeting with if you  
3 wanted to, but nothing else.

4 MR. SURABIAN: Okay. And I think  
5 that's my only question. Nothing further.

6 CHAIRMAN LOUD: Thank you, Mr.  
7 Surabian. And, Ms. Kahlow?

8 MS. KAHLOW: I have no questions  
9 of this witness. Thank you.

10 CHAIRMAN LOUD: Thank you very  
11 much. Ms. Miller, do you have any additional  
12 witnesses?

13 MS. MILLER: Not related to the  
14 Certificate of Occupancy issue, no.

15 CHAIRMAN LOUD: Okay. Then where  
16 we are in the proceeding is that the ANC has  
17 submitted a report. It is a report that does  
18 not take a position at all, as I understand  
19 it. It is our Exhibit 14, ANC-2A.

20 I see Commissioner Coder here. I  
21 don't necessarily think that we need to have  
22 testimony on the record in light of the fact

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1 that it is a neutral recommendation. We'll  
2 just take note of the fact that it has been  
3 submitted for the record.

4 We will now turn back to the  
5 appellant, Ms. Kahlow, for rebuttal and  
6 rebuttal is limited to rebutting specific  
7 testimony that came out from the witnesses,  
8 given that you have declined to cross Mr.  
9 Hart.

10 So it would be an opportunity to  
11 rebut the testimony of either Mr. Hart or Mr.  
12 Le Grant and then closing statement by the  
13 appellant.

14 MS. KAHLOW: In the abundance of  
15 your time, I think that rebuttal is not  
16 necessary, just a closing. Would you like me  
17 to give the closing now or wait for something  
18 else?

19 CHAIRMAN LOUD: No, we would like  
20 you to give the closing.

21 MS. KAHLOW: Thank you. In  
22 closing, I have six points to make.

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1           The first is the D.C. Law. The  
2 law in various D.C. Court decisions governing  
3 nonconforming grandfather uses are clear. The  
4 law forbids any enlargement of a nonconforming  
5 use, including no additional square footage,  
6 no additional floors for an actual use, not  
7 storage, not office space, but an actual use  
8 for sales use.

9           The statute makes clear that a  
10 prior existing nonconforming use is to remain  
11 limited to its original dimensions. It may  
12 not be extended throughout the building.

13           I believe the WECA has met its  
14 burden of proof by establishing from sworn  
15 testimony before the BZA by the former owner  
16 of the Foggy Bottom Grocery that her sales,  
17 grocery sales were on one floor only.

18           The recent half page document for  
19 her and the DCRA's 2/19 submission was neither  
20 under oath nor subject to cross examination by  
21 the BZA or the WECA. And it contradicts the  
22 written document that she submitted after the

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1 hearing in the BZA case file for the former  
2 case that there was only grocery use on one  
3 floor.

4 The Board cannot make a decision  
5 which is inconsistent with D.C. Law, i.e., it  
6 cannot allow grocery sales or food sales on  
7 more than one floor.

8 The second point, substantial  
9 change or change in use. As you know, the C  
10 of O says change in use. The sworn testimony  
11 from the former Foggy Bottom Grocery owner  
12 reveals that the former grocery only sold  
13 prepackaged sandwiches that were prepared off-  
14 site.

15 So FoBoGro's proposed substantial  
16 change to include freshly prepared sandwiches  
17 and other on-site prepared foods would be an  
18 expansion of a limited nonconforming  
19 grandfathered use, which the D.C. Court of  
20 Appeals has clearly ruled is not allowed.

21 "The D.C. Court of Appeals has  
22 ruled that nonconforming uses are not favored

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1 and must be regulated strictly and any  
2 expansion would defeat one of the major  
3 purposes of the Zoning Regulations, namely the  
4 gradual elimination of existing nonconforming  
5 structures."

6 Because of the BZA ruling on the  
7 Papa John's case, thank goodness, this is now  
8 residential use and a Residential Zone.

9 The -- Mr. Turnbull asked  
10 wonderful questions about the separate and new  
11 carryout area that are showed in the  
12 structural diagrams for the basement. And  
13 clearly this is a change in use and that is  
14 why I believe the C of O said change in use.

15 The third case, BZA Rules and  
16 Precedents. The BZA's Rules do not allow the  
17 addition of accessory prepared food shops if  
18 there is any heating equipment other than a  
19 microwave or toaster, i.e., not a Panini  
20 Press.

21 The only other BZA accessory  
22 prepared food case for a nonconforming grocery

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1 permitted limited addition of essentially only  
2 coffee and hot dogs. No expansion of the  
3 grocery square footage, just coffee and hot  
4 dogs.

5 Granting the requested extensive  
6 expansion would set a danger citywide  
7 precedent to other grandfathered properties in  
8 residential uses, even if they have other  
9 floors that may be in some way related to  
10 storage or office use, but the sales is only  
11 on one floor. This could be a very bad  
12 precedent citywide.

13 Four, there is nothing in the  
14 structural diagrams that shows for a  
15 completely renovated facility handicap access.

16 As you questioned properly to access either  
17 the first or second floors, you need to go up  
18 stairs. To enter the basement, you need to go  
19 down stairs. There is no handicap access,  
20 which I believe the ADA requires for a  
21 completely renovated facility.

22 Five, we still believe that the C

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1 of O was issued invalid -- is invalid under  
2 DCRA's own rules, because it was prematurely  
3 issued before the extensive construction was  
4 completed. It was not completed November 4,  
5 '09. It is still not completed.

6 Now, number six, we ask for the  
7 WECA to direct the -- to revoke the C of O  
8 and to clarify the limited terms of any  
9 replacement C of O for only one story of  
10 grocery sales and two floors could be storage  
11 or whatever, if they have to have three floors  
12 and to fix the change in use provision, if it,  
13 in fact, is not what was intended.

14 In any case, the C of O, the  
15 11/4/09 C of O is defective as already  
16 testified by the Zoning Administrator. So  
17 that C of O has to be revoked and we ask that  
18 the BZA direct one floor of grocery or food  
19 sales and a description of what would be on  
20 the other floors as well.

21 Thank you for your letting us  
22 present our case today, considering the

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1       lateness of the hour also.

2                   CHAIRMAN LOUD:   Okay.   Thank you,  
3       Ms. Kahlow.   Thank you, Ms. Maddux.   I want to  
4       thank counsel as well and the witnesses that  
5       have appeared for your patience in making it  
6       through what has been a fairly long day.  
7       Everyone did an outstanding job of putting the  
8       information on the record, even prior to our  
9       coming out here, and have helped to illuminate  
10      most of the issues for our consideration once  
11      you came out here.

12                   And I also want to thank you for  
13      sticking to the narrow scope that we defined  
14      at the outset.   I think it was very helpful in  
15      keeping us on track.

16                   We have got a couple of options,  
17      at this point.   We can deliberate the case  
18      today, particularly if we think the record is  
19      full.   Sometimes it's helpful to do that,  
20      because all the information is fresh, or we  
21      can set it for decision.

22                   I think we are interested in going

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1 forward with the deliberation today, based on  
2 their being a full record. And I think that  
3 once we do that, we will move into the Francis  
4 case, which should not take us very long.

5 And I do believe that Board Member  
6 Moldenhauer was going to start us off on the  
7 deliberation.

8 MEMBER MOLDENHAUER: Thank you,  
9 Chairman Member Loud. The case before us in  
10 Appeal No. 18031 is an issue of whether or not  
11 the ZA erred in issuing the C of O for Foggy  
12 Bottom Grocery, No. CO1000323. That C of O  
13 was issued for a grocery store use and for the  
14 location at 2140 F Street.

15 We first addressed the issue that  
16 we were not -- there was two really major  
17 factors being raised in the appeal. One was  
18 the potential issue of whether or not the  
19 grocery store was able to also provide  
20 prepared foods as a matter-of-right.

21 And we addressed that issue first  
22 by relying on the case of Se Jeong, which was

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1 Appeal No. 17906, which was decided by the BZA  
2 on April 14, 2008.

3 That case specifically was on  
4 point for this case. While it was a case of  
5 first impression by the BZA, it was a little  
6 more narrow than I believe my final analysis  
7 comes out this evening.

8 That case did though address  
9 whether or not a nonconforming grocery needed  
10 a special exception to provide additional  
11 prepared foods and the BZA determined, in that  
12 case, that they did not, that it was  
13 considered to be part of the principal use and  
14 was not something that required an additional  
15 accessory use.

16 We asked the appellant to provide  
17 any argument that would provide any  
18 distinctions on that case law to the present  
19 case. And I believe the only testimony that  
20 we heard was the issue that that case  
21 specifically stated four different types of  
22 use and that it would have no other use.

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1           And while that case does make such  
2 a reference, that case only makes reference,  
3 as I said I think previously, based on the  
4 fact that it was a matter of first impression  
5 and, two, the fact that it specifically then  
6 clarifies that statement and says that it is  
7 talking about the fact that it cannot say, as  
8 a matter of law, that the ordinary operation  
9 of a grocery store does not include packaged  
10 beers or wine or sales.

11           And so I don't think that we need  
12 to look at that case so narrowly. And I think  
13 that in the new found use of a grocery store,  
14 there are a lot of grocery stores, such as,  
15 you know, Whole Foods in the District of  
16 Columbia, you have, you know, Safeway and  
17 Giant which all nowadays, as of what is  
18 considered a traditional grocery store, have  
19 the general prepared food uses as a part of  
20 their principal use.

21           And so with that case, relying on  
22 that case, I think that that can be dismissed

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1 and we can move on to then the secondary issue  
2 of the case, as to whether or not the C of O  
3 was issued in error as to whether the number  
4 of floors and the square footage, based on  
5 prior nonconforming use.

6 We had the applicant testify that  
7 they had knowledge of only the first floor use  
8 being used. But they also testified that they  
9 had seen the lower level being used as  
10 storage, but that they had all -- both the  
11 applicant and Ms. Maddux testified that they  
12 had never been up onto the second floor to  
13 know whether or not there was any related use.

14 In addition to that, Ms. Maddux  
15 and Ms. Kahlow also both confirmed in their  
16 testimony that they had generally no knowledge  
17 of any other use being in that building since,  
18 you know, around the '70s.

19 And so that in conjunction with  
20 the DCRA's testimony by Mr. Le Grant and his  
21 review of the prior C of Os going back to '77,  
22 illustrate that, in his research, there was no

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1 other use of the property.

2 And I think that, one, based on  
3 the appellant's arguments, they really don't  
4 provide any additional support for their case.

5 In closing remarks, Ms. Kahlow relies heavily  
6 on the prior owner's testimony.

7 However, she was not here and  
8 simply relying on transcript testimony and you  
9 can't cross her and provide additional  
10 understanding as to what her statements were  
11 and that was also then contradicted by Mr.  
12 Hart's testimony as to his working with the  
13 prior owner, you know, as an employee.

14 And then in his review as a  
15 potential purchaser of the business as to what  
16 was actually occurring on the second floor and  
17 in the basement. And I think that the fact  
18 that the appellant's, both, witnesses could  
19 not provide specific personal testimony that  
20 those uses were not used in conjunction with  
21 the grocery store, I think weakened their case  
22 and go to an issue of whether or not they

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1 actually satisfied the burden.

2 DCRA, I think, also provided  
3 sufficient testimony that they did issue a C  
4 of O correctly. There was the point that this  
5 is not a case of enforcement. DCRA has to  
6 issue a C of O based on the applicant for the  
7 Certificate of Occupancy and the permit plans.

8 And that they are not reviewing  
9 the actual operation or the intent of the  
10 business owner, but rather the ZA, Mr. Le  
11 Grant, analyzing prior Certificates of  
12 Occupancy and then also the building plans.

13 And I think that based on that,  
14 his determination that all levels had been  
15 used in the past in conformity with the  
16 grocery store use, that there were C of Os  
17 both for the first floor, the second floor and  
18 the basement and that in his experience there  
19 was an understanding that there would be need  
20 for inventory or office space that would be in  
21 conjunction with the C of O for a grocery  
22 store that he was correct in issuing a C of O.

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1 I'll open the floor up for any  
2 additional analysis.

3 CHAIRMAN LOUD: Thank you, Board  
4 Member Moldenhauer. It was a very thorough  
5 analysis of the legal framework and the  
6 evidence. Are there other Board Members that  
7 want to weigh in?

8 Okay. Then I'll very briefly  
9 weigh in and just go over the six points, I  
10 think, that Ms. Kahlow made in her closing  
11 statement and respond to those very, very  
12 briefly. And I think we can call for a  
13 motion.

14 The first point she made was that  
15 the law precludes extension of a nonconforming  
16 use. I think generally speaking, that is an  
17 accurate statement of the law. And I think we  
18 would all agree with that. But I think the  
19 very question here was whether the  
20 nonconforming use had been extended.

21 And agreeing with the statement of  
22 the law by the appellant doesn't necessarily

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1 mean you draw the same conclusion that in this  
2 case it had been extended. So that's my  
3 response to that and I'll talk a little bit  
4 about whether or not it has been extended.

5 I think Board Member Moldenhauer  
6 covered it very thoroughly though.

7 The second point she made was that  
8 the prior owner testified under oath that she  
9 only sold groceries from the first floor. And  
10 I think Board Member Moldenhauer addressed  
11 that issue. And all I will add to that is  
12 that that would not be dispositive of whether  
13 previous C of Os authorized groceries to be  
14 sold throughout the entire building.

15 It would just speak for the prior  
16 owners either decision to sell from only one  
17 floor or understanding of what the C of O  
18 would have allowed, but would not have been  
19 dispositive.

20 The third point she made was that  
21 the BZA Rules do not allow Panini and kitchen  
22 equipment for prepared food shop. I think

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1 that with respect to that issue, it's an  
2 enforcement issue. And if, in fact, the  
3 appellee would be operating beyond the scope  
4 of the C of O, that would be an issue.

5 And we have had cases where DCRA  
6 has been contacted. They have conducted an  
7 investigation and if it were found that the  
8 owner of the C of O was operating outside of  
9 that, DCRA would take the appropriate action  
10 and could either appeal that action or the  
11 community could appeal that action.

12 So we are not an enforcement body  
13 at BZA.

14 The fourth point that she made was  
15 that nothing shows the handicap access. I'm  
16 not certain if I fully understood that, but  
17 that would be beyond the jurisdiction of the  
18 BZA as a zoning issue with respect to whether  
19 the Building Code requires that and whether it  
20 has been complied with with respect to the  
21 plans.

22 The fifth issue is the contention

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1 that the C of O was issued prior to completion  
2 of the construction. I think that Matt Le  
3 Grant, in his testimony, addressed that issue  
4 very specifically and rebutted that contention  
5 of the witness. I find his testimony credible  
6 in that regard, as he is in a position to know  
7 and understand that issue.

8 And then the sixth, and I believe  
9 final point, was that she, the appellant,  
10 requested the Board to direct that one floor  
11 of the grocery store is all -- I guess she was  
12 saying, that we only allow grocery store on  
13 one floor.

14 But again, if we are making a  
15 finding, as Board Member Moldenhauer's  
16 excellent analysis laid out, that the C of Os  
17 prior to 2000, between '58 and 2000, permitted  
18 the grocery use throughout the entire  
19 building, there would be no reason for us to  
20 in any way restrict that.

21 Finally, I just wanted to add,  
22 with respect to Mr. Le Grant's testimony, that

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1 he made it very clear that given his  
2 experience, and we qualified him as an expert,  
3 there were no objections to him being  
4 qualified as an expert, except for Ms. Kahlow  
5 wanting it to be limited to D.C. and I think  
6 in his pertinent testimony he talked about his  
7 review of this site and C of Os on this site  
8 as an expert, that part of what he testified  
9 to was that the inventory and the office space  
10 that were dedicated to the grocery use are  
11 part of the principal grocery store use.

12 And he said that in a number of  
13 different ways. He talked about his knowledge  
14 that grocery stores include areas that are not  
15 accessible to the public. He knows that  
16 grocery stores include both storage and office  
17 space and that these uses are absolutely  
18 critical to the operation of the grocery  
19 store, as long as they don't constitute the  
20 majority of the floor area. And no floor area  
21 had been added.

22 So I think in light of everything

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1 Board Member Moldenhauer said, I too am  
2 supportive of the direction that you are  
3 suggesting for us.

4 And in closing, let me just say  
5 that there was in our record, I think it was  
6 at Exhibit 17, it was a DCRA questionnaire.  
7 And in the questionnaire, the, I guess, DCRA  
8 had entered change of use as the answer for an  
9 item requesting the type of occupancy. I  
10 believe this was the November C of O.

11 But under oath here this  
12 afternoon, Mr. Le Grant testified that that  
13 was a mistake and that it should have  
14 indicated change of ownership. And again, I  
15 think he is credible as a witness and he is  
16 sworn under oath. And so I think the point he  
17 was trying to make was that he was not  
18 conceding that it was a change of use, but  
19 rather a change of ownership.

20 MEMBER MOLDENHAUER: Chairman  
21 Loud, I think that you are just -- I think  
22 those facts are a little confused.

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1 CHAIRMAN LOUD: Yes?

2 MEMBER MOLDENHAUER: I think you  
3 are referring to Exhibit E, second page, which  
4 was the '08 application. And that is  
5 something that is filled out by the applicant,  
6 the second section No. 9 is actually squared  
7 ownership change not change of use. The  
8 change of use is Exhibit A and that was the  
9 later C of O, '09, and I think that Mr. Le  
10 Grant testified that that was an error,  
11 because the change of ownership had already  
12 been issued under Exhibit E, which is the  
13 August 21, 2008 C of O.

14 And thus, instead of changing  
15 ownership again, there was an error and they  
16 identified it as changing use, because it was  
17 the old incorrect prior C of O, which included  
18 the sandwich shop, changing that then to the  
19 current description of the occupancy.

20 Is that --

21 CHAIRMAN LOUD: Well, I think it's  
22 an important point. I think we are saying the

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1 same thing, but I think because the record has  
2 so many different copies of the same things  
3 and different exhibits, what I'm referring to  
4 is marked as Exhibit A. It's a DCRA's Exhibit  
5 17. And it would be the November 4<sup>th</sup>  
6 Certificate of Occupancy.

7 And then if you look on that  
8 document under type of occupancy, which would  
9 be about the one, two, three, four, maybe the  
10 fifth row down, it says type of occupancy and  
11 then it says use change.

12 MEMBER MOLDENHAUER: Yes.

13 CHAIRMAN LOUD: And I think the  
14 suggestion was made that the ZA considered  
15 this a change of use. But his testimony on  
16 the record correcting that was that it should  
17 have been entered as an ownership change.

18 In other words, it was human  
19 error. It was a mistake. I just wanted to  
20 clarify that that's not something in the  
21 record that would tend to suggest that DCRA  
22 viewed it as a change of use.

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1                   So with that said, are there other  
2 Board Members that want to weigh in?

3                   COMMISSIONER TURNBULL: Mr. Chair,  
4 I would just concur with your assessment and  
5 Ms. Moldenhauer's assessment. I think they  
6 were very good analyses.

7                   CHAIRMAN LOUD: Thank you, Mr.  
8 Turnbull. Is there a motion?

9                   MEMBER MOLDENHAUER: Yes. A  
10 motion to deny the appeal under Appeal No.  
11 18031 finding that the ZA did not err in  
12 issuing C of O No. CO1000323 on November 4,  
13 2009 for the Foggy Bottom Grocery, LLC at the  
14 address of 2140 F Street, N.W.

15                  CHAIRMAN LOUD: Thank you, Board  
16 Member. Is there a second?

17                  COMMISSIONER TURNBULL: Second.

18                  CHAIRMAN LOUD: All right. The  
19 motion has been made to deny Appeal No. 18031  
20 and seconded. Is there further deliberation?

21                  Hearing none, all those in favor  
22 say aye.

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1 ALL: Aye.

2 CHAIRMAN LOUD: All those who  
3 oppose? And any abstentions? And, Ms.  
4 Bailey, can you read back the vote, please?

5 MS. BAILEY: Mr. Chairman, the  
6 vote is recorded as 4-0-1 to deny the appeal.  
7 The motion was made by Board Member  
8 Moldenhauer, seconded by Commissioner  
9 Turnbull, Board Member Sorg and Loud support  
10 the motion. Board Member Dettman is not  
11 present, not voting.

12 CHAIRMAN LOUD: Thank you. I want  
13 to commend again the appellant, Ms. Kahlow,  
14 Ms. Maddux. I want to commend DCRA as well as  
15 the owner, Ms. Miller and Mr. Hart for your  
16 presentations and your patience this  
17 afternoon.

18 Is there anything further on this  
19 case?

20 MS. BAILEY: No, Mr. Chairman.

21 CHAIRMAN LOUD: Okay. Why don't  
22 we call the final case for this evening?

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1 MR. SURABIAN: Mr. Chairman, thank  
2 you, Mr. Chairman.

3 CHAIRMAN LOUD: Thank you.

4 MR. HART: Thank you.

5 MS. BAILEY: The last case of the  
6 day is Appeal No. 18029. It's the Appeal of  
7 Friends of Francis Field and it is pursuant to  
8 11 DCMR ' 3100 and 3101, from a September 25,  
9 2009, decision of the Zoning Administrator,  
10 Department of Consumer and Regulatory Affairs,  
11 to issue a Certificate of Occupancy No.  
12 CO903586, allegedly in violation of Zoning  
13 Commission Order No. 06-35. The property is  
14 Zoned CR. It is located at 1255 25<sup>th</sup> Street,  
15 N.W., Square 24, Lot 883.

16 CHAIRMAN LOUD: Thank you, Ms.  
17 Bailey. Is there a need for any setup in this  
18 case? No? Okay. There appears to be some  
19 need --

20 MS. MILLER: Yes.

21 CHAIRMAN LOUD: -- for setup.

22 MS. MILLER: Just a little bit of

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1 setup.

2 CHAIRMAN LOUD: Okay. Just a  
3 little bit of setup. So if you -- yes, sir?  
4 I don't believe you can be heard right now.  
5 That green light will come on.

6 MR. GRIFFITH: I'm sorry, it's on  
7 now.

8 CHAIRMAN LOUD: There you go.

9 MR. GRIFFITH: We just have to  
10 turn the computer on.

11 CHAIRMAN LOUD: Okay.

12 MR. GRIFFITH: We have a  
13 PowerPoint presentation. We think it will  
14 be --

15 CHAIRMAN LOUD: That's fine. Then  
16 no penalties. I was just going to suggest why  
17 don't we give you a few minutes to do setup  
18 and we will break for about three minutes.  
19 Okay, three to five minutes and we will come  
20 right back. Okay.

21 MR. GRIFFITH: Thank you, Mr.  
22 Chairman.

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1 CHAIRMAN LOUD: All right.

2 (Whereupon, at 7:36 p.m. a recess  
3 until 7:49 p.m.)

4 CHAIRMAN LOUD: Good evening, at  
5 this point. We are now back on the record for  
6 the final case of the evening. I believe Ms.  
7 Bailey is already called that case and the  
8 parties are at the table preparing and ready  
9 to introduce themselves and get started with  
10 the PowerPoint.

11 Before we get started with the  
12 PowerPoint though, why don't we have everyone  
13 at the table introduce yourselves? And  
14 following that, we will proceed from there.  
15 Starting on my far left and moving through.

16 MR. GRIFFITH: My name is Gary  
17 Griffith, I'm secretary of the Friends of  
18 Francis Field, a nonprofit organization.

19 CHAIRMAN LOUD: Good evening, Mr.  
20 Griffith. And who is to your right?

21 MR. HASPEL: I'm Chris Haspel,  
22 just assisting Mr. Griffith with the audio/

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1       visuals.

2                   CHAIRMAN LOUD:    All right.    Good  
3       evening.

4                   MR. HASPEL:    Thank you.

5                   MR. AVITABILE:    Dave Avitabile, a  
6       land use counsel with Pillsbury Winthrop Shaw  
7       Pittman, counsel for Vornado, Charles E.  
8       Smith, the owner of the property.

9                   CHAIRMAN LOUD:    Good evening, Mr.  
10      Avitabile.

11                  MR. EPTING:    I'm John Epting, also  
12      with Pillsbury.

13                  CHAIRMAN LOUD:    Good evening, Mr.  
14      Epting.

15                  MS. MILLER:    I'm Constance Miller  
16      with Manning Sossamon. I'm here on behalf of  
17      the ANC-2A.

18                  CHAIRMAN LOUD:    Okay.

19                  ZONING ADMIN. Le GRANT:    Matthew  
20      Le Grant. I'm the Zoning Administrator.

21                  CHAIRMAN LOUD:    Good evening  
22      again, Mr. Le Grant.

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1 MR. SURABIAN: Assistant Attorney  
2 General, Jay Surabian here on behalf of DCRA.

3 CHAIRMAN LOUD: All right. Good  
4 evening to each of you.

5 We have -- I'm sorry, and  
6 Commissioner?

7 MS. CODER: Thank you. I'm  
8 Rebecca Coder. I'm the Chair of ANC-2A.

9 CHAIRMAN LOUD: Good evening  
10 again. We saw you earlier in one of our cases  
11 earlier today.

12 We have reviewed the record and  
13 sort of pieced together what we suspect are  
14 the issues in the case. And I want to turn it  
15 over to Board Member Moldenhauer just to help  
16 us frame what we see as maybe the most  
17 pertinent issue here.

18 MEMBER MOLDENHAUER: Well, I don't  
19 know if I would qualify it as the most  
20 pertinent issue. I think I would just kind of  
21 phrase where we stand from what our  
22 understanding is from the current

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1 documentation in our hearing folders. And  
2 then pose one question to Mr. Griffith to kind  
3 of pose, I think, one of the questions that  
4 some of the Board Members have. And then we  
5 can kind of go from there.

6 What we understand the issues to  
7 be are that the appellant is questioning  
8 whether or not the DCRA had the authority to  
9 issue the C of O based on the escrow agreement  
10 in place, because the amenities had not yet  
11 been provided.

12 But I guess one of my questions is  
13 is there any issue with the actual amenities  
14 that are currently, I guess, anticipated to be  
15 provided or starting to be provided?

16 MR. GRIFFITH: Yes, the escrow  
17 attempts to satisfy \$350,000 worth of amenity  
18 proffers with about \$111,000. There is  
19 \$200,000 missing in the escrow. There is  
20 \$164,000 missing just in Condition C, 10C, and  
21 that is one of the most important issues.

22 The other issue is whether the

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1 escrow itself was truthful in its assumption  
2 that there had to be an escrow because issues  
3 were out of control.

4 But the number one thing is the  
5 missing money in the escrow.

6 MEMBER MOLDENHAUER: So if that  
7 issue can be addressed, and my understanding  
8 is that the amenities are already starting to  
9 be provided or the construction has started,  
10 would that then, I guess, eliminate the  
11 concerns of the applicant?

12 MR. GRIFFITH: We think this case  
13 can be solved very easily. And we would like  
14 the case to be moot. We think that Vornado  
15 has to provide the amenities at the full value  
16 either -- by installing them as the order  
17 states. We really don't have an objection to  
18 an escrow settling the case, but this escrow  
19 was put in without any notice to the  
20 Commission, to us. This was put in as an ex-  
21 parte. It never went back to the Commission.

22 We had to file a Freedom of

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1 Information Act to get the actual escrow,  
2 which, as we say, shortchanges the  
3 neighborhood and the value here of over  
4 \$200,000.

5 MEMBER MOLDENHAUER: Well --

6 MR. GRIFFITH: Which we will show.

7 MEMBER MOLDENHAUER: -- based on  
8 that testimony, I would then ask you, you  
9 know, one, based on what you are stating is  
10 the limited aspect of your concern on the  
11 appeal that you narrow your testimony to that  
12 issue simply of, I guess, the way in which the  
13 escrow is drafted, the value and then any  
14 concerns about how that would potentially  
15 conform or not conform with the Zoning  
16 Commission order.

17 Is that correct?

18 MR. GRIFFITH: Yes, I have no  
19 problem doing that. What I'm -- the other  
20 thing we want to say though is that we don't  
21 think that the Zoning Administrator had the  
22 authority to substitute an escrow anyway, I

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1 mean, in the first place.

2 We are going to say if you find  
3 that -- we would like you to find that he  
4 didn't have the authority at all. We don't  
5 think he did. And we don't think they can  
6 cite any statute that says that he did or  
7 regulation.

8 And the case could end right  
9 there, but we are not really asking you to  
10 throw all the tenants out of the building,  
11 which would be the result, we would think, of  
12 your revoking the Certificate of Occupancy for  
13 the building.

14 So we are not opposed to -- you  
15 know, we think you should find that he didn't  
16 have the authority to do this.

17 MEMBER MOLDENHAUER: Okay.

18 MR. GRIFFITH: And that there  
19 ought to be a new escrow that ought to be --  
20 that ought to put the money back in and this  
21 Commission has all of the powers, this Board  
22 has all of the powers of the Zoning

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1 Commission. So you can decide the case.

2 MEMBER MOLDENHAUER: I don't think  
3 the authority of the decision of the case is  
4 the question. What I would ask now is if  
5 there are any other questions from other Board  
6 Members? I think we can really limit the  
7 testimony not to any of the, I guess, past,  
8 but more just focused on the value of the  
9 escrow and any concerns about the actual  
10 escrow agreement.

11 MR. GRIFFITH: May I ask if the  
12 truthfulness of the rationale for the escrow  
13 is allowable?

14 CHAIRMAN LOUD: I think it's a  
15 permissible scope, but I think it is -- in  
16 light of what you have indicated in response  
17 to Board Member Moldenhauer, it sounds like a  
18 subordinate issue almost to the issue of the  
19 amount of the escrow and the adequacy of the  
20 escrow to address the commitment to the  
21 amenities. Am I stating that fairly?

22 MR. GRIFFITH: Mr. Chairman, I

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1 think I understand that you want to limit the  
2 time here and I'm willing to try to do my best  
3 to do it. We were scheduled to go on, as you  
4 know, on the 11<sup>th</sup>. We got delayed a couple of  
5 times. But we are ready to go on with the  
6 case and we will try to narrow it to the  
7 issues that you want to hear.

8 CHAIRMAN LOUD: Okay. Well, I  
9 think, you know, regardless of how long it  
10 goes, we probably are going to try to narrow  
11 it to the most relevant issues. But we are  
12 not going to limit the case at all. Now, we  
13 may have to continue it from tonight to  
14 address all of the issues, because we're not  
15 going to be able to get through the whole  
16 thing tonight, I don't suspect. We will  
17 probably go for about another hour and even  
18 before then we're going to lose one Board  
19 Member.

20 So I don't want you to think we  
21 are cutting your case short, but we are just  
22 saying that given what you have indicated

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1 about the amount in the escrow being an issue  
2 and there not being a clear meeting of the  
3 minds on that, that ought to be, to me, the  
4 first issue we focus on.

5 And then to the extent that that  
6 doesn't get us through the case, then the  
7 subordinate issue, I think, would be the  
8 latter issue that you raised regarding the  
9 authority of the ZA with respect to the  
10 establishment of the escrow and the like. It  
11 just sounds to me like the reasonable way to  
12 proceed.

13 I wanted to ask you a question in  
14 response to Board Member Moldenhauer's  
15 suggestion that we ask questions. What is the  
16 exact amount of the escrow that appellant's  
17 contend it should be?

18 MR. GRIFFITH: What do we contend  
19 it --

20 CHAIRMAN LOUD: Yes.

21 MR. GRIFFITH: -- should be?

22 CHAIRMAN LOUD: Yes. You

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1 mentioned that figure.

2 MR. GRIFFITH: It should be  
3 \$350,000. There was \$150,000 proffer for  
4 Condition 10B and a \$200,000 proffer for  
5 Condition 10C.

6 CHAIRMAN LOUD: Excellent. Thank  
7 you. Let's see if other Board Members have  
8 questions that will be helpful to framing sort  
9 of where the evidence goes.

10 MEMBER MOLDENHAUER: I'm sorry,  
11 I've got a follow-up question to that. So my  
12 understanding is that you are saying that  
13 there was a proffer to the value of those  
14 amenities. Is there testimony that you are  
15 going to be providing that the actual building  
16 plans -- have you seen the building plans for  
17 the current amenities that are going to be  
18 going into the --

19 MR. GRIFFITH: The amenities are  
20 going onto the field and the streetscape.

21 MEMBER MOLDENHAUER: I guess my  
22 question is have you seen the building plans

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1 as they exist currently? I think that the  
2 building plans are in existence. They have  
3 been approved. They are starting  
4 construction.

5 MR. GRIFFITH: The building is --

6 MEMBER MOLDENHAUER: Not the  
7 building, the amenities. The amenities for  
8 the -- yes.

9 MR. GRIFFITH: Yes. The answer is  
10 yes, I have seen the plans.

11 MEMBER MOLDENHAUER: Okay. Do  
12 those amenities, in the plans, satisfy the  
13 different amenities that were provided for in  
14 the zoning order?

15 MR. GRIFFITH: No.

16 MEMBER MOLDENHAUER: Okay. So  
17 what elements are missing? There is two  
18 different issues. One is value and a  
19 proffered value. And another one is actual  
20 amenities. So if you are saying that, you  
21 know, one, the value is low on the escrow and  
22 you are saying that's because an amenity is

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1 missing, I think it's good for the Board to  
2 understand what exact amenities you feel are  
3 missing.

4 MR. GRIFFITH: Well, I mean, the  
5 answer is they haven't planted any new trees.

6 MEMBER MOLDENHAUER: Okay.

7 MR. GRIFFITH: They haven't put up  
8 the new fence. They haven't installed any of  
9 the trash containers. They haven't installed  
10 any of the benches.

11 MEMBER MOLDENHAUER: But --

12 MR. GRIFFITH: They haven't  
13 replaced the sidewalk. They haven't installed  
14 the tree boxes.

15 MEMBER MOLDENHAUER: Are the  
16 benches and the trash cans, are those shown?  
17 I mean, those are normally depicted on plans.  
18 Are those shown on the plans?

19 MR. GRIFFITH: Yes, they are shown  
20 on the plans.

21 MEMBER MOLDENHAUER: Okay. And so  
22 then, I guess, what elements are not shown on

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1 the plans that were part of the zoning order?

2 MR. GRIFFITH: Very little. Only  
3 some streetscape elements and removal of curb  
4 cuts and things like that that aren't on the  
5 plans.

6 MEMBER MOLDENHAUER: Can you be  
7 more specific on that?

8 MR. GRIFFITH: Yes. There are --  
9 let me try to just back up one moment and say  
10 that part of the amenity here was a landscape  
11 plan itself, which wound up having to go to  
12 the U.S. Commission of Fine Arts. So there is  
13 that landscape architectural plan, which is  
14 the approved plan by the Commission of Fine  
15 Arts.

16 You had asked me whether I had  
17 seen the construction plans. And the  
18 construction plans and the Fine Art plans  
19 differ in some areas. But what our main  
20 concern is is that they are not going to  
21 install these improvements at the full value.

22 And there is a big difference. I

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1 mean, if you will look at the -- when you see  
2 the plans, you will see a big part of it is  
3 just trees. So there is a big difference in  
4 how many trees you can buy for, you know,  
5 \$200,000 and how many you can buy for what  
6 they have put in the -- the \$111,000 that they  
7 have put in the escrow.

8 So I can't tell you exactly which  
9 trees are missing, but the way that this case  
10 began was with an order that the amenities  
11 actually be installed before a Certificate of  
12 Occupancy was issued.

13 And we agree, we have no  
14 disagreement that this plan got delayed. But  
15 it didn't get delayed in any way in the way  
16 that Vornado has said it did in the escrow.  
17 The escrow blames the National Park Service,  
18 the escrow blames the Commission of Fine Arts  
19 and WASA, the Water and Sewer Authority.

20 None of those -- that's not true.  
21 The delay was caused by Vornado itself and by  
22 the Department of Parks and Recreation. But

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1 nobody could say that in the escrow because  
2 the agreement was between Vornado and Parks  
3 and Recreation.

4 So they had to blame somebody else  
5 and that's where we get to the real truth of  
6 the escrow. The escrow that they are trying  
7 to put in is itself, first of all, not  
8 allowed, secondly, untrue in terms of its  
9 reasons and, three, shortchanges us \$200,000  
10 in value.

11 But the order reads that "No  
12 Certificate of Occupancy should be issued  
13 until the amenities are installed." They  
14 would have you forget and not read that in the  
15 order in this case it says install the  
16 amenities.

17 And as a matter of fact, the  
18 Commission Chair sat right there and said  
19 during the set down hearing that they wanted  
20 this case to read that no Certificate of  
21 Occupancy would be issued until the actual  
22 amenities had been installed because of so

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1 many other problems with PUD amenity cases in  
2 our neighborhood.

3 And that's basically our case.

4 MR. SURABIAN: Could I jump in  
5 with a question for the Board? Does the Board  
6 have DCRA's prehearing statement?

7 CHAIRMAN LOUD: That would be  
8 Exhibit 17. Well, we have marked it as  
9 Exhibit 17.

10 MR. SURABIAN: Okay. There is a  
11 little confusion on if the Board had it.

12 CHAIRMAN LOUD: Yes.

13 MR. SURABIAN: I was just making  
14 sure you do.

15 CHAIRMAN LOUD: I think, you know,  
16 what happened was that the other exhibit from  
17 the West End case was also Exhibit 17 and so I  
18 think it was mixed up in our two files. But  
19 we do have your prehearing dated February 8.

20 MR. SURABIAN: Great. Thanks.

21 CHAIRMAN LOUD: Yes. So we'll  
22 double check and make sure other Board Members

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1 have it.

2 Let me suggest while we are doing  
3 this that we are probably only going to be  
4 able to go until about, oh, my gosh, 8:30 and  
5 it is already 8:00 p.m. So I think we do need  
6 to move into the case.

7 Just very briefly, I wanted to ask  
8 Mr. Epting and Mr. Avitabile to respond to  
9 just this disparity between the \$350,000 that  
10 the appellant has referenced and what you  
11 contend is appropriate. And then we can -- I  
12 think you should be allowed to make your case  
13 on your appeal and we can move directly into  
14 that and get as far along as we can.

15 MR. AVITABILE: Thank you for the  
16 opportunity. I think the easiest way to do  
17 this is just to start with the condition and  
18 talk about what values are associated with the  
19 condition, the Conditions of Approval, and  
20 those are on page 2 of the cover letter from  
21 our prehearing submission.

22 CHAIRMAN LOUD: Yes.

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1                   MR.    AVITABILE:            The    first  
2                   condition was the improvements of Francis  
3                   Field and the requirement there was a  
4                   contribution of design materials and labor for  
5                   improvements to the field valued at \$150,000.

6                   So taking the design, the  
7                   materials and the labor together, total value  
8                   of \$150,000. And as we are prepared to  
9                   discuss, and we discussed in our filings, we  
10                  have actually exceeded that amount in  
11                  materials and labor and design all taken  
12                  together.

13                  What we did in the escrow account  
14                  was, at that point in time, we had already  
15                  completed much of the design, about \$38,000  
16                  worth of design work. And that included some  
17                  survey work, preliminary work to actually  
18                  putting together your construction plans as  
19                  well as the actual preparation of the  
20                  landscape design that Mr. Griffith just, you  
21                  know, pointed out was part of our amenity.

22                  So the remaining balance from the

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1 \$150,000 was about \$111,000 or \$112,000. So  
2 that was part of what was put into the escrow  
3 account.

4 In addition to that, there was  
5 also a proffer to amend the -- which is  
6 Condition 10C, which is for landscape and  
7 streetscape improvements to both sides of 25<sup>th</sup>  
8 Street. And the condition doesn't give a  
9 dollar amount. It was discussed -- excuse me.

10 CHAIRMAN LOUD: Let's just --  
11 gentlemen, gentlemen. Let's just get it all  
12 on the record. Nobody is going to win or lose  
13 their case based on what is said in the next  
14 two or three minutes. But at least then we  
15 will know what the gap is and why the  
16 perceptions are as they are regarding the  
17 gaps.

18 MR. AVITABILE: What I was going  
19 to say --

20 CHAIRMAN LOUD: So we understand  
21 your --

22 MR. AVITABILE: -- is there wasn't

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1 a dollar value put in the condition. During  
2 the hearing, a general amount was discussed of  
3 about \$200,000. And the one point that this  
4 condition does make clear was that the value  
5 of the fence, the new fence that is going to  
6 be removed and installed along the -- in  
7 between the park and the public space was  
8 supposed to come out of the streetscape  
9 budget, not the park budget.

10 And that was done to really make  
11 it clear that the fence was something in  
12 addition to the \$150,000 for the park  
13 improvements.

14 And so what we did in the escrow  
15 account was put an additional, I don't  
16 remember the exact amount, I want to say it  
17 was \$36,000 or \$38,000 into the account to  
18 cover the cost of the fence to make sure that  
19 that was provided for in the escrow agreement  
20 as well.

21 As for the rest of the value of  
22 the streetscape improvements, \$36,000 was for

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1 the fence put into the escrow account. So  
2 that's why the escrow account came to a total  
3 of \$147,000. It was the \$111,000 remaining  
4 for the park improvements plus \$36,000 for the  
5 fence.

6 As to the remaining value of the  
7 streetscape amenity, actually much of that has  
8 already been installed. Everything on the  
9 east side of 25<sup>th</sup> Street has been installed  
10 and that by itself exceeded well over  
11 \$200,000.

12 So that clearly satisfies both the  
13 letter and the intent of the condition with  
14 respect to the east side of the street. And  
15 then as for the west side of the street, once  
16 we complete the improvements that are  
17 discussed here, they will -- obviously, there  
18 will be a new improved streetscape on the west  
19 side of 25<sup>th</sup> Street.

20 As you saw from the plans, this is  
21 an interesting situation where the park  
22 improvement really straddles the property line

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1 into both public and private space. So as a  
2 result of the completion of the park  
3 improvements, the public space will have been  
4 improved as well. And part of that  
5 improvement will include the new fence, which  
6 is covered in the escrow account.

7 So I think that makes it fairly  
8 clear how the accounting works, but I'm happy  
9 to clarify that if the Board has questions.

10 CHAIRMAN LOUD: I just have one  
11 quick follow-up question. Who paid for the --  
12 you're saying a part of this that is not  
13 within that \$150,000 has been substantially  
14 completed, as I understood.

15 MR. AVITABILE: Oh, the design  
16 work?

17 CHAIRMAN LOUD: The \$200,000.  
18 Well, you mentioned a \$200,000 figure that you  
19 said has been approached already in terms of  
20 spending for --

21 MR. AVITABILE: Oh, right.

22 CHAIRMAN LOUD: -- my

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1 understanding. Okay.

2 MR. AVITABILE: Yes, that's for  
3 the streetscape, yes.

4 CHAIRMAN LOUD: And who paid for  
5 that?

6 MR. AVITABILE: We did.

7 CHAIRMAN LOUD: You paid for that.

8 MR. AVITABILE: Vornado paid for  
9 it. And it was part of our improvements. We  
10 constructed it and, you know, paid our  
11 contractors after they had completed the work.

12 CHAIRMAN LOUD: Okay. All right.  
13 I just wanted to understand that. Again, we  
14 are not accepting any of this at face value.  
15 We just want to, at least I want to,  
16 understand where the polarities are.

17 COMMISSIONER TURNBULL: Can that  
18 be documented?

19 MR. AVITABILE: Yes, I think we  
20 can certainly --

21 COMMISSIONER TURNBULL: Do we have  
22 a breakout?

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1 MR. AVITABILE: Yes, I think we  
2 can certainly do that. We would be happy to  
3 do that. I think we anticipating that have  
4 put something together preliminarily, but we  
5 would be happy to take more time to make sure  
6 it is clear for the Board and submit it, you  
7 know, in between tonight and the next hearing  
8 or whenever you would like.

9 MEMBER MOLDENHAUER: Yes, I mean,  
10 obviously, if we don't get to your case  
11 tonight, I would recommend to put that  
12 together, provide it to all the parties and  
13 that may resolve a lot of the issues. To  
14 actually build a document, the values and if  
15 you can show specifically the value has maybe  
16 even exceeded or have been at least up to  
17 those values that were quoted during the  
18 hearing, then I think that that would be very  
19 helpful.

20 MR. AVITABILE: Absolutely. Thank  
21 you.

22 COMMISSIONER TURNBULL: And maybe

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1 just going on, do that on the \$150,000.

2 MR. AVITABILE: Yes.

3 COMMISSIONER TURNBULL: Do kind of  
4 a breakdown on that also.

5 MR. AVITABILE: We would be happy  
6 to do that.

7 COMMISSIONER TURNBULL: I think  
8 that would help clarify everything.

9 MR. AVITABILE: Absolutely.

10 CHAIRMAN LOUD: And with that,  
11 unless we have additional questions from the  
12 Board, why don't we allow the appellant to get  
13 into his case?

14 And let me just ask you, how many  
15 witnesses do you have?

16 MR. GRIFFITH: I have none, but  
17 the ANC will have witnesses in their case.

18 CHAIRMAN LOUD: Okay. The ANC  
19 would, in our order of the universe, be fourth  
20 in the queue to present its case. So we will  
21 probably get through your case. And then  
22 break and reschedule and try to finish off the

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1 case.

2 MR. AVITABILE: One second. I  
3 actually just consulted with our client about  
4 that financial accounting. We have actually  
5 put that together. And if the Board would  
6 like, we would be happy -- we only have one  
7 copy available ourselves, but if the Board  
8 wants to make copies and have it distributed  
9 for everyone to consider, if they feel that  
10 that would help move along the discussion and  
11 consideration tonight, we would be happy to do  
12 that just in the interest of moving things  
13 along.

14 CHAIRMAN LOUD: Well, my quick  
15 response, I don't know how much it will move  
16 the discussion along tonight, because, you  
17 know, we've got to give the appellant the  
18 opportunity to present the case that they want  
19 to present.

20 But I would think it is important  
21 to get some copies made, give it to the  
22 appellant, give it to Board Members

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1 considering we are probably going to continue  
2 the case, everybody can have a chance to look  
3 at it before we reconvene.

4 MEMBER MOLDENHAUER: Would the  
5 appellant want to potentially get a copy of  
6 that before presenting its case and review  
7 that in advance of presenting its testimony?

8 MR. GRIFFITH: Yes. We would not  
9 be -- we would love to know where this money  
10 went, but they can't spend all of the  
11 streetscape improvements on their own  
12 landscaping in front of their own building.  
13 They haven't done the other side of the  
14 street. And they are arguing that they have  
15 spent most of the money on one side of the  
16 street, which is where their building is.

17 We would love to see it is the  
18 point. We didn't see it. We have never seen  
19 any accounting. And the escrow, as we say, is  
20 \$200,000 short. We would love to see the  
21 accounting, because that's what we want to  
22 argue.

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1                   MEMBER MOLDENHAUER: Well, I guess  
2 I'm asking you the question of do you want to  
3 get a copy of this documentation, review it  
4 over the evening and then have the opportunity  
5 to present your actual case in chief after  
6 reviewing it or do you want to continue on  
7 this evening and then you would only be able  
8 to use it as rebuttal time? I'm just trying  
9 to be as -- provide you as many options as you  
10 have.

11                   MR. GRIFFITH: I'm very happy to  
12 delay all of this and do this at another  
13 session. But we would like to put our case  
14 on. We would like to -- rather than rush  
15 through the next few minutes, we think that if  
16 we put on the case the way we have prepared  
17 it, we have an extremely convincing case to  
18 make to you.

19                   And we think that we can stick to  
20 the issues. We tried to do it with slides and  
21 so on and so forth. We are not unhappy. If  
22 this has to be continued, we are happy to

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1 start over on a day when you have time.

2 CHAIRMAN LOUD: Why don't we do  
3 that? I think Board Member Moldenhauer was  
4 just trying to give you ever conceivable  
5 option. But I think what we can do if we have  
6 a copy of that, perhaps you can give it to Ms.  
7 Bailey and we can get some copies made. Ms.  
8 Bailey, if you can do that, if you can help us  
9 out?

10 And then provide you with that and  
11 you may or may not close your case tonight if  
12 you decide you want to keep it open and we  
13 resume with that part of your case when we  
14 reconvene if you've got some additional  
15 follow-up after reviewing that. Okay?

16 So that will allow you to proceed  
17 with your case and still get a chance to  
18 review this.

19 MS. MILLER: If I may? Mr.  
20 Chairman, I think that the presentation would  
21 be interrupted at a point where it may be a  
22 little disjointed for everyone if he begins

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1 the presentation and continues. And I know  
2 that the ANC has concerns that there be at  
3 least some consistency and some flow.

4 And obviously, if the information  
5 that is being proffered by Vornado in terms of  
6 the value of the installed amenities, at this  
7 point, that it would be valuable both for the  
8 ANC, and I'm not speaking for Friends of  
9 Francis Field, but I'm sure that they would  
10 appreciate the opportunity to review that,  
11 because it may actually shorten their  
12 presentation and actually allow us to have a  
13 lot more focus.

14 CHAIRMAN LOUD: And so all of that  
15 is to say that you would -- right now, we are  
16 just in the appellant's case. And I thought I  
17 heard him say that he is not going to  
18 incorporate the information from that document  
19 into this case right now.

20 MR. GRIFFITH: I'm sorry. If  
21 that's how the Chair understood me, I think I  
22 misspoke.

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1 CHAIRMAN LOUD: Okay.

2 MR. GRIFFITH: I'm very happy to  
3 wait until we get their information to put on  
4 our case.

5 CHAIRMAN LOUD: Okay. Okay.  
6 Well, if that's the case --

7 MR. GRIFFITH: I would --

8 CHAIRMAN LOUD: I'm sorry.

9 MR. GRIFFITH: -- also say that  
10 they have had -- I've just said it, but they  
11 have had months to give us this.

12 CHAIRMAN LOUD: Okay.

13 MR. GRIFFITH: We would love to  
14 see it. That's what we want to see.

15 CHAIRMAN LOUD: Okay. I did  
16 misunderstand. Well, then we still need  
17 copies of that before we get out of here  
18 tonight.

19 And I think in light of what I  
20 understand the appellant is saying, if we can  
21 agree upon a date to push this into and give  
22 ourselves enough time to really begin and end

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1 the case on that day, we wouldn't want to  
2 inconvenience witnesses beyond this night and  
3 the next night.

4 Is there a date on the calendar  
5 that is fairly soon and then pretty open in  
6 the afternoon?

7 MS. BAILEY: Mr. Chairman, is  
8 there a document I'm supposed to be making  
9 copies of?

10 CHAIRMAN LOUD: There is. I think  
11 -- are --

12 MS. BAILEY: It's coming?

13 CHAIRMAN LOUD: -- you working on  
14 getting it to her? Yes, okay.

15 MS. BAILEY: Okay. Sorry.

16 COMMISSIONER TURNBULL: Mr.  
17 Avitabile and Mr. Epting, I was just wondering  
18 the document on cost, does that breakdown the  
19 unfinished street work on the other side of  
20 the street that the appellant is talking  
21 about?

22 MR. AVITABILE: Yes. In a sense

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1 that the unfinished street work is part of the  
2 park improvements. It is one in the same.

3 MR. EPTING: Some of those are  
4 shown on the plans.

5 COMMISSIONER TURNBULL: Okay.

6 MR. EPTING: Which you will see  
7 clearly.

8 COMMISSIONER TURNBULL: I'm just  
9 trying to break this down as simply as  
10 possible that we all can understand once we  
11 look at it and where the money went, where it  
12 is going to go and if we're going to walk away  
13 shaking our heads that we understand it.

14 MR. AVITABILE: Okay.

15 COMMISSIONER TURNBULL: Okay.

16 MR. GRIFFITH: Mr. Chairman, may I  
17 be heard on this?

18 CHAIRMAN LOUD: Yes, sir.

19 MR. GRIFFITH: I think that, as  
20 you have just said, you want to end at 8:30.  
21 And that will only give us a few minutes.

22 CHAIRMAN LOUD: Okay.

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1                   MR. GRIFFITH: We would ask though  
2                   that -- and we think this is a complicated  
3                   case and a complicated issue. We would love  
4                   to come back and have the hour that we should  
5                   have to put on our case, not be rushed through  
6                   it in the next few minutes, not have to  
7                   bifurcate it and so on and so forth.

8                   So we are not opposed to coming  
9                   back. There are just two issues involved in  
10                  this. One, Vornado is saying our case is moot  
11                  because they have started construction and  
12                  that's what they are going to try to argue is  
13                  that oh, we have done this.

14                  We filed this case on October 28.  
15                  They didn't start the construction until last  
16                  week.

17                  And the other question here is  
18                  this is a case where it involves a Certificate  
19                  of Occupancy for a building that now has, you  
20                  know, multiple -- there are 300 units in this  
21                  building.

22                  CHAIRMAN LOUD: Yes.

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1           MR. GRIFFITH:  And they have never  
2           -- they will not provide us a list of how many  
3           people are in it.  But the longer that our  
4           case is delayed, the more difficulty you are  
5           going to have with the concept of throwing,  
6           you know, 50, 70, 80 tenants out of this  
7           building.

8           Now, we are not asking for that.  
9           These people are our neighbors.  But the  
10          problem with the case is the more people they  
11          get in this building and the further along  
12          they get with installing the amenities that  
13          they are trying to cut back the cost on, the  
14          more it seems to prejudice our case.

15          So we would only ask that if we  
16          are now delayed --

17          CHAIRMAN LOUD:  Yes.

18          MR. GRIFFITH:  -- that it not  
19          prejudice our case because they say oh, we are  
20          almost done.  But I also say there is nothing  
21          we would like more than to have this case be  
22          moot, to have all of the amenities delivered

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1 and that's what we want. That's why we are  
2 here.

3 CHAIRMAN LOUD: Okay. And it's a  
4 point well-made. And certainly we would not,  
5 at least I wouldn't, receive it that way in  
6 terms of being prejudicial. And the good  
7 thing about the BZA's jurisdiction on appeals  
8 is that we stand in the shoes of the Zoning  
9 Administrator. So we may have a little bit  
10 more flexibility around fashioning the  
11 equivalent of a remedy, unlike say in special  
12 exceptions and variances, that can take all of  
13 that into consideration, the tendencies and  
14 that type of thing.

15 Okay. The news is not good. Mr.  
16 Moy has given me three dates. On March 2<sup>nd</sup> we  
17 could hear the case, as early as March 2<sup>nd</sup>,  
18 which is next week, I guess, but it would be  
19 the fourth case in the p.m.

20 Mr. Moy, I don't have my calendar,  
21 but the other three cases, are any of them  
22 appeals?

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1 MR. MOY: One of them is.

2 CHAIRMAN LOUD: I think pretty  
3 much a death sentence.

4 MR. MOY: There was that one date  
5 where we have the Reaves appeal, which I  
6 believe --

7 CHAIRMAN LOUD: Well --

8 MR. MOY: -- should not be a full  
9 afternoon, which was scheduled for the --  
10 let's see, what did I say on that?

11 CHAIRMAN LOUD: I don't see -- oh,  
12 you may have a more updated calendar. But you  
13 are saying we have a Reaves appeal on March  
14 the 2<sup>nd</sup> in the afternoon? Oh, I'm sorry,  
15 okay.

16 Okay. So if March 2<sup>nd</sup> does not  
17 work, then I'm still looking at March 2<sup>nd</sup>,  
18 because on March 2<sup>nd</sup>, we don't have any  
19 appeals. I don't know if --

20 MR. MOY: Yes.

21 CHAIRMAN LOUD: -- the parties are  
22 available.

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1                   MR. MOY: I was mistaking it for  
2 April 13<sup>th</sup>. But for March 2<sup>nd</sup>, we -- I mean,  
3 that's doable as the fourth. We have an  
4 application from the Government, which I'm  
5 hoping won't go as long as some applications.

6                   MR. EPTING: Mr. Chair?

7                   CHAIRMAN LOUD: Yes?

8                   MR. EPTING: Both of my clients --  
9 my clients are out of town or not available on  
10 the 2<sup>nd</sup>.

11                   CHAIRMAN LOUD: Okay. All right.

12                   So --

13                   MR. EPTING: I'm actually not  
14 available on the 9<sup>th</sup>.

15                   CHAIRMAN LOUD: Okay. Well, I  
16 don't think that was a date that we had  
17 available either.

18                   MR. EPTING: Okay.

19                   CHAIRMAN LOUD: The next date that  
20 we have would be April 13. And that again  
21 would be in the afternoon, I think, as Mr. Moy  
22 had indicated. There is one appeal set for

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1 that. I think Ms. Moldenhauer had a good  
2 point about perhaps scheduling this as the  
3 first case on the 13<sup>th</sup>, which, of course, we  
4 could do.

5 MR. SURABIAN: Mr. Chairman, on  
6 the 13<sup>th</sup> the Zoning Administrator will be out  
7 of town.

8 CHAIRMAN LOUD: Okay. And I don't  
9 suppose the Zoning Administrator could  
10 designate an appropriate official that could  
11 cover all of what might be germane to the  
12 case?

13 MR. SURABIAN: I don't think so.  
14 I'll let him answer as well, but I mean I  
15 think he is the factual witness here.

16 CHAIRMAN LOUD: Okay.

17 MR. SURABIAN: Because he was  
18 personally involved.

19 ZONING ADMIN. Le GRANT: No. And  
20 in addition, the Deputy Zoning Administrator I  
21 have is resigning Friday, so it's either me or  
22 I don't have a new Deputy assigned yet.

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1 MR. MOY: Well, apart from that,  
2 Mr. Chairman, then that would leave the next  
3 date on deck would be April the 20<sup>th</sup> in the  
4 afternoon.

5 CHAIRMAN LOUD: I'm sorry? I'm  
6 sorry, a couple of conversations. Let me just  
7 make sure I can take all of them in.

8 Why don't we start and go ahead  
9 with you, Mr. Moy? And then we will come  
10 back. Go ahead.

11 MR. MOY: The dates that we have  
12 discussed, I mean, they are potentials  
13 depending on representatives I suppose. But  
14 apart from that, then if the Board is -- if  
15 April 13<sup>th</sup> in the afternoon won't suffice,  
16 then the next available date would be April  
17 20<sup>th</sup> in the afternoon.

18 CHAIRMAN LOUD: All right. As Mr.  
19 Moy indicated, we can look at April 20 in the  
20 afternoon. That's almost a guarantee of being  
21 able to hear the full case, because it's the  
22 second case in the afternoon.

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1           If we try to go for some of the  
2 other options, it sounded to me as if someone  
3 was not going to be available on either March  
4 the 2<sup>nd</sup> or the 13<sup>th</sup>. The only way we would be  
5 able to do it is to bifurcate the case.

6           So we probably wouldn't be able to  
7 hear all of it on a single day.

8           I think we could hear all of it in  
9 one day on the 20<sup>th</sup>.

10           MR. GRIFFITH: Mr. Chairman, I'm  
11 not opposed to that. The argument I would  
12 like to make, however, is that we were  
13 scheduled for February 11<sup>th</sup> and that got  
14 canceled for snow.

15           We were scheduled for February 16<sup>th</sup>  
16 and, basically, on advise that we got that  
17 your Philly Pizza case would go until late in  
18 the day, as it did, we all agreed to come back  
19 at some other date which would not  
20 inconvenience this Board.

21           And I don't -- what I'm suggesting  
22 or what I don't quite understand or what I

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1 would suggest is can't -- you know, can't you  
2 move us to the next -- can't we go like first  
3 in your next session? Why couldn't somebody  
4 else be moved behind us, I mean?

5 CHAIRMAN LOUD: Well --

6 MR. GRIFFITH: It seems to me we  
7 are in line.

8 CHAIRMAN LOUD: It was my  
9 understanding -- if we look at March the 2<sup>nd</sup>,  
10 correct, one of the three of you were not  
11 going to be available.

12 MR. AVITABILE: Our clients are  
13 not available on that day.

14 CHAIRMAN LOUD: So it's not that  
15 BZA would not make the --

16 MR. GRIFFITH: Thank you.

17 CHAIRMAN LOUD: -- adjustment.  
18 Okay. So again, we would be looking at April  
19 20. There is a very, very remote chance that  
20 we could go on March 16<sup>th</sup>, but if you select  
21 that date and each of you are available, you  
22 may very well be in the same situation that

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1 you are in tonight, because the one appeal  
2 that we do have is an appeal that may last a  
3 very, very, very long time.

4 So given that each of you have  
5 clear calendars for April 20, we can guarantee  
6 that, first, you will be the first case on the  
7 20<sup>th</sup> and that we will get through your case.

8 Again, we had offered up both  
9 March 16<sup>th</sup> as a possibility and then April the  
10 20<sup>th</sup>. And I think each of you had clear  
11 calendars for the 20<sup>th</sup> of April.

12 MR. SURABIAN: That's correct.

13 CHAIRMAN LOUD: Okay.

14 MR. AVITABILE: That's correct.

15 CHAIRMAN LOUD: All right. So do  
16 we want to go with April 20<sup>th</sup>?

17 MR. GRIFFITH: Mr. Chairman,  
18 that's okay with us, yes.

19 CHAIRMAN LOUD: Okay.

20 MR. GRIFFITH: Are we first on  
21 that date?

22 CHAIRMAN LOUD: You will be first

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1 on April 20<sup>th</sup>.

2 MR. GRIFFITH: And is that an  
3 afternoon or morning?

4 CHAIRMAN LOUD: That's an  
5 afternoon calendar.

6 MR. GRIFFITH: The first case in  
7 the afternoon on April 20<sup>th</sup>?

8 CHAIRMAN LOUD: That's correct.

9 MR. GRIFFITH: Thank you.

10 CHAIRMAN LOUD: Okay.

11 MR. EPTING: Mr. Chair?

12 CHAIRMAN LOUD: Yes?

13 MR. EPTING: Instead of filing  
14 this, I haven't even looked at this document,  
15 could we just delay it until tomorrow to file  
16 the table of cost and we want to have a chance  
17 to kind of explain it? And we will serve that  
18 on everybody tomorrow.

19 CHAIRMAN LOUD: Okay. That's  
20 fine.

21 MR. AVITABILE: I at least want to  
22 read it before I turn it in.

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1                   CHAIRMAN LOUD:     That makes a lot  
2 of sense to me.

3                   MR. GRIFFITH:     And, Mr. Chairman,  
4 we don't have -- we would like to see it, but  
5 if we're not going on until April 20<sup>th</sup> --

6                   MR. AVITABILE:     I'll serve it  
7 tomorrow.

8                   MR. GRIFFITH:     -- there's no hurry  
9 for them to provide it to us.

10                  CHAIRMAN LOUD:     He has represented  
11 that he will serve it tomorrow. Let's let him  
12 serve it tomorrow.

13                  MR. AVITABILE:     And one other  
14 thing we may include as well in this will  
15 directly speak to Board Member Moldenhauer's  
16 question about did the amenities that we put  
17 in the permit plan satisfy what was in the  
18 conditions?

19                  We have got a chart that tracks  
20 that right through from the order through the  
21 CFA approved plan to the permit plans to the  
22 construction drawings. And we will provide

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1 that as well, just to really make this easy  
2 for everyone to look at.

3 CHAIRMAN LOUD: Okay.

4 MS. MONROE: I have a question.  
5 Somebody left this here and you probably  
6 should take it back, whoever it was.

7 MR. AVITABILE: We can do that.

8 MS. MONROE: Is that -- I mean, I  
9 don't know. I don't even know whose it is.

10 MR. AVITABILE: We were planning  
11 to submit it.

12 CHAIRMAN LOUD: Why don't you give  
13 it to Ms. Bailey, Ms. Monroe.

14 MR. EPTING: Those are our photos  
15 showing construction as of today.

16 MR. AVITABILE: We'll take it  
17 back, that's fine.

18 MR. EPTING: Sure.

19 CHAIRMAN LOUD: Okay. Is there  
20 anything further on this case? We look  
21 forward to seeing you on April 20. I look  
22 forward to you following through on the

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1 representations made regarding the additional  
2 filings and again apologize that we were not  
3 able to get to you earlier tonight.

4 Okay. And extend our thanks to  
5 the witnesses that appeared tonight as well  
6 that won't get a chance to testify. Okay.

7 Anything further, Ms. Bailey?

8 MS. BAILEY: Mr. Chairman, can I  
9 put a little note beside the April 20<sup>th</sup>  
10 afternoon indicating that these will be the  
11 only two cases in the afternoon?

12 CHAIRMAN LOUD: I think that's a  
13 smart thing to do. And we tend to be the  
14 biggest violators of it here, BZA Members  
15 continuing cases on the calendar after you  
16 guys have carefully calibrated the calendar.  
17 So that's a good idea to put that note there.

18 But you should also put them first  
19 on the calendar --

20 MS. BAILEY: Absolutely.

21 CHAIRMAN LOUD: -- for the 20<sup>th</sup>.

22 MS. BAILEY: Absolutely.

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1                   CHAIRMAN LOUD:    Okay.    Okay.    We  
2                   are adjourned.

3                   (Whereupon, the Public Hearing was  
4                   concluded at 8:29 p.m.)

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