

GOVERNMENT

OF

THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

FEBRUARY 4, 2003

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 2:00 p.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS, Chairperson
 ANNE MOHNKERN RENSHAW, Vice Chairperson
 CURTIS L. ETHERLY, Board Member
 DAVID A. ZAIDAIN, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

JOHN G. PARSONS, Commissioner

BZA STAFF PRESENT:

BEVERLEY BAILEY, Office of Zoning
 ALBERTO BASTIDA, Office of Zoning
 CLIFFORD MOY, Office of Zoning
 JOHN NYARKU, Office of Zoning

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OTHER AGENCY STAFF PRESENT:

KAREN THOMAS, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

LORI MONROE, ESQ.

COREY BUFFO, ESQ.

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TO CONSIDER THE FOLLOWING:	
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Adjourn	

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P R O C E E D I N G S

2:00 P.M.

CHAIRMAN GRIFFIS: I call the afternoon session and wish everyone a good afternoon.

This is, of course, the 4th of February, 2003 Public Hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis. I am Chairperson. Joining me today is Vice Chair Ms. Anne Renshaw. Also, Mr. Curtis Etherly is seated to my right. Representing the National Capital Planning Commission is Mr. Zaidain. And with us this afternoon, representing the Zoning Commission, Mr. Parsons.

Copies of today's hearing are available to you. They are located at the table where you entered into the Hearing Room. If we don't have sufficient copies, please, let staff know. We'll make more available.

Let me run through a few pieces that will be attendant to the entire afternoon session. We have -- and that is this. Please be aware that all proceedings before the Board are being recorded. So we ask when coming forward to speak to the Board that you fill out two witness cards. Witness cards are available to you at the table in front of us and also

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1 the table where you entered into the Hearing Room.
2 Those two cards need to go to the Recorder who is
3 sitting to my right.

4 I would also ask that everybody please
5 turn off any cell phones or beepers at this time so
6 that we don't disrupt any of the proceedings that we
7 will enter into this afternoon.

8 When addressing the Board, on your first
9 occasion, I would ask that you introduce yourself for
10 the record with name and address.

11 All persons planning to testify either in
12 favor or in opposition, of course, will come forward
13 and we will have order of procedure for the special
14 exception and variances. First, we will have the
15 statement of witnesses of the Applicant. Second would
16 be Government reports attendant to the application.
17 Third would be the report from the Advisory
18 Neighborhood Commission. Fourth would be parties or
19 persons in support of the application. Fifth would be
20 parties or persons in opposition and finally, sixth,
21 we will have closing remarks by the Applicant.

22 Cross examination of witnesses is
23 permitted by the Applicant or parties, the ANC within
24 which the property is located is automatically a party
25 in the case. The record will be closed at the

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1 conclusion of each public hearing except for any
2 material that is specifically requested by the Board
3 and the Board will be very specific on what is to be
4 submitted and when it is to be submitted into the
5 Office of Zoning.

6 The Sunshine Act requires that public
7 hearing on each case be held in the open and before
8 the public. The Board may, however, consistent with
9 its rules of procedures and the Sunshine Act, enter
10 into Executive Session during or after a public
11 hearing on a case for the purposes of reviewing the
12 record or deliberating on the case.

13 The decision of the Board in contested
14 cases must be based exclusively on the public record
15 and therefore, we ask people present today not to
16 engage Board Members in any conversation so that we do
17 not give the appearance of not basing our
18 deliberations solely on the record.

19 Let us jump into the first case of the
20 afternoon and then we do have a Civil Infraction case
21 of which I have other introductions for. But let us
22 get to the first case in the afternoon, unless there
23 are any preliminary matters that the staff is aware of
24 and they can bring those to the attention of the Board
25 at this time.

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1 MS. BAILEY: Mr. Chairman, Members of
2 Board, good afternoon.

3 No, Mr. Chairman, there is none for staff.

4 CHAIRMAN GRIFFIS: Good. Does anyone
5 attending this afternoon with public hearing cases
6 have any preliminary matters for the board?

7 Preliminary matters are those which
8 whether a case will or should be heard today, of
9 course, such as requests for postponements,
10 continuances or withdrawals or whether proper and
11 adequate notice has been given to the application.
12 You can signify having preliminary matters by coming
13 up to the Board at this time.

14 (Pause.)

15 Not seeing anybody rush to the table, I
16 think we can call the first case of the afternoon.

17 MS. BAILEY: Application No. 16975 of
18 Kathryn Pirnia, pursuant to 11 DCMR 3104.1, for a
19 special exception to allow a rear addition to a single
20 family dwelling under section 223, not meeting the lot
21 area and lot width requirements of section 401. The
22 property is located in the R-4 District at premises
23 654 Independence Avenue, S.E., Square 870, Lot 63.

24 Please stand to take the oath. Please
25 raise your right hand.

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1 (Witnesses were sworn.)

2 Will you please come forward and have a
3 seat at the table?

4 Mr. Chairman, briefly, the application was
5 advertised for relief from the lot area and lot width
6 requirements under Section 223. In addition to those
7 two reliefs, the Applicant is also requesting zoning
8 relief from the lot occupancy, also under Section 223
9 of the regulations.

10 CHAIRMAN GRIFFIS: Thank you. Good
11 afternoon. I would have you turn your microphone on
12 and you can just introduce yourselves and then we can
13 proceed.

14 MS. PIRNIA: Yes. I am Kathryn Pirnia. I
15 am the owner of residence 654 Independent Avenue, S.E.

16 CHAIRMAN GRIFFIS: And that's where you
17 reside?

18 MS. PIRNIA: Yes, I do.

19 MR. DU PONT: Stephen du Pont. I'm the
20 architect, 5159 Fulton Street, N.W.

21 CHAIRMAN GRIFFIS: Very good, and you're
22 in concurrence with the staff's statement regarding
23 the lot occupancy, is that correct?

24 MS. PIRNIA: Yes.

25 CHAIRMAN GRIFFIS: Very well. Let me turn

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1 it over to you. I would anticipate that we can get
2 through this case within a matter of 30 to 45 minutes
3 at most, so let's proceed.

4 MS. PIRNIA: Well, I guess I'm not sure
5 what I need to talk about, but basically we're looking
6 to extend the dwelling by a rear addition from a 60
7 percent that's permitted to 70 percent. The house
8 itself is very, very small, currently the width of it
9 is 14 feet, but there is an alley that goes through
10 from front to back that basically the actual width of
11 the living room is 10 feet 4 inches. It's very
12 substandard in size and it really doesn't accommodate
13 my needs or that of my family. My family is my
14 husband and son are currently still living in
15 Maryland. We're hoping to do these renovations so
16 that we can be reunited as a family. That is our
17 primary goal here. I live here during the week and
18 often go back to Maryland or they have to come and
19 visit me on the weekends. My daughter, who is in law
20 school, resides with me in the house currently.

21 So we're hoping that based on the small
22 size of the house and the fact that the neighbor most
23 impacted by the addition, the neighbor to my west that
24 has the same size house as mine, is in total support
25 of it. The neighbor on my east, who has a larger

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1 dwelling than mine, her concerns were those related to
2 the light in her backyard and we've met with her and
3 discussed this, shown her the plans and she has
4 provided a letter which I have with me today. Many of
5 the things on there are just issues between her and I
6 about a tree that we're talking about and having our
7 engineer look at her foundation and kind of check on
8 it as we do the actual construction work. We did talk
9 to her about the possibility if she wanted to maybe
10 put a skylight on the overhang of the upstairs rear
11 porch, but other than that, she is in support of what
12 we're trying to do as well.

13 I've met and it's been approved by the
14 Historic Preservation group and in terms of the
15 design, and I have appeared both the ANC and the
16 Capitol Hill Restoration Group and presented plans so
17 that the neighbors could see and had an opportunity to
18 comment on it.

19 CHAIRMAN GRIFFIS: Good. Okay, let me lay
20 out because I think you've done it essentially, but
21 you're here for a special exception and of course,
22 special exception tests goes to proving that this, if
23 granted, would be -- would follow the general purpose
24 and intent of the zoning and also would not adversely
25 affect any of the use of the neighboring properties.

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1 That being said, you made a note that
2 there was a letter in the record from an adjoining
3 letter?

4 MS. PIRNIA: There is a letter in the
5 record that you have for the neighbor that has the
6 most impact. It was an e-mail I received from her. I
7 provided it to staff here and I also have a note from
8 the other neighbor that I just received this morning,
9 but I can provide to you from the record, even though
10 it does address some other issues not related to this,
11 I'd be glad to provide you with that.

12 CHAIRMAN GRIFFIS: Okay, and are you aware
13 of any opposition or any issues that came up in
14 discussion?

15 MS. PIRNIA: None at all. The only
16 consideration that came up with the Capitol Hill
17 Restoration Group was one neighbor was concerned about
18 what materials we're using on the side of it and we
19 agreed to keep that a brick facade and there was no
20 other problem.

21 VICE CHAIR RENSHAW: Ms. Pirnia, when did
22 you meet with ANC-6B.

23 MS. PIRNIA: I met with -- I can't
24 remember the exact date, but it was early January. It
25 was one of their first meetings, when they just -- it

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1 was the first meeting when they had new leadership at
2 the meeting, so whatever date that was.

3 VICE CHAIR RENSHAW: The first meeting of
4 --

5 MS. PIRNIA: Of this year, of the new
6 year.

7 VICE CHAIR RENSHAW: All right, and who is
8 chairing 6B, do you remember?

9 MS. PIRNIA: I'm sorry, I really don't
10 remember the names. There were so many new people and
11 faces there.

12 VICE CHAIR RENSHAW: We don't have
13 anything --

14 MS. PIRNIA: But I have talked with
15 several people at the ANC since then. One of the
16 gentlemen's name was -- and if you let me look, I can
17 dig up the name, a member of the board, subsequently,
18 letting him know of the letters and the activities
19 that we were doing.

20 One of the harder things was the neighbor
21 on my west who owns the property, she doesn't reside
22 in the house. She inherited it and I was having
23 trouble contacting her and fortunately, I was able
24 from the tax records to get her address and I sent her
25 a certified letter and with my phone number and we did

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1 talk and she's the one who sent the e-mail in total
2 support. She likes the plan as she sees it.

3 VICE CHAIR RENSHAW: Very good. Thank
4 you. We'll bring up the ANC later on, Mr. Chairman.

5 CHAIRMAN GRIFFIS: Indeed, any other
6 questions, clarifications?

7 The brick -- the Capitol Hill Restoration
8 Society wanted brick on which --

9 MS. PIRNIA: We had originally planned for
10 it to be all along the back. In fact, I'm going to
11 turn the old brick and reuse it, but it was just the
12 sides that came up.

13 MR. DU PONT: The party wall.

14 MS. PIRNIA: The party wall.

15 CHAIRMAN GRIFFIS: The party wall.

16 MR. DU PONT: It's only about 5 feet of
17 brick though or less.

18 I'd like to add one more comment which is
19 that even with the 70 percent lot coverage, the house
20 will still be 20 percent smaller than a by right house
21 in this zone.

22 CHAIRMAN GRIFFIS: It just doesn't have a
23 legal lot size.

24 MS. PIRNIA: Very tiny.

25 VICE CHAIR RENSHAW: Does your addition go

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1 beyond your neighbors' homes or does it come to the
2 end of your neighbors' homes?

3 MS. PIRNIA: Its goes beyond both homes.
4 The one home with the most impact on my west, it's a
5 substantial increase. She has a one story addition
6 behind her house that goes further than mine, but this
7 will extend the party wall or the wall considerably
8 back. She has no problems with that at all.

9 The other side it extends it about 9.5
10 feet of which on the second level where there's a
11 balcony so in effect it's just a few feet difference.

12 It's about 4.5 feet that it goes beyond her wall.
13 Her wall currently extends 20 feet beyond mine. The
14 elevation of our house, I step down into my house.
15 It's sort of subground level and she steps up, so her
16 upstairs sort of sits at least a half a story above
17 mine, so the impact on the second floor for her is
18 really minimal.

19 MR. DU PONT: Even the first floor is only
20 a foot and a half above the fence.

21 CHAIRMAN GRIFFIS: Okay, any other
22 questions?

23 Mr. Parsons.

24 MR. PARSONS: I'm a little confused. The
25 Historic Preservation Review Board of the Office of

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1 Historic Preservation apparently asked you to set back
2 three feet in the front of the property to recognize
3 the passageway that exists on that and you've done
4 that on the drawing.

5 MS. PIRNIA: Yes.

6 MR. PARSONS: A2. But I didn't see how
7 you were going to do that -- there's no elevation to
8 that front entrance in the material that we have or at
9 least I can't find it. So how is that accomplished?

10 MR. DU PONT: It's an alley that runs all
11 the way through the house.

12 MR. PARSONS: Yes.

13 MR. DU PONT: And all we did was cap it
14 off three feet in and we'll leave the gate in place.

15 MR. PARSONS: So it goes the full height
16 of the building then?

17 MR. DU PONT: No, it's on the first floor.
18 It's one of these horse walks or something that goes
19 through the first floor.

20 MR. PARSONS: So you simply have got this
21 darkened space about the size of an outhouse or
22 something?

23 MR. DU PONT: Exactly, and it becomes like
24 a garden shed. It can become a trash --

25 MR. PARSONS: You can put a door on it or

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1 something.

2 MS. PIRNIA: Right.

3 MR. DU PONT: No, no, no. It's actually
4 not uncommonly done.

5 MR. PARSONS: I understand. Okay, thank
6 you.

7 MR. DU PONT: The only requirement was
8 that we put a gate on it, not a door. So that it
9 looks like what it was.

10 MR. PARSONS: Good.

11 MS. PIRNIA: I have a picture, if that
12 would help.

13 CHAIRMAN GRIFFIS: I think they're in the
14 file.

15 MS. PIRNIA: Okay.

16 CHAIRMAN GRIFFIS: Any other questions,
17 clarifications to the Board?

18 Good, let's go to Office of Planning for
19 their report then.

20 MS. THOMAS: Good afternoon, Mr. Chairman,
21 Members of the Board. I'm Karen Thomas presenting the
22 recommendation for Kathryn Pirnia's request for a
23 special exception to allow addition to her residence
24 which does not meet the lot area, lot width and lot
25 occupancy requirements.

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1 At this time we would stand on the record
2 and leave it open if you have any questions for us.

3 CHAIRMAN GRIFFIS: Very well. Let's take
4 up first preliminarily, is there any objection to
5 waiving in the Office of Planning Report? If there's
6 no objection, we can waive it in and accept it.

7 Questions of the Office of Planning on
8 their report?

9 (Pause.)

10 MR. PARSONS: I did have a question about
11 the recommendation at the bottom of page 4 which
12 suggests that the party wall on the second level be
13 extended to the entire addition.

14 MR. DU PONT: The neighbor has asked that
15 that not be done because it would cut down on her
16 light. We have showed her a perspective of that.

17 MR. PARSONS: So you're familiar with this
18 report of the Office of Planning?

19 MR. DU PONT: And we've also told the
20 neighbor that we would make the roof above that porch
21 translucent to let even more light in.

22 MR. PARSONS: That's what I thought you
23 said in your presentation. That's why I wanted to go
24 to this question.

25 So has the Office of Planning discussed

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1 this with you and the solution and the neighbor's
2 opinion?

3 MS. THOMAS: Yes, Kathryn discussed that
4 with me. This was after we wrote the report and sent
5 it to report. So we would be fine with any agreement
6 that she has with her neighbors concerning the light
7 and air.

8 MR. PARSONS: Very good. Thanks.

9 CHAIRMAN GRIFFIS: Okay, any other
10 questions? Do you have any questions of Office of
11 Planning?

12 MS. PIRNIA: No, not at this time.

13 CHAIRMAN GRIFFIS: The initial issue came
14 up with lot occupancy. Office of Planning is
15 indicating that the proposed is 70 percent, is that
16 correct?

17 MS. PIRNIA: That's correct.

18 MR. DU PONT: That is the special
19 exception maximum or normal, or whatever you call it.

20 And as I pointed out, that still leaves a
21 house that's 20 percent smaller than allowed by that
22 zone.

23 CHAIRMAN GRIFFIS: Right. I guess I'm
24 just a little confused then about why are we
25 indicating lot occupancy in the 223.

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1 MS. THOMAS: Well, it's 223 because under
2 223 it allows for lot occupancy. By right it's 60
3 percent in the R-4 zone and it's allowed under 223 up
4 to 70 percent.

5 CHAIRMAN GRIFFIS: Now I understand.
6 Okay, so we're changing it from 36 to 70. It's still
7 within the parameters to keep it a special exception.

8 MR. DU PONT: Right.

9 CHAIRMAN GRIFFIS: Very well. Anything
10 else? Any other clarifications? Anything else from
11 the Office of Planning in which case ANC has been
12 talked about.

13 Ms. Renshaw, did you have additional
14 questions?

15 VICE CHAIR RENSHAW: Just to ask that the
16 minutes of 6B's meeting got into the file in some way.
17 If the Office of Planning could ask ANC 6B to send out
18 its minutes?

19 MS. THOMAS: Yes, we would be happy to do
20 that.

21 VICE CHAIR RENSHAW: Just to have the
22 record complete.

23 CHAIRMAN GRIFFIS: I see. Okay. That's
24 all the Government reports I have notes on. Are you
25 aware of any other Government agency that gave reports

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1 to this application?

2 MS. PIRNIA: I'm sorry?

3 CHAIRMAN GRIFFIS: Any other Government
4 agencies that you're aware of that submitted reports
5 on this?

6 MS. PIRNIA: Not that I'm aware of.

7 MR. DU PONT: Historic Preservation did.

8 CHAIRMAN GRIFFIS: Indeed. All right.
9 Anyone here to give testimony today in either support
10 or opposition of Application 16975?

11 (No response.)

12 We'll have to hold the crowds back.

13 Okay, no one giving testimony, I think we
14 can turn to you, then for any closing remarks you
15 might have.

16 MS. PIRNIA: Well, I just hope that the
17 Board considers this so that we can move forward with
18 our plans.

19 CHAIRMAN GRIFFIS: Consider it considered.
20 Now you want some action on it?

21 MS. PIRNIA: Now I want some action on it.

22 CHAIRMAN GRIFFIS: Now I'm getting clear.
23 That being said, Board, are we prepared to go forward
24 today with a decision? I see no difficulty in doing
25 that and I would move approval of the special

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1 exception attendant to the Application 16975 for 654
2 Independence Avenue, S.E. this would allow the
3 addition to the residence under Section 223 not
4 meeting lot area, lot width, lot occupancy
5 requirements in the R-4 District.

6 I'd ask for a second.

7 VICE CHAIR RENSHAW: Second.

8 CHAIRMAN GRIFFIS: Thank you, Ms. Renshaw.

9 I think it's been clearly laid out in the written
10 submissions, the Office of Planning's report and also
11 your testimony today of the test for special
12 exception.

13 There has been no communication in
14 opposition nor any issues arisen indicating that this
15 may tend to adversely affect the use of the
16 neighboring properties. Clearly this is the
17 accommodation to a residential single family home in
18 which case fits into the general intent and integrity
19 of the zone plan and map.

20 That being said, does anyone else have
21 comments? Discussion on the motion?

22 Then I ask for all those in favor signify
23 by saying aye.

24 (Ayes.)

25 Opposed?

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1 (No response.)

2 MR. DU PONT: Thank you very much.

3 CHAIRMAN GRIFFIS: We will record the vote
4 on that.

5 MS. BAILEY: The vote is recorded as 5-0-0
6 to approve the application. Motion made by Mr.
7 Griffis; seconded by Ms. Renshaw; Mr. Zaidain, Mr.
8 Parsons and Mr. Etherly are in support.

9 This is a summary order, Mr. Chairman?

10 CHAIRMAN GRIFFIS: Yes, I see no concern
11 about that, yes, we'll do a summary order.

12 MS. BAILEY: Thank you very much.

13 CHAIRMAN GRIFFIS: Thank you very much.

14 VICE CHAIR RENSHAW: Just to ask the
15 Applicant, how long is construction going to take and
16 how long before your family can be reunited?

17 MS. PIRNIA: Well, the construction
18 estimates are just very rough since we haven't done
19 the final design drawings on it. It's probably 9
20 months to a year. My daughter is getting married in
21 that interim period, so we have to now schedule out
22 when we can start and when we can get it completed.
23 So my son will be graduating from high school soon, so
24 it should hopefully have them in the same home before
25 he goes off to college.

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1 VICE CHAIR RENSHAW: Well, within the
2 year, we hope.

3 MS. PIRNIA: We're hoping.

4 CHAIRMAN GRIFFIS: Good. When it's done
5 you can invite Ms. Renshaw over for a martini in the
6 backyard.

7 MS. PIRNIA: Absolutely, in fact, you can
8 all come over for one if you'd like.

9 CHAIRMAN GRIFFIS: Enjoy the beautiful day
10 outside.

11 MS. PIRNIA: Thank you.

12 MR. DU PONT: Thank you, sir.

13 CHAIRMAN GRIFFIS: Thank you very much.
14 Okay, this is a time, of course, scheduled for the
15 Board of Zoning Adjustment to hear appeals from orders
16 of the Hearing Examiner issued pursuant to Civil
17 Infractions Act involving violations of the zoning
18 laws and the regulations.

19 I will introduce everybody again. Of
20 course, I am Geoff Griffis. Ms. Renshaw is with me as
21 Vice Chair. Mr. Zaidain is also here representing
22 National Capital Planning Commission. Mr. Parsons is
23 representing the Zoning Commission.

24 The Board has one appeal on today's
25 agenda. Each party will have 30 minutes to present

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1 their argument. Questions posed by the Board and your
2 responses thereto will count towards the 30 minutes.
3 You may not refer to any evidence, of course, that is
4 -- or statements, rather, that are not on the record
5 or in the record. And the Appellant may reserve a
6 portion of its time for rebuttal argument.

7 Mr. Bastida, would you please call the
8 case?

9 MR. BASTIDA: Yes, Mr. Chairman. This is
10 an appeal by the New Partnership, Innovative Recyclers
11 & Rodgers Brothers Custodial Service, Incorporated
12 against the decision of the Law Judge on BZA Case No.
13 97-0002.

14 The Appellant is represented by Mr.
15 Cooper. The Appellee is represented by Mr. Parker and
16 Ms. Gilbert.

17 The staff has one issue we would like to
18 resolve before the Board proceeds. There is a
19 briefing from the Appellant addressing the issues of
20 the last brief of the Appellee that is not officially
21 in the record. That brief was, according to the
22 Appellant was sent to his office in September and with
23 13 copies. That has not been found. The staff has
24 checked with the Appellee and the Appellee had
25 received the brief in a timely fashion and no damage

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1 incurred because they received it in a timely fashion.

2 This office would like to be able to
3 include the brief in the file in a timely fashion
4 provided that the Office of DCRA received in a timely
5 fashion on the day that they received it and I would
6 like to hear from DCRA if they have any objections
7 when the time it was mailed and it was received by
8 their office.

9 CHAIRMAN GRIFFIS: Actually, let me put it
10 -- do they concur with the account that Mr. Bastida
11 has just laid out?

12 MR. PARKER: Arthur Parker, Assistant
13 Corporation Counsel on behalf of District of
14 Columbia's Department of Consumer and Regulatory
15 Affairs.

16 I don't have anything that's contrary to
17 what was represented. What we have determined was the
18 situation is that we received our copy of our -- of
19 Mr. Cooper's brief on behalf of the Appellant on the
20 3rd or 4th of October and there's a postmark date of
21 September 27th.

22 CHAIRMAN GRIFFIS: I see.

23 MR. PARKER: That's all we can tell you.
24 And he represents in his Certificate of Service that
25 at the same time he sent the 13 copies, the Board's

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1 copies at the same time.

2 CHAIRMAN GRIFFIS: Very well.

3 MR. PARKER: Other than that, we know
4 nothing.

5 CHAIRMAN GRIFFIS: I don't see any harm in
6 taking into the record at this time.

7 MR. BASTIDA: Then I will note it was
8 received timely, for the record.

9 CHAIRMAN GRIFFIS: I'll leave that up to
10 you.

11 MR. BASTIDA: Thank you.

12 CHAIRMAN GRIFFIS: Let's introduce
13 everybody for the record. We'll start on my left,
14 please.

15 If you wouldn't mind turning your mike on,
16 you can just touch the base of it.

17 MR. COOPER: Mr. Chairman, I am A.J.
18 Cooper, counsel for the Appellants. With me is Mr.
19 George Rodgers, Jr.

20 MS. GILBERT: Laura Gisolfi Gilbert,
21 Agency Counsel from the Department of Consumer and
22 Regulatory Affairs.

23 MR. PARKER: Again, my name is Arthur
24 Parker. I'm Assistant Corporation Counsel on behalf
25 of the Appellee, Department of Consumer and Regulatory

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1 Affairs.

2 CHAIRMAN GRIFFIS: Excellent. Mr. Cooper,
3 do you want to reserve any time for closing rebuttal?

4 MR. COOPER: Yes, Mr. Chairman. I'd like
5 to reserve 15 minutes for closing.

6 CHAIRMAN GRIFFIS: Fifteen minutes, okay.

7 MR. COOPER: On a preliminary issue of the
8 receipt of the brief, we mailed everyone's copy --

9 CHAIRMAN GRIFFIS: You got what you
10 wanted, right? It's in. Am I misunderstanding that?

11 MR. COOPER: I didn't want to leave the
12 impression that somehow or another we were --

13 CHAIRMAN GRIFFIS: I don't think that's
14 the impression at all. If that was the impression, we
15 probably wouldn't have accepted it and given you a
16 hard time. But that not being done, let us move on
17 and in fact, Mr. Bastida is looking at it as timely
18 filed. So I don't think the record is even going to
19 reflect that there was a mix-up in the mailing or
20 wherever it was.

21 That being said, we have 15 minutes on the
22 clock.

23 Mr. Cooper, when you are ready, you may
24 proceed.

25 MR. COOPER: Mr. Chairman and ladies and

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1 gentlemen, lady and gentlemen, I represent three
2 entities, the New Partnership, Innovative Recycling
3 and Rodgers Brothers. This case is now well over 60
4 months old. For two and a half years, this case was
5 lost. When it was finally found, in the next two and
6 a half years we have gone through the loss of the
7 record, the finding of the record, the loss of the
8 recordings, the finding of some, but not all of the
9 recordings. Some 3700 pages of transcripts have been
10 permitted to be used in this case which transcripts
11 the record shows were not a part of the record, which
12 transcripts came into the possession of the
13 Administrative Law Judge as subsequent to the close of
14 the record as an accommodation at the Law Judge's
15 request that the Respondents permit him to use our
16 private transcript to help him write his findings of
17 facts and conclusions of law. It was provided to him
18 with the agreement that it not be printed out and not
19 be provided --

20 CHAIRMAN GRIFFIS: Was that a written
21 agreement?

22 MR. COOPER: Part of it was.

23 CHAIRMAN GRIFFIS: I see.

24 MR. COOPER: And I provided to the
25 Respondents.

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1 CHAIRMAN GRIFFIS: And this was not a
2 certified transcript then, this was your own personal
3 transcript?

4 MR. COOPER: It was our own personal
5 transcript made by our court reporter.

6 CHAIRMAN GRIFFIS: Okay. Were there other
7 transcripts available?

8 MR. COOPER: No, Your Honor, and there
9 were not tapes available because the District had lost
10 the tapes.

11 So we went through a series of motion
12 practices, arguing this issue. It was finally
13 determined in spite of what we considered to be the
14 clear dictates of the DCMR that a matter can proceed
15 only on the exclusive record. And the exclusive
16 record is the recording of the hearing.

17 CHAIRMAN GRIFFIS: The use of your
18 transcripts has somehow prejudiced you?

19 MR. COOPER: If I can just spin this out
20 because it gets a little complicated.

21 CHAIRMAN GRIFFIS: Okay.

22 MR. COOPER: The official transcripts
23 included meetings at the bar which were not privy to
24 our reporter. The record transcript is that which an
25 unofficial transcript would have to be compared to in

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1 order to determine whether or not it was fully
2 accurate. At the beginning of the hearing in the
3 record, the Administrative Law Judge said we give --
4 we grant through discretion permission for you to have
5 a court reporter here, but you must understand that
6 that which the court reporter records is not the
7 official record.

8 A few days later, the Chief Administrative
9 Law Judge sends down an order halting our hearing,
10 saying they have run out of tapes. And saying that
11 the only way our hearing can continue is if we -- the
12 Respondent provide tapes or permit our court reporter
13 to do a transcription on behalf of the Government and
14 we pay for it.

15 Well, we respectfully declined to pay for
16 it and the Chief Administrative Law Judge who is not
17 the Law Judge hearing the matter, issued another
18 order, castigating us, on the record, and we think
19 that was biased and prejudiced to us.

20 So ultimately, this transcript is the
21 transcript that's being used here. We think that is
22 reversible error.

23 We think further --

24 CHAIRMAN GRIFFIS: What's the reversible
25 error?

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1 MR. COOPER: The reversible error is that
2 it is a per se requirement by the Court of Appeals
3 that, and it's not harmless error, it's a requirement.
4 The appeal must be based on the official record.

5 CHAIRMAN GRIFFIS: Okay, so your issue is
6 that you provided the tape with some controversy and
7 you don't feel that that's the official tape so that
8 there was no official --

9 MR. COOPER: We did not provide any tape.
10 We provided a transcript.

11 CHAIRMAN GRIFFIS: I'm sorry, that's what
12 I meant, transcript. Okay.

13 MR. COOPER: The second thing is that this
14 Board ruled that in order for the District to use it,
15 they have to pay half of the cost. Well, as we sit
16 here today, having gone through a whole briefing
17 schedule, the District has yet to compensate us for
18 anything and we think they should not be allowed to
19 even refer to anything that happened.

20 CHAIRMAN GRIFFIS: Is that a mild
21 technicality?

22 MR. COOPER: Mild? These things cost
23 about \$8,000 to repair.

24 CHAIRMAN GRIFFIS: I'm not belittling the
25 dollar amount. I'm sure it is, but when it goes to

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1 the substance of what the issue before us is, is who
2 paid or whether payment is complete, I just question.

3 MR. COOPER: Whether it is form or
4 substance, this Respondent has a right to have the law
5 obeyed.

6 CHAIRMAN GRIFFIS: Okay.

7 MR. COOPER: Next is we have thoroughly
8 briefed in 40 pages over three dozen issues of error.

9 The District is fond of saying that the errors are
10 harmless. The errors are harmless. No matter what it
11 is, it is a harmless error. There is a complete body
12 of law here in the District which talks about harmless
13 error.

14 And what it says is that in order for the
15 error to be harmless, that beyond a reasonable doubt,
16 the error cannot have affected the outcome. And so
17 when you say harmless, it's not what normally
18 ordinarily we think of as harmless. It is a much more
19 serious analysis. So we began our case by saying in
20 1998, the District was embarked on a policy and
21 practice of attempting to put out of business solid
22 waste companies, that they were improperly using the
23 zoning regulations to do that and that they were using
24 the zoning regulations, frankly as a bargaining chip
25 in the negotiations to come into compliance with these

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1 different companies.

2 We therefore asked to call as a witness
3 Mitchell Burger who was a lawyer for DCRA and who was
4 representing them at this hearing. And we gave the
5 grounds of calling Mr. Burger. Mr. Burger was the
6 co-chair of the Solid Waste Committee of the District
7 which was charged with the closure of the seven solid
8 waste, what they call transfer stations. Mr. Burger
9 was the person who directed the activities of the
10 investigators in this matter. Mr. Burger was the
11 person who wrote the statute and wrote the
12 regulations. And Mr. Burger was the person who was in
13 charge of a particular, what we call raid, what they
14 call site visit, bringing about 13 to 15 people to
15 this site on a particular day and he was responsible
16 for supervising the investigators who spent two weeks
17 total, different days, doing surveillance of this
18 site.

19 We were denied the right to call Mr.
20 Burger. We believe that denied us due process. We
21 believe that that was not harmless error, that under
22 the sixth amendment, we had a right under the
23 Administrative Procedures Act, we had a right to call
24 witnesses in our defense.

25 There was another witness who was an

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1 investigator. We tried to call. This lady was a
2 person who accompanied Ms. Washington to do the
3 surveillance. The city attempted to enter and did, in
4 fact, enter certain notes that were made. On cross
5 examination it was determined that the witness who
6 proffered the notes, Ms. Washington, was not the
7 person who made the notes and that the person who made
8 the notes was the witness we attempted to call. We
9 were denied the right to call this witness and be able
10 to cross examine this witness as to the contents of
11 the notes, the veracity of the notes.

12 MR. ZAIDAIN: When you say notes, you're
13 talking about the notes on the surveillance?

14 MR. COOPER: Yes, the contemporary notes
15 which were put into evidence which was part of what
16 the Administrative Law Judge used to justify his
17 decision.

18 CHAIRMAN GRIFFIS: And that person was
19 Jerry Glover?

20 MR. COOPER: Yes.

21 CHAIRMAN GRIFFIS: Okay.

22 MR. COOPER: Next, Mitchell Burger and his
23 supervisor, Karen Edwards, created out of whole cloth
24 a subpoena form. The first subpoena form ever created
25 by their office. They each signed that subpoena form,

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1 sent that subpoena form to Georgetown -- I mean George
2 Washington University and Howard University. That
3 subpoena form purported to require them to issue, to
4 respond to it as a subpoena duces tecum. Now this
5 subpoena form which had never been used ever before by
6 anybody in this Government was not provided for by any
7 statute, any rule or any regulation.

8 The act under which we are proceeding
9 provides that if someone wants a subpoena, you apply
10 to the Administrative Law Judge for the subpoena.
11 That's a pro forma thing and they issue the subpoena,
12 but there is no place under which there is any
13 delegation of any authority to a staff lawyer and the
14 staff lawyer's boss to gen. up on a computer their own
15 subpoena. And then send out and get private records
16 between two parties.

17 There is nothing in this record that
18 sustains the District's argument that they had the
19 innate right to do it, that it was delegated by the
20 Solid Waste Facility Act. Well, nothing is charged
21 here under the Solid Waste Facility Act. We don't
22 concede that that act delegated authority to anybody
23 to issue these subpoenas and if it did, that
24 delegation under that act was not redelegated down to
25 their level, but under the act we're proceeding on,

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1 there is no authority.

2 Now on top of this, the Administrative Law
3 Judge admitted the evidence, evidence we claim was the
4 fruit of a poisoned tree resulting from the use of
5 this information which at that point then pervaded
6 everything forward.

7 The Administrative Law Judge says subpoena
8 is fine and here's why it's fine. The Agency's
9 mission statement from 10 years ago says they have the
10 right to enforce A, B and C. Now this mission
11 statement didn't say they have a right to issue
12 subpoenas. But guess what? This mission statement
13 was outside of the record. This mission statement was
14 never discussed by anyone. The Judge just went
15 somewhere and got it.

16 In addition, he refers to a delegation
17 order. Well, the delegation order refers to the Solid
18 Waste Facility Act, but guess what again? It was not
19 in the record. He went somewhere else and found it.

20 In this record also is the fact that the
21 Judge went and visited the site. Did not tell anybody
22 about it. And -- how's my time, Mr. Chairman?

23 CHAIRMAN GRIFFIS: Fifteen seconds. You
24 can see it on the clock on each side.

25 MR. COOPER: And so with that let me stop

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1 by saying and I have more to say later. This is just
2 maybe a third of all of the reversible errors.

3 CHAIRMAN GRIFFIS: Good, thank you. Let's
4 go to the Appellee.

5 MR. PARKER: I'd just a clarification.
6 Mr. Cooper here is reserving 15 minutes in rebuttal.
7 I understand rebuttal to be responses to points that I
8 bring up in my case, not another opportunity to bring
9 up other points that he hasn't raised yet. If he
10 wants more time to do that, I'm prepared to let him
11 adjust his time, but I don't want that to be used
12 inappropriately.

13 CHAIRMAN GRIFFIS: That is my
14 understanding of what the rebuttal would be used for
15 also unless Corporation Counsel has a different
16 opinion.

17 Are you clear on that, Mr. Cooper?

18 MR. COOPER: No, I'm not.

19 CHAIRMAN GRIFFIS: Well, we have 30
20 seconds. You can reevaluate your time at this point.

21 You have 30 minutes and we obviously give you the
22 flexibility to break it in two.

23 MR. COOPER: Can I speak to my client?

24 CHAIRMAN GRIFFIS: Absolutely. Why don't
25 we take a break and turn the air conditioning on.

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1 (Pause.)

2 CHAIRMAN GRIFFIS: Yes, Mr. Cooper?

3 MR. COOPER: Mr. Chair, if I could take
4 two additional minutes now and then I will reserve the
5 balance to address rebuttal.

6 CHAIRMAN GRIFFIS: Very well. Let's put
7 two minutes on the clock and --

8 MR. COOPER: I'm sorry.

9 CHAIRMAN GRIFFIS: I'm waiting on the
10 clock. I'll let you know.

11 Done. When you're ready, Mr. Cooper.

12 MR. COOPER: Mr. Chairman, there are a
13 series of cases, Gemstar Stone Products, 777 A.2d
14 27270; Gardner E. Palmer, 287 A.2d 535; White v.
15 United States, 613 A.2d 869; which all go to the
16 issue of harmless error and related matters I raised.

17 The right of an Administrative Law Judge
18 is narrowly limited by the statute and I refer you to
19 the Ramos case which I think you all are familiar
20 with. There, we would ask that you take careful note
21 of our reply brief particularly in light of the time
22 constraints here, pages 14 through 19. The District
23 always says to us well, you don't point out any
24 specific harm that whatever was done to you had, so
25 we've taken time to point out a number of different

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1 harmful things.

2 And finally, we would ask you to look
3 carefully at the page 4, 5 and 6 of our introductory
4 brief which lays out sort of a road map of all of the
5 errors that we were able to mention within the 20 page
6 limitation that we had.

7 Thank you.

8 CHAIRMAN GRIFFIS: Thank you. We'll set
9 the clock to 30 and ask Appellee to start.

10 MR. PARKER: Thank you, Members of the
11 Board. The reason I raised that issue with regard to
12 the division of time is that one of the threshold
13 things I think the Board is going to need to decide on
14 this appeal is what's properly before it. The
15 briefing order that went out on this matter set up the
16 requirement of establishing issues and then presenting
17 arguments and that briefing order is very similar to
18 the District of Columbia Court of Appeals Rule 28
19 which sets up the means by which you raise an issue
20 and then argue in support it before an appellate body.

21 That provision has been construed in Joiner v.
22 Woodner, this is in my footnote 2 at the bottom of
23 page 9 of my brief; and also Ramos v. United States --

24 MR. COOPER: Mr. Chair.

25 CHAIRMAN GRIFFIS: I'm not going to have

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1 any interruptions.

2 MR. COOPER: It's not in the record, this
3 argument.

4 CHAIRMAN GRIFFIS: Can we just hold the
5 clock for a second?

6 This is my time. Just refer to the
7 document you just cited, the page.

8 MR. PARKER: My brief, Appellee's brief,
9 page 9, footnote 2.

10 CHAIRMAN GRIFFIS: Which is in the record.

11 MR. PARKER: Correct.

12 CHAIRMAN GRIFFIS: Okay. Let's continue.

13 MR. PARKER: That's cited for the
14 proposition that you just can't list a pile of issues
15 and properly raise them. They have to be supported by
16 an argument and in this case, in the Appellant's
17 initial brief, there is a whole series of issues
18 raised, but there's only about a half a dozen
19 arguments that are actually made on particular issues
20 which are procedural issues.

21 Also, the guiding principle for an
22 appellate body is in an appellate argument, you can't
23 raise a new argument for the first time in a reply
24 brief because it's obviously unfair to the Appellee.
25 We don't have an opportunity to address it and to

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1 direct argument to it.

2 In the Appellant's brief, particularly --
3 I should say in the reply brief, particularly at pages
4 4 and 5 of the reply brief and the pages 17 and 18
5 where there's a seriatim listing of factual disputes,
6 none of those were raised appropriately in the initial
7 brief and the Appellee never had a proper ability to
8 address those. So I would suggest to you that
9 initially you'll need to determine what the proper
10 scope of the issues that have been raised and I would
11 submit to you that it's the issues that were
12 identified and argued, first of all, in the
13 Appellant's brief and then in our Appellee's brief.

14 Turning to those issues, the first issue
15 is the issue regarding the state of the record which
16 is essentially a rehash of the motions to dismiss that
17 were filed repeatedly in this matter regarding the
18 transcripts and the tapes.

19 I think it's important to understand that
20 when that issue came before the Board it was the
21 Appellee's position that under the Civil Infractions
22 Rule that the Appellant is required to obtain a
23 transcript of the official tapes and make that part of
24 the record. Now the Appellant raised a legitimate
25 concern saying we've already paid \$8,000 for a

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1 transcript. To accommodate them, OAD then reviewed
2 those transcripts and certified those transcripts as
3 the official record.

4 There then became an issue that there
5 apparently was not a transcript for one of the days
6 and OAD then sent over a copy of the tape for that
7 day.

8 CHAIRMAN GRIFFIS: What's the procedure
9 for certifying the transcripts by OAD?

10 MR. PARKER: The Hearing Examiner would
11 have looked at the transcript to determine that it was
12 an appropriate or a true and accurate --

13 CHAIRMAN GRIFFIS: Is there any document
14 that's in existence that certifies it or is it just
15 accepted?

16 MR. PARKER: I believe it may have been
17 transmitted with the transcripts in the record. I
18 don't have it in here and I can't cite you to the
19 number, but it's my understanding that that was the
20 process.

21 So therefore between all of the
22 transcripts and the one tape that was sent over, you
23 have the entire record. And if there was ever a gap
24 or problem with the record, the Appellant was on duty
25 to make a motion to supplement in some manner. They

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1 have made an academic or hypothetical argument that
2 there's somehow something missing before you, but they
3 never said specifically what it is and how it's
4 prejudicing them to raise any argument that they're
5 trying to raise. So we think that that's a complete
6 red herring. And we would ask you to treat it
7 appropriately.

8 The denial of calling Mr. Burger as a
9 witness, that issue was, we believe, properly ruled
10 upon by the Hearing Examiner. He determined that Mr.
11 Burger, as an attorney and not simply because he was
12 the attorney, but because the only issue he was being
13 called on was to talk about policy grounds of the
14 Agency, that those considerations were irrelevant.
15 And that it would get into a collateral inquiry that
16 had nothing to do with whether any of these Appellants
17 were operating their facility outside the scope of
18 their certificate of occupancy, what was observed,
19 what actually was happening out there. So that was an
20 appropriate exercise of his authority.

21 All Administrative Law Judges have the
22 ability to exclude immaterial, irrelevant and
23 repetitious information and we would suggest that this
24 fits squarely within that discretion.

25 The denial of the subpoenas, again, that

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1 was a situation where there was an objection to the
2 issuing of subpoenas to DCRA for various information.

3 And the ALJ made a ruling that once the objection was
4 raised that the Appellants failed to make out a
5 showing, that the information they were seeking was
6 either relevant and not overbroad, not unduly
7 burdensome.

8 And based on that calculus and that
9 reasoning, the subpoenas were denied and the ALJ ruled
10 that it was an appropriate basis for denial, given the
11 fact that there wasn't any follow up to demonstrate
12 why that subpoenaed information was going to be
13 useful.

14 Also, they raised in the brief,
15 appropriately, is this issue about the denial of
16 prehearing discovery and there again, as we argued in
17 our brief, the general rule is there is no pre-hearing
18 discovery permitted in administrative proceedings
19 unless the enabling statute authorizes it or unless
20 the particular rules of that Agency authorizes it.
21 And as we've noted, there was no such authorization
22 for pre-hearing discovery in the nature of
23 interrogatories or requests for documents.

24 And this whole scenario is squarely on
25 point with the In Re Herndon case which is another

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1 administrative proceeding before the bar counsel for
2 an attorney who went and -- he actually asked for a
3 request to file a request for documents. And it was
4 denied. In this case, the initial request for
5 approval of that process wasn't even made. There was
6 just a request for document issued. So that -- we
7 believe that case is also controlling and that that
8 wasn't a proper procedure and the denial of the
9 prehearing discovery was appropriate and there wasn't
10 anything raised to show that there was -- there was no
11 specifics given as to why that particular process
12 needed to take place to preserve a particular issue
13 that the Appellants were trying to bring out before
14 the Administrative Law Judge.

15 They also raised in their brief the issue
16 about whether the findings of fact were sufficiently
17 specific to justify the conclusions of law. They
18 focused on, again, what seems to be a hypertechnical
19 discussion of the ALJ in recounting the witness
20 testimony of Ms. Shirley Washington and Mr. Vincent
21 Ford, concluded by saying instead of maybe -- might
22 more artfully have said, I'm crediting their testimony
23 as to then go on to the conclusions of law. He said I
24 adopted the testimony. And he's reading that to mean
25 somehow that there was no specific findings of fact,

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1 although they went for paragraph after paragraph of
2 the specific findings of fact.

3 In all the case law that he cites in that
4 proposition are in circumstances where Boards have
5 essentially just parroted what was said by the witness
6 and then just conclusory, applied the violation
7 standard and there is nothing really left to review.
8 There's no guts to the opinion. And I would submit to
9 you that in here, you've seen the length of the
10 opinion and the detail with which it was drawn up. I
11 don't see how those cases are applicable in this
12 circumstance.

13 The last issue that was raised is the use
14 of the subpoena. And first of all, it raises an
15 interesting issue in that Howard University was the
16 entity that was subpoenaed for the documents. They
17 never raised any objection to this. It was their
18 documents that were subpoenaed. So the question of
19 standing here in the first instance about whether it
20 was even appropriate for the Appellants to be raising
21 the use of the subpoena.

22 Second of all, there's a distinction
23 between an investigatory subpoena and a subpoena
24 issued as a result of an on-going administrative
25 process. In other words, we obviously can apply for a

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1 subpoena when a case is already going on, but this
2 subpoena was used to gather information to investigate
3 what was taking place at a facility in terms of an on-
4 going enforcement exercise.

5 We believe that the ALJ appropriately
6 worked his way through the delegations of authority
7 and the authority that is invested in the Mayor to
8 issue subpoenas for investigatory purposes. We think
9 that his analysis is sound and we ask you to support
10 that. Assuming that you find some fault in the manner
11 in which the subpoena was used, we pointed out that it
12 only gathered corroboratory information that went to
13 the fact that solid waste or municipal solid waste was
14 being delivered to this facility. That was merely
15 corroborative of all the eye witness testimony of the
16 inspectors and the neighbors and the other people that
17 had already said -- and pictures that were part of the
18 record, that showed that what was taking place there
19 was not just bulk paper recycling. And that's the
20 essence of what the case is all about.

21 They had a certificate of occupancy for
22 bulk recycling of waste paper and they were carrying
23 activities outside of their C of O.

24 So we would submit to you that there was
25 -- even without the Exhibit Q which was the product of

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1 the subpoena, there was more than ample evidence to
2 affirm the rulings of the Administrative Law Judge.

3 Now one of the issues that I wanted to
4 address in the Administrative Law Judge's order. He
5 has 10 different orders in it. The first five pertain
6 to the findings that the infractions that he's
7 sustaining the infractions and that there's no
8 mitigating factors and then he goes on to assess
9 fines.

10 There's Order 6 through 10 in which he
11 orders the operation to cease and desist. We, the
12 Department of Consumer Regulatory Affairs actually
13 filed a motion to clarify this order and arguing that
14 the cease and desist orders were probably not
15 appropriate. And we are not asking that you affirm
16 those portions of the order. What we are asking you
17 to affirm is the findings that the underlying
18 infractions were appropriate and the fines and costs
19 associated therewith.

20 The point being that we would then, if we
21 have an affirmance of this order and we felt it was
22 appropriate, we then could take further administrative
23 actions in terms of suspension or revocation with
24 regard to the Certificate of Occupancy. We're not
25 looking for you to direct that at this point.

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1 And with that, I think that's all that's
2 all appropriately arguable, given the state of the
3 initial brief and our brief and I'm available to
4 answer any questions.

5 We have a few minutes left and Ms. Gilbert
6 would like to add a couple of points with regard to
7 the transcript issue.

8 MS. GILBERT: Yes. I would just like to
9 bring to your attention with a pleading that's part of
10 the record, the Opposition to Motion for Partial
11 Reconsideration of Board's Order of May 21st. It
12 looks like it was filed on or about July 29th of 2002.

13 Essentially, that pleading reiterates that
14 under Title 16 DCMR 3118.12 which is the Civil
15 Infractions Regulations, that the Appellant is
16 required to pay the cost of preparing a transcript.

17 During those first hearings that we had
18 before this Board, if you will recall, the Appellant
19 urged that DCRA, the Appellee, should pay for 50
20 percent of the transcript. We have no recollection
21 and I do not believe that it's anywhere in the record
22 that Appellee was ever ordered to pay 50 percent of
23 the cost of a transcript, although that has been
24 stated by Appellant's counsel.

25 I do not believe that is the state of the

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1 record. And essentially, it was -- we were, I believe
2 at that point what the Board ordered was for the
3 parties to brief the issue of the transcript and who
4 was supposed to pay for the transcript and after that
5 hearing, so that the Board did not reach any decision,
6 after that hearing, counsel for Appellant and Appellee
7 spoke, I believe at the hearing, if My recollection is
8 correct, the fact of this transcript which had been
9 created by the Appellant, came into the fore and he
10 said we've got this transcript and then we, as an
11 accommodation to the Appellant said, okay. Well, if
12 you've got a transcript, we'll agree to use that one.

13 It's not a question of the tapes not being available.

14 And if I'm not mistaken, I believe the
15 tapes are part of the record that you have at this
16 time. So I just wanted to further clarify that point.

17 MR. PARKER: I have two other points with
18 regard to that. Mr. Cooper cited regarding this
19 transcript a provision that parties that order or use
20 a particular portion of a transcript are responsible
21 for the expense. We have never -- the Agency has
22 never ordered a copy of the transcript and if you look
23 at our citings to the record, they cite to other
24 provisions after the matter was submitted to the Board
25 or the record was submitted to the Board. So we've

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1 never ordered a copy of the transcript. So this idea
2 that we're supposed to share it is not even supported
3 in the particular regulation or statute that Mr.
4 Cooper cites repeatedly.

5 And I think the Board is already on to
6 this as a technical issue. Again, it gets away from
7 the idea that what the issue here was is there's a
8 certificate of occupancy that provides for bulk paper
9 recycling and what was observed was activities that
10 did not stay within those boundaries. And much of
11 what has been argued has been procedural issues. Very
12 little has been argued with regard to those facts.

13 The last issue which I'm sure is going to
14 be raised is that Mr. Cooper will try to blame the
15 fact that he didn't -- he wasn't more specific about
16 his issues and raising the arguments appropriately on
17 the page limits that you imposed on us with regard to
18 the briefing schedule, but even the Court of Appeals
19 makes provisions that their 50-page limit is not
20 carved in stone. If you need relief from it, you know
21 how to apply for it and ask for the relief. That was
22 never done here.

23 Thank you.

24 MS. GILBERT: May I have one moment to
25 confer?

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1 (Pause.)

2 CHAIRMAN GRIFFIS: All finished?

3 MR. PARKER: Yes.

4 CHAIRMAN GRIFFIS: Any questions from the
5 Board? In which case which put 10 minutes. I believe
6 it was 10 minutes, right?

7 MR. PARKER: I think he has 13. He took
8 17.

9 CHAIRMAN GRIFFIS: My Timex is a little
10 off.

11 MR. COOPER: They can always give us the
12 balance of their time.

13 CHAIRMAN GRIFFIS: No, we get the balance
14 of their time.

15 MS. GILBERT: Actually, we'd like to
16 reserve the balance of our time, if we could.

17 CHAIRMAN GRIFFIS: I think we're ready --

18 MR. COOPER: Mr. Chairman, I take great
19 umbrage --

20 CHAIRMAN GRIFFIS: Hold on, you're
21 starting, correct?

22 MR. COOPER: Yes.

23 CHAIRMAN GRIFFIS: In which case, I need
24 your microphone on and we can turn these two
25 microphones off. Very well, let's begin.

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1 MR. COOPER: All right, I take great
2 umbrage as Ms. Gilbert's remarks. Her remarks fly in
3 the face of our written response to that argument
4 which they made in writing. Our written response put
5 them on notice that we did not agree with what she
6 just asserted. We never agreed to share any
7 transcripts. The fact of the matter, this Board heard
8 this issue, told us to submit briefs and then came
9 back and said guess what? We've reviewed this and the
10 issue is so clear we don't need briefing on it. Our
11 determination is that the parties have to share the
12 cost. End of story. They have never shared the
13 cost. The next issue is how do they get to
14 certify, in other words pull themselves up by their
15 own bootstraps, our paid for transcript as the
16 official transcript? If they don't have anything in
17 the record to compare it to and if there are no tapes
18 against which -- just to pull a couple pages out and
19 say let me check and see if this is right, it's not
20 there.

21 But to go back to the substantive issues,
22 the District wants to talk about what's properly
23 before it, wants to talk about the rules of civil
24 procedure. They can't have it both ways. Sometimes
25 they want us to refer to the rules of civil procedure

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1 when it helps them, but when it doesn't help them they
2 don't want to use the rules of civil procedure. The
3 rules of civil procedure don't apply here.

4 The issues that are before this Board are
5 the issues that we've raised in our documents. And
6 frankly, that which is written about implicates,
7 inculcates the issues that are listed. They're all
8 part and parcel of it and they inculcate the whole
9 record which we've made part of our pleas and part of
10 our briefing because you have extensive motion
11 practice on a number of the issues which you can then
12 go to and see how each side spelled out the issues.

13 The case law is important because all
14 times the city cites cases for things they don't
15 really represent. You need to read Herndon to see
16 what Herndon says. There's a case about a lawyer who
17 wanted to get discovery. What does that case say?
18 The case says oh, we gave you some discovery. What
19 you want is extra discovery. In this case, discovery
20 was denied.

21 Let me read something to you.
22 "Nevertheless, several Courts have held that an
23 administrative agency must grant discovery to a party
24 in a contested case regardless of whether the agency
25 enabling statute or agency rules provide for it. If

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1 refusal to grant discovery would so prejudice the
2 party as to amount to a denial of due process."
3 McClelland versus Andress, 196 U.S. Appellate D.C.
4 371. PSC Resources versus N.L.R.B., 576 F.2d 380;
5 Jacob Stein, George Mitchell & B. Mecendez, Section
6 2301.

7 The fact is, it is an abuse of discretion
8 to just completely deny discovery where that which is
9 requested is narrow, limited and required to be able
10 to defend oneself. And that's what happened here.

11 The denial of Mr. Burger's testimony,
12 well, the city would like you to think that the only
13 issue was city policy. Well, it wasn't city policy.
14 It was facts, facts about the raid he went to and
15 supervised and participated in. Facts about what he
16 instructed his employees to do, the people he
17 supervised, the two investigators. Facts about the
18 submission of documents under one person which
19 belonged to another. But facts about the city policy.

20 Policy is important. It was important to what was
21 happening here and whether or not this was a solid
22 waste transfer facility, whether this was a bulk waste
23 paper recycling facility, the Administrative Law Judge
24 says that Rogers Brothers was processing more than 20
25 percent residuals. That's what's left over. But

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1 nowhere in the record is there proof of that. Nowhere
2 in the record is there something that says here is a
3 rule that applies to the 20 percent and you fail to
4 meet the rule.

5 In addition, Mr. Burger would have been
6 able to testify about the fact that in the instance of
7 innovative waste who was charged because they were
8 operating under Rogers Brothers' certificate of
9 occupancy, that the city's policy reflected in the
10 transcripts which we attempted to offer, testimony of
11 Mr. Burger reflected that the city permitted the other
12 waste operators to use the certificate of occupancy
13 under a management agreement. Well, we had a written
14 management agreement exactly saying as the other
15 people. The city has continued and to this date
16 permits that to occur.

17 With regard to whether or not this was
18 being done illegally which was referred to by Mr.
19 Parker, the city charged the landlord as if the
20 landlord knew that somehow or another more than 20
21 percent was being processed. Now obviously the
22 landlord had no way to know that one way or the other.
23 They were operating under a legal certificate of
24 occupancy.

25 The city would like you to think that the

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1 issue with regard to the findings of fact are hyper
2 technical. If there's any one thing that's transpired
3 between our Court of Appeals, the BZA, the Board of
4 Zoning and the Board of Appeals and Review is the
5 steady, incessant determination by the Court of
6 Appeals that Administrative Law Judges have to take
7 the time and have the discipline to write their
8 decisions in the correct way, that they cannot just
9 adopt the whole testimony of someone and say this is
10 our findings of fact and that they say well, these are
11 our conclusions of law. And there is no relationship
12 between a particular finding of fact and a particular
13 conclusion of law.

14 So for all of 40 pages, reciting
15 essentially what was written in the District's
16 proposed findings of facts, that is what happened.
17 There is no citation in the entire opinion to anything
18 in the transcript and indeed, if you take a look at
19 the brief of the Appellants there is no citation to a
20 transcript with regard to any testimony. Which brings
21 us to the Appellees saying well, we never requested a
22 copy of the transcript. Why would they have to
23 request a copy of the transcript? They had it.
24 They're the ones who brought it to you all. So they
25 had 2600 pages of transcript already which they got to

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1 review. They got to use to write their brief with for
2 free.

3 No objection by Howard University to the
4 subpoena? How was Howard supposed to know that it was
5 a phony subpoena? How was anybody supposed to know?
6 Until way after the fact when all of a sudden we see
7 the subpoena that just came from nowhere. It wasn't
8 filed with any Court. There's a process in the
9 District of Columbia law to obtain investigatory
10 subpoenas from the Superior Court of the District of
11 Columbia. There's a process to do all of this. The
12 District was out of control when it came to solid
13 waste facilities. They wanted to close them down and
14 they were willing to do anything they could to do it.

15 Now how was this subpoena used? This
16 subpoena was used to find out what Howard said they
17 were delivering, when they were delivering and how
18 they were delivering. Based on that schedule, the
19 District then sent its investigators because the
20 investigators didn't know which trucks were bringing
21 what and from where. The investigators weren't inside
22 the building at the time it was dumped, so this was
23 the road map that they used. And our contention is
24 that road map all constitute fruit of the poisoned
25 tree and has to be suppressed. And anything that

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1 flows from it cannot be used as a basis for this
2 decision.

3 Delegations. In administrative law, as
4 Ramos speaks to, the right of Administrative Law Judge
5 is founded in statutes. So it is with delegations of
6 power. The Mayor has to write out a delegation. It's
7 got to go to an agency head. If the agency head,
8 under law, further wishes to delegate something, he
9 has to write out the delegation. Now this hearing
10 took place on the 9th floor of a building. The
11 Director's office was a 100 feet down the hall. If
12 the Director or the General Counsel had delegated this
13 authority they could have just walked right across and
14 said, Administrative Law Judge, we sure did delegate
15 this to Mr. Burger. But guess what? There was no
16 written defense. Nothing. No testimony other than
17 Mr. Burger and the Administrative Law Judge going
18 outside of the record.

19 The issue here correctly is whether or not
20 this company was doing bulk waste processing as
21 opposed to operating a solid waste transfer station.
22 The record is clear by the expert witnesses, five of
23 them who travel from around the country against the
24 word of Mrs. Washington, an investigator, that the
25 record shows had no training, in service or otherwise,

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1 no education, any of that to determine the difference
2 between the two.

3 And with that, we thank you very much for
4 your time and attention and encourage you strongly to
5 please read the briefs.

6 Thank you very much.

7 CHAIRMAN GRIFFIS: Thank you very much.

8 MR. COOPER: I'll take any questions.

9 CHAIRMAN GRIFFIS: Any questions of the
10 Board? Then I would thank you all and the hearing on
11 this appeal is concluded and the parties are excused.

12 Thank you.

13 (Whereupon, at 3:22 p.m., the public
14 hearing was concluded.)

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