

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY

APRIL 29, 2003

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
DAVID ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

CAROL J. MITTEN	Commissioner
JOHN G. PARSONS	Commissioner

COMMISSION STAFF PRESENT:

BEVERLEY BAILEY	Office of Zoning
JOHN K. A. NYARKU	Office of Zoning
CLIFFORD MOY	Office of Zoning

OTHER AGENCY STAFF PRESENT:

JOHN MOORE	Office of Planning
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D.C. OFFICE OF CORPORATION COUNSEL:

LORI MONROE, ESQ.

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

9:46 a.m.

CHAIRMAN GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the 29 April 2003 public hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Geoffrey Griffis. I am chairperson. Joining me today is the representative from the National Capital Planning Commission, Mr. Zaidain, and representing the Zoning Commission is Mr. Parsons.

A few things to go through to make sure everyone is of the understanding of what our process will be today. First of all, agendas of today's hearing are available to you. They are located at the door where you entered into the hearing room. I would also indicate that all hearings are recorded, so with that there are some things that people should be aware of.

First of all, we will require that people give their full attention to the proceeding, and, please, refrain from making any disruptive noises or actions in the hearing room. Also, when coming forward to speak to the Board, you need to fill out two witness cards. Two witness cards are available at the table where you entered into, also at the table in

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1 front of us. Those witness cards go to the recorder,
2 who is sitting on the floor to my right.

3 When sitting down to speak to the Board,
4 make yourselves comfortable, and I would like you to
5 turn on a microphone and also give me your name and
6 your address for the record, so that we can make sure
7 to give you great credit for the wonderful things you
8 will say today.

9 The order of procedure for this morning,
10 as this is an appeal, will be first we'll have
11 statements and witnesses of the appellant. Second, we
12 will go through the Zoning Administrators or other
13 Government officials and their representatives.
14 Third, we will have the owner/lessee operator of the
15 property if so involved. Fourth would be the ANC
16 within which the property is located. Fifth would be
17 the intervenor's case, and six would be rebuttal and
18 closing statements by the appellant.

19 Cross examination, of course, is permitted
20 by those who are granted status in the hearing, and
21 the ANC, of course, within which the property is
22 located is automatically a party in these cases. The
23 record will be closed at the end of the hearing,
24 except for any material that is specifically requested
25 by this Board, and we will be specific on what is to

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1 be submitted and when it is to be submitted into the
2 Office of Zoning. Of course, after that receipt of
3 information, the record would then be closed and no
4 other information would be accepted.

5 The Sunshine Act requires that public
6 hearings on each case be held in the open and before
7 the public. This Board, however, may, as is
8 consistent with its own rules of procedure and the
9 Sunshine Act, enter executive session during or after
10 the hearings on a case. This would be for purposes of
11 reviewing the record or deliberating on a case. The
12 decision of the Board in contested cases must be based
13 exclusively on the record, and so we ask that people
14 present today not engage Board members in any outside
15 conversation, so that we do not give the appearance of
16 not basing our deliberation solely on the record.

17 Let me ask that everyone turn off all the
18 cell phones and beepers, at this time, so that we
19 don't have any disruptions of the hearing as we
20 proceed, and I think we can go right into any
21 preliminary matters. Preliminary matters are those,
22 of course, which relate to whether a case will or
23 should be heard today, such as requests for
24 postponements, continuances, withdraws or whether
25 proper adequate notice has been provided.

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1 If you are not prepared to go forward
2 today with a case or you believe that the Board should
3 not proceed with its case this morning, I would ask
4 that you come forward and have a seat as an
5 indication. I will ask staff this morning if they
6 have any preliminary matters, and also say good
7 morning to them. Ms. Bailey, on my very far right,
8 and Mr. Moy. Mr. Nyarku is also here with us on my
9 left, and Ms. Monroe, corporation counsel.

10 With that, do we have any preliminary
11 matters?

12 MS. BAILEY: Mr. Chairman, members of the
13 Board, good morning.

14 CHAIRMAN GRIFFIS: Good morning.

15 MS. BAILEY: Staff has none, Mr. Chairman.

16 CHAIRMAN GRIFFIS: Thank you. I see that
17 several have made themselves comfortable. Would you
18 introduce yourself, sir, for the record and tell me
19 what's on your mind? Actually, not what's on your
20 mind, but perhaps a preliminary matter.

21 MR. TUMMONDS: Pertinent things on my
22 mind. Good morning, my name is Paul Tummonds with the
23 Law Firm of Shaw Pittman. I'm here this morning on
24 behalf of the owner of the River Inn, which is the
25 holder of the building permit, which is the subject of

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1 today's appeal. My preliminary matter is that I would
2 formally request, formally make a motion that this
3 appeal be dismissed as moot. The basis for this
4 motion was outlined in my letter dated April 25, 2003
5 to the Board, which was also served on the appellant,
6 as well as the defendant, DCRA.

7 In addition to the materials that I
8 addressed and outlined in my April 25th letter, I have
9 submitted to the Board, as well as to the ANC and to
10 DCRA, a copy of a letter from and signed on behalf of
11 the owner of the River Inn relinquishing any rights in
12 the permit, building permit, which is the subject to
13 today's appeal, to pull the recessed window line out
14 to the front of the building.

15 In addition, I have copies of the updated
16 building permit, permit #B450235.

17 CHAIRMAN GRIFFIS: So that's a revised
18 permit?

19 MR. TUMMONDS: Yes.

20 CHAIRMAN GRIFFIS: Okay.

21 MR. TUMMONDS: Actually, it's a revision
22 that allowed additional work, revised work. It does
23 not supersede the original building permit, which is
24 the subject of this appeal, but I will run through
25 with that permit and show you how we think that as a

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1 result of the permit issued by DCRA on April 9th that
2 all of the issues that are the subject of this appeal
3 are, in fact, moot and it would be proper and
4 appropriate for this Board to dismiss this appeal.

5 CHAIRMAN GRIFFIS: Let me get
6 clarification. There are two permits appended to this
7 renovation?

8 MR. TUMMONDS: That is correct.

9 CHAIRMAN GRIFFIS: Okay.

10 MR. TUMMONDS: Yes, and I think it's
11 there was an original building permit issued on August
12 7, 2002, which was I will call the full interior
13 renovation permit to allow the interior renovations at
14 the River Inn. That permit authorized the pulling out
15 of this recessed window line to the front of the
16 building. Subsequent to that, after the ANC submitted
17 this appeal, the building owner said, you know what,
18 we're not going to pull it. Their concern seemed to
19 be with this recessed window line. We're not going to
20 pull the window line out to the front of the building.

21 So as is the course, as the building
22 permit review process proceeds, they, the owners of
23 the River Inn, needed to have an additional permit
24 regarding, I think it was, fire and electrical. That
25 was the permit issued on April 9th, which is permit

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1 #B450235. In that permit, our drawings would show the
2 window line to remain as existed since 1979 and exists
3 out there today. So that's why, for these reasons, we
4 think that that building permit approves the location
5 of that recessed window line, and therefore we think
6 that that is controlling on the property, and
7 therefore the appeal is moot.

8 CHAIRMAN GRIFFIS: Okay. Hold on just a
9 second. What are you -- are you submitting something,
10 Mr. Tummonds?

11 MR. TUMMONDS: Yes.

12 CHAIRMAN GRIFFIS: Let me.

13 MR. TUMMONDS: I'm sorry.

14 CHAIRMAN GRIFFIS: We're going to hear the
15 whole thing here and then we'll get everyone
16 introduced and hear discussion on the motion that's
17 before us, and then we'll deliberate on it.

18 MR. TUMMONDS: Yes. What I have submitted
19 into the record and is being passed out to you are
20 really pertinent portions of that revised building
21 permit #450235, and what I have done is that I have
22 highlighted in green the location of the recessed
23 window line, and then in pink is the location of the
24 front of the building above to show really to kind of
25 highlight the fact that that window line is recessed.

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1 Those are approved permit drawings, and therefore
2 this issue is moot, coupled with the letter that I
3 submitted earlier giving the Board, and as well as
4 DCRA, BRA, the comfort level that any rights that were
5 granted in the original building permit to pull that
6 window line out, you know, we have relinquished those
7 rights.

8 CHAIRMAN GRIFFIS: I see.

9 BOARD MEMBER ZAIDAIN: Let me make sure I
10 understand. The green line is the existing?

11 MR. TUMMONDS: Yes. The green line is the
12 location of the window that existed in 1979, that's
13 existed prior to the issuance of the building permit
14 last August.

15 BOARD MEMBER ZAIDAIN: Right.

16 MR. TUMMONDS: And is what's out there
17 right now.

18 BOARD MEMBER ZAIDAIN: Right. And the
19 pink line is what they were going to do, but now are
20 not going to do?

21 MR. TUMMONDS: Correct.

22 BOARD MEMBER ZAIDAIN: So building permit
23 #B450235 is for maintaining the green line,
24 essentially?

25 MR. TUMMONDS: I think what it is for is,

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1 and I think this was some of the concern that was
2 raised, as you see these plans really show the details
3 of electrical and fire related items.

4 BOARD MEMBER ZAIDAIN: Right.

5 MR. TUMMONDS: But they also show, in
6 fact, the location of that wall. So our stance,
7 position is that they are governing with regards to
8 location of that recessed wall, and, in addition, the
9 letter also will assure that that location of the wall
10 will remain.

11 BOARD MEMBER ZAIDAIN: But they didn't
12 submit a revised?

13 MR. TUMMONDS: Specifically, no. There
14 was not a specific permit that said here is now the
15 location of the recessed window line.

16 MS. GILBERT: May I be heard a second?

17 CHAIRMAN GRIFFIS: Everyone will be heard.

18 MS. GILBERT: Right.

19 CHAIRMAN GRIFFIS: Let me make sure that
20 the Board is clear on what has been presented, and
21 then we can obviously hear others.

22 MS. GILBERT: Okay.

23 CHAIRMAN GRIFFIS: Mr. Zaidain?

24 BOARD MEMBER ZAIDAIN: Well, I guess my
25 question would be how? I mean, I understand what's

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1 going on. We got the letter and the revised
2 electrical permits. How binding is that that they've
3 got? I mean, they've got a permit that's still valid
4 showing the wall coming out.

5 MS. GILBERT: Right.

6 BOARD MEMBER ZAIDAIN: They've got revised
7 electric showing the wall staying in.

8 MS. GILBERT: That's what I would --

9 BOARD MEMBER ZAIDAIN: It's kind of weird.

10 MS. GILBERT: That's what I would like to
11 clarify, if I may?

12 BOARD MEMBER ZAIDAIN: If I could just say
13 that.

14 MS. GILBERT: Yes.

15 CHAIRMAN GRIFFIS: Okay. Why don't we
16 have introductions?

17 MS. GILBERT: All right. My name is Laura
18 Gusolfi Gilbert, attorney for the Department of
19 Consumer and Regulator Affairs, the appellant in this
20 case. We've had some conversations with Mr. Tummonds
21 over the last several days, since he submitted his
22 letter. We've also had our engineers review the
23 original permit that was issued that's on appeal here,
24 as well as the permit that Mr. Tummonds is referring
25 to.

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1 We agree that, essentially, the issues in
2 this appeal are if not moot now, can be easily
3 resolved or mooted, and what we would like to do is
4 have and River Inn has agreed to this, have River Inn
5 submit two new drawings in relation to the original
6 permit that was issued here. Two new plans. It would
7 be SP1.1 and SP1.2. I have those drawings here, and
8 those are the drawings which authorized the windows to
9 come out. So that our proposal and regrettably we
10 didn't get to this a week or two ago, but our proposal
11 is for River Inn to submit revised drawings to DCRA.

12 We can then issue a revised permit which
13 will make clear that the wall is to remain -- the
14 windows are to remain where they are and the existing
15 wall is to remain where it is. So that that would
16 resolve the window issue. The other issues, which
17 have been raised in this appeal, we had an inspector
18 go out yesterday, and we have photographs which
19 demonstrate that there is no longer any sign that
20 indicates the restaurants existence. There is just a
21 sign that says the River Inn.

22 Also, there is no entrance from the
23 outside, a separate entrance to the restaurant that
24 may have been part of the request in the original
25 permit, but there is no entrance from the outside.

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1 The only way to enter the restaurant is through the
2 main door of the hotel. And the third issue that I
3 believe was of concern to the appellant was whether
4 the restaurant was concealed, and our photographs,
5 which we're prepared to proffer or if we have to go
6 through a full hearing we will be presenting into
7 evidence, demonstrate that shrubbery has been
8 replaced.

9 It's not as full as it was a year ago,
10 because it was removed at the time that River Inn
11 intended to move those windows. But now that they've
12 completed their renovation and have not moved the
13 windows, they have replanted shrubbery. So my sense
14 is that this matter can be easily resolved. It may
15 not be right to be mooted today, because of the
16 question that you asked, Mr. Zaidain, with respect to
17 how binding is this. We do still have a live permit
18 here, and we agree that that permit has to be revised.

19 I understand that the appellant would like
20 to see that permit vacated, but I don't believe that
21 that's a realistic stance at this stage of the game,
22 because renovations have been accomplished pursuant to
23 that permit. So it would not really -- I mean, it
24 wouldn't be a valid exercise, I don't think.

25 CHAIRMAN GRIFFIS: Right.

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1 MS. GILBERT: To vacate that permit at
2 this time.

3 CHAIRMAN GRIFFIS: Your point is because
4 there's substantially more work involved attendant to
5 the permit than just a single issue?

6 MS. GILBERT: Right, than just a single
7 issue.

8 CHAIRMAN GRIFFIS: Okay.

9 MS. GILBERT: So that what we would like
10 to do is revise the permit and, you know, maybe if we
11 were given a week within which to accomplish that,
12 then we could finalize this case.

13 CHAIRMAN GRIFFIS: But is it then your
14 position? Okay. Any questions?

15 MS. GILBERT: I mean, I believe that
16 legally, and our engineer would testify to this if we
17 have to go forward, that, you know, the legal issue
18 that was raised by the appellant is somewhat mixed.
19 The volume of the building did not change, so the
20 gross area of the entire building would not have
21 changed if the windows had been moved out.

22 CHAIRMAN GRIFFIS: Would the FAR change?

23 MS. GILBERT: However, the appellant
24 certainly has a point that the size of the restaurant
25 would have been increased. The size of the commercial

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1 adjunct would have been increased --

2 MS. ELLIOTT: I object, Chairperson
3 Griffis.

4 MS. GILBERT: -- if the appellant had been
5 permitted to -- if the River Inn had been permitted to
6 come forward.

7 CHAIRMAN GRIFFIS: Okay. All right.
8 Let's move on.

9 MS. ELLIOTT: My name is Elizabeth
10 Elliott, Chairperson Griffis and Board members, and
11 I'm here representing the ANC in this case. I have
12 been authorized to represent the ANC. I'm the
13 immediate past chair of ANC-2A. We think, in fact,
14 that what's moot here today is the fact that there is
15 another building permit that the Alamac Corporation is
16 attempting to gerrymander and to use to get over the
17 fact that this permit was improperly issued.

18 There are sections in the Zoning
19 regulations that clearly state that you cannot
20 increase a commercial adjunct, and the Zoning
21 Administrator apparently overlooked those and granted
22 these permits. And we went through this in another
23 venue.

24 CHAIRMAN GRIFFIS: Wait. Rather than
25 arguing here, I mean, obviously we have to get into a

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1 little substance, but let's stick to addressing
2 specifically the motion. The motion as I understand
3 it is this. They had --

4 MS. ELLIOTT: These issues aren't -- these
5 issues aren't moot.

6 CHAIRMAN GRIFFIS: Actually, it's probably
7 better if I articulate and you can answer it.

8 MS. ELLIOTT: Okay.

9 CHAIRMAN GRIFFIS: The motion is to
10 dismiss based on the mootness is that there is a
11 permit. We haven't established whether it was right
12 or wrong. There is a permit that's allowing a certain
13 type of development or a window line, to be specific,
14 that they are not going to build to that window line.
15 They are maintaining it where it is existing. How
16 are we then to proceed with an appeal of the permit
17 for the work that's not going to be done?

18 MS. ELLIOTT: That's not what we're
19 asking. We're asking you to vacate the permit based
20 on its improper issuance.

21 CHAIRMAN GRIFFIS: Well, conceivably in
22 the logical sense, then let's vacate the specific
23 piece of that permit, not the entire permit.

24 MS. ELLIOTT: Well, we also need to have
25 vacated the basis for that, which Mr. Tummonds in his

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1 letter of April 25th used a letter from the Zoning
2 Administrator, from a previous Zoning Administrator,
3 opining that this was the correct expansion. That the
4 -- it was a direct contravention to the 11 DCMR
5 Chapter 3, 350.4, that a hotel that was in existence
6 as of May 16, 1980, commercial adjuncts may not be
7 increased, and he ignored that and issued this permit.

8 CHAIRMAN GRIFFIS: Well, but they define
9 in the regulations what increases.

10 MS. ELLIOTT: It's in the regulations that
11 you cannot increase the floor area ratio. You cannot
12 increase the commercial adjunct. I mean, it's in the
13 record.

14 CHAIRMAN GRIFFIS: Right.

15 MS. ELLIOTT: It's in the Zoning
16 Regulations.

17 CHAIRMAN GRIFFIS: I mean, one way you
18 would measure an increase of the commercial adjunct is
19 to have --

20 MS. ELLIOTT: Well, by pulling the wall
21 out beyond that line, which was in the original
22 permit, that was what was submitted.

23 CHAIRMAN GRIFFIS: I understand.

24 MS. ELLIOTT: And which was okayed.

25 CHAIRMAN GRIFFIS: I understand.

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1 MS. ELLIOTT: By the Zoning Administrator
2 improperly. He did --

3 CHAIRMAN GRIFFIS: Well, I know you keep
4 saying improperly, but it is based on the fact of
5 whether that was counted as FAR at the original
6 building or whether it wasn't. And if it was counted
7 as the original mass of the FAR, then there is no
8 increase.

9 MS. ELLIOTT: Well, we actually got a
10 later letter during another iteration of this case in
11 front of the Public Space Committee where they
12 attempted to also increase the commercial adjunct by
13 putting a sidewalk cafe in the space, which we
14 mentioned here in our report.

15 CHAIRMAN GRIFFIS: Right.

16 MS. ELLIOTT: And we got an opinion from
17 the Zoning Administrator, at that time, Mr. Denzel
18 Noble and I have copies of that letter that cite the
19 same provision, that they cannot be expanding the
20 commercial adjunct.

21 CHAIRMAN GRIFFIS: Yes, but that's going
22 to the sidewalk cafe.

23 MS. ELLIOTT: No.

24 CHAIRMAN GRIFFIS: It's not going to this.

25 MS. ELLIOTT: It's about -- it cites that

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1 same provision that I'm just citing right now.

2 CHAIRMAN GRIFFIS: I know the provision.

3 MS. ELLIOTT: Which says that you cannot.

4 CHAIRMAN GRIFFIS: We've all read it.

5 MS. ELLIOTT: Yes. Well, and we need to
6 apply it, and as opposed to playing these games of
7 allowing this permit to stand, and then applying for
8 it later on and saying oh, well, we have this opinion
9 in here that says thus and such, which is incorrect.
10 You know, the October 9, 2000 opinion of Michael
11 Johnson is improper and should be -- it should be
12 mooted or rejected and not referred to.

13 CHAIRMAN GRIFFIS: But if the decision by
14 Mr. Johnson is not actually brought to fruition, it's
15 not actually built, than what do we have at issue?

16 MS. ELLIOTT: The fact that he made the
17 decision and gave them an improper permit.

18 CHAIRMAN GRIFFIS: So this is more of --

19 MS. ELLIOTT: I mean, these issues aren't
20 moot. I'm just saying that --

21 CHAIRMAN GRIFFIS: But they're becoming a
22 little bit more philosophical, you know, in building
23 them, aren't they?

24 MS. ELLIOTT: Well, not really, because
25 you -- with these things standing there's a potential

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1 for another attack on this at some future date if this
2 is allowed to stand, if his opinion is allowed to
3 stand.

4 CHAIRMAN GRIFFIS: Okay.

5 MS. ELLIOTT: You can make decisions on
6 it.

7 CHAIRMAN GRIFFIS: What is your opinion --

8 MS. ELLIOTT: The other thing I just --

9 CHAIRMAN GRIFFIS: -- of what DCRA is
10 indicating that they would like to have happen, and
11 that is a resubmission, a revision to the original
12 permit that would show that there's no change in the
13 glass line, and therefore Michael Johnson's opinion
14 would actually be worth nothing, because it wouldn't
15 be part of this project any more.

16 MS. ELLIOTT: Well, we asked to have this
17 permit vacated, and then to have Alamac come in front
18 of us with -- to apply for a revised permit. And, you
19 know, they have for months and months and months now
20 this is -- this case has been pending, and they've
21 known about this.

22 CHAIRMAN GRIFFIS: Okay. They haven't
23 done it, but now they're saying that they would.

24 MS. ELLIOTT: No. Well, that would be one
25 issue. I suppose that would be all right with us if

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1 there was some sort of confirmation to eliminate this
2 and negate this previous opinion, so that it can't be
3 used going forward in any other case in an attempt by
4 Alamac to expand this commercial adjunct in way,
5 shape, form or manner.

6 CHAIRMAN GRIFFIS: I see. So your concern
7 is that okay, fine, they'll revise this permit.
8 They'll put the window line there. But what's to say
9 they don't come back in a month.

10 MS. ELLIOTT: Right, right.

11 CHAIRMAN GRIFFIS: Revisit this letter.
12 Let's get an opinion from DCRA. Could you use this
13 letter for a new permit on expansion of this hotel?

14 MS. GILBERT: No.

15 CHAIRMAN GRIFFIS: Expansion not being
16 allowed? Why don't you turn your microphone on?

17 MS. GILBERT: I don't think it would have
18 any great precedential value. I think you would have
19 to get a new opinion. However, I can confer with the
20 Zoning Administrator and see what the view is with
21 respect to this letter. That's one issue that I
22 didn't discuss with him.

23 CHAIRMAN GRIFFIS: If there's a new permit
24 that's issued, would it not be reviewed by the Zoning
25 Administrator?

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1 MS. GILBERT: Certainly.

2 CHAIRMAN GRIFFIS: Could the developer
3 bring this letter and say is this not a proper
4 interpretation?

5 MS. GILBERT: He could bring it and say is
6 this not a proper interpretation.

7 CHAIRMAN GRIFFIS: Okay. So now it's in
8 front of the --

9 MS. GILBERT: However, we've already
10 determined --

11 CHAIRMAN GRIFFIS: Now, it's in front of
12 the Zoning Administrator. You have the letter. Now,
13 what happens?

14 MS. GILBERT: I'm sorry? Can you say that
15 again?

16 CHAIRMAN GRIFFIS: You have a new
17 submission of a permit.

18 MS. GILBERT: Right.

19 CHAIRMAN GRIFFIS: You bring this letter
20 in. The Zoning Administrator looks at both. Now,
21 what happens?

22 MS. GILBERT: I would --

23 CHAIRMAN GRIFFIS: What's the process?

24 MS. GILBERT: -- say the Zoning
25 Administrator is going to look at the regulations

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1 again.

2 CHAIRMAN GRIFFIS: Okay. So it's going to
3 be a fresh review --

4 MS. GILBERT: And decide whether or not --

5 CHAIRMAN GRIFFIS: -- of the permit that's
6 in front of them?

7 MS. GILBERT: Yes.

8 CHAIRMAN GRIFFIS: I see.

9 MS. GILBERT: Definitely.

10 CHAIRMAN GRIFFIS: Okay. All right. Mr.
11 Parsons?

12 MS. ELLIOTT: Chairperson Griffis, could I
13 make one other point here? On the issues, the other
14 issues with being able to see the sidewalk cafe, I
15 have actually been over there within the last few
16 days, both in the daytime and at nighttime. There is
17 no shrubbery. They have been -- the shrubbery has
18 been taken down that really masked the commercial
19 adjunct, and you can see clearly from across the
20 street, both during the daytime and the nighttime into
21 the space. There have been some very low growing
22 liriope plants put in the very, very low plants, and
23 you can see directly into the commercial adjunct.

24 Also, there have been some uprights
25 planted in these or placed in the planter areas and

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1 they light up very intensely the front of the hotel,
2 and you can see the commercial adjunct through the
3 lights. Around the front door, there were two very
4 large Holly trees removed from around the entry way,
5 and then there are two very intense, high intense
6 lights into the entrance way of the hotel, which are
7 very, very -- they are commercial lighting. And
8 they've replaced the very low lighting that was there
9 prior to this. So that provision has not been taken
10 care of.

11 BOARD MEMBER ZAIDAIN: I think you
12 mentioned a lot of that in your submission, and I
13 think one thing I was struggling with is this appeal
14 is based on 350.4(d), right?

15 MS. ELLIOTT: Well --

16 BOARD MEMBER ZAIDAIN: And I guess I
17 couldn't understand these questions about the
18 shrubbery and being able to see into the commercial
19 adjunct. How does that tie into the regulations?

20 MS. ELLIOTT: It's part of the
21 regulations, because as we talked about in the report,
22 this is a very low density. We were right in the
23 historic district of Foggy Bottom.

24 BOARD MEMBER ZAIDAIN: Yes.

25 MS. ELLIOTT: And it's a totally non

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1 commercial area.

2 BOARD MEMBER ZAIDAIN: Yes. Was zoned
3 residential, right?

4 MS. ELLIOTT: Yes, low residential. I
5 think it's R-5.

6 CHAIRMAN GRIFFIS: E.

7 MS. ELLIOTT: E.

8 BOARD MEMBER ZAIDAIN: Right.

9 MS. ELLIOTT: No, no, no, no.

10 CHAIRMAN GRIFFIS: D.

11 MS. ELLIOTT: No, it's R-3. The hotel is
12 in R-5D.

13 CHAIRMAN GRIFFIS: Right.

14 MS. ELLIOTT: But it abuts the historic
15 district, which is much lower.

16 CHAIRMAN GRIFFIS: Sure.

17 MS. ELLIOTT: I think it's R-3. And the
18 hotel is not. We have a long history with the River
19 Inn in this neighborhood.

20 BOARD MEMBER ZAIDAIN: I'm sure.

21 MS. ELLIOTT: And we -- they were there.
22 They were grandfathered in specifically under the
23 regulations, and the regulations were put to control
24 these commercial properties.

25 BOARD MEMBER ZAIDAIN: And that's the

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1 order for 1980, right, from the Zoning Administrator?

2 MS. ELLIOTT: Yes, yes, the hotel at --

3 BOARD MEMBER ZAIDAIN: So I still --

4 MS. ELLIOTT: So we're very concerned
5 about the impact of this on this very, very quiet
6 residential area.

7 BOARD MEMBER ZAIDAIN: Yes.

8 MS. ELLIOTT: And we don't want some busy
9 commercial thing going on there, and we are protected
10 by the regulations. The interpretation very
11 specifically says you cannot see the commercial
12 adjunct from the sidewalk.

13 CHAIRMAN GRIFFIS: Okay.

14 MS. ELLIOTT: And not only can you see
15 it --

16 CHAIRMAN GRIFFIS: Let's not get too far
17 into arguing the case. Mr. Zaidain, do you have other
18 questions?

19 BOARD MEMBER ZAIDAIN: I just wanted --
20 and then I appreciate what's being said. I just
21 wanted to know for my own understanding what section
22 of the regulations the whole not being able to see
23 into the adjunct and landscaping and all that that was
24 being tied to. Like the argument in terms of
25 increasing is tied to 350.4(d) or whatever that is.

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1 MS. ELLIOTT: Yes.

2 BOARD MEMBER ZAIDAIN: So in terms of the
3 lighting and being able to see into the commercial
4 adjunct, where in the regulations are we?

5 CHAIRMAN GRIFFIS: 51.2(c).

6 BOARD MEMBER ZAIDAIN: 51.2(c).

7 CHAIRMAN GRIFFIS: Mr. Parsons?

8 BOARD MEMBER ZAIDAIN: Okay. Thank you.

9 COMMISSIONER PARSONS: I'm trying to stick
10 with this argument and go back to the other.

11 CHAIRMAN GRIFFIS: I think it's 51.2(c).

12 BOARD MEMBER ZAIDAIN: My question has
13 been answered.

14 COMMISSIONER PARSONS: So you're referring
15 to no part of such adjunct or the entrance thereto is
16 visible from a sidewalk?

17 MS. ELLIOTT: Yes.

18 COMMISSIONER PARSONS: And are you saying
19 that a year ago that was true?

20 MS. ELLIOTT: Yes, they had -- in our
21 submission, I believe, there are some photographs
22 showing the front of the building, and it had
23 shrubbery as the -- as we mentioned, and you couldn't
24 see into the -- they had curtains and you could not
25 see into the commercial adjunct.

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1 COMMISSIONER PARSONS: You mean the
2 curtains were always closed?

3 MS. ELLIOTT: Yes.

4 COMMISSIONER PARSONS: So this could be
5 cured if they put curtains in the window?

6 MS. ELLIOTT: Yes.

7 COMMISSIONER PARSONS: And you think
8 that's what the Zoning Commission had in mind that we
9 should have curtained windows here, so that it
10 wouldn't be visible from the street?

11 MS. ELLIOTT: Well, I think that they had
12 in mind that a commercial operation would not be
13 visible from the street, because it's a commercial
14 operation in the midst of a residential neighborhood.

15 COMMISSIONER PARSONS: Understood. But
16 I'm trying to understand what you would like us to do
17 about this. I mean, this case isn't about --

18 MS. ELLIOTT: Well, enforce this.

19 COMMISSIONER PARSONS: This case isn't
20 about landscaping today. It's about a decision that
21 was made about a different issue. So why is the
22 lighting and the landscaping something you're
23 presenting to us?

24 MS. ELLIOTT: Well, because the applicant
25 has brought it up and has said that this issue is

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1 moot, and it isn't moot, because they haven't -- the
2 only --

3 COMMISSIONER PARSONS: Well, but that's
4 not before us today.

5 CHAIRMAN GRIFFIS: Right. I think Mr.
6 Parsons is bringing up an excellent point, and that is
7 this is an appeal, not a public hearing, which I know
8 you are aware of, but for my own mind, I'll clarify.
9 In the appeal we have what is before us and the only
10 thing that we can entertain and decide on is an
11 administrative decision which you have brought as in
12 error.

13 MS. ELLIOTT: Right.

14 CHAIRMAN GRIFFIS: So is there the permit
15 documents -- is a permit required to remove that
16 shrubbery out front? If it is a permitted issue, then
17 you can appeal that permitted issue. If it's not a
18 permitted issue, then there's nothing we can actually
19 control of it. Are the curtains, the screening on the
20 window a permanent item, and is that under appeal?
21 You know what I mean? We need to be very specific
22 about how much. We cannot make this a special
23 exception or a variance case and argue merits, not
24 merits or problems or how this is affecting me or
25 anything of that nature.

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1 We need to have the specific things in
2 appeal, and that is an administrative decision of
3 which we can review, whether it was in error or not in
4 error.

5 MS. ELLIOTT: Well, you have the
6 opportunity of doing that, because as Mr. Parsons just
7 quoted, there is something in the Zoning Regulations
8 under this Hotel Act that says that this commercial
9 adjunct is not supposed to be visible from the street.

10 CHAIRMAN GRIFFIS: But we have an existing
11 condition. You have to show me how, in fact, the
12 permanent item -- I see the validity of discussing if
13 that window line moved. We would have to go into the
14 regulations to say was that part of the mass of the
15 building? Is there an increase? But the point of
16 whether it is visible, because it was an existing
17 condition and the wall is staying where it is, I'm not
18 sure how we get over the threshold to actually
19 entertain it.

20 MS. ELLIOTT: You don't have to entertain
21 it. The Zoning Administrator has made his decision
22 based on the fact that he did not use -- he did not
23 apply that in looking at this permit. I mean, this is
24 just one of the elements that he did not see to issue
25 this permit.

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1 CHAIRMAN GRIFFIS: Right, right.

2 MS. ELLIOTT: I mean, it's just one of
3 the --

4 CHAIRMAN GRIFFIS: But there's probably
5 some rule of law somewhere or at least legal logic.

6 MS. ELLIOTT: There is, the Zoning
7 Regulations.

8 CHAIRMAN GRIFFIS: Well, follow where I'm
9 going first before you agree with me. If there's a
10 decision, if we're to entertain a decision, then there
11 has to be a recourse for our decision one way or the
12 other. And in my mind, I mean, if we uphold this or
13 we deny it, there has to be an action that's related
14 to our decision. And the mere fact that what is being
15 appealed essentially is this wall, and how it was
16 going to be placed somewhere, and it actually is not
17 and is being maintained, I think does bring us to a
18 strong argument of it is fairly moot for us to argue
19 about the potential of what would have happened if
20 that wall was able to move.

21 MS. ELLIOTT: Again, we're not arguing
22 about the wall. We're arguing about the Zoning
23 Administrator's decision in this, which was based on
24 incorrect premises. He issued a building permit that
25 did not follow what we've outlined in our appeal. And

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1 that's the law that you can follow.

2 COMMISSIONER PARSONS: Okay. Why don't we
3 get back to that then?

4 MS. ELLIOTT: Yes.

5 COMMISSIONER PARSONS: Instead of
6 landscaping and lighting. So I'm trying to determine
7 whether this decision is precedent setting and could
8 be used by others throughout the city. Forget the
9 River Inn, that's moot. But is there reason for this
10 Board to hear this case so as to clarify this decision
11 as proper or improper?

12 MS. GILBERT: Well, let me say with
13 respect to any other hotel, I think it would be
14 unlikely that we would run into the exact same factual
15 situation. Essentially, we're dealing here with the
16 enclosure of an overhang area, and the basis of the
17 Zoning Administrator's decision was that a
18 determination was made in '78, which permitted
19 enclosure of the garage area without any zoning
20 relief, since that area had already been included
21 within the building's FAR.

22 So we have a very specific decision by the
23 Zoning Administrator. I might say as well, and this
24 might be something that the appellant might want to
25 consider, you know, clearly she has raised some issues

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1 which are at least arguable as far as expanding the
2 commercial adjunct space. However, it's quite
3 possible that you would hear this case, and you would
4 decide that the Zoning Administrator's decision was
5 correct.

6 COMMISSIONER PARSONS: Yes.

7 MS. GILBERT: What we have here is we have
8 the River Inn having conceded that they are prepared
9 to not move the window line, and DCRA being prepared
10 to revise the permit, and so essentially, from my
11 perspective, it seems to me the ANC has won. And you
12 know, I think as far as the issues with the shrubbery,
13 I think that has been -- perhaps you can explain it
14 better than I. But my understanding is that that's
15 going to be -- that's public space for one thing.

16 CHAIRMAN GRIFFIS: Right.

17 MS. GILBERT: So it's not relevant.

18 CHAIRMAN GRIFFIS: I don't think we need
19 to get into that.

20 MS. GILBERT: But that situation will be
21 resolved.

22 COMMISSIONER PARSONS: So you feel that
23 this is a precedent setting? The uniqueness of this
24 case is that, it's unique?

25 MS. GILBERT: I'm just saying it's very

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1 limited, and we do keep these things. An attorney
2 could say hey and could send us a letter and say hey,
3 this is the same situation, that that isn't really
4 going to, you know, determine what we're going to do,
5 because we can say well, it's not the same situation,
6 because these factors are different. Furthermore, in
7 that case, we wound up revising the permit and not
8 having the work go forward.

9 So I don't see any -- you know, I don't
10 see that this should be a major concern. I haven't,
11 you know, consulted directly on this point with the
12 Zoning Administrator with respect to, you know, but I
13 do know that in general, you know, these letters that
14 the Zoning Administrator issues had very limited
15 perspective impact.

16 COMMISSIONER PARSONS: Yes, so that letter
17 or opinion --

18 MS. GILBERT: And in this case, it's very
19 specific.

20 COMMISSIONER PARSONS: To this property?

21 MS. GILBERT: To this case, to this
22 property.

23 COMMISSIONER PARSONS: So another
24 applicant can't wave this letter over in southeast
25 somewhere and say see, this is what I want to do, too?

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1 MS. GILBERT: I don't believe so.

2 BOARD MEMBER ZAIDAIN: Yes, and speaking
3 of precedent, I mean, I think it was the last hearing
4 we got into a big issue about the importance of
5 countersigning letters and whether or not, you know,
6 they can be used as a point of contention in terms of
7 timeliness on appeals, and we had a ruling last week
8 saying these countersign letters are interesting. But
9 in terms of points of making them appealable or
10 whatever or precedential value, I don't think this
11 Board gave them great weight, at that time.

12 CHAIRMAN GRIFFIS: Well, I think it's an
13 excellent point to bring up. We had a Zoning
14 Administrator letter that gave an interpretation on
15 that, and what was being said is that's when the clock
16 starts for the appeal. And what this Board decided
17 was that that is not the case. That this was, in
18 fact, a substantial document of the Zoning
19 Administrator's decision or interpretation.

20 It could be relied upon in developing a
21 permit, but there was actually no action to be taken.

22 There was no building to be built solely based on
23 this letter. So it's an important critical part of
24 the entire process. But in order to bring to an
25 appeal, it is a permit document that would need to be

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1 appealed. So I think it goes -- you know, it's an
2 interesting point to bring up, because then it goes
3 back to this of whether we would appeal the Zoning
4 Administrator's letter or we would appeal the permit.

5 BOARD MEMBER ZAIDAIN: I don't think we
6 want to get into the business of appealing Zoning
7 Administrators' letters.

8 CHAIRMAN GRIFFIS: That's very true.

9 BOARD MEMBER ZAIDAIN: And I mean, I think
10 there's a similar situation here. I really don't see
11 what kind of precedential impact the letter would
12 have.

13 CHAIRMAN GRIFFIS: Okay. Let's run
14 through then for clarification as we entertain the
15 motion to dismiss. The other aspects, we've mentioned
16 a couple, but the other aspects of the appeal as laid
17 out in your December 30, 2002 letter. I think that's
18 the best source to go to, so that we might at least
19 figure out whether there is anything that is not
20 included within this motion, if I make hopefully
21 myself clear.

22 MR. TUMMONDS: Chairman, as this is my
23 motion, perhaps I can run you through it and then I
24 can show you how we believe that we have addressed
25 those four issues. If you think that would be of

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1 interest.

2 CHAIRMAN GRIFFIS: You don't want to run
3 through their issues first though?

4 MR. TUMMONDS: It's through an appeal. I
5 was going to say -- I'm sorry. My motion to dismiss,
6 I would like to say how we believe that we have
7 satisfied four issues they raised on appeal.

8 CHAIRMAN GRIFFIS: Okay. What?

9 MR. TUMMONDS: The first would be the --

10 CHAIRMAN GRIFFIS: No, actually, all I
11 want to hear is a listing.

12 MR. TUMMONDS: Absolutely.

13 CHAIRMAN GRIFFIS: Just list them all.
14 Can you do that?

15 MS. ELLIOTT: You wanted what we -- the
16 four -- what we asked for at the end of this?

17 CHAIRMAN GRIFFIS: Yes.

18 MS. ELLIOTT: Based on our evidence, we
19 would hope that the BZA would uphold our appeal,
20 thereby voiding the validity of building permit
21 #B47779, as well as any DCRA approvals of plans for
22 renovation of the referenced premises.

23 CHAIRMAN GRIFFIS: Actually, what I'm
24 looking for is just the itemization. For instance,
25 your first one is the fact that the ANC, DCRA did not

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1 legally give notification to the ANC.

2 MS. ELLIOTT: Oh, okay.

3 CHAIRMAN GRIFFIS: That's issue one.

4 MS. ELLIOTT: Okay. New and expanded
5 hotels in R Zone areas are prohibited. Hotels
6 existing in R Zoned areas on May 15, 1980 were
7 permitted to remain grandfathered. Two, the gross
8 floor area of grandfather hotels may not be increased,
9 and the total area within the hotel devoted to
10 function rooms.

11 CHAIRMAN GRIFFIS: Okay. So two is
12 increase FAR or gross floor?

13 MS. ELLIOTT: Yes, one is actually hotels
14 are restricted under the provisions of that Hotel Act
15 incorporated into the regulations.

16 BOARD MEMBER ZAIDAIN: That's one of the
17 issues you are appealing?

18 MS. ELLIOTT: No, no, no. We're saying we
19 want these regulations strictly enforced with all
20 issues that we talked about with the commercial
21 adjunct.

22 CHAIRMAN GRIFFIS: Let's keep going.

23 MS. ELLIOTT: The view and so on and so
24 forth.

25 BOARD MEMBER ZAIDAIN: Okay. Okay.

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1 MS. ELLIOTT: Gross floor area. Three is
2 no direct entrance of the commercial adjuncts from
3 outside the building. Four, no part of the commercial
4 adjunct or entrance to the adjunct shall be visible
5 from a sidewalk. No sign or display indicating the
6 existence of commercial adjunct shall be visible from
7 outside the building.

8 CHAIRMAN GRIFFIS: Okay. And are you of
9 the understanding that -- what of these do you think
10 are still a potential for happening? For instance, is
11 there a direct entrance for the restaurant proposed in
12 the permit?

13 MS. ELLIOTT: No, I think that they have
14 satisfied that, at this point.

15 CHAIRMAN GRIFFIS: Okay. And the signage?

16 MS. ELLIOTT: The signage has been
17 satisfied, also. There is no sign for the commercial
18 adjunct.

19 CHAIRMAN GRIFFIS: Okay. And if the wall
20 is maintained where it is existing, is there an
21 increase in the gross floor?

22 MS. ELLIOTT: No, but I don't -- as I said
23 earlier, this is not moot. I think there is still the
24 potential for that, unless you put that to rest once
25 and for all.

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1 CHAIRMAN GRIFFIS: Okay.

2 MS. ELLIOTT: So that they cannot --

3 CHAIRMAN GRIFFIS: No, I think this helps
4 narrow the issues.

5 MS. ELLIOTT: Yes, yes.

6 CHAIRMAN GRIFFIS: So we're looking at a
7 ZA letter. And then four, if you have an existing
8 glass line that will be maintained, is there a change
9 in the visibility?

10 MS. ELLIOTT: It isn't that it has nothing
11 to do with whether it was there or not there.

12 CHAIRMAN GRIFFIS: Why not?

13 MS. ELLIOTT: Because under the regs you
14 are not supposed to be able to --

15 CHAIRMAN GRIFFIS: Well, this can't be
16 built today. We'll concede that it's nonconforming.
17 It can't be built new.

18 MS. ELLIOTT: Right. No, but I'm saying
19 that the visibility of the commercial edge adjunct is
20 not supposed to be there, either. I mean, and that
21 has not yet been satisfied. This is the law.

22 BOARD MEMBER ZAIDAIN: And I guess the
23 question that I've had is how are they expanding the
24 visibility, by the curtains?

25 MS. ELLIOTT: You can see through -- the

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1 plantings is one issue.

2 BOARD MEMBER ZAIDAIN: Right.

3 MS. ELLIOTT: The lights on the outside is
4 another issue, because that's focusing even more as a
5 commercial property as a whole, and it also emphasizes
6 the restaurant area, and you can see the restaurant
7 day and night from across the street.

8 BOARD MEMBER ZAIDAIN: Yes. Well, were
9 there lights before the permit though?

10 MS. ELLIOTT: No, there was not.

11 BOARD MEMBER ZAIDAIN: And what was the
12 difference?

13 MS. ELLIOTT: Well, there was shrubbery
14 that you could -- it was very -- if you look at the
15 photos that we brought in.

16 BOARD MEMBER ZAIDAIN: The shrubbery?

17 MS. ELLIOTT: Yes.

18 BOARD MEMBER ZAIDAIN: And then the
19 curtain issue?

20 MS. ELLIOTT: Yes.

21 BOARD MEMBER ZAIDAIN: How are the shrubs
22 changing?

23 MR. TUMMONDS: I think --

24 BOARD MEMBER ZAIDAIN: And the permit.

25 MR. TUMMONDS: Here's why. This is a

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1 lower level to walk into.

2 BOARD MEMBER ZAIDAIN: Yes.

3 MR. TUMMONDS: So you would see before you
4 see the top foot from the sidewalk, you see the top 2
5 or 3 feet of the window above. You saw that in 1979.
6 You saw that now. The shrubs, which were previously
7 there, were 2 feet high, 3 feet high. They didn't
8 block your view of the top 2 feet of the window. That
9 top 2 feet of the window was visible in 1979, 2000,
10 2001. It's visible today. That hasn't changed. And
11 I think I would say it's a preexisting condition. We
12 didn't change that.

13 BOARD MEMBER ZAIDAIN: Is there any
14 landscaping tied to the permit?

15 MR. TUMMONDS: No, it's public space.

16 BOARD MEMBER ZAIDAIN: In terms of the
17 lighting?

18 MR. TUMMONDS: Again, I would say, you
19 know, truthfully, Mr. Zaidain, lighting in public
20 space. I mean, these are issues that --

21 BOARD MEMBER ZAIDAIN: Well, I mean, I can
22 understand that, but I think we need to explore 351.2,
23 because I think that's where we are stuck. This
24 pertains to commercial adjuncts in the hotel, in terms
25 of visibility, and you brought up the issue of

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1 lighting. Is the expanding lighting aimed directly at
2 the commercial adjunct or is it to eliminate the
3 entire hotel?

4 MS. ELLIOTT: It's uplighting and it
5 lights the bottom half of that lip, the overhang. It
6 lights the overhang, and there is lighting on the
7 inside walls of the entry way to the hotel that's
8 very, very bright. And also, as I said --

9 CHAIRMAN GRIFFIS: But there is existing
10 lighting on there right now. I see them in the
11 photograph.

12 MS. ELLIOTT: Yes, but it has been
13 changed. There is -- it's different than what is
14 here.

15 CHAIRMAN GRIFFIS: So we're going to
16 appeal the change in the light fixtures?

17 MS. ELLIOTT: No. All I'm saying is that
18 the -- it's actually more visible than it was before.

19 It's not -- I don't disagree that the window was a
20 preexisting condition, but they had curtains on it
21 where you couldn't see into the commercial adjunct.
22 And that started to change as the project went
23 forward, as they got the building permit. And you can
24 see into that commercial adjunct. Not only from the
25 sidewalk, but across the street you can see in and you

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1 can see the restaurant and so on and so forth.

2 CHAIRMAN GRIFFIS: And you're saying it
3 wasn't like that before. And the lighting?

4 MS. ELLIOTT: No.

5 CHAIRMAN GRIFFIS: And you're saying that
6 the lighting --

7 MS. ELLIOTT: You could see some light
8 from the top of the window.

9 CHAIRMAN GRIFFIS: -- is illuminating the
10 restaurant more than it was before?

11 MS. ELLIOTT: Yes.

12 CHAIRMAN GRIFFIS: I mean, I'm trying to
13 follow your argument, because if it was a sign, if it
14 was a bigger entrance to the restaurant, well, I don't
15 think they can have an inference or something like
16 that I can see the argument. I'm just trying to
17 follow along with the lighting issue here.

18 MS. ELLIOTT: I'm not trying to make this
19 a mountain out of a mole hill with this. I'm just
20 saying that where there was a sign before, that's
21 gone. That's been taken care of. There's nothing
22 there. However, two of the trees, there's a tree that
23 -- and we submitted this in the photographs, I don't
24 know if you have that.

25 CHAIRMAN GRIFFIS: Yes, I've got it the

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1 paper.

2 MS. ELLIOTT: Yes. That's gone now and
3 it's very open here, and you can see directly into
4 everything on that first floor now from across the
5 sidewalk at day and night, because it's lit up from
6 inside. So all I'm saying is that it's even now more
7 prominent than it was before.

8 CHAIRMAN GRIFFIS: Okay.

9 MS. GILBERT: If I may, and I don't know
10 to what extent you want to see more, I can proffer a
11 series of photographs that we have. I will say there
12 is a line of trees in front of this whole area, as
13 well, but I do have photographs that our investigator
14 took yesterday.

15 CHAIRMAN GRIFFIS: Mr. Zaidain, you want
16 to see those?

17 MS. GILBERT: Black and white if you would
18 like us to proffer.

19 MS. ELLIOTT: They are in there. We have
20 them.

21 MS. GILBERT: No, I'm just saying.

22 COMMISSIONER PARSONS: I think that would
23 be helpful.

24 CHAIRMAN GRIFFIS: Okay. Why don't you
25 put those in?

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1 MS. GILBERT: All right. Let me. I
2 didn't make a second copy, so let me show them to you
3 first.

4 CHAIRMAN GRIFFIS: Well, while that's
5 being dealt with, let me deal with the first issue
6 that I brought up, and I'm not sure whether this was a
7 basis of the appeal or an element of the basis of the
8 appeal or whether this was more of information for the
9 Board to understand the fact of the DCRA not notifying
10 ANC about the issuance of the permit.

11 I had our corporation counsel pull up the
12 regulations, and it is, in fact, correct that DCRA is
13 to, and I think it's once a month or so, list
14 applications for construction and issue them to the
15 ANC. In my opinion of looking at this, that is a
16 matter of DCRA's process, not a matter of DCRA's
17 administrative decision making, and so I do not or
18 would not see a great substance of which to appeal in
19 that point, but we could hear arguments if they are
20 needed on that.

21 BOARD MEMBER ZAIDAIN: Where is that
22 codified? I didn't see that.

23 CHAIRMAN GRIFFIS: I have copies for you.

24 COMMISSIONER MITTEN: I think it's in the
25 ANC laws.

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1 BOARD MEMBER ZAIDAIN: The ANC law.

2 CHAIRMAN GRIFFIS: Oh, it is. Yes, and
3 that's a good --

4 BOARD MEMBER ZAIDAIN: It's not in the
5 Zoning Regulations?

6 CHAIRMAN GRIFFIS: It's not in the Zoning
7 Regulations. It's in the ANC regulations. But I
8 could see an argument being made that, you know, here
9 is something that DCRA is supposed to do, and
10 therefore is it appealable to this Board? But in
11 order to do that, I think you need to have that it is
12 an official administrative decision or a DCRA
13 decision, not a process of which there may not be the
14 capacity. Who knows why it is not happening.

15 MS. GILBERT: Let me say it's my
16 understanding that it did happen in this case. We
17 send out each week to the ANC a list of the --

18 CHAIRMAN GRIFFIS: Each week?

19 MS. GILBERT: Each week or every two
20 weeks. I'm not sure which. I think it's every week
21 that we send a listing of the perma applications that
22 have been filed within the past week.

23 CHAIRMAN GRIFFIS: Wow.

24 MS. GILBERT: As well as the over the
25 counter permits that have been issued.

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1 CHAIRMAN GRIFFIS: So that happens in
2 every ward?

3 MS. GILBERT: And legally we're required
4 to do it every two weeks.

5 CHAIRMAN GRIFFIS: Right.

6 MS. GILBERT: And I think we've been doing
7 it as a matter -- of course, I tried to reach Mr.
8 Douglas this morning to verify, but his administrative
9 assistant told me they do it every week. So it's a
10 listing to ANC sent by email and it lists the over the
11 counter permits that are issued, as well as the
12 permits that were filed. In this case, the permit --
13 the application was filed on June 11th and the permit
14 was not issued until August 7th, and I believe the
15 notice went out somewhere between June 17th and June
16 21st, that's the information that I've been given and
17 that's what we would put on testimony.

18 CHAIRMAN GRIFFIS: Okay. Interesting.
19 Were we going to see something or are they making
20 copies? Mr. Zaidain?

21 BOARD MEMBER ZAIDAIN: Since it seems like
22 we're at a lull here for a second, just to try to
23 reach some sort of resolution, is there any way the
24 issue with the landscaping and the lighting could be
25 worked out? In terms of, you know, it seems like

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1 we've got somewhat of a settlement in terms of the
2 issue with the wall, and I would -- I mean, I know I
3 can speak for my self that I think the Board should go
4 in some sort of direction of having DCRA issue a
5 revised permit, so that the property owner is held to
6 building a wall where it is.

7 CHAIRMAN GRIFFIS: So we don't step too
8 far into mediation services, I think what we want to
9 do is base -- this is what I see as a course of
10 action. First of all, we could take action on the
11 motion immediately. We could table the motion that's
12 before us and set this for a week and wait for the
13 action. I mean a lot has been offered, but the
14 actions may not actually have taken place. We could
15 wait to see that. We could wait to see the revision
16 and pick up the motion again. We could, based on a
17 specific course of action, continue and hear the
18 entire appeal today. So those are the options. Up or
19 down on the motion, appeal or put it aside and just it
20 would ensure the fact that the revisions to the
21 permits are made that would then substantiate one
22 position on this motion.

23 Do we have pictures yet?

24 MS. GILBERT: Sure. I'm very nervous.

25 Could I --

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1 CHAIRMAN GRIFFIS: Wait. Let me hear from
2 Mr. Parsons.

3 COMMISSIONER PARSONS: I wanted to ask if
4 the permit initially issued contained a landscape plan
5 and a lighting plan that was specific as to species
6 and heights of plants and wattage of lamps and those
7 kinds of things?

8 MS. GILBERT: I don't have all of the
9 plans with me.

10 COMMISSIONER PARSONS: Oh.

11 MS. GILBERT: I am and let me look at the
12 permit application itself and the permit before I
13 answer that. Where's the permit? I believe there
14 were drawings of shrubs, but there was no approval per
15 se of the shrubs. As far as lighting, I would have to
16 check on that. May I have a moment?

17 COMMISSIONER PARSONS: Yes.

18 MR. TUMMONDS: Commissioner Parsons, in
19 answering --

20 COMMISSIONER PARSONS: Yes?

21 MR. TUMMONDS: In answering your question,
22 no, they show -- I guess the first answer is the
23 planting area it's in public space, so they wouldn't
24 show up with that sort of detail on a building permit
25 application.

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1 COMMISSIONER PARSONS: Yes.

2 MR. TUMMONDS: Second, on the plans we did
3 take a look at, they show generically squiggly line
4 outlines of bushes, landscaping, things of that
5 nature.

6 COMMISSIONER PARSONS: I see.

7 MR. TUMMONDS: And maybe if I could -- I'm
8 not sure how well. The pictures that were presented
9 to you, maybe the first one shows the best, really
10 there's two areas of plantings in front of this very
11 large sidewalk that's public space here. You have the
12 first row are a row of trees, Crate Myrtle trees.

13 COMMISSIONER PARSONS: Yes.

14 MR. TUMMONDS: And then closer into the
15 building is the row of plantings that were initially
16 removed while this work occurred. Now, they have the
17 low plantings in there. So this landscape we're
18 talking about is the landscape being closest to the
19 building. The Crate Myrtles remain. They have never
20 been touched.

21 COMMISSIONER PARSONS: Now, where is the
22 River Inn?

23 MR. TUMMONDS: It is --

24 COMMISSIONER PARSONS: I can't see it.

25 MR. TUMMONDS: From --

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1 COMMISSIONER PARSONS: Which side of the
2 entrance is this Inn on? I mean, we got all these
3 pictures. I don't know where the River Inn is. I see
4 the sign.

5 MR. TUMMONDS: Yes.

6 COMMISSIONER PARSONS: I see the
7 landscaping.

8 CHAIRMAN GRIFFIS: You mean the
9 restaurant?

10 COMMISSIONER PARSONS: All right. Let's
11 go to this picture here. Yes, where is it?

12 CHAIRMAN GRIFFIS: Right.

13 COMMISSIONER PARSONS: Is it on this side
14 or that side or both sides?

15 MR. TUMMONDS: Left side. If you're
16 facing the building, it is just to the left.

17 COMMISSIONER PARSONS: Okay.

18 MR. TUMMONDS: Everything to the right is
19 administrative office.

20 BOARD MEMBER ZAIDAIN: To the left of the
21 awning, essentially?

22 MR. TUMMONDS: Yes.

23 BOARD MEMBER ZAIDAIN: Okay.

24 MR. TUMMONDS: An awning, and that's the
25 main entrance into the River Inn.

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1 CHAIRMAN GRIFFIS: Is there any difference
2 between the conditions as proposed or existing or as
3 for posting the permit between the right side and the
4 left side?

5 MR. TUMMONDS: No, we didn't do any work
6 to the --

7 BOARD MEMBER ZAIDAIN: Where is the
8 jurisdiction of public -- well, where is the right of
9 way line? Where is public space?

10 MR. TUMMONDS: In front of the building.

11 BOARD MEMBER ZAIDAIN: The building?

12 MR. TUMMONDS: From the face of it.

13 BOARD MEMBER ZAIDAIN: In front of it.
14 The front of the building. Okay. So the awning is in
15 public space, essentially, right?

16 MR. TUMMONDS: That's correct.

17 BOARD MEMBER ZAIDAIN: Okay. I mean, I
18 know that's not a point of contention here. I was
19 just trying to get my bearings on this.

20 COMMISSIONER PARSONS: So what appears in
21 the photographs, at least as I look at them, are
22 venetian blinds in the window.

23 MR. TUMMONDS: That is correct. The
24 venetian blinds have been installed.

25 COMMISSIONER PARSONS: So in order to meet

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1 the intent and spirit of the regulations, if the
2 venetian blinds were closed, you can't see in.

3 MR. TUMMONDS: Yes.

4 COMMISSIONER PARSONS: I'm not asking for
5 a commitment to close the blinds.

6 MR. TUMMONDS: I mean, right.

7 COMMISSIONER PARSONS: But it isn't as
8 though it's an open window with people eating.

9 MR. TUMMONDS: Right. Right now it is --
10 yes, it's a window and there are blinds.

11 COMMISSIONER PARSONS: Right.

12 MR. TUMMONDS: And I suppose if you put
13 blinds there all the time, it kind of defeats the
14 purpose of having a window.

15 COMMISSIONER PARSONS: Yes.

16 MR. TUMMONDS: But, yes, there are blinds
17 there. Previously, there were.

18 COMMISSIONER PARSONS: The restaurant
19 patrons are able to look out onto that landscaping or
20 are lower than that?

21 MR. TUMMONDS: They are lower.

22 COMMISSIONER PARSONS: So the window to
23 the patrons --

24 MR. TUMMONDS: I guess, if you sat down --
25 I'll get the answer in a second.

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1 CHAIRMAN GRIFFIS: Your head is going to
2 be right about there.

3 MR. TUMMONDS: The window is about table
4 height. So if you sat down --

5 COMMISSIONER PARSONS: I see. Okay.

6 CHAIRMAN GRIFFIS: Are we --

7 BOARD MEMBER ZAIDAIN: I just have a
8 question real quick.

9 CHAIRMAN GRIFFIS: Let me --

10 BOARD MEMBER ZAIDAIN: Okay.

11 CHAIRMAN GRIFFIS: The photographs that
12 have just been submitted April 28th, so we're looking
13 at the renovation completed from all intents and
14 purposes on the outside?

15 MR. TUMMONDS: That's correct.

16 BOARD MEMBER ZAIDAIN: If you look at, I
17 don't know the page number, but referred by the JPEG
18 number here it's DSC0077, do you know what I'm talking
19 about?

20 MR. TUMMONDS: 77?

21 BOARD MEMBER ZAIDAIN: 77.

22 CHAIRMAN GRIFFIS: This is on the
23 administrative side.

24 BOARD MEMBER ZAIDAIN: Okay. So that's
25 not the restaurant right there?

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1 CHAIRMAN GRIFFIS: That's correct. If the
2 directions of what we've been told are accurate.

3 BOARD MEMBER ZAIDAIN: Is that correct?

4 MR. TUMMONDS: That's correct.

5 BOARD MEMBER ZAIDAIN: Is it the same for
6 the next one, the 0071? No, that's the restaurant
7 side. So that planning bed is the same on both sides
8 of the awning?

9 MR. TUMMONDS: That's correct.

10 BOARD MEMBER ZAIDAIN: Okay. Has there
11 been any change there since the permit has been
12 issued?

13 MR. TUMMONDS: Yes.

14 BOARD MEMBER ZAIDAIN: What kind of
15 changes?

16 MR. TUMMONDS: Prior to all this work
17 being done, the interior renovations.

18 BOARD MEMBER ZAIDAIN: Right.

19 MR. TUMMONDS: There were plants that I
20 would say --

21 BOARD MEMBER ZAIDAIN: They are higher
22 than what's there?

23 MR. TUMMONDS: Yes, they were
24 approximately knee high, standing at that level.

25 BOARD MEMBER ZAIDAIN: Okay.

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1 MS. ELLIOTT: Chairperson Griffis, in our
2 submission, there's a photograph of what was there.
3 It's I believe on the last page of our submission in
4 attachment 8 or section 8.

5 COMMISSIONER PARSONS: Is it the picture
6 here?

7 MS. ELLIOTT: Yes, yes.

8 CHAIRMAN GRIFFIS: Oh, yes.

9 MS. ELLIOTT: It's on the right hand side.

10 BOARD MEMBER ZAIDAIN: Bottom right hand
11 corner?

12 MS. ELLIOTT: Yes.

13 CHAIRMAN GRIFFIS: But your point in
14 comparing those two is the difference of the
15 vegetation height?

16 MR. TUMMONDS: Well, I mean --

17 MS. ELLIOTT: Yes.

18 CHAIRMAN GRIFFIS: Is that correct?

19 MS. ELLIOTT: Yes, that's one thing.

20 CHAIRMAN GRIFFIS: All right. Would you
21 agree that --

22 MS. ELLIOTT: And then the lighting.

23 CHAIRMAN GRIFFIS: -- these shrubs have to
24 grow?

25 MS. ELLIOTT: No, these are liriopie plants

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1 and this is about the height that they are going to
2 get. These aren't shrubs and the new plantings.

3 BOARD MEMBER ZAIDAIN: Yes, arbor and
4 stuff.

5 MS. ELLIOTT: Right. No, gardener.

6 BOARD MEMBER ZAIDAIN: Gardener. Okay.

7 COMMISSIONER PARSONS: Well, what about
8 this canopy with a sign on it? How do you feel that
9 meets the regulations? I might say --

10 MS. GILBERT: The hotel is called the
11 River Inn.

12 COMMISSIONER PARSONS: Oh.

13 CHAIRMAN GRIFFIS: They removed this
14 portion.

15 COMMISSIONER PARSONS: Because the
16 prohibition is on signage for a commercial adjunct.

17 MS. ELLIOTT: If you look at our
18 submission --

19 COMMISSIONER PARSONS: So this sign that
20 said Foggy Bottom Cafe is the one?

21 MS. ELLIOTT: That's the old.

22 COMMISSIONER PARSONS: Oh, now I
23 understand.

24 CHAIRMAN GRIFFIS: And that has been
25 removed.

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1 MS. ELLIOTT: Right. That's the
2 commercial adjunct.

3 CHAIRMAN GRIFFIS: Right.

4 BOARD MEMBER ZAIDAIN: But that's gone,
5 right, that sign?

6 MS. ELLIOTT: Yes, if you look at their
7 new submission, it just says the River Inn on the
8 canopy.

9 BOARD MEMBER ZAIDAIN: So it seems to me
10 that we're down to the issue of whether or not the new
11 landscaping or whatever this change constitutes a
12 change in visibility of the restaurant.

13 CHAIRMAN GRIFFIS: Well, there's two
14 issues to it. If you found that, then I think you
15 would have -- yes, okay. Last comments. We're going
16 to go straight down the table again.

17 BOARD MEMBER ZAIDAIN: Well, one more
18 question before we do that. The trees in front of the
19 building, those are the same, right?

20 MR. TUMMONDS: Yes, those trees in public
21 space, yes.

22 MS. ELLIOTT: There's a -- are you
23 speaking, Member Zaidain, about the --

24 BOARD MEMBER ZAIDAIN: The trees in the
25 concrete planters.

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1 MS. ELLIOTT: Oh, okay.

2 BOARD MEMBER ZAIDAIN: Those are still
3 there?

4 MS. ELLIOTT: Yes.

5 BOARD MEMBER ZAIDAIN: It seemed to me if
6 they took those down, that would have a bigger impact
7 on visibility than these bushes. How do you feel
8 about that?

9 CHAIRMAN GRIFFIS: That's going into an
10 interesting hypothetical.

11 BOARD MEMBER ZAIDAIN: I know. I don't
12 know, we're kind of really splitting hairs on things
13 here.

14 CHAIRMAN GRIFFIS: Okay.

15 BOARD MEMBER ZAIDAIN: So I just thought I
16 would follow along with it.

17 CHAIRMAN GRIFFIS: Let's hear from the
18 participants and then we'll decide. I'll lay out what
19 our potential actions can be, at this point, and then
20 we'll move on.

21 MR. TUMMONDS: I believe that we fully
22 addressed all the issues that we raised in our motion
23 to dismiss the appeal as moot. I believe that we will
24 agree to work with the LRA and file revised building
25 permit plans, SP1.1 and SP1.2, to really effectuate

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1 the letter that we submitted into the record, which
2 will then provide the assurance to the Building and
3 Land Regulation Administration and this Board that
4 that window line will not be pulled out, and we
5 believe that all of the other issues raised in the
6 ANC's appeal are moot.

7 In that, and it sounds like we're down to
8 one issue, the ability to see the commercial adjunct
9 space from the sidewalk, it was a preexisting
10 condition. We haven't changed the -- you know, we
11 haven't effected that preexisting condition, so
12 therefore we think the appeal should be dismissed.

13 MS. GILBERT: Yes, I would say that we're
14 prepared to revise the permit as soon as we receive
15 the amended plans from the River Inn. I think that
16 effectively resolves the issue with respect to the
17 windows. With respect to the shrubbery, I did confer
18 with our engineer here, and that is public space, the
19 area in which the shrubbery is right beyond the
20 windows, so that that's nothing that was specifically
21 approved in the permit, so I think that that
22 essentially has -- is not really relevant to this
23 appeal.

24 Now, there could be an allegation that we
25 should bring a citation against them for not

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1 concealing the restaurant if we wanted to, you know,
2 six months from now or something like that if the
3 shrubs don't grow, but I don't think that has any
4 basis for this appeal. So I think this should be able
5 to be resolved, and I think we've agreed the other
6 issues have been resolved.

7 CHAIRMAN GRIFFIS: Okay. Well, before we
8 move on, I'm going to ask Ms. Monroe whether we would
9 even have the jurisdiction to require that this
10 building owner deal with however we see fit the public
11 space in front of the property.

12 MS. MONROE: No. No, you would not.

13 CHAIRMAN GRIFFIS: Okay.

14 MS. MONROE: Also, I want to point out,
15 too, that 351.2 doesn't deal with lighting at all or
16 landscaping specifically, and I didn't see lighting
17 brought up at all in the appeal, either. I just
18 wanted to mention that.

19 CHAIRMAN GRIFFIS: Okay. Thank you.

20 MS. ELLIOTT: Again, this is very
21 problematic, and I don't think, Chairperson Griffis
22 and members of the Board, that these are moot issues
23 that Alamac is saying now that they are not doing
24 this, but the whole point of the matter was that they
25 were -- they did present an improper attempt to expand

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1 this commercial adjunct in the original building
2 permit, even though they haven't done this now.

3 And these issues aren't mooted. They just
4 aren't doing them. And the lighting was not brought
5 up in our original appeal, because we had no idea what
6 they were going to be doing out there. We were not
7 presented these plans. We were not presented revised
8 plans. The ANC has not been involved in this process,
9 which is another troubling situation here is that
10 we've had to run around behind the scenes to try to
11 find out what's going on.

12 And as I said to you earlier, we would
13 prefer, at this point, to have you table the motion
14 and give some time to deal with these issues, and give
15 us some more time to see what's going on here and be
16 included in the process, and then come back and make a
17 decision whether we still want to have this permit
18 overturned, because we have some questions about, you
19 know, what's being set up here as precedent, even
20 though there has been talk about this.

21 We would also request that the record stay
22 open. Council member Mendelson is going to be
23 weighing in on this. We've spoken with his office.
24 He was very involved in the hotel and restaurant
25 regulations that were created back in 1980, and he was

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1 involved in the other hearing on this in terms of the
2 public space, and he is very concerned about this
3 issue, and we would like to have that. He was
4 supposed to fax over to the Board this morning.

5 CHAIRMAN GRIFFIS: It sounds like that
6 would be more appropriate for it to go to the
7 Commission than us, but we'll figure that out.

8 MS. ELLIOTT: No, because it's dealing
9 with this appeal. He wanted to weigh in on this
10 particular appeal, as he did on the public space
11 appeal. So we would prefer that, you know, if -- if
12 you're heading to moot all these points that we've
13 brought up, that you table this, as suggested, and
14 that if you want to revise the permit and take care of
15 this issue of this improper issuance of the permit
16 under the regs, that we have some more time on this
17 and we would be able to come back and deal with this.

18 It's just very clear to us, as we
19 presented in our case, that all of these points we've
20 substantiated in our appeal.

21 CHAIRMAN GRIFFIS: Okay. Thank you all
22 very much. What I see as probably the best course of
23 action is that we keep the record open to accept the
24 revised permit plans and that permit document, and
25 then pick up the motion again. I would anticipate

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1 that that should not be difficult to produce in a very
2 timely fashion, and would anticipate that we perhaps
3 do that on the 6th or the 13th of May. My feeling is
4 that the record would be open to accept that
5 information.

6 In terms of accepting information from the
7 council member or any other arguments or other issues
8 or further review, I think we can take that up if we
9 get into the appeal, but clearly we have a specific
10 motion before us with specific information that, I
11 think my understanding of this Board in its
12 discussions today, that revised permit will address.
13 But let me hear from Mr. Parsons and Mr. Zaidain on
14 that.

15 BOARD MEMBER ZAIDAIN: I agree with that
16 course of action. I don't think we need to get into
17 what would be a punitive proceeding. It sounds like,
18 you know, the DCRA and the hotel have either seen the
19 error of the ways or decided this isn't a fight they
20 want to take on and they want to correct it. But I
21 think we need to give some assurance to the community
22 that they are going to correct it, and that's why we
23 need to see the revised permit.

24 CHAIRMAN GRIFFIS: Okay. Mr. Parsons?

25 COMMISSIONER PARSONS: I would agree, but

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1 I would like to make sure that the appellant and
2 others, at least on my view that I have no reason that
3 I can see to -- please, Ms. Miller. No reason I can
4 see to hear the basic appeal of the FAR issue. I
5 don't see it as precedent setting. I don't see it as
6 a citywide issue giving the uniqueness of the case.

7 CHAIRMAN GRIFFIS: I agree.

8 COMMISSIONER PARSONS: So I don't want to
9 come back with a file full of fresh information about
10 that issue. It's simply --

11 CHAIRMAN GRIFFIS: As proposed now.

12 COMMISSIONER PARSONS: -- the closure of
13 the permit that we're after.

14 CHAIRMAN GRIFFIS: The record is open and
15 will remain open to accept the revisions to the permit
16 that is under appeal. That's all we will be
17 accepting.

18 COMMISSIONER PARSONS: Okay.

19 BOARD MEMBER ZAIDAIN: Because it seems to
20 me to meet the spirit of the regulations, the venetian
21 blinds are the only thing we would have jurisdiction
22 over.

23 CHAIRMAN GRIFFIS: Right.

24 BOARD MEMBER ZAIDAIN: And mandating that
25 they be closed, I just don't think is what is met.

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1 CHAIRMAN GRIFFIS: Okay. Let me change
2 the schedule. Let me address two things. First of
3 all, Mr. Zaidain, you said that DCRA may be noting the
4 error of their ways, but I think it was clearly stated
5 by the representative of DCRA that they, in fact,
6 believe that this could in fact --

7 BOARD MEMBER ZAIDAIN: Well, yes. The
8 position was taken from the hotel and not DCRA.

9 CHAIRMAN GRIFFIS: Right. If we got into
10 it, looking at it on face, it will be an interesting
11 argument about whether that was counted in the gross
12 floor area or not.

13 BOARD MEMBER ZAIDAIN: True.

14 CHAIRMAN GRIFFIS: And that would be
15 acceptance of the issue. That is clearly not been
16 decided nor do I hear anyone conceding error or not
17 error in that respect. In terms of what Mr. Parsons
18 just brought up, also, for the Zoning Administrator's
19 interpretation for a potential permit or a permit in
20 this case, this Board has in recent past decided that
21 that is not the basis of an appeal, but rather goes to
22 the entire permit of what will physically be built.
23 That interpretation can be given substantial weight in
24 producing designs and development. But until it
25 becomes the reality of what will be built, we are just

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1 bantering about an interpretation or an opinion.

2 BOARD MEMBER ZAIDAIN: I agree and I think
3 that's kind of the reason why we want to see a revised
4 permit.

5 CHAIRMAN GRIFFIS: That's correct.

6 BOARD MEMBER ZAIDAIN: Because nothing is
7 official until we get a permit.

8 CHAIRMAN GRIFFIS: That's correct. What
9 is the time line for getting the revised permit to
10 DCRA, and then I'm going to ask DCRA how long it will
11 take to issue a revised permit.

12 MR. TUMMONDS: We can have revised plans
13 to DCRA hopefully by the end of the day today. If
14 not, early tomorrow. With our goal that we would be
15 able to address this on May 6th.

16 CHAIRMAN GRIFFIS: These are essentially
17 as built, at this point. Is that right?

18 MR. TUMMONDS: Absolutely, yes, yes.

19 CHAIRMAN GRIFFIS: I mean, that's fairly
20 substantial. And DCRA how long does it take to turn
21 it around?

22 MS. GILBERT: It should take no time, a
23 day.

24 CHAIRMAN GRIFFIS: Really?

25 MS. GILBERT: No, I was told that as soon

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1 as the plans were submitted --

2 CHAIRMAN GRIFFIS: Let me get in that
3 express line. I got some -- all right. Okay.

4 MS. GILBERT: Okay.

5 CHAIRMAN GRIFFIS: But in all seriousness,
6 you think that that information could be here in a
7 timely manner for May 6th. That's really pushing it,
8 because it actually needs to get here by Thursday.

9 MS. GILBERT: All right.

10 MS. ELLIOTT: Chairperson Griffis?

11 CHAIRMAN GRIFFIS: Yes?

12 MS. ELLIOTT: The ANC-2A is --

13 MS. GILBERT: I think it would be okay.

14 CHAIRMAN GRIFFIS: Or whatever.

15 MS. ELLIOTT: The ANC-2A has got several
16 major issues on its plate and coming up on the 6th, and
17 we would appreciate a little bit of push back on the
18 time line of this, moving it later rather than
19 tomorrow or next week.

20 CHAIRMAN GRIFFIS: Well, let me clarify
21 and let me see if the Board is of the same
22 understanding. This is a decision on the motion.
23 There's no -- we're not having additional testimony on
24 it.

25 MS. MILLER: We need to see it. May I

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1 speak? I'm the chair of ANC-2A.

2 CHAIRMAN GRIFFIS: I know. But we have
3 the representative.

4 MS. ELLIOTT: Right.

5 CHAIRMAN GRIFFIS: I mean, tell her what
6 you want to say.

7 MS. MILLER: Okay. But I'm also in the
8 letter to speak, as well.

9 MS. ELLIOTT: May I consult with
10 Chairperson Miller?

11 CHAIRMAN GRIFFIS: Yes.

12 MS. ELLIOTT: Thank you.

13 (Whereupon, off the record for a recess.)

14 MS. ELLIOTT: Chairperson Griffis?
15 Chairperson?

16 CHAIRMAN GRIFFIS: Yes?

17 MS. ELLIOTT: Chairperson Griffis,
18 Commissioner Miller has brought up a good point, since
19 the community has not seen any of this, we would like
20 to have these plans brought to the community at our
21 next meeting, that's May 21st.

22 CHAIRMAN GRIFFIS: Yes, I understand that.
23 Here's the point though. You have the original
24 permit. I think the issue is clear for this Board and
25 what needs to be decided. I think we have heard from

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1 everybody and the issues are before us, that we have
2 further review or comment, I don't think is pertinent,
3 at this point. We will see the revisions to the
4 existing permit, and if Board members feel
5 differently, I obviously will hear that.

6 But I think we have the information needed
7 in order to deliberate and make a decision on the
8 specific motion. This isn't the entire appeal. This
9 is a specific motion that's before us. So I don't --
10 there it is.

11 MS. ELLIOTT: Could I respond to that?

12 CHAIRMAN GRIFFIS: Okay.

13 MS. ELLIOTT: If you decide to moot our
14 appeal and dismiss this appeal --

15 CHAIRMAN GRIFFIS: Right, right.

16 MS. ELLIOTT: Then there won't be an
17 appeal.

18 CHAIRMAN GRIFFIS: What you're saying is
19 there is some possibility that showing the revisions
20 to the ANC, that the ANC will somehow see that there
21 is new issues that have a difference between whether
22 this wall was where it was in the existing -- in the
23 original development and where it is now. I just
24 don't see where there is substance in furthering the
25 issue. It seems pretty straightforward.

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1 MS. ELLIOTT: Well, again it's part of the
2 proper process in that we weren't notified about this,
3 and we haven't been privy to any of the renovations
4 and so on and so forth, and I believe contrary to Mr.
5 Parsons --

6 CHAIRMAN GRIFFIS: You're going to see
7 something different in the revisions that show that
8 this wall isn't actually where it is or that it was
9 moved or was different from where it was in existence?

10 MS. ELLIOTT: Not now, but we will see
11 that the plans have been revised.

12 CHAIRMAN GRIFFIS: And you will see that,
13 but you don't think that this Board will be able to
14 see that?

15 MS. ELLIOTT: That's not what I was -- I
16 mean, the Board has seen that and is making a judgment
17 on it.

18 CHAIRMAN GRIFFIS: Right.

19 MS. ELLIOTT: But I believe that we need
20 to have, the community needs to have some sort of
21 input into this whole thing.

22 CHAIRMAN GRIFFIS: But the issue, I mean,
23 the importance of a process is to get us the
24 information, so that we can deliberate on it.

25 MS. ELLIOTT: Right.

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1 CHAIRMAN GRIFFIS: And what you're saying
2 is that there is something that the ANC can see that
3 we will not be able to see.

4 COMMISSIONER PARSONS: Well, let me ask
5 this.

6 MS. ELLIOTT: Okay.

7 COMMISSIONER PARSONS: Is it possible that
8 the ANC upon seeing these plans and learning what
9 we've learned today would withdraw the appeal? Is
10 that a potential for this delay?

11 MS. ELLIOTT: That could be. That could
12 be a potential.

13 COMMISSIONER PARSONS: That to me is
14 reason to extend to what she is saying. But that's
15 the only reason that I can think of is when the
16 community begins to learn what has happened here and
17 the neighbors being neighborly, if you will, and
18 understands the issues, maybe we won't be hearing this
19 again or deciding anything.

20 MS. MOORE: Mr. Chairperson, can I just
21 say something?

22 CHAIRMAN GRIFFIS: Yes.

23 MS. MOORE: I think whether or not this
24 appeal is moot is a legal question, which you guys can
25 resolve. I don't think the ANC needs to relook at the

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1 new permit issues. It's a legal decision, whether or
2 not it's moot. If it is mooted and then we see new
3 issues, you bring appeal on the new issues. That
4 would be a separate appeal.

5 CHAIRMAN GRIFFIS: Right.

6 MS. MOORE: And whether or not they
7 withdraw, it wouldn't matter if you decided to moot
8 it. There would be no reason then to withdraw.

9 CHAIRMAN GRIFFIS: Well said. I think
10 that's what I was trying to get across.

11 MS. MOORE: Yes, what I'm saying is you
12 can do it on the 6th. You can decide, but I think
13 legally your decision, whether or not you moot, based
14 on these plans can come whenever you are ready to do
15 it.

16 MS. GILBERT: Chairman Griffis?

17 CHAIRMAN GRIFFIS: Yes?

18 MS. GILBERT: Whether you would like to go
19 on the 6th or the 13th, either date would be fine with
20 the Department. We will when we issue the revised
21 permit if the ANC-2A wants to come over and pick up a
22 copy of the revised permit and the revised plans,
23 we'll make it available to them. But personally, I'm
24 going to be probably out the last two weeks in May, so
25 I would prefer that we resolve this either on the 6th

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1 or the 13th, is possible.

2 CHAIRMAN GRIFFIS: Okay. Let's do a great
3 compromise, which won't appeal to everybody, but we'll
4 decide this on the 13th, and it will be the -- oh, boy,
5 we can put it on second in our special public meeting.

6 That also gives some insurance that we can get
7 through the whole process, get the revised drawings
8 in, get the revised permit out, and we won't be rushed
9 to get it here by Thursday, so that we can review it
10 by Tuesday, so we have additional time.

11 So it would be -- in order for us to take
12 it up on the 13th, of course, all that information has
13 to be in the Thursday before, Wednesday before, Ms.
14 Bailey?

15 MS. BAILEY: Wednesday, Mr. Chairman.

16 CHAIRMAN GRIFFIS: Indeed. And the date
17 of that is?

18 MS. BAILEY: The 7th, May 7th.

19 CHAIRMAN GRIFFIS: So we're shooting for
20 the 7th. So it should be served no later to the Office
21 of Zoning and to the ANC by the 7th and will be picked
22 up on the 13th. Board members?

23 MS. GILBERT: And we will submit both the
24 existing plans and the revised of these plans, so that
25 you can see the difference.

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1 CHAIRMAN GRIFFIS: Okay. And that's SP1
2 and SP2?

3 MS. GILBERT: Right.

4 CHAIRMAN GRIFFIS: Okay.

5 MS. GILBERT: SP1.1 and SP1.2.

6 CHAIRMAN GRIFFIS: Okay.

7 MS. ELLIOTT: Chairperson Griffis?

8 CHAIRMAN GRIFFIS: Yes?

9 MS. ELLIOTT: Sorry.

10 CHAIRMAN GRIFFIS: No, it's okay.

11 MS. ELLIOTT: I have one other request.
12 Would it be possible for us to submit into the record
13 some photographs of the River Inn, additional photos
14 of the exterior of the River Inn from the ANC?

15 CHAIRMAN GRIFFIS: I would --

16 MS. ELLIOTT: From the outside?

17 CHAIRMAN GRIFFIS: Are they different than
18 what you have?

19 MS. ELLIOTT: Yes.

20 MR. TUMMONDS: I would object to that. I
21 think it's pretty clear what the issues are raised,
22 and we should keep it to this issue of the revised
23 plans.

24 MS. ELLIOTT: Well, we would like to put
25 in our own submissions of photographs that give a

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1 different prospective on how this appears, and I would
2 appreciate your looking at that. It won't be
3 extensive, but it would be some day photographs and
4 night photographs of the appearance of the Inn.

5 CHAIRMAN GRIFFIS: Well, as we did accept
6 the DCRA's submission today, let's allow that, unless
7 Board members have any objection to it.

8 COMMISSIONER PARSONS: Yes, that's fine.

9 CHAIRMAN GRIFFIS: And let me just ask
10 that -- well, there it is. You clearly don't need to
11 submit 50 photographs. I think you know what we're
12 looking at though.

13 MS. ELLIOTT: Right.

14 CHAIRMAN GRIFFIS: I mean, it is very
15 narrow in its scope as all appeals are, and so go with
16 that advice and we'll have that in also by the 7th.
17 Okay.

18 MS. ELLIOTT: Thank you.

19 CHAIRMAN GRIFFIS: Anything else?
20 Questions, clarifications? Everyone clear on what
21 we're doing? It only took us two and a half hours to
22 get here. No, I'm just kidding you. It was only an
23 hour and a half. All right. If that's the case,
24 anything else for us in the morning session?

25 MS. BAILEY: That's your morning agenda,

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1 Mr. Chairman.

2 CHAIRMAN GRIFFIS: Very well. Then on the
3 13th we will revisit this motion in our public meeting.

4 Of course, there will not be additional testimony.
5 We have kept the record open for two items,
6 photographs and revised documents with permit
7 assessed. That being said, I think I can adjourn the
8 morning session of 29 April 2003.

9 (Whereupon, at 11:11 a.m. a recess until
10 1:14 p.m.)

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

2 1:14 p.m.

3 CHAIRMAN GRIFFIS: Good afternoon, ladies
4 and gentlemen. Let me call to order the afternoon
5 session of the 29 April 2003 public hearing of the
6 Board of Zoning Adjustment of the District of
7 Columbia. My name is Geoffrey Griffis. I am
8 chairperson. Joining me today is the National Capital
9 Planning Commission member, Mr. Zaidain, also the
10 Zoning Commission member, Ms. Mitten.

11 Copies of today's hearing are available to
12 you or the agendas, rather. They are located at the
13 table where you entered into the hearing room.
14 Please, review that and note that there was one
15 schedule change. We have added a short conclusion of
16 a case in this afternoon's schedule, and we have
17 indicated that we have 60 minutes to get through that,
18 and then we will go to the appeal, which is the only
19 other case in the afternoon.

20 A couple of things everyone should be
21 aware of, those of you who have been here before, of
22 course, will know and this will be a reiteration of
23 important factors, but all public hearings before the
24 Board of Zoning Adjustment are recorded. Therefore,
25 we ask several things of you.

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1 First, you need to fill out two witness
2 cards. Witness cards are located at the table where
3 you entered into and also the table in front. Those
4 two witness cards are to go to the recorder, who is
5 sitting to my right on the floor. That would be prior
6 to coming forward to speak. When you come forward to
7 speak, you can grab a chair, pick your favorite beige
8 color of chair and make yourself comfortable, and then
9 I need you to speak into the microphone.

10 That microphone should be on. You just
11 touch the base. We will give indication of how to do
12 that if there is technical difficulties. And here is
13 a very important piece. I need you to state your name
14 and your address for the record, so that we have that
15 and all our recordings will reflect your important and
16 pertinent statements before the Board.

17 The order of procedure for appeals. I
18 will hold off on that and we'll get to the appeal
19 order as we move into that case, and also in terms of
20 the special exception and variances, I am not going to
21 take everybody's time to go through the procedure of
22 that as this is a continuing case, and I think we know
23 where we left off and I will reiterate on the specific
24 cases.

25 However, an important piece, of course, in

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1 all hearings, cross examination is permitted by
2 applicants and parties in the case, and that would be
3 both for appeals and any variance or special
4 exceptions. The ANC within which the property is
5 located is, of course, automatically a party or
6 participant in the case.

7 All records are closed at the conclusion
8 of our hearings, except for any material that is
9 specifically requested by the Board, and the Board
10 will be very specific on what information is to be
11 submitted and when it is to be submitted into the
12 Office of Zoning. Once that information is received,
13 of course, it goes without saying, but I will say it
14 anyway, the record would then be closed and no other
15 information would be accepted.

16 The Sunshine Act requires that this Board
17 hold hearings in the public for each and every case.
18 The Board may, however, consistent with its rules of
19 procedure and the Sunshine Act, enter executive
20 session. The executive sessions would be for the
21 purposes of reviewing the record or deliberating on a
22 case.

23 The decision of this Board in contested
24 cases, of which all of ours are, must be based
25 exclusively on the record. Therefore, we ask for

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1 people present today not engage Board members in any
2 type of conversation, so that we do not give the
3 appearance of not basing our deliberations solely on
4 the record.

5 Let me second to last, I might say, ask
6 everyone if they would turn off all their cell phones
7 and beepers, so that we don't have any disruptions of
8 people giving testimony before the Board or break our
9 flow, and I am sure you will see how smooth and
10 elegant it actually is.

11 We will make every effort to conclude our
12 hearing today by 6:00. Of course, if, in fact, we go
13 close to that hour and are going over, I will revisit
14 the schedule and make sure that it can be
15 accommodated. Of course, the first case that we will
16 hear this afternoon will have its own deadline.

17 I think we can entertain preliminary
18 matters. Let's hear preliminary matters. Preliminary
19 matters are those, which pertain to whether a case
20 will or should be heard today, such as requests for
21 postponements, outright dismissals or whether proper
22 and adequate notice has been given to each of the
23 applications.

24 Let me ask staff if they have any
25 preliminary matters for the Board, and also say good

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1 afternoon to them, Ms. Bailey on my very far right,
2 Mr. Moy representing the Office of Zoning, Ms. Monroe
3 representing the corporation counsel, and Mr. Nyarku
4 on my very far left representing the Office of Zoning.

5 Any preliminary matters, Ms. Bailey, that
6 you have for us?

7 MS. BAILEY: Mr. Chairman, members of the
8 Board, good afternoon. Mr. Chairman, staff does not
9 have any preliminary matters.

10 CHAIRMAN GRIFFIS: Okay. Any other
11 preliminary matters from those attendant to each of
12 the cases this afternoon? Yes, sir?

13 MR. RUSHKOFF: Bennett Rushkoff
14 representing DCRA. There is a preliminary matter in
15 the American Towers' appeal, specifically our motion
16 to dismiss.

17 CHAIRMAN GRIFFIS: Indeed. What I am
18 going to do is, and that is an excellent point to
19 bring up, we are aware of the motion that was
20 submitted into the Board. We are going to get through
21 our first case in the afternoon, as we have scheduled
22 that, and then we will pick up the motions and any
23 other attendant issues to that case when we actually
24 call it, and then we can hear it within the
25 proceedings.

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1 So with that then, if there is nothing
2 else, let's call the first case in the afternoon.

3 MS. BAILEY: Application #16974 of Tudor
4 Place Foundation, Inc., pursuant to 11 DCMR 3104.1,
5 for a special exception to continue the operation of a
6 museum by a non-profit organization. The Board last
7 approved the application, the order is dated January
8 14, 2000, and it is under BZA case number 16477. This
9 project is under section 217 of the Zoning
10 Regulations. It is located in the R-1-B District at
11 premises 1644 31st Street, N.W., and 1670 31st Street,
12 N.W., as well. It is also located in Square 1281 on
13 Lots 827 and 830.

14 Is there anyone here who will be
15 testifying today who has not been sworn in? Anyone
16 who has not been sworn in previously, please, stand to
17 take the oath. Please, raise your right hand.

18 (The witnesses were sworn.)

19 MS. BAILEY: Thank you. Mr. Chairman,
20 brief remarks. The applicant has submitted a thick
21 document that you have in front of you. It's not
22 marked as an exhibit as yet. And in addition, the
23 Office of Planning has submitted a letter or a
24 memorandum, which addresses information the Board had
25 asked for previously. And then lastly, the Board was

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1 handed a resolution from ANC-3C. It has a case number
2 of 16974, but it does not pertain to this case, and
3 that document should be disregarded, at this time.

4 CHAIRMAN GRIFFIS: Good. Thank you very
5 much. Are all the participants in possession of the
6 two documents that were just indicated, the Office of
7 Planning's memo and then the submission?

8 MR. CROCKETT: No, we don't have the
9 Office of Planning memo.

10 CHAIRMAN GRIFFIS: Okay. Do we have
11 additional copies of that?

12 MS. BAILEY: Yes, sir, we can make it
13 available.

14 CHAIRMAN GRIFFIS: Okay. Let's take a
15 minute and review that.

16 MR. CROCKETT: I'll get it straightened
17 out. Well, that's the other case. They are mixing in
18 this other case.

19 CHAIRMAN GRIFFIS: Very well. I think
20 we're in order. All my pilots have been properly
21 placed, in which case we can begin. As you recall, we
22 finished all the testimony of persons. Is that
23 correct?

24 MR. CROCKETT: Not quite.

25 CHAIRMAN GRIFFIS: Indeed.

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1 MR. CROCKETT: Mr. Chairman, I am Don
2 Crockett. I live at 3070 Q Street, N.W.

3 CHAIRMAN GRIFFIS: Right.

4 MR. CROCKETT: When we finished at the
5 late hour, two of our witnesses could not stay,
6 because it went way past the time, and we have those
7 two people here for three minute statement.

8 CHAIRMAN GRIFFIS: Okay. So they wouldn't
9 be witnesses, but would be testifying as persons?

10 MR. CROCKETT: Persons.

11 CHAIRMAN GRIFFIS: Is that correct?

12 MR. CROCKETT: Right.

13 CHAIRMAN GRIFFIS: Okay. Let's get them
14 up and then we'll move on from there.

15 MR. CROCKETT: Laine and Pedro.

16 MS. KATZ: My name is Laine Katz and I
17 reside at 1671 32nd Street where I have lived for
18 almost 25 years. I am aware that we have a
19 contentious issue in the neighborhood, and there are
20 parties on both sides of the question as to whether or
21 not the Tudor Place should enjoy the pleasures of
22 commercial entertainments and possibly there is a
23 question in here, it's not clear to me, as to whether
24 it should become a museum, as well.

25 Now, I have heard all of these voices and

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1 the only voice that I, frankly, haven't heard is the
2 voice of Mr. and Mrs. Peter. And I would like to
3 explain that I knew Mrs. Peter. I chatted with her
4 over a period of a few years back in the '80s after
5 she had moved from Tudor Place to Dower House. Some
6 of our conversations were, in fact, about Tudor Place.

7 I was impressed with the bequest and I was pleased as
8 a neighbor to learn about it, and so we did talk about
9 it from time to time.

10 It was very clear to me that both of the
11 Peters had their own very certain awareness of what an
12 extraordinary architectural treasure they were
13 entrusting to the public. Because of a substantial
14 endowment, apparently, she said that they expected
15 that the house and grounds that they so loved would be
16 maintained as the family had done over a period of
17 time.

18 Further, we ended up talking about
19 furniture, because I was interested in antiques, and
20 she said that the furniture and the furnishings of the
21 house were not important antiques. They were
22 important to the family, and she assumed that all
23 would remain in place to allow any visitors a sense of
24 how that family lived with the memorabilia of several
25 generations.

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1 She never made the slightest suggestion
2 that the house would become a museum, certainly for
3 purposes of any other kind of collection or display.
4 She made it clear to me that the public would be
5 permitted on a limited basis, and that visitors would
6 be expected to maintain the decorum appropriate to the
7 family tradition, and to our Georgetown neighborhood.

8 The Peters lived in our historic
9 neighborhood with great dignity. I believe that there
10 has been a sorry reinterpretation of purpose for Tudor
11 Place. I think despite repeated promises to operate
12 with a mission of preservation and education, Mrs.
13 Peter could never have guessed the many uses to which
14 Tudor Place has already been put.

15 Among them, frankly, are some things that
16 recently came to my attention via material that Tudor
17 Place has distributed in the neighborhood, and some of
18 that amounts to the presence of a resident artist on
19 the premises and his art is hanging at Tudor Place.
20 Certainly, things of the family's have been removed
21 for that purpose.

22 CHAIRMAN GRIFFIS: I have to have you
23 summarize.

24 MS. KATZ: All right. Sorry.

25 CHAIRMAN GRIFFIS: That --

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1 MS. KATZ: All right. My sense is that
2 the lessons, the artist and the kinds of disturbance
3 in the neighborhood has been inappropriate to finish
4 in their voice. I did go back to try to determine
5 what was in the will, and in Mr. Peter's voice, "Tudor
6 Place should be kept as I shall leave it and that it
7 be considered not as a period museum, but as a house
8 lived in and loved by generations of our family."

9 And I think their voice should be heard in
10 this. They were very good neighbors in a neighborhood
11 that is not only a residential neighborhood, but it is
12 a historic neighborhood and we are all lucky to have
13 that property. This was never intended to be a house
14 to become a party planners paradise. Thank you.

15 CHAIRMAN GRIFFIS: Good. Thank you very
16 much, Ms. Katz. Any questions from the Board? Very
17 well. Sir?

18 MR. KANOF: Good afternoon, Mr. Chairman,
19 members of the Board. Thank you for this opportunity
20 to explain my concern as a neighbor in Georgetown. My
21 name is Pedro Kanof and my home is 1669 32nd Street,
22 N.W., and the patio of my home is in the direction to
23 the Tudor Foundation.

24 In order to economize the time, I would
25 like to describe to you a journey where I had to

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1 suffer in my home when I returned from a mission
2 abroad. It was a Saturday and I arrived with the taxi
3 from Dulles. The taxi couldn't enter in 32nd Street,
4 because there was movement of cars. I spent minutes
5 just so we could arrive to my home going one block
6 down from R to Reservoir.

7 When I arrived to my home after more of 15
8 hour flight, what I discover is an incredible noise.
9 It was Saturday night and the only thing, I suppose, I
10 could do was to make 911. I discover it was Moffett.

11 I could understood then when I understood for
12 somebody who make noise, which arrived to my home.

13 Around 1:00 a.m. at the following day, the
14 music stopped. At the following day, I tried to go to
15 my office and when I move my own car from the parking,
16 I discover the traffic again was stopped that time
17 between Reservoir and Q, because there was a truck
18 trying to enter to take the garbage of the Foundation,
19 and the door for that truck is on 32nd Street and Q,
20 practically.

21 So again, I must stop and lose my time,
22 and that truck have not the possibility to make a
23 quick movements, so they need a lot of time and use a
24 lot of time to enter and to go out. This is what
25 happened. That happened a few years ago, and a result

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1 of that experience I described to you, I arrived to
2 the conclusion that, in fact, if I supposed to be very
3 lucky to have a historical house in my neighborhood,
4 in the same block, I must realize that was managed for
5 people who was no concern to be bad neighbors.

6 So that was my conclusion after that
7 experience. Now, why I am here after third time, a
8 third time to explain to you my concern is because
9 there are problem of noise. There are problem of
10 traffic. There are problem of parking, because in the
11 neighbor when I don't have idea if they go to put 400
12 car who arrive for reception, so I suppose that I am
13 in front to a situation in which the neighbor are
14 losing his dignity. I say dignity.

15 I am here, members of the Board, to ask
16 for your help to save my savings in my home to
17 maintain the dignity of the neighbor. Last week, it
18 was open a shop. This city is an extraordinary city
19 for remember the culture and for the education of the
20 history of this great country. The Smithsonian, but
21 nobody live closer to the Smithsonian.

22 It's easy to make money in a neighbor,
23 which is residential. It's very easy. I am very,
24 very concerned. I am offended for this tentative, and
25 I seriously ask to the members of the Board to stop

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1 any planning, meetings of entertainment in my
2 neighbor. Thank you.

3 CHAIRMAN GRIFFIS: Thank you very much.
4 Any questions from the Board? You indicated that one
5 event that you spoke of was several years ago. What
6 was the date on that when you came back from the
7 airport and couldn't access your house?

8 MR. KANOF: Yes, that was -- yes, I could
9 say to you I couldn't say exactly the day.

10 CHAIRMAN GRIFFIS: But, I mean, it was
11 2001?

12 MR. KANOF: But it was at least three,
13 four years ago and that is the reason for what I was
14 here when I asked with my other neighbors to put
15 limitations to the commercial exploitation of the
16 Tudor Foundation.

17 CHAIRMAN GRIFFIS: Right. Okay.

18 MR. KANOF: Thank you, sir.

19 CHAIRMAN GRIFFIS: Thank you. Is there
20 any cross examination of the testimony that we just
21 heard? Not seeing anyone rush the table to cross
22 examine, I am assuming there is no cross examination.
23 Okay. Very well. Thank you both very much. I
24 appreciate your time down here this afternoon.

25 Let us then go to the presentation of the

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1 case of the opposition parties. I believe our order
2 is the Q Street first, and then we will have the 31st
3 Street, and then we're going to have the 32nd Street.
4 Is that correct?

5 MR. CROCKETT: Actually, Your Honor, we
6 are going to do it opposite.

7 CHAIRMAN GRIFFIS: Okay.

8 MR. CROCKETT: We're going to go 32nd, 31st
9 and Q.

10 CHAIRMAN GRIFFIS: Perfect.

11 MR. CROCKETT: That's all.

12 CHAIRMAN GRIFFIS: We do know we're in a
13 15 minute time crunch, is that correct, so we're going
14 to be very efficient and expeditious? We will not
15 interrupt you, obviously. That will just throw the
16 clock off a little bit. Of course, any of our time of
17 questions and cross examination doesn't count towards
18 your time. So we'll do 15 minutes and we'll try and
19 cut the clock off when we transition, so that we have
20 usable time. You know, we want to hear everything.
21 So with that, whenever you are ready, sir.

22 MR. KATZ: Good afternoon, everyone,
23 Chairman and members of the Board. My name is Norton
24 Katz. I reside at 1671 32nd Street, N.W. I have
25 resided in this private residence for over 25 years,

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1 and the back of my property nearly abuts the northwest
2 corner of Tudor Place. Most particularly, the corner
3 that is the northwest corner of Dower House.

4 The neighborhood is a distinctly
5 residential neighborhood, and Tudor Place is a
6 distinctly lovely structure. We all admire the
7 mission of Tudor Place for education and for
8 preservation. However, the use of Tudor Place for
9 convention purposes and party purposes abuses its
10 mandate in the neighborhood. Its mandate is to be a
11 distinguished home for visitors and the applicant is
12 attempting to make it a convention center. We all
13 believe that it should exist and serve its basic
14 mission.

15 The presence of these parties, however, is
16 an undue impact on the neighborhood. In fact, it
17 becomes virtually a catastrophic impact on the
18 neighborhood, because while many of the neighbors who
19 testified earlier indicated that some of these things
20 didn't bother them, 32nd Street happens to be the
21 service area on the west side of Tudor Place, and it
22 receives and becomes a kind of dumping ground for the
23 high level of activities, for the applicant's
24 purposes, high level of activities that go on on the
25 premises.

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1 There is an increased amount of garbage
2 and debris that is generated by these parties. That
3 means extra garbage trucks come tearing down 32nd
4 Street more than twice a week that would serve the
5 normal residents. The noise and the vibration of
6 these vehicles, including the tent trucks, the
7 refrigeration catering trucks, which keep their motors
8 running, of course, to keep the refrigeration going,
9 generates so much noise and vibration, I think the
10 windows are going to fall out of some of our houses.

11 So it isn't simply a matter of parking
12 about which I am here today. It's the movement of
13 traffic. In addition to all of the debris and
14 commercial movement on 32nd Street, when the visitors
15 arrive on 31st Street to enter the premises, they are
16 served by valet parking. And, gentlemen and ladies,
17 members of the Board, I tell you that each one of
18 those vehicles makes four trips through Georgetown.
19 The visitor arrives. His car is picked up on 31st
20 Street. It is then delivered to a parking lot
21 someplace like Gellos.

22 Whereupon, the people then come tearing
23 down 32nd Street with their vehicles in order to have
24 people recover their cars northbound or southbound,
25 whatever they are on 31st Street. So you have this

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1 enormous number of vehicles, not just 200 vehicles for
2 500 person party, but you have got 200 vehicles make
3 four trips through Georgetown. The burden becomes
4 catastrophic for those who live there, the noise, the
5 exhaust.

6 I notice that Mr. Moore was diligent in
7 visiting Tudor Place on 31st Street, he said, during
8 one of the parties. He didn't mention, however, that
9 his inspection included visiting the other side of the
10 parties, not the visitor and the entertainment and the
11 lovely part of the parties, but the back end of these
12 parties with the garbage trucks and the tent trucks
13 and the vehicles tearing down 32nd Street, so that the
14 visitors there -- okay. I'm out of time.

15 I don't think we, as neighbors, should
16 have to protect ourselves against Tudor Place by
17 attending the meetings that they call for from time to
18 time. In fact, one of the meetings stated that they
19 want to maximize the rear entrance of Tudor Place for
20 all this activity. That's where we live, too. Thank
21 you for your attention.

22 MR. SNIDER: May I please the Board? May
23 I please the Board? I am Ronald Snider, 1607 31st
24 Street, N.W. I have a few remarks to make on behalf
25 of 31st Street. Earlier, I asked Ms. Buhler about an

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1 event on April 8. They have now inserted into the
2 record two letters, one by Mr. Brose and another one
3 by someone by the name of Perkins who said that they
4 arrived at about 7:10 on that same day.

5 Well, I arrived at 7:30. There was not a
6 parking place on 31st between Q and R, at that time,
7 where there are normally between 10 and 15. In short,
8 I believe Brose and Perkins had eaten up the parking
9 places. That shows the congestion that was created in
10 that one little belt.

11 Next, you heard from Gretchen Handwinger
12 whose address was 1679 31st Street. In this record
13 already, you have before you signed statements by 21
14 other people who live on upper 31st Street, everybody
15 all around Gretchen. There are submissions from 1657,
16 69, 97, 98, 94, 96, 99, 75, 77, 81, a total of 21
17 people on the other side.

18 They have got a problem on upper 31st
19 Street, and the problem happens to be the issue with
20 respect to 1670 and the proposed four weddings or
21 rentals per month combined with other things that they
22 are in the order called receptions. We don't know
23 what these receptions are, but I anticipate that we're
24 going to have a serious parking problem. And it's
25 more serious up above the street, but it comes all the

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1 way down even below towards Q Street when you get on
2 the parking issue. The noise and the bigger
3 congestion is opposite Mr. Wells who testified
4 previously.

5 You have also been supplied with
6 information by Tudor Place, which is records of
7 various meetings held over the last three years. I
8 have been in attendance to almost every one of those
9 meetings, and I stated then and I state today we had
10 no problems in the last two years. However, this
11 order as we read it now does not in any way comport
12 with the conduct in the last two years. If we could
13 live like we did that last two years, we wouldn't be
14 here, but that is not the situation.

15 There is one other little hole in the
16 order, which I would like to bring to your attention,
17 and that is the order refers to weddings. Well, we
18 also have something out there called wedding
19 receptions. In short, the way this order reads right
20 now, I can have a wedding down at the church and go to
21 Tudor Place and have a 400 person reception. That's
22 got to be cleared up. That concludes my statement.

23 MR. CROCKETT: Mr. Chairman, John Crockett
24 again.

25 CHAIRMAN GRIFFIS: Just turn on your mike.

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1 MR. CROCKETT: I'm sorry.

2 CHAIRMAN GRIFFIS: And we can turn off
3 these, so we don't get the interference.

4 MR. CROCKETT: I'm sorry.

5 CHAIRMAN GRIFFIS: Thanks.

6 MR. CROCKETT: Prior to the Board coming
7 in, I had my exhibits collated and passed around to
8 the Board, so what you have there is a stack of
9 exhibits, which I would like to briefly discuss what
10 they are. The first is since Tudor Place put in the
11 current editorial, I thought it appropriate that you
12 have before you my reply to that editorial and that's
13 why that's there.

14 The next document is the will of Armstead
15 Peter, which set up this whole thing, which I think
16 the Board needs to have, and I particularly would
17 refer you to the, I think, it's the 11th article, which
18 contains all the restrictions and his desires for the
19 perpetuation and preservation of Tudor Place. And I
20 think if you will read that article 11 and what Mr.
21 Peter wanted to happen, you will see that that isn't
22 what's happening with respect to these proposals to
23 turn Tudor Place and the house next door into a
24 location or a venue for meetings, lectures, parties
25 and that sort of thing. That isn't what he had in

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1 mind at all.

2 The next two documents, the first is Tudor
3 Place's financial statements for 1998 and 1997, and
4 the next is their tax return for 2001. I would point
5 out the issue here, they say the only reason they want
6 to do these events, these commercial events, rental
7 events, that sort of thing is for money, because they
8 need it. I think the tax return demonstrates that
9 last year where they had no such events, in 2001, they
10 did very well. They had \$60,000 more in revenue than
11 they had in expenses, and we believe that if they want
12 to generate additional revenue, that they should rent
13 1670, which is a single family home to a single
14 family, and they could do that, I believe, for
15 \$100,000 a year, which is the same price, the same
16 amount of money that they proposed that they would get
17 during the last exception proceeding. They said they
18 needed to earn \$100,000 from these special events.
19 They could get that from simply renting that home and
20 everybody would be happy.

21 The next exhibit is the selected pages
22 from the Georgetown Parking Study. I don't have time
23 to go through this with you, but what this study
24 showed was that on evenings and weekends, generally,
25 there is just no parking in Georgetown, particularly

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1 on weekends. There are more cars parked than there
2 are legal spaces, and that's the normal condition.
3 And when you put an event, 200, 300, 400, 500 people
4 in there, there is no way that it can absorb that
5 number of cars, that number of people, at those times.

6 And we have already given the Board the old Osborne
7 George study of Saturday.

8 The last document that I have given you is
9 the French case. I would like the Board to take a
10 look at the French case, what they said, what the
11 Board did in French. They said no events. Park your
12 cars off sites, no events period, and I think that
13 that case was properly decided back in 1995 and it
14 ought to apply to this case.

15 One more thing we want to put in, the tape
16 of Mr. Snider that he took one night at the Glickman
17 wedding, and the noise that came on his -- I mean,
18 there is no question about the fact that it's noisy,
19 but this demonstrates what the noise is.

20 CHAIRMAN GRIFFIS: I am not going to take
21 your time up. We'll address that when you're done.

22 MR. CROCKETT: All right. Now, my house,
23 of course, the windows in my house look over the Tudor
24 Place. I had a bad experience. The first time I
25 heard this, I couldn't believe it. I didn't know what

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1 was happening back in about 1995 when they did their
2 first party. I really couldn't believe it. I was
3 watching a television movie, and all of a sudden there
4 was this huge noise outside and I thought well,
5 somebody is parked out in front of my space with their
6 radio on way up loud.

7 Well, that wasn't what it was. There was
8 a 21 piece orchestra over on the lawn at Tudor Place,
9 and they played until 11:00 at night and it was
10 impossible with that kind of music coming across to do
11 anything else. I mean, it just shut everything down.

12 A person couldn't sleep. All of the parties have
13 been that way, and it doesn't matter whether or not
14 the music is amplified.

15 I mean, you have horns and drums and
16 pianos and it doesn't matter. This is a house that is
17 next door to us. So this non amplification thing
18 doesn't do us any good. I am getting real short on
19 time, so we know about valet parking. We support the
20 Tudor Place application to continue the tours as they
21 have over the last two years. We oppose the special
22 events. We oppose extending the evening tour hours,
23 because there isn't parking, and we oppose the use of
24 1670 as anything but a single family residence.

25 I think we spoke. I think you suggested

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1 that we file a legal brief with respect to these
2 issues, and since I don't have time to go over these
3 legal points, we would like the opportunity to brief
4 them for you giving you the appropriate cases and
5 citations.

6 CHAIRMAN GRIFFIS: Yes, I'll follow-up to
7 that.

8 MR. CROCKETT: But briefly, I would just
9 say there has been a failure of proof that in order to
10 get this exception, the applicant had to show that
11 there would be no adverse effects. There is a total
12 failure of proof there. All of the evidence is to the
13 opposite and, therefore, I don't believe that the
14 Board has the authority under the regulations to grant
15 the exception for these special events.

16 And I also would like the Board to take a
17 look at the serious legal issues, which were just
18 washed over by the last Board, which are the Board
19 does not have authority to establish a museum in a
20 residential neighborhood. And yet, that's what they
21 have done under the guise of 217 and we don't believe
22 that's correct.

23 Number two, fund raisers by non-profit
24 corporations are not allowed in the residential zone,
25 and those are the main points. And then we have 1670,

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1 which is a massive problem all on its own where they
2 have annexed another single family home to the Tudor
3 Place and want to use it as a party venue.

4 Well, we are going to give you the cases,
5 which show that that can't be done under the zoning
6 laws, and that the only use for 1670 that is currently
7 authorized is as a single family home, and they ought
8 to rent it, and that's basically what our position is.

9 CHAIRMAN GRIFFIS: Summation sentence or
10 is that it? I will give you 20 more seconds.

11 MR. CROCKETT: Well, 1670 has become a
12 real problem, and the whole idea that the prior Board
13 incorporated that into an exception order, I mean, it
14 doesn't meet the requirements of 217. It is not an
15 accessory use. An accessory use in a residential zone
16 can only be 15 high. It's a 30 foot, three story
17 single family home. It just can't be done.

18 Nevertheless, the prior Board did it and
19 we think that these legal issues are so serious, they
20 are going to affect any other house in Georgetown that
21 comes into this. And we think that if there is any
22 question about it, these legal issues ought to go up
23 to the full Commission and it ought to get a full
24 hearing and a full legal review, and then the Zoning
25 Commission ought to decide whether 217 is going to be

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1 a vehicle for this kind of nonsense.

2 CHAIRMAN GRIFFIS: Okay. Thank you very
3 much. Mr. Crockett, you make a statement that you
4 support the application for a continuing operation of
5 the home, but you have just made a case that museums
6 are not allowed under 217. What do you classify Tudor
7 as being?

8 MR. CROCKETT: A historic single family
9 home.

10 CHAIRMAN GRIFFIS: And how would you open
11 that to the public?

12 MR. CROCKETT: Under 217, that is the
13 purpose of the corporation is to make it available to
14 the public, making --

15 CHAIRMAN GRIFFIS: That wouldn't classify
16 it as a museum to you though?

17 MR. CROCKETT: No, I wouldn't classify it
18 as a museum.

19 CHAIRMAN GRIFFIS: Okay.

20 MR. CROCKETT: And Mr. Peter didn't. He
21 said he didn't want it to be a museum. He wanted it
22 to be his home.

23 CHAIRMAN GRIFFIS: I guess from my
24 processing and deliberation on this, we would have to
25 go to the regulations and then find a definition, and

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1 that is what I am asking you. How does it fit then
2 for your interpretation of how we are supposed to
3 review it through the Zoning Regulations?

4 MR. CROCKETT: As I understand it, when
5 you do an exception, you stay within the four corners
6 of the exception authority.

7 CHAIRMAN GRIFFIS: Yes.

8 MR. CROCKETT: And in this case, it's 217.
9 So a non-profit corporation and come in and use this
10 house, which is over 10,000 square feet.

11 CHAIRMAN GRIFFIS: Right.

12 MR. CROCKETT: For its purpose on the
13 condition that there be no adverse impacts on the
14 neighborhood.

15 CHAIRMAN GRIFFIS: So you would classify
16 this just as a non-profit corporation.

17 MR. CROCKETT: Using it.

18 CHAIRMAN GRIFFIS: That is housed in this
19 building?

20 MR. CROCKETT: And the use is residential,
21 because residents in Georgetown have traditionally
22 opened their homes to tours, to both private tours,
23 public tours, the Georgetown House Tour.

24 CHAIRMAN GRIFFIS: Do they have parties?

25 MR. CROCKETT: They don't have parties.

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1 They just have tours. Allowing tours is a residential
2 function in Georgetown.

3 CHAIRMAN GRIFFIS: I see.

4 MR. CROCKETT: Renting your house out for
5 parties is not a residential function. That is a
6 commercial function, and that is the distinction that
7 we make.

8 CHAIRMAN GRIFFIS: Okay. Also, you cited
9 French, and we will read it. I think it's cited quite
10 a bit and we have probably read it. Oh, this is '95.
11 Okay. We'll all take the time and take a look at
12 that then. 1670, I get the notion that you want to
13 maintain that as a residential and residential only.

14 MR. CROCKETT: Oh, absolutely.

15 CHAIRMAN GRIFFIS: You are asserting that
16 they could rent it for \$10,000 a month, roughly?

17 MR. CROCKETT: Yes.

18 CHAIRMAN GRIFFIS: Okay. That's all I
19 have. Other Board members, questions? Very well.
20 Cross examination?

21 AUDIENCE: No cross examination.

22 CHAIRMAN GRIFFIS: Thank you. Then it's
23 indicated that there is no cross examination. Yes,
24 indeed, and I throw that out to everybody. Does the
25 ANC have any cross examination of any of the

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1 testimony? Okay. Also indicated not, in which case
2 let us move to any rebuttal witnesses that will be
3 called by the applicant, at this time, and if so, we
4 can avail those to cross examination, and if not, we
5 will go right into conclusions.

6 Now, at the end of that, we will reassess
7 and look. Well, there are things that the Board will
8 ask for to be submitted, so I am going to go through
9 all that. I am going to go through the schedule. I
10 am going to go through next steps. So don't worry,
11 and I will have the opportunity to answer any
12 questions and clarifications. But that was the delay
13 of time for you guys to get ready, see? I am feeling
14 the air with it. So no one will leave this afternoon
15 without having a full understanding of where we're
16 going in the process on this one.

17 MR. VON SALZEN: Mr. Chairman, Eric Von
18 Salzen, attorney for the applicant. We have a very
19 brief statement in rebuttal from Ms. Buhler.

20 MS. BUHLER: Mr. Chair and members of the
21 Board, Tudor Place led a very transparent process of
22 consultation with neighbors regarding the terms of its
23 special exception application. During this process,
24 neighbors had ample time to express their concern on
25 the restriction and expressed concern about the

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1 restrictions on large evening events, and that they be
2 more clearly defined. So in response to this concern,
3 Tudor Place included in its application a limitation
4 on rental events and all events involving 200 or more
5 guests.

6 While Tudor Place acted, I believe, in a
7 very transparent process during which none of the
8 concerns regarding limitations or functions under 200
9 were discussed until three weeks ago. I believe it is
10 in the best interests of all, Tudor Place and
11 neighbors, to take an additional step.

12 I want to make it very clear that we are
13 constrained by the limits of our staff to do a large
14 volume of events, and it is not the primary function
15 of Tudor Place to run events, but to be a historic
16 house museum and garden. Rental functions are
17 secondary to Tudor Place and, as you have heard, there
18 is an inherent limit to operation of such functions.
19 We simply cannot do many of them.

20 Based on what we have heard over the last
21 several weeks, we would limit the number of large
22 evening functions involving 200 to 500 guests at the
23 site to six per year with no more than two of such
24 functions being rental functions, and no more than one
25 of such functions taking place at the site in any one

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1 calendar month. The number of evening rental
2 functions involving 100 to 200 guests at the site we
3 would limit to 10 per year, and involving 50 to 100
4 guests at the site would be limited to 15 per year.

5 Finally, in no event would rental
6 functions for the purpose of weddings be permitted for
7 75 or more guests. I believe these additional
8 proposed limits respond to the neighbors' concerns,
9 which we have just heard over the last three weeks for
10 a greater degree of certainty and a realistic
11 reflection of our abilities. Thank you.

12 CHAIRMAN GRIFFIS: Thank you very much.
13 Any other witnesses?

14 MR. VON SALZEN: Nothing further, Mr.
15 Chairman.

16 CHAIRMAN GRIFFIS: Cross examination, ANC,
17 yes, Mr. Snider? Of course, cross examination is
18 questions of the testimony you have just heard.

19 MR. SNIDER: Exactly.

20 CHAIRMAN GRIFFIS: Good.

21 MR. SNIDER: In your testimony, you
22 referred to events in the 100 to 200 size range. What
23 number of those are rentals?

24 MS. BUHLER: All these numbers referred to
25 rental functions.

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1 MR. SNIDER: In other words, all 10 could
2 be rentals?

3 MS. BUHLER: All these referred to rental
4 functions in the evening.

5 MR. SNIDER: Okay. And again in this
6 group of 50 to 100, you said there would be 15. Is
7 that correct?

8 MS. BUHLER: Yes.

9 MR. SNIDER: And those would all be
10 rentals?

11 MS. BUHLER: Yes.

12 MR. SNIDER: And then in order for me to
13 be assured, you referred to weddings. That also
14 includes wedding receptions. Is that correct?

15 MS. BUHLER: Yes.

16 MR. SNIDER: No further questions.

17 MR. TICE: For the record, I'm Richard
18 Tice and I live at 3102 Q Street. I have been here
19 before. I think my other information is already on
20 file.

21 CHAIRMAN GRIFFIS: And you are being
22 represented as part of the party of the?

23 MR. TICE: Q Street.

24 CHAIRMAN GRIFFIS: Q Street? And Mr.
25 Crockett is not here today?

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1 MR. TICE: He is sitting right over here.
2 He is just taking a break. Is that all right?

3 CHAIRMAN GRIFFIS: Okay. Let's go.

4 MR. TICE: Okay. Ms. Buhler, you just
5 said that the restrictions and functions refer to the
6 rental events only?

7 MS. BUHLER: Yes.

8 MR. TICE: So the application still stands
9 that you could hold an unlimited number of events for
10 up to 50 people in Dower House?

11 MS. BUHLER: No, this does not reflect the
12 Dower House, that last clause on Dower House.

13 MR. TICE: So the application --

14 MS. BUHLER: Dower House is restricted to
15 four events per month, no more than four events per
16 month.

17 MR. TICE: That's four rental events?

18 MS. BUHLER: Yes.

19 MR. TICE: I am talking about -- no.

20 MS. BUHLER: You need to say that most of
21 these rental events are during the day and for
22 Georgetown neighbors.

23 MR. TICE: Are you done?

24 MS. BUHLER: Yes, are you?

25 MR. TICE: No, I'm not. Is the

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1 application though for Dower House -- now, the
2 application says you could hold events for up to 50
3 people. Tudor Place could host them, not rentals, but
4 Tudor Place could hold events for up to 50 people
5 virtually any day of the year. You are not changing
6 that part of the application, are you?

7 MS. BUHLER: Could you repeat that?

8 MR. TICE: The application would allow
9 Tudor Place to host events, not rentals, but Tudor
10 Place to host events in Dower House for up to 50
11 people. Is that correct?

12 MS. BUHLER: Yes.

13 MR. TICE: And there is no limitation on
14 the number of those events each day, is there?

15 MS. BUHLER: In the application, no.

16 MR. TICE: Okay. And there is no
17 limitation on the number of events each month you
18 could hold at Dower House in the application. Is that
19 correct?

20 MS. BUHLER: For our own, for education
21 purposes, for meetings?

22 MR. TICE: For Tudor Place's purposes.

23 MS. BUHLER: Purposes?

24 MR. TICE: Not rentals.

25 MS. BUHLER: No, there are no constraints

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1 on that.

2 MR. TICE: And you are leaving that in the
3 application now? You are not restricting that, right?

4 MS. BUHLER: No.

5 MR. TICE: No, you are leaving it or no,
6 you are not?

7 MS. BUHLER: We are leaving it in.

8 MR. TICE: Okay.

9 MS. BUHLER: No, we are not restricting
10 that.

11 MR. TICE: If I may, this goes just a
12 little bit off, but have you provided any parking
13 accommodations for when Tudor Place holds an event at
14 Dower House?

15 CHAIRMAN GRIFFIS: Actually, that goes way
16 off, because she didn't give any testimony on parking,
17 at this point.

18 MR. TICE: Okay. Withdrawn.

19 CHAIRMAN GRIFFIS: Anything else?

20 MR. TICE: No.

21 CHAIRMAN GRIFFIS: Anything, any other
22 questions, cross examination? Very well. Thank you
23 very much.

24 COMMISSIONER MITTEN: Mr. Chairman, I just
25 wanted to follow-up on something that we had discussed

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1 the last time we were together, and then Mr. Katz was
2 focused on 32nd Street, and we didn't get the site plan
3 yet I don't believe.

4 MR. KATZ: It was submitted.

5 COMMISSIONER MITTEN: It was submitted?
6 Okay.

7 CHAIRMAN GRIFFIS: Can you shut off that
8 mike on that corner, please? Thank you.

9 COMMISSIONER MITTEN: I haven't gotten a
10 copy of the site plan, let me put it that way, but I
11 am familiar enough with the area to know that you make
12 a very sharp turn to go up your driveway, and I think
13 the testimony that we had heard about the difficulty
14 that trucks have getting up that driveway in terms of
15 making it in just one quick movement, I don't think
16 anyone has disputed that it takes more than one quick
17 movement.

18 And I would like to see some effort on the
19 part of Tudor Place, if we leave the record open, to
20 address the issue of blocking 32nd Street with these
21 trucks that, you know, require, you know, multiple
22 movements to get up the driveway.

23 MS. BUHLER: We have garbage collection
24 three times a week, and that is the only blockage that
25 we have. There are apartment buildings up on our

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1 street and I have been blocked by not only city
2 collection of trash driving down to Tudor Place, but
3 also other neighbors blocking with work that is being
4 done at their site, as well as the apartment building
5 trash collection, too.

6 So all the trash trucks that come down 32nd
7 Street are not Tudor Place. It takes about three
8 turns to get into Tudor Place. It is, approximately,
9 three to four minutes for a truck to back in and out
10 each.

11 COMMISSIONER MITTEN: I understand what
12 you just said in terms of three trash pickups per
13 week, but we had testimony that the trucks that
14 service the large events also use that same entrance,
15 and so whenever there is a large event that requires
16 catering or a tent or whatever it is, so that there is
17 actually more traffic than that under those
18 circumstances.

19 MS. BUHLER: The trucks that are used for
20 catering and for refrigeration are smaller. We have
21 never had a truck have to make more than the ones that
22 come and deliver. It is not our experience and my
23 experience with our spring garden party, which is our
24 large fund raising event, that there has ever been a
25 problem with the trucks getting in and out of our

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1 property.

2 I do agree that we have a major problem,
3 that we have a problem with our service entrance. I
4 don't think it's as good as it should be, and I would
5 hope that we would be able to solicit the funds
6 perhaps from our 32nd Street neighbors to help
7 ameliorate the situation.

8 COMMISSIONER MITTEN: But you are not
9 going to propose any amelioration, at this point?

10 MS. BUHLER: It's not something that we
11 can just do. It has to go before the National Park
12 Service. It's a scenic easement on the property and
13 the National Park Service would have to approve any
14 changes or additions to the property. So it's not
15 something that we can just say we'll do.

16 COMMISSIONER MITTEN: Okay. Thank you.

17 CHAIRMAN GRIFFIS: Any other questions
18 from the Board? Ms. Mitten brought up an excellent
19 point of the site plan that we had asked for, and I do
20 have an April 22nd submission and I am not sure. So it
21 is in, but we need to provide copies to everybody.
22 That's my problem.

23 I don't have an exhibit number on it in my
24 file, so I am not sure what exhibit it is, but we will
25 revisit the entire file to make sure everything that

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1 was submitted gets to all the Board members. Of
2 course, this file is about that thick, at this point,
3 so it takes some further review. Okay.

4 Anything further? Then let's go to any
5 closing remarks.

6 MR. VON SALZEN: Thank you, Mr. Chairman.

7 CHAIRMAN GRIFFIS: Oh, first, is there any
8 recross of the answers to the questions from the
9 Board, at this point, from the testimony? Okay.

10 MR. VON SALZEN: Mr. Chairman, Eric Von
11 Salzen, attorney for the applicant. First, on behalf
12 of Tudor Place, we would like to thank the Board for
13 accommodating all the parties and, obviously, this has
14 been a lengthy hearing over three different days. And
15 over this period of time, I think it is significant
16 that there has been no significant opposition to the
17 continuation of the special exception under which
18 Tudor Place has been operating for the past 15 years.

19 Virtually everyone agrees that Tudor Place
20 is a wonderful institution and a great asset to
21 Georgetown and to the District of Columbia as a whole.

22 The only question that has been raised has had to do
23 with whether the Board should impose more restrictive
24 conditions on the special exception this time than it
25 did three years ago, and we submit that the answer to

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1 that question should be a resounding no.

2 Now, let's look at the conditions that
3 Tudor Place has proposed. These are in most respect
4 the same conditions that the Board imposed three years
5 ago and that the District of Columbia Court of Appeals
6 approved in rejecting an appeal by the very same
7 people who are leading the opposition to Tudor Place
8 again this time.

9 In 1999, this Board said this. "The most
10 significant issue associated with the continuation of
11 the museum use is the parking and operational
12 situation during large special events, and the
13 Foundation's plans to further strengthen its control
14 over traffic will ensure that the proposed use will
15 have no significant adverse effects."

16 The Court of Appeals affirmed the Board's
17 judgment in these words. "In speculating that these
18 measures proposed by Tudor Place and adopted by the
19 Board cannot eliminate all potential parking concerns,
20 the opposition group fails to view Tudor Place's
21 effect on parking in its proper overall context. As
22 the BZA found, Tudor Place generates little demand for
23 parking on the surrounding streets the majority of the
24 time."

25 In fact, due to its low density use and

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1 extensive street frontage, Tudor Place, far from
2 adversely impacting residential parking needs, more
3 often generates parking space for the community along
4 its three perimeter streets. No showing has been made
5 that on those limited occasions where the Foundation
6 holds special events the parking concerns are not
7 addressed by the measures stated in the Foundation's
8 plan.

9 Consequently, the BZA reasonably
10 concluded, based on substantial evidence, that the
11 Foundation's special events would not adversely impact
12 traffic or parking in the neighboring community. None
13 of the opponents has submitted any substantial
14 evidence that the Board and the court had been proved
15 wrong, that the conditions approved three years ago
16 have not been adequate to ensure that the proposed use
17 will have no significant adverse effects.

18 The witnesses in opposition have offered
19 to you, as the opponents did three years ago, only
20 speculation that these conditions might result in
21 intolerable neighborhood impacts. So in seeking to
22 continue its special exception, Tudor Place has
23 proposed, essentially, the same conditions that the
24 Board approved three years ago. Where Tudor Place has
25 proposed minor changes to the conditions, these have

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1 grown out of the very process of liaison and
2 communication between Tudor Place and its neighbors,
3 that this Board's 1999 order encouraged.

4 Let's consider the changes. Tudor Place
5 is proposing a five year period for the special
6 exception, rather than three years, to save the cost
7 in money and time associated with the application. A
8 proceeding of this kind imposes substantial burdens on
9 a non-profit organization like Tudor Place with a
10 small staff and limited resources.

11 As Ms. Buhler testified, the idea of a
12 five year extension was discussed with neighbors and
13 most agreed with it. Tudor Place proposes to conduct
14 tours one evening per week to make the site more
15 accessible to the public in general, and particularly
16 to those who work during the day. Tudor Place
17 proposed to clarify the term large evening functions
18 as used in the last order by defining them as those
19 with 200 or more guests. The existing special
20 exception does not define large evening functions.

21 In discussions with neighbors, as
22 described by Ms. Buhler, Tudor Place proposes to
23 eliminate a requirement for extended arrival times for
24 large evening functions, because people do arrive at
25 different times for any large evening function

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1 regardless of there being an extended cocktail hour or
2 something like that. Experience has shown that the
3 restriction added additional logistical concerns that
4 did not effectively serve any purposes.

5 Tudor Place proposes to further restrict
6 large evening functions, which remain capped at no
7 more than 10 per year, by providing that no more than
8 two such functions per year can be rental functions,
9 and that no more than three of such large evening
10 functions can be held in the same month. Tudor Place
11 also proposes a new restriction on weddings with no
12 rental function for a wedding can have 75 or more
13 guests.

14 The current special exception treats large
15 evening rental functions and large evening functions
16 sponsored by and for Tudor Place the same. Tudor
17 Place and its neighbors discussed this restriction
18 extensively in the manner described by Ms. Buhler, and
19 agreed to make the restriction on large evening rental
20 functions more strict while still allowing the
21 necessary flexibility for Tudor Place to sponsor its
22 own large evening functions and to host small wedding
23 rentals.

24 Tudor Place proposes to modify the use of
25 measures to address parking for evening events by

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1 making those measures applicable to non rental events
2 with 100 or more attendees, rather than 75. The
3 purpose of this change was to reflect Tudor Place's
4 experience with non rental events, which has
5 demonstrated that a significant portion of visitors
6 either come by public transportation or live in the
7 Georgetown area and walk to the site as Ms. Buhler
8 testified.

9 Tudor Place also proposes to not require
10 the hiring of a person to direct traffic for evening
11 events, which results, from experience, showing that
12 hiring a person to direct traffic causes more
13 disruption, rather than less. Tudor Place proposes to
14 clarify the provisions for notifying neighbors of
15 large evening events by specifying that these
16 provisions apply to all events for 75 or more
17 attendees, and by requiring that such notice be
18 delivered by mail or otherwise, at least 60 days
19 before the event, rather than quarterly as is
20 presently the case.

21 These changes offer additional flexibility
22 to Tudor Place with respect to notice delivery methods
23 and accommodate neighbors' desires for additional
24 advance notice to facilitate the planning by neighbors
25 of events hosted by them on their own property.

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1 Tudor Place proposes to clarify the
2 provisions dealing with the liaison committee by
3 prescribing how notice of committee meetings is to be
4 given. The purpose of this change is to make more
5 neighbors aware of the liaison committee meetings.
6 Tudor Place proposes an additional restriction on
7 outdoor entertainment by extending the ban on
8 amplified music at outdoor functions to include
9 amplified singing and further proposes a new
10 restriction on amplified music at indoor functions,
11 which is not specifically restricted in the existing
12 conditions by requiring that all windows and doors be
13 closed when such music is played.

14 Tudor Place proposes a new restriction on
15 cleanup after evening functions, requiring that such
16 cleanup activities not start before 7:30 a.m. the next
17 day. This is proposed to accommodate a neighbor on
18 32nd Street.

19 Finally, Tudor Place proposes to clarify
20 the accessory uses of the Dower House to include small
21 Tudor Place functions for not more than 50 people, and
22 a limited number of small rental functions, no more
23 than four in any month for no more than 50 people, as
24 well as office space for no more than seven staff
25 members who do not use on street parking.

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1 The restrictions applicable to the Tudor
2 Place main house have been clarified to include the
3 Dower House. The changes to the use of the Dower
4 House generally represent clarifying changes to the
5 existing operating conditions relating to Dower House,
6 which had previously allowed an unlimited number of
7 small receptions. These are proposed by Tudor Place
8 in an effort to ensure transparency in its proposed
9 conditions.

10 These proposed conditions were not only
11 developed in a cooperative spirit with Tudor Place's
12 neighbors, they have been reviewed and unanimously
13 approved by the Advisory Neighbor Commission, the
14 recognized voice of the neighbor, under D.C. law.
15 This Board gives great weight to the recommendations
16 of the ANC, and it is particularly appropriate that
17 the Board do so, in this instance, because the central
18 issue involves how to balance the needs of Tudor Place
19 with the legitimate concerns of its neighbors.

20 It is common knowledge that in any
21 community, there are some individuals who can never be
22 satisfied, but the ANC reflects a consensus of the
23 views of the neighborhood as a whole. Also, the
24 Office of Planning has reviewed these proposed
25 conditions and recommended that the application be

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1 approved as submitted. Again, OP's recommendations
2 are entitled to great weight.

3 On April 22nd, the Board heard from more
4 than a dozen neighbors of Tudor Place who went to the
5 trouble to come down here, some on two separate
6 occasions, to testify to their support of Tudor
7 Place's application. They find Tudor Place to be a
8 good neighbor, and they understand that a certain
9 amount of traffic and noise is a part of living in a
10 vibrant, urban community like Georgetown.

11 The Board has also received letters of
12 support for Tudor Place's application from more than
13 45 other neighbors. The small number of opponents of
14 the application belies any claim that the activities
15 of Tudor Place adversely affect its neighbors' use of
16 their properties. Members of no more than five
17 households testified as opponents at the April 22nd
18 hearing and this hearing today.

19 The opponents make much of the number of
20 names they were able to solicit for a petition that
21 they submitted into the record of this case, but as
22 Ms. Buhler testified, they did so in a misleading way.

23 They solicited signatures under the name of "friends
24 and neighbors of Tudor Place," and their solicitation
25 letter and petition opened with statements supporting

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1 Tudor Place, and then went on to say that Tudor Place
2 is violating the wishes of the last owner, which is
3 not true.

4 The solicitation asked signors to oppose
5 disruptive uses that Tudor Place is not proposing.
6 Ms. Buhler quoted from, and we have submitted into the
7 record, letters from several neighbors who objected
8 strenuously to the misleading solicitation. One went
9 so far as to call it wicked.

10 From the handful of opponents of Tudor
11 Place, the Board has heard a peculiar complaint that
12 Tudor Place has not gone to the limit during the past
13 two years in terms of the special events that the
14 existing conditions allow. So by asking that the
15 existing conditions be continued, the opponents claim
16 that Tudor Place is seeking to expand its activities.

17 Tudor Place is not proposing any
18 substantial change in its rights or activities. The
19 conditions adopted three years ago represent, as this
20 Board and the Court of Appeals said, a reasonable
21 balance between the needs of Tudor Place and the
22 concerns of its neighbors. Tudor Place has
23 demonstrated since the last action by the Board that
24 it is committed to being a good neighbor.

25 This is, of course, to the credit of Ms.

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1 Buhler, the executive director, but we are not asking
2 the Board to rely on the good faith of a particular
3 individual. The conditions provide reasonable
4 assurance that Tudor Place will be a good neighbor no
5 matter who is the executive director.

6 Tudor Place's opponents have not provided
7 any evidence or persuasive argument to show that there
8 is any aspect of the conditions proposed by Tudor
9 Place that needs to be changed to protect the
10 neighborhood. As one of the neighbors put it in her
11 testimony on April 22nd, "If it ain't broke, don't fix
12 it."

13 Nevertheless, as Ms. Buhler has just
14 stated in her rebuttal statement, it is important to
15 Tudor Place to continue to enjoy the trust and
16 confidence of its neighbors, which was so clearly
17 demonstrated at the April 22nd hearing, and she has,
18 therefore, stated the commitment of Tudor Place to
19 even more stringent limitations on the number of
20 rental events, both large, medium and small that Tudor
21 Place will conduct during the period of the special
22 exception for which it is applying.

23 We do not believe that those limitations
24 are necessary for the needs of the neighboring
25 community, but they are offered in the spirit of

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1 neighborliness. The conditions proposed by Tudor
2 Place, as the Board is required to find, will ensure
3 that the proposed use will have no significant adverse
4 effects on neighboring properties. Accordingly, we
5 respectfully submit that the Board approve Tudor
6 Place's application as it was submitted. Thank you.

7 CHAIRMAN GRIFFIS: Thank you very much.

8 BOARD MEMBER ZAIDAIN: Mr. Chair?

9 CHAIRMAN GRIFFIS: Yes, Mr. Zaidain?

10 BOARD MEMBER ZAIDAIN: Yes. I just had a
11 quick question actually. The last statement you just
12 made in your closing said to approve the application
13 as submitted, but it's my understanding that some of
14 the proposed conditions have been changed in the
15 testimony of Ms. Buhler today. Is there any way we
16 can get that testimony and sort of documents that --

17 CHAIRMAN GRIFFIS: Oh, we're going to get
18 better than that.

19 BOARD MEMBER ZAIDAIN: Oh, okay. Well, if
20 you get better ideas, then --

21 CHAIRMAN GRIFFIS: Indeed. Any other
22 questions?

23 BOARD MEMBER ZAIDAIN: No.

24 CHAIRMAN GRIFFIS: Clarifications on that?
25 Okay. Let's go over what should be submitted to the

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1 Board, and then we'll get dates after all of the
2 information is submitted. First of all, I am going to
3 ask the applicant and the parties to submit findings
4 of facts and conclusions, basically, draft orders. So
5 in that, and Mr. Zaidain's point is well taken in
6 that, obviously, the applicant will lay out the
7 conditions as they are proposing them. Clearly, there
8 is the opposition's order that would reflect the
9 opposition direction that it would go and how they
10 reflect that or conditions, so be it.

11 In addition, let us reiterate some of the
12 other things that we had asked for during the
13 hearings. We did talk about the site plan, which is
14 in, and I am assuming that all of the parties were
15 served that, copies to them. Secondly, there was
16 information on the valet parking and the
17 accommodations of valet. I believe, if I recall, and
18 forgive me, I didn't reread the entire file for today,
19 but will for deliberation, I thought we had a little
20 bit of, but not the total, information on the valet
21 accommodation.

22 Is that correct or what has been
23 submitted?

24 MR. WILSON: I think we submitted a
25 complete report.

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1 CHAIRMAN GRIFFIS: It's all in here there?

2 MR. WILSON: Yes, we submitted a report
3 from the valet company.

4 CHAIRMAN GRIFFIS: Excellent. So we have
5 that, which is accomplished, and that has all been
6 served also the parties, so they have that. Very
7 well. Did we have any other information just to
8 review in the entire record on this? Is staff or any
9 other Board members aware of anything else?

10 BOARD MEMBER ZAIDAIN: Was there an
11 exhibit number on that site plan?

12 CHAIRMAN GRIFFIS: I still don't have
13 that.

14 CHAIRMAN GRIFFIS: Okay.

15 CHAIRMAN GRIFFIS: And I just have copies
16 of it.

17 BOARD MEMBER ZAIDAIN: Oh.

18 CHAIRMAN GRIFFIS: Not the official
19 record.

20 BOARD MEMBER ZAIDAIN: I will follow-up
21 with staff.

22 CHAIRMAN GRIFFIS: Okay. Well, actually I
23 have the official record right here if you want to
24 look. Okay. Let's look at dates then, Ms. Bailey, if
25 you have the schedule in front of you.

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1 MS. BAILEY: Mr. Chairman, just for
2 clarification, other than the findings of fact, that's
3 the only document that the record will be left open
4 for?

5 CHAIRMAN GRIFFIS: Unless others. Oh, I
6 need to address the issue of the tape. The issue of
7 the tape, the Board does not often accept documents
8 such as that for several reasons. First of all, you
9 don't have 11 copies of which would need to go to all
10 the Board members and all the parties and the
11 applicant. That is a technicality we could probably
12 get around.

13 The other piece is that it gets into a
14 large battle of the authenticity of it, how it was
15 done, where. I mean, for me personally looking at it,
16 if I listen to that tape, I want to know what kind of
17 recording mechanism, what time of day, where was it,
18 what were the different points, what was happening
19 around, how much is it attendant to Tudor Place? I am
20 not sure it gives us a heck of a lot of information.

21 I think this Board has gone through enough
22 of these specific applications, but also all around
23 the city, to know the issues involved in parking,
24 noise, congestion, so that we can, in fact, deliberate
25 sufficiently on this.

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1 Very quickly, is there something I am
2 missing in regards to that tape?

3 MR. SNIDER: Yes, the tape was prepared by
4 me and it has on the tape the date and where it was
5 made.

6 CHAIRMAN GRIFFIS: Where were you
7 standing?

8 MR. SNIDER: On my front porch. It says
9 so on the tape.

10 CHAIRMAN GRIFFIS: How long?

11 MR. SNIDER: There are about three
12 segments in the tape.

13 CHAIRMAN GRIFFIS: What time of day was
14 it?

15 MR. SNIDER: 10:10 in the evening.

16 CHAIRMAN GRIFFIS: Is the weather --

17 MR. SNIDER: It says that on the tape.

18 CHAIRMAN GRIFFIS: Was it sunny?

19 MR. SNIDER: What?

20 CHAIRMAN GRIFFIS: What was the weather
21 like?

22 MR. SNIDER: The weather that evening was
23 clear.

24 CHAIRMAN GRIFFIS: Yes. It was clear?

25 MR. SNIDER: Yes.

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1 CHAIRMAN GRIFFIS: Okay. Now, can the
2 rest of the parties substantiate all that information
3 based on that tape?

4 MR. SNIDER: Can they what?

5 CHAIRMAN GRIFFIS: Can they substantiate
6 that?

7 MR. SNIDER: They can just listen to the
8 tape. All the information I just gave you is on the
9 tape.

10 CHAIRMAN GRIFFIS: And you say it on the
11 tape?

12 CHAIRMAN GRIFFIS: I say it on the tape.

13 CHAIRMAN GRIFFIS: Okay.

14 MR. SNIDER: I did it for that very
15 purpose.

16 CHAIRMAN GRIFFIS: Enough said. Board
17 members, accept the tape, not accept the tape?

18 COMMISSIONER MITTEN: Are there copies of
19 the tape for the parties?

20 CHAIRMAN GRIFFIS: There is one copy. Is
21 that correct?

22 MR. SNIDER: Correct, one copy.

23 COMMISSIONER MITTEN: Well, then --

24 CHAIRMAN GRIFFIS: We could break it up in
25 11 pieces, but it won't do much good that way, will

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1 it?

2 COMMISSIONER MITTEN: I mean, you know,
3 the applicant is entitled to a copy. The ANC is
4 entitled to a copy. So if the copies are
5 unavailable --

6 CHAIRMAN GRIFFIS: On the substance of it,
7 if we accept it, we have not accepted -- in fact, to
8 my knowledge, when audios are submitted, we do not
9 accept them. Even with acoustical engineers that do
10 sound tests, it is a written report that comes in that
11 talks about the sound, the level of sound, the actual
12 elements that created the sound, what are the overall
13 conditions of that situation.

14 For instance, was the tape recorder in a
15 bucket that would echo some of the -- these are the
16 things that if I was an applicant, I would be
17 objecting based on these types of pieces.

18 COMMISSIONER MITTEN: Well, maybe you
19 should ask Mr. Von Salzen if he does object.

20 CHAIRMAN GRIFFIS: That is okay, because I
21 am objecting here whether he does or not. I don't
22 want us to get into an issue. Anyway, I may be
23 totally off base, and I will, obviously, listen to my
24 Board on this decision.

25 BOARD MEMBER ZAIDAIN: My take is, I

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1 guess, two. One, I don't think it should be the
2 burden of staff to duplicate the tape for everyone.

3 CHAIRMAN GRIFFIS: No.

4 BOARD MEMBER ZAIDAIN: And secondly --

5 CHAIRMAN GRIFFIS: It's not only about the
6 copies.

7 BOARD MEMBER ZAIDAIN: I agree with you.
8 I agree with all the points you're making, but I think
9 that goes to the quality of the evidence being
10 submitted and we'll take it for what it's worth.

11 CHAIRMAN GRIFFIS: So you want a copy?

12 BOARD MEMBER ZAIDAIN: I mean, for the
13 record. I mean, I agree with everything you just
14 said, which means that it's not very good evidence to
15 admit into the record, and I think the Board is
16 intelligent enough to take it for what it's worth.
17 That's my point.

18 CHAIRMAN GRIFFIS: Then why take it?

19 COMMISSIONER MITTEN: Because out of an
20 abundance of caution, it is always better to accept
21 more evidence into the record than to exclude
22 evidence.

23 BOARD MEMBER ZAIDAIN: I mean, to be
24 honest, I think that we have got good testimony on the
25 issue from both sides. I don't see what the tape is

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1 going to do, but I --

2 CHAIRMAN GRIFFIS: We have expended our 20
3 seconds on this tape issue.

4 BOARD MEMBER ZAIDAIN: Okay.

5 CHAIRMAN GRIFFIS: So we will accept it
6 with the number of copies that are actually required
7 for submissions of documents. So if you can get that
8 duplicated, we'll take it into the record. We won't
9 keep the record open for the duplication time period,
10 but we are about to establish the schedule.

11 So it will be treated as, obviously, a
12 submission into the record and it should be served by
13 everybody. Of course, you can probably limit the
14 copies if you can get the parties in opposition not to
15 request one, but that's up to you. Yes, Mr. Crockett?

16 MR. CROCKETT: A point of order, Mr.
17 Chairman. Before you go, we were going to establish a
18 briefing schedule for the legal brief on the legal
19 points.

20 CHAIRMAN GRIFFIS: On the Dower?

21 MR. CROCKETT: On the Dower.

22 CHAIRMAN GRIFFIS: Yes, one thought of
23 that is that it could be included in the document of
24 conclusions. If it needs to be separate --

25 MR. CROCKETT: I would prefer not to put

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1 it --

2 CHAIRMAN GRIFFIS: Yes, indeed. Let's do
3 that. Okay. And what else? What else do we have
4 coming in? Is the applicant aware of anything else
5 that was asked for for submission that I am
6 overlooking or any of the parties? It doesn't matter.
7 Board members? We'll go to staff soon, because --

8 BOARD MEMBER ZAIDAIN: Well, I would like
9 to say since we did allow the tape, if the applicant
10 wants to submit any statements regarding the tape, I
11 think they are entitled to.

12 CHAIRMAN GRIFFIS: Rebuttal tapes?

13 BOARD MEMBER ZAIDAIN: Rebuttal tapes.

14 CHAIRMAN GRIFFIS: Okay.

15 BOARD MEMBER ZAIDAIN: Yes.

16 CHAIRMAN GRIFFIS: Giving copies of blank
17 tapes.

18 BOARD MEMBER ZAIDAIN: Sure.

19 CHAIRMAN GRIFFIS: Yes. Obviously, with
20 the submission of new evidence, the record stays open
21 to receive any sort of rebuttal information that you
22 might have. It is an interesting piece as how you
23 would actually rebut what we're going to hear, but
24 there that is. So we need two schedules then, one
25 submissions and then responses to that submission, and

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1 then we're going to have the final submissions, which
2 is findings and conclusions, right?

3 MS. BAILEY: Mr. Chairman, June at the
4 decision meeting. I guess that's a starting point.

5 CHAIRMAN GRIFFIS: Yes.

6 MS. BAILEY: June 3rd is that meeting. Is
7 that acceptable?

8 CHAIRMAN GRIFFIS: That is to me.
9 Obviously, we can't make the May. June may be
10 expedited, but let's see. I think we have enough time
11 to get the submissions in as long as they are fairly
12 quick, as long as they happen fairly quickly, and then
13 we can get the findings.

14 MS. BAILEY: Findings, a suggestion would
15 be May 27th, which is the Tuesday before the meeting.
16 Keep going?

17 CHAIRMAN GRIFFIS: Yes.

18 MS. BAILEY: Mr. Crockett, would it give
19 you sufficient time to have your information filed by
20 May 13th?

21 MR. CROCKETT: Well, that will be plenty
22 of time. I thought what we were talking about was
23 having a briefing schedule, so the Board would get the
24 full benefit of our filing a legal brief, the
25 applicant filing a responsive brief, and we filing a

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1 short rebuttal, the normal three step legal briefing
2 process. It's not going to be of much benefit to you
3 if all you get is my brief.

4 CHAIRMAN GRIFFIS: No, we're not only
5 getting yours, but what she is setting up is she is
6 starting with you to see when you can get it in.

7 MR. CROCKETT: Right, and since they don't
8 know what I am going to say --

9 CHAIRMAN GRIFFIS: Right.

10 MR. CROCKETT: -- they are not going to
11 really know what I am going to say until they get it.

12 CHAIRMAN GRIFFIS: But they have a fixed
13 time in order to respond. So as long as we can get --

14 MR. CROCKETT: I can do it earlier than
15 that if it will accommodate things.

16 CHAIRMAN GRIFFIS: Let's do it as early as
17 possible. When can it be submitted?

18 MR. CROCKETT: Well, we can submit it a
19 week from today.

20 CHAIRMAN GRIFFIS: A week from today, Ms.
21 Bailey?

22 MS. BAILEY: Yes, sir, that is May 6th,
23 next Tuesday. The response then would be due May 13th,
24 which is the following Tuesday.

25 MR. VON SALZEN: That's agreeable to the

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1 applicant.

2 MS. BAILEY: Okay. And I think those were
3 the dates that I have, Mr. Chairman.

4 CHAIRMAN GRIFFIS: Okay. And then the
5 final in terms of looking at the legal briefings, is
6 it unacceptable to include that in your final
7 submission?

8 MR. CROCKETT: Well, I could file them at
9 the same time. I don't think that you want to have
10 that sort of thing in our proposed final order.

11 CHAIRMAN GRIFFIS: Okay. Done. Is that
12 clear?

13 MS. BAILEY: Did we just decide another
14 date? Was there another?

15 CHAIRMAN GRIFFIS: No, we combined the
16 last submission, basically.

17 MS. BAILEY: 13th?

18 CHAIRMAN GRIFFIS: The combining of the
19 arguments and the legal briefs with the findings of
20 facts, conclusion dates.

21 MS. BAILEY: Okay.

22 CHAIRMAN GRIFFIS: So that we get all of
23 that together, and that's what we're looking at at the
24 end.

25 MS. BAILEY: Okay. That's fine. Do I

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1 need to repeat anything?

2 CHAIRMAN GRIFFIS: Probably.

3 MR. CROCKETT: I'm sorry. I didn't
4 understand what the final date was.

5 CHAIRMAN GRIFFIS: Okay. Ms. Bailey is
6 going to take it and run it down from beginning to
7 end.

8 MS. BAILEY: Let's try it. May 6th, Mr.
9 Crockett, that's when your brief will be filed with
10 the Board. The applicant has until May 13th to
11 respond. The findings of fact in all other
12 submissions will be due on May 27th. The Board is
13 scheduled to make a decision on June 3rd.

14 CHAIRMAN GRIFFIS: Everybody clear?

15 MR. VON SALZEN: For clarification, I
16 assume that the parties will serve each other by hand
17 delivery given the short time frames involved.

18 CHAIRMAN GRIFFIS: Is that acceptable, Mr.
19 Crockett?

20 MR. CROCKETT: Yes, that is agreeable.

21 CHAIRMAN GRIFFIS: Excellent. Okay. So
22 we will revisit this on the 3rd of June officially at
23 our public meeting. Of course, no other further
24 testimony will be presented, at that time. That is
25 deliberation. I think that's it for the afternoon

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1 case. Everyone absolutely clear? If there is not
2 clarity or there are questions that come up,
3 obviously, you can call into the Office of Zoning and
4 speak to the staff members there and they will ably
5 assist you in doing that and getting the submissions
6 in. If not, anything else?

7 MR. VON SALZEN: Nothing for the
8 applicant. Thank you, Mr. Chairman.

9 CHAIRMAN GRIFFIS: Good.

10 MR. CROCKETT: Thank you, Mr. Chairman.

11 CHAIRMAN GRIFFIS: Of course. Have an
12 excellent afternoon. Let us take four minutes to let
13 this group leave and we can set up for the next case,
14 and we'll call that shortly.

15 (Whereupon, at 2:38 p.m. a recess until
16 2:50 p.m.)

17 CHAIRMAN GRIFFIS: Very well. Let us call
18 the next case for the afternoon.

19 MS. BAILEY: This is an appeal #16990 of
20 American Towers, Inc., pursuant to 11 DCMR 3100 and
21 3101, from the administrative decision of the Acting
22 Director of the Department of Consumer and Regulatory
23 Affairs for rescinding building permit numbers
24 B4252701, 420358, 429362 and others relating to the
25 construction of an antenna tower.

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1 The appellant alleges that DCRA erred in
2 ruling that a side yard did not meet the minimum
3 requirements under section 775. The property is
4 located in the C-2-B District at 4623 41st Street, N.W.

5 It's also located in Square 1769 on Lots 20 and 30.

6 Please, stand all those who will be
7 testifying today. Please, stand to take the oath. No
8 one will be testifying other than the attorneys?
9 Okay.

10 MR. RUSHKOFF: Well, on behalf of DCRA, we
11 have Mr. Noble on call in case he is needed this
12 afternoon. We don't have -- he is on 45 minute call.

13 We were thinking that the preliminary matters may not
14 require his presence today or they may take awhile, so
15 we were just going to give him a call as soon as we
16 knew he was needed. And I assume that if we do reach
17 the merits today, that American Towers would go first
18 since they are the appellant, and we would then call
19 Mr. Noble, so that he was here in time to testify for
20 DCRA.

21 MS. BAILEY: I am assuming, Mr. Chairman,
22 that when or if he does come, he will be sworn in, at
23 that time?

24 CHAIRMAN GRIFFIS: Yes, I think we can
25 accommodate that.

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1 MS. BAILEY: At this --

2 CHAIRMAN GRIFFIS: Are there any other
3 witnesses that are potentially being called that are
4 present by any of the participants? Very well. Then
5 as people are coming forward, we can have them sworn
6 in. Okay.

7 First of all, we have a preliminary motion
8 that was submitted in writing. Why don't we start
9 with introductions of those that are in front of us,
10 so that we know who we are addressing, and then we
11 will proceed from there.

12 MR. COOPER: Good afternoon, Mr. Chair,
13 members of the Board. My name is Robert Cooper from
14 the Law Firm of Jackson and Campbell. I am here on
15 behalf of the appellant, American Towers, Inc.

16 MR. RUSHKOFF: Good afternoon. My name is
17 Bennett Rushkoff. I am from the Office of the
18 Corporation Counsel and I represent DCRA.

19 CHAIRMAN GRIFFIS: Good. Mr. Rushkoff, it
20 is your motion. Is that correct?

21 MR. RUSHKOFF: That is correct, Mr. Chair.

22 CHAIRMAN GRIFFIS: Do you want to just
23 briefly summarize it?

24 MR. RUSHKOFF: That would be fine. I
25 don't want to go back through the material covered in

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1 the memo that we submitted in January. I assume that
2 the Board has had an opportunity to review that. That
3 memo focuses on the distinction between the ANC's
4 appeal, which was #16649 and has since been withdrawn,
5 and this pending appeal, which is 16990, and was
6 brought by American Towers.

7 CHAIRMAN GRIFFIS: For clarification, Mr.
8 Cooper, you are in receipt of this motion and its
9 substantial attachments?

10 MR. COOPER: Yes.

11 CHAIRMAN GRIFFIS: Okay.

12 MR. RUSHKOFF: Okay. What I would like to
13 do first is just focus on some of the highlights on
14 the law, and then I will go and focus on some of the
15 highlights on the factual side. In looking at the
16 legal issue, I think the main point we would want to
17 emphasize is that the requirement that an appeal to
18 the BZA be timely is jurisdictional.

19 That means that if an appeal has not been
20 timely filed, the Board is without power to consider
21 it. It is not a matter of exercising discretion to,
22 you know, be nice to an appellant. If the Board
23 doesn't have the power to hear the appeal, it can't
24 hear it.

25 CHAIRMAN GRIFFIS: Are you saying we don't

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1 have the power to be nice?

2 MR. RUSHKOFF: Within bounds, within
3 bounds.

4 CHAIRMAN GRIFFIS: Okay.

5 MR. RUSHKOFF: Now, in applying the two
6 month limitation on American Towers, we are relying on
7 waste management. That case was decided on July 5,
8 2001, and it affirmed a BZA order dated May 22, 2000.

9 We are not relying on the Zoning Commission's recent
10 rule making setting 60 days as the time limit for
11 appeals to the BZA.

12 And specifically, the language in waste
13 management that we are relying on is at page 1122, and
14 that refers to a two month period between the notice
15 of a decision and the appeal therefrom as the limit of
16 timeliness.

17 One clarification, which we find both in
18 waste management and in the earlier decision, Woodley
19 Park, which I don't think we have cited, that is at
20 490A(2), 628, is that in applying this reasonableness
21 standard, the courts have consistently held that the
22 time for filing an appeal commences when the party
23 appealing is chargeable with notice or knowledge of
24 the decision complained of.

25 CHAIRMAN GRIFFIS: Okay. Let me speed you

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1 up a little bit, because this Board is all too
2 familiar and, in fact, is becoming experts in our own
3 right.

4 MR. RUSHKOFF: Okay.

5 CHAIRMAN GRIFFIS: In terms of the
6 timeliness, in terms of, first of all, the new
7 commission, but also in the past, in the precedents,
8 so I think we're well aware of that. Why don't we go
9 to the specifics then and the basis of your timeliness
10 argument?

11 MR. RUSHKOFF: Okay.

12 CHAIRMAN GRIFFIS: What is the milestone
13 dates? How long and what has passed?

14 MR. RUSHKOFF: Okay. Well, American
15 Towers' appeal refers to DCRA's decision dated October
16 5, 2000. That was the first decision and that was the
17 decision to rescind and cancel building permits. Now,
18 we are willing to count five days after that, which
19 would be October 10th, the date when the decision
20 became final, and when American Towers was notified of
21 the need to appeal to this Board.

22 CHAIRMAN GRIFFIS: So the October 10, 2000
23 actually had a statement that indicated that there
24 should be a timely appeal filed to this Board?

25 MR. RUSHKOFF: That's right.

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1 CHAIRMAN GRIFFIS: Okay.

2 MR. RUSHKOFF: And we have quoted that in
3 our memorandum. We have quoted from that decision,
4 and specifically the two sentences would be "In order
5 to exercise this right, you must file written requests
6 for hearing with the appropriate board. A timely
7 appeal to the Board of Zoning Adjustment must be filed
8 with the Board at" and then it gives the address.

9 CHAIRMAN GRIFFIS: Right.

10 MR. RUSHKOFF: That notice also
11 distinguished between issues to be appealed to the BZA
12 and issues to be appealed to the Board of Appeals and
13 Review. Now, at the time that DCRA informed American
14 Towers of the need to file an appeal with the BZA, the
15 ANC appeal, this is ANC-3E, was already pending before
16 the BZA and notwithstanding that fact, the DCRA saw
17 fit to notify the company of the need to appeal and
18 the need to file a timely appeal.

19 CHAIRMAN GRIFFIS: Okay. And the ANC-3E
20 filed an appeal in September. Is that correct?

21 MR. RUSHKOFF: That is correct.

22 CHAIRMAN GRIFFIS: Okay.

23 MR. RUSHKOFF: Now, responding to the
24 arguments raised in the opposition that was filed late
25 on Friday, I would first deal with the issue of

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1 whether or not there was some kind of an agreement
2 either with the BZA or with DCRA to treat American
3 Towers' intervention in the ANC's appeal as American
4 Towers own appeal. That is kind of my articulation of
5 what I think is the argument that American Towers is
6 making, is that there was an understanding or an
7 agreement that by having intervened in that other
8 case, that that would serve or function as an appeal
9 of the decision of October 10th.

10 And what I would point to as the obvious
11 response to that there was no such an understanding
12 between the BZA, or I should say the Zoning Office,
13 and American Towers is the letter dated October 30th
14 that was sent by Jerrily Kress, which is the one that
15 says "In the interest of maintaining your options, the
16 Office of Zoning recommends American Towers Systems,
17 Inc. file an appeal based on the revocation of the
18 permits for the tower."

19 Now, I acknowledge Mr. Cooper's
20 representation to the Board that he did not receive
21 this letter, but even if he didn't receive it, it's
22 still evidence of an absence of an understanding
23 between American Towers and the BZA or the Zoning
24 Office that the ANC's appeal would be treated as
25 American Towers' appeal.

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1 Now, in its opposition, American Towers
2 states that the District Government made
3 representations to the U.S. District Court, this is in
4 the related federal court litigation, that there were
5 representations made back in December of 2000 that
6 evidence a "mutual understanding with respect to
7 American Towers' involvement with the ANC appeal."

8 Now, the fact is that the statement that
9 was made in that case by the District's attorney
10 doesn't reflect any understanding at all. The
11 statement is just wrong. The focus of the statement,
12 by the way, is on the availability of a procedure for
13 appealing, and if you look at the statement, which is
14 in attachment 4 to American Towers' opposition, I am
15 going to read just a couple of sentences from it.
16 This is the statement that the District's attorney
17 made back in December of 2000. "Plaintiff was
18 informed --

19 CHAIRMAN GRIFFIS: Hold on a second.

20 MR. RUSHKOFF: I'm sorry.

21 CHAIRMAN GRIFFIS: In the opposition to
22 the motion or is it --

23 MR. RUSHKOFF: This is American Towers
24 opposition to our motion here, is an attachment 4,
25 which American Towers points to as evidence of an

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1 understanding.

2 CHAIRMAN GRIFFIS: Good. Got it.

3 MR. RUSHKOFF: Okay. And if I remember
4 correctly, I think it's page 19 perhaps. It's by
5 itself.

6 CHAIRMAN GRIFFIS: Yes.

7 MR. RUSHKOFF: Okay. And the part I am
8 focusing on is where it says, and this is the
9 District's attorney speaking, plaintiff, and that
10 would refer to American Towers, "Plaintiff was
11 informed that the side yard setback issue could be
12 appealed to the BZA and remaining grounds for
13 rescission to the BAR." So far so good. Then the
14 District says "In fact, plaintiff has filed appeals
15 with both bodies." Okay. That is an incorrect
16 statement.

17 Further on, it says "This course of
18 conduct simply cannot be justified in light of the
19 administrative procedures in place." Clearly, the
20 thrust of the argument was that there were
21 administrative procedures in place, one of which was
22 an appeal to the BZA. The fact that counsel believed
23 that there was, in fact, an appeal to the BZA was
24 meant simply to be an illustration of the existence of
25 this remedy.

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1 And if you look at the U.S. District Court
2 decision that came out, which is an exhibit in this
3 case, it's clear that the U.S. District Judge in
4 deciding -- let me just pull that out real quick.

5 CHAIRMAN GRIFFIS: What date was that? Is
6 that the October 30, 2002?

7 MR. RUSHKOFF: No, this is the U.S.
8 District Court decision.

9 CHAIRMAN GRIFFIS: Okay. What's the date
10 on it?

11 MR. RUSHKOFF: June 14, 2001.

12 CHAIRMAN GRIFFIS: Okay.

13 MR. RUSHKOFF: And this is the copy. I am
14 looking now at the copy as filed. I am not sure who
15 filed it. Someone filed, put in the BZA a copy of
16 this decision, and I think it was taken -- it looks
17 like it was taken off an email. It's Exhibit 10 in
18 the BZA file, and on page 4, the second paragraph,
19 gives the U.S. District Court's analysis of the
20 availability of administrative remedies.

21 And there, the court says in language that
22 someone parallels what the District's attorney had
23 said, says "Since American Towers does not contest the
24 fact that it has been provided with post deprivation
25 procedures - indeed, it currently is taking advantage

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1 of the District's administrative processes by
2 appealing the rescission to the Board of Zoning
3 Appeals and to the Board of Appeals and Review." Then
4 there is a citation and a dash. "The question for the
5 court to decide on this motion is whether the notice
6 sent by the District and the opportunity for hearing
7 provided before rescission were sufficient to comport
8 with due process."

9 So it's clear what the U.S. District Court
10 was mainly concerned with was there an administrative
11 process for appealing the rescission. It didn't
12 really matter whether or not the outcome of that case
13 would have been the same whether or not American
14 Towers had decided to pursue that administrative
15 remedy.

16 So, basically, to sum up, I mean, the fact
17 that the District's attorney who was representing the
18 District in that federal court litigation mistakenly
19 thought that American Towers had filed an appeal
20 doesn't make it so and it surely doesn't serve to
21 expand the BZA's jurisdiction here.

22 Now, after we got American Towers'
23 opposition, it was faxed to us on Friday, so yesterday
24 and today we have taken another look at the court
25 filings, and would like to circulate one that we like,

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1 which are motion papers filed by the District in the
2 Superior Court case on October 17, 2002. I have
3 provided copies to Ms. Bailey. I don't know if I
4 should just work with it or if we should circulate
5 that or not. One of the documents I gave Ms. Bailey
6 was a copy of motion papers filed on October 17th.

7 CHAIRMAN GRIFFIS: Did you provide Mr.
8 Cooper with a copy?

9 MR. RUSHKOFF: Yes.

10 MS. BAILEY: Mr. Chairman, you will be
11 accepting that into the record?

12 CHAIRMAN GRIFFIS: I'm not sure. What is
13 it going to show us?

14 MR. RUSHKOFF: Well, I will tell you what
15 it's going to show you.

16 CHAIRMAN GRIFFIS: Substance.

17 MR. RUSHKOFF: Yes.

18 CHAIRMAN GRIFFIS: Don't tell me what it
19 is.

20 MR. RUSHKOFF: Okay. It involves a
21 representation by the District Government to the court
22 regarding whether or not an appeal had been filed to
23 the BZA.

24 CHAIRMAN GRIFFIS: I see. Mr. Cooper,
25 have you had an opportunity to review that document?

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1 MR. COOPER: I have.

2 CHAIRMAN GRIFFIS: Any objections?

3 MR. COOPER: No, no, actually, I don't.

4 CHAIRMAN GRIFFIS: Okay. Well, let's
5 bring it down. Oh, well. Thanks goodness there are
6 just two copies on that. It's a heavy document.

7 MR. RUSHKOFF: It's --

8 CHAIRMAN GRIFFIS: I certainly hope so.

9 MR. RUSHKOFF: It's that document.

10 CHAIRMAN GRIFFIS: Okay. Your comment off
11 the record was you were going to highlight something
12 for us.

13 MR. COOPER: Let's see.

14 MR. RUSHKOFF: Okay. Do you have a copy
15 now?

16 CHAIRMAN GRIFFIS: Indeed.

17 MR. RUSHKOFF: Okay. First, if you look
18 at the bottom of page 1 to the top of page 2, I am
19 just going to read the sentence. "Plaintiff has, in
20 fact, brought such administrative appeal," it says
21 here in the Board of Administrative Appeals, but they
22 mean the Board of Appeals and Review, BAR, "but has
23 not sought review in the Board of Zoning Adjustment,
24 BZA." Okay. That is a statement that the District's
25 attorney made on October 17, 2002.

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1 If you turn just a few pages over to page
2 5, near the middle of the page just above the boldface
3 heading, it states "Incredibly, given plaintiff's
4 apparent recognition, they would be prudent to at
5 least take a protective appeal to the BAR. American
6 Towers has failed to file any appeal with the BZA."
7 And then there is a footnote 3, and footnote 3 simply
8 questions whether or not an appeal, at this point,
9 would be timely.

10 But the reason I am introducing this, it's
11 not to show whether or not an appeal would be timely,
12 but simply to show that at least, certainly as of
13 October 17, 2002, American Towers knew that the
14 District Government did not think that American Towers
15 had filed an actual appeal or a constructive appeal or
16 an agreed upon sort of appeal. It was clear that we
17 were taking the position that there was no appeal
18 before the BZA.

19 Now, if they were surprised by what the
20 District Government said, you would think they would
21 have rushed down to the BZA and filed their appeal.
22 In fact, they waited until January 10, 2003, almost
23 three months later, to file their appeal. So the
24 thought here again, I am not suggesting that this was
25 the decision, the decision we say is October 10, 2000.

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1 What we are saying here is that this is
2 evidence that there was not the understanding that is
3 claimed, okay, because if there was an understanding
4 that an appeal was pending, we come out and say there
5 is no appeal pending, and we don't see anything for
6 almost three months. You would think that they would
7 have taken steps to preserve their position.

8 I guess there is another document that I
9 would like to introduce subject to possible objection,
10 which is the complaint that was filed in the Superior
11 Court case, and I have also provided copies of that.

12 CHAIRMAN GRIFFIS: Why? What is that
13 going to show?

14 MR. RUSHKOFF: I think that is going to
15 show that there is a discussion in the complaint of a
16 pending appeal, and I think it reflects on whether or
17 not, I think, that the discussion of what appeal was
18 pending, at that time, is reflective of American
19 Towers' understanding of what it had appealed and what
20 maybe had not been appealed.

21 CHAIRMAN GRIFFIS: Mr. Cooper, have you
22 reviewed this information?

23 MR. COOPER: Excuse me. I have seen the
24 complaint, yes.

25 CHAIRMAN GRIFFIS: Any comments?

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1 MR. COOPER: I don't know exactly what
2 provision in the complaint he is referring to.

3 MR. RUSHKOFF: Okay.

4 MR. COOPER: But I will address it in my
5 response.

6 CHAIRMAN GRIFFIS: Okay. So no objection
7 to having it accepted in?

8 MR. COOPER: It's part of --

9 CHAIRMAN GRIFFIS: Okay.

10 MR. COOPER: It should be part of the
11 record.

12 MR. RUSHKOFF: And this is the complaint
13 that was filed by American Towers in the D.C. Superior
14 Court on March 26, 2002, and I would like to direct
15 the Board's attention to paragraphs 50 and 51 on page
16 15. Paragraphs 50 to 51 note that "American Towers
17 filed an appeal to the Board of Appeals and Review,"
18 and they go on to allege that "Attempts by American
19 Towers to exhaust administrative remedies before the
20 Board of Appeals and Review would be futile."

21 The complaint makes no reference to a
22 pending appeal before the BZA or of any attempt by
23 American Towers to exhaust administrative remedies
24 before the BZA. And if there had been an
25 understanding that there was an appeal pending, at

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1 that time, before the BZA, surely one would expect
2 American Towers to put that in their complaint.

3 And then the last point I would make is
4 that if American Towers thought its appeal was
5 dependent on the ANC's appeal, why did it wait so long
6 to file its own appeal in response to the ANC
7 withdrawing its appeal? The ANC's letter withdrawing
8 its appeal is dated November 1, 2002 and was filed on
9 November 4, 2002. It shows that it was sent by first
10 class mail to American Towers' attorney here in D.C.
11 Yet, again, American Towers waited until January 10,
12 2003, more than two months later, to file this appeal
13 with the BZA.

14 And once again, I don't want to confuse
15 the Board. We are not taking the position that
16 somehow the withdrawal of the ANC's appeal was the
17 decision that needed to be appealed or that the time
18 period runs from that point. Again, we are simply
19 trying to suggest that the American Towers' actions
20 are not consistent with the understanding they say
21 they had, which is that they had an appeal pending
22 before the BZA, and it was there, because they had
23 intervened in the ANC's case. I think I will just,
24 you know -- of course, I can answer the Board's
25 questions on any aspect of our memo, for example.

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1 CHAIRMAN GRIFFIS: Okay. Any preliminary
2 questions from the Board, clarifications? If not, I
3 think it's appropriate. Let's go and hear from Mr.
4 Cooper to speak to the motion of timeliness. Mr.
5 Cooper, it's all you.

6 MR. COOPER: Thank you, Mr. Chairman.
7 Good afternoon. Robert Cooper from the Law Firm of
8 Jackson and Campbell. The appeal that is before you
9 today was filed by American Towers on January 10th,
10 shortly after we were informed that a prior appeal
11 filed by Ms. Diskins had been withdrawn without
12 prejudice.

13 Now, counsel makes statements concerning
14 the fact that it was some delay between the time of
15 the letter and the time of the filing. I can only
16 explain that there were the holiday season and people
17 were out of town. You know, it got filed as promptly
18 as was possible, given the delays that we inherently
19 have in that time of year.

20 This appeal was filed to preserve a status
21 quo that had been established previously, specifically
22 that American Towers Systems as the intervenor in that
23 ANC appeal along with the appellant and the D.C.
24 Corporation Counsel were all of the same understanding
25 that the matters before this body had been stayed.

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1 Now, counsel makes reference to the motion
2 to dismiss and cites page 11 of the motion. This is
3 the motion to dismiss in the Superior Court action.
4 I'm sorry. I believe it was page 6. Sorry, page 5,
5 excuse me. It says that --

6 COMMISSIONER MITTEN: What are we looking
7 at now?

8 MR. COOPER: I'm sorry. We're looking
9 at --

10 CHAIRMAN GRIFFIS: Motion to dismiss in
11 the Superior Court.

12 MR. COOPER: Yes, the October 17, 2002
13 filing.

14 COMMISSIONER MITTEN: Okay.

15 CHAIRMAN GRIFFIS: It's one of the
16 submissions that just came in.

17 COMMISSIONER MITTEN: Okay. I'm there.

18 MR. COOPER: Between October 2000 and
19 October 2002, there were no such statements made in
20 any of the court proceedings that the American Towers
21 had not properly filed or an appeal of certain issues
22 were not properly before this body. In fact, as
23 counsel pointed out, in Exhibit 4, I'm sorry.

24 CHAIRMAN GRIFFIS: That's all right.

25 MR. COOPER: I'm skipping back to Exhibit

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1 4.

2 CHAIRMAN GRIFFIS: Yes.

3 MR. COOPER: My opposition to this motion
4 to dismiss. That attachment was the District's motion
5 to dismiss in the U.S. District Court case filed
6 December 20, 2000. Twice in this document, on page 19
7 and on page 22, this was in December of 2000, the
8 District wrote that American Towers had filed an
9 appeal of the BZA action. We were of the opinion that
10 the actions that we had taken in intervening in this
11 case and bringing certain issues before the body was,
12 in fact, satisfactory of our obligations.

13 It wasn't until two years later that they
14 first stated to any court, now, these are documents
15 that were filed in the court and these are supposedly
16 statements of fact, that it was not filed, an appeal
17 was not filed, and they refer to the motion to dismiss
18 in the Superior Court. Never once did they allege to
19 the U.S. District Court that an appeal had not been
20 filed to this body.

21 They said it for the first time two years
22 later, October 17, 2002, to the Superior Court, and
23 they say, you know, that the earlier statements
24 contained in the U.S. District Court filing were in
25 error. I direct your attention to page 11 of this

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1 document, which is the October 17, 2002 filing. It
2 says "For whatever reason, American Towers has chosen
3 not to pursue administrative review in the BZA and the
4 BAR."

5 So despite the fact that they previously
6 said in this same document that we had filed in the
7 BAR, they say again later that we had not filed in the
8 BAR. The fact of the matter is that we were of the
9 opinion that when this intervention action was taken,
10 that we were satisfying our obligation to appear, at
11 that point, before this body and would, at the
12 appropriate time, brief the issues that were going to
13 be before this body with respect to side yards, height
14 and anything else that came before it and that, at
15 that point, we would address all the issues in the
16 case that was already pending.

17 Now, you know, we did, in fact, file a BAR
18 action on October 20th, I believe it was, or 25th of
19 2002, I mean, of 2000, excuse me. We could have just
20 as easily filed another action here at the BZA. We
21 didn't, because there was already, in our mind, in our
22 understanding, an understanding amongst the parties
23 that we had, in fact, filed an appeal by intervening
24 in this action.

25 Now, again, this action that we filed in

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1 January was after we received notice of the
2 termination of or the withdrawal of the motion, excuse
3 me, of the then pending ANC appeal. Interestingly, at
4 some point, we did receive a copy of Ms. Diskins'
5 letter requesting to withdraw, but there was never a
6 service on anybody of the letter referring to the
7 actual withdrawal of it. We found out about that in
8 late December, that, in fact, this body had accepted
9 the withdrawal of that ANC appeal. We then filed our
10 application.

11 Now, since the BZA never held a hearing on
12 that ANC appeal, and on at least two occasions had
13 stayed and postponed the scheduling events of the
14 hearing, again, nobody briefed any of the position
15 statements that would need to be filed in this action,
16 in that action, excuse me.

17 Ms. Diskins, in fact, wanted the permits
18 to be reviewed by the BZA to determine whether they
19 were proper and/or properly issued. Likewise,
20 American Towers wanted the permits that had been
21 issued to be reviewed and the decisions of Michael
22 Johnson, administrator, on March 18, '99 and 10/20/99
23 to be affirmed.

24 Prior to the decision and action of the
25 District Government to rescind the permits on October

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1 5th and October 10th, the District Government and
2 corporation counsel were to have been on the side of
3 American Towers in defending the actions of that same
4 zoning administrator and the DCRA. We were part of
5 that case.

6 Yet, as stated above, no briefs or
7 position statements or exhibits had been filed by the
8 parties as a result of the stays. Now, once the
9 permits were rescinded, it was our understanding that
10 the matter then pending would serve as our vehicle to
11 address the issues, all of the issues before it, not
12 only the single side yard issue, but the totality of a
13 review of the approval of the permits.

14 Again, in our recent filing of last
15 Friday, we responded to the corporation counsel's
16 argument that since we were told by the BZA to file in
17 order to protect our interests, our failure to do so
18 has failed to the appeal that is now pending before
19 you.

20 First, again, as counsel stated, in our
21 file we indicated that we never got the letter from
22 Ms. Kress. Although, I have no doubt that the letter
23 was, in fact, properly addressed and mailed to our
24 offices. We never got it. Second, the letter itself
25 was never used in any aspect of the litigation either

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1 in the federal U.S. District Court or in the Superior
2 Court and, in fact, no one even knew of its existence,
3 at least as far as I can tell. Third, it's
4 inconceivable that we would have refused or ignored
5 the recommendation of Ms. Kress to file an appeal to
6 maintain our options.

7 The fact is that simply filing a separate
8 appeal could have been done, but we were of the
9 understanding that by intervening in the already
10 pending action, which was on all of these very points,
11 that once briefed and once the smoke settles, that
12 those issues would be presented in that forum. And as
13 noted in our recent filing, they never suggested that
14 we had failed to file an appeal.

15 So to American Towers, it was clearly
16 everyone's understanding that the action that was then
17 pending before the BZA included the issues being
18 brought on behalf of American Towers Systems. As for
19 the BAR action, just like the ANC appeal, the Board
20 has stayed all actions pending the resolution of
21 judicial proceedings.

22 The judicial proceedings addressed the
23 totality of and every aspect of the permit rescission,
24 basically, challenging the right and methodology used
25 by the DCRA to rescind the permits, whether there even

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1 existed entitlement to rescind the permits or whether
2 their failure to follow their own rules and
3 regulations with respect to the permit revocation, and
4 that is the basic content of that complaint that has
5 not been presented to you.

6 And as I understand it, the courts are
7 continuing to review the matter. There are various
8 motions pending, and the court has not ruled on those
9 motions. In the interim, we previously, as part of
10 this filing, requested a stay of this action pending
11 the court's review.

12 One of the primary reasons that we have
13 requested this stay is that despite our repeated
14 requests for formal discovery in both the federal
15 action and in the D.C. Superior Court action, and our
16 Freedom of Information Act request directly to the
17 DCRA in anticipation of any administrative
18 proceedings, the corporation counsel has refused to
19 provide the information, as generally requested by the
20 court, to prevent us from obtaining the information
21 necessary to support our cases and our permits.

22 We are not in a position to proceed with
23 either of the administrative actions without receiving
24 the properly requested information from the District
25 of Columbia Government. It appears to us that the fox

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1 is guarding the henhouse. For us to argue before you
2 on appeal or even before the BAR, our matter is now
3 also before it, it is imperative that we have this
4 information contained in the files of the District of
5 Columbia Government, especially before they are lost
6 or destroyed in their due course.

7 Even simple issues relating to the zoning
8 or Office of Planning reviews with respect to these
9 permits have been denied to us. Yet, the files have
10 been removed from the Records Management Office and
11 are in someone else's office and are unavailable to
12 us. Until there is some resolution of these discovery
13 and Freedom of Information Act requests, we will ask
14 that this matter be stayed. We are not and cannot
15 proceed without the information.

16 Now, there are three final points. First,
17 there really is no harm in either allowing the appeal
18 over the District Government's motion to dismiss and,
19 secondly, there is no harm in granting the stay. As
20 to the motion to dismiss, the issue of these permits
21 had already been set and placed before the Board by
22 the ANC's filing. Upon its withdrawal, American
23 Towers Systems filing replaced it as the vehicle to
24 present these issues before you.

25 All of the interested parties and their

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1 counsel remain fully aware and apprised of each of the
2 issues pertaining to these permits. Therefore, there
3 is no surprise by this alleged late filing. We have
4 all been involved, including and most important,
5 excuse me, the community neighboring the various
6 towers in Tenleytown.

7 It is not as if these issues are now being
8 brought to their attention or to your attention for
9 the first time or by some surprise without their
10 knowledge or ability to mobilize and become educated
11 about the issues. Many of them may be more educated
12 about these issues than all of us sitting here today.

13 So there really is no harm.

14 As to the stay, the granting of the stay
15 or continuing the previous stay is, likewise, not
16 harmful to anyone. The D.C. Government is still
17 involved in the pending litigation and may still
18 present its case at the BAR, if necessary, and to this
19 body. It is a waste of the limited and precious
20 resources already stretched to the limit to have these
21 battles raging in three different theaters
22 simultaneously.

23 Additionally, it is conceivable that each
24 could result in different opposing outcomes. If the
25 stay is continued, we would not need to spend time

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1 before you unless and until the court acts. If the
2 court rules in our favor, thereby holding that the
3 attempted rescission was improper and reinstates the
4 permits, then we would not advance our case here, but
5 it is possible that the citizens may decide to attempt
6 to revive their case. In the event the court rules
7 against us and determines that the rescission was
8 proper, then we will appear before you as suggested by
9 that letter of October 5th for an area variance. But
10 we suggest that we wait until such time as the court
11 acts.

12 Finally, the underlying issues that Ms.
13 Fuller in her October 5th and October 10th letters
14 suggests we come to you for review for the side yard
15 issues. Obviously, there are other issues that are
16 pending and may, ultimately, come before you, at some
17 point in time, but we are not yet there.

18 As such, I direct your attention to
19 several portions on the Zoning Regulations, excuse me,
20 which sheds some light on this matter, the first being
21 section 770.1 through 3, which was also the subject of
22 Ms. Diskins' appeal, which is excess height of the
23 tower, section 721.2, which addresses the issue of the
24 radio television broadcast.

25 CHAIRMAN GRIFFIS: I'm a little confused.

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1 How is that going to the motion to dismiss and
2 timeliness?

3 MR. COOPER: I am also addressing our
4 motion to stay.

5 CHAIRMAN GRIFFIS: Okay.

6 MR. COOPER: Which was actually filed
7 before their motion to dismiss.

8 CHAIRMAN GRIFFIS: Okay.

9 MR. COOPER: If I may.

10 CHAIRMAN GRIFFIS: Yes, that's fine. So
11 your point is there is a heck of a lot more that might
12 come in, so that we might as well not hear this today?

13 MR. COOPER: Exactly. That's the primary
14 point.

15 CHAIRMAN GRIFFIS: You can tell I have no
16 legal training, right, with my verbiage? Okay.

17 MR. COOPER: No, not at all. You know,
18 and then the other point is that I refer your
19 attention to, which again addresses this issue of the
20 side yard and really, we are not ready to address
21 these, is section 775.5. Now, it is more likely than
22 not that Towers were never intended or even
23 anticipated to be subject of this side yard
24 calculation and contained in that provision.
25 Specifically, we brought that to the attention of Ms.

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1 Fuller in response to her October 5th letter.

2 CHAIRMAN GRIFFIS: Right.

3 MR. COOPER: Where we stated that the
4 building itself did not create a side yard. She
5 responded by saying well, I'm not redressing the
6 building. I am redressing the tower. But if you read
7 the language of 775.5 --

8 CHAIRMAN GRIFFIS: Okay. Well, let me
9 take your first note in that you are not ready to
10 argue that, so let's not argue it.

11 MR. COOPER: Well, I was --

12 CHAIRMAN GRIFFIS: If we get into the
13 substance, then, I mean, that will take some time, and
14 that will be a basis of what we need to address. So
15 rather than hearing counterpoints on all that, we'll
16 get a little bit in digression.

17 Anything further on the motion or your
18 further motion to stay?

19 MR. COOPER: No, none.

20 CHAIRMAN GRIFFIS: I am not cutting you
21 off. I am just giving direction. Okay. Let me go
22 first to the question. Am I not mistaken, Mr. Cooper,
23 that you indicated that based on the fact that you had
24 court proceedings in the District Court that you
25 thought after the remedy of that or the outcome of

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1 that, there is perhaps the ability for you to come
2 before this Board?

3 MR. COOPER: The ability, I guess, to come
4 before this Board may always exist with the request
5 for an area variance, if necessary.

6 CHAIRMAN GRIFFIS: That's true. My
7 question is the way you phrased it, it put us in the
8 position of actually being the appeal body to a
9 District Court decision. Is that your understanding?

10 MR. COOPER: No, not -- I guess, we have
11 two options at the point of a decision in the D.C.
12 Superior Court. We could either appeal that,
13 obviously, to the Court of Appeals and take whatever
14 course of action in the judicial proceedings, or come
15 back and one, continue with the BAR, which has been
16 stayed pending resolution of judicial proceedings,
17 two, continue with the prior ANC appeal that was
18 pending and stayed.

19 CHAIRMAN GRIFFIS: Okay.

20 MR. COOPER: Or three, file an area
21 variance as was suggested in the October 5, 2000
22 letter from Ms. Fuller, which would address the side
23 yard issue, come before you to address the side yard
24 issue.

25 CHAIRMAN GRIFFIS: Okay.

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1 MR. COOPER: In an area variance.

2 CHAIRMAN GRIFFIS: Now, I'm clear. The
3 way you phrased it, it was my understanding that you
4 were indicating that you could actually come here to
5 appeal, and I knew you didn't think that, but I wanted
6 clarification. Secondly, on your F.O.I.A. request,
7 what other information you gave Office of Planning,
8 and I think you said something else, but what other
9 information are you looking for or that you know
10 exists or potentially think exists that you haven't
11 received.

12 MR. COOPER: I believe I included as
13 exhibit, we requested June 22, 2001 and then follow-up
14 letters in July of 2001, information pertaining to the
15 public records pertaining to this tower, a review of
16 other towers.

17 CHAIRMAN GRIFFIS: So those are individual
18 letters submitted into the record?

19 MR. COOPER: There was a Freedom of
20 Information Act request that we filed on June 22,
21 2001.

22 CHAIRMAN GRIFFIS: But was that submitted
23 into this record?

24 MR. COOPER: I am not certain.

25 CHAIRMAN GRIFFIS: Okay.

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1 MR. COOPER: I don't think it was.

2 CHAIRMAN GRIFFIS: I didn't see it and I
3 don't think the other Board members did.

4 MR. COOPER: I don't think it was.

5 CHAIRMAN GRIFFIS: So it's probably not
6 in. If we need it, we will take it in.

7 MR. COOPER: I have got a copy of it.

8 CHAIRMAN GRIFFIS: Let's go to the next
9 point. The way I am seeing this, at this point, I am
10 focusing now on the motion to dismiss based on
11 timeliness, it seems like we have two parallels, how
12 would you describe it, two parallel substantive
13 pieces. One is the ANC's appeal of the permit of
14 which you seem to be hanging a lot on. And then we
15 have the submission of your appeal, which is actually
16 the appeal of the revocation of the permit.

17 I see those as fairly independent, and I
18 think it's important for that in terms of taking then
19 the time line for those issues. But let me go to the
20 Board, if they have questions of Mr. Cooper or others.

21 Otherwise, we can go directly to address the motion.

22 COMMISSIONER MITTEN: I just have one
23 question, which is you mentioned that you took action
24 to intervene in the ANC's appeal. What did you submit
25 to the Board that requested intervenor status?

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1 MR. COOPER: We submitted a letter setting
2 forth our position with respect to the appeal, and we
3 then were involved with a requested stay, which was
4 granted pursuant to our request. We were constantly
5 informed of the status of the proceeding. Now, there
6 never was a hearing in which this Board specifically
7 said you are granted intervenor status.

8 COMMISSIONER MITTEN: Okay.

9 MR. COOPER: However, that is because
10 there never was a hearing. Every hearing that had
11 been set to either perform that duty or to perform any
12 other duties, including briefings, were always
13 postponed, stayed or canceled. So there never was a
14 formal order, per se, but we were included thereafter
15 in communications, telephonically, as well as in
16 letters and correspondence with respect to the status
17 of that ANC appeal.

18 COMMISSIONER MITTEN: Because I believe
19 you would have automatically been informed because of
20 the interests you have in the property, but you are
21 saying you -- actually, I had asked staff earlier
22 whether something had been submitted into the record
23 requesting intervenor status and we couldn't find it.
24 That's why I was asking.

25 MR. COOPER: I don't know if I have it

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1 here with me. Let me see.

2 COMMISSIONER MITTEN: But your position,
3 at that time, was as you had suggested earlier, which
4 is that you and DCRA as it related to the ANC's appeal
5 were on the same side.

6 MR. COOPER: Initially, before.

7 COMMISSIONER MITTEN: As it relates to the
8 ANC's appeal?

9 MR. COOPER: Yes, initially, until, of
10 course, that -- their appeal was filed September 18th.

11 The DCRA rescinded the permits in a few weeks, so the
12 DCRA took the position, not necessarily the Zoning
13 Administrator, but DCRA took the position, and I
14 presume corp counsel, as well, that they were now
15 siding on the side of revocation or rescission of the
16 permits, and this matter was merely stayed. It wasn't
17 withdrawn then. It was withdrawn two years later, at
18 which time and point we filed our appeal.

19 COMMISSIONER MITTEN: Okay.

20 MR. RUSHKOFF: Could I respond a bit to
21 the arguments made earlier by Mr. Cooper?

22 CHAIRMAN GRIFFIS: If Ms. Mitten is
23 finished.

24 COMMISSIONER MITTEN: My question is
25 satisfied, yes.

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1 CHAIRMAN GRIFFIS: Yes.

2 MR. RUSHKOFF: The issue on our motion to
3 dismiss is just whether or not the BZA has
4 jurisdiction. That's based on, the only thing the BZA
5 has to determine is, you know, when was the decision,
6 when was the appeal and is there some, you know,
7 justification that rises to the level of creating
8 jurisdiction where there otherwise isn't. All of the
9 discovery that Mr. Cooper was referring to does not go
10 to the issues raised by the motion to dismiss.

11 CHAIRMAN GRIFFIS: That I understand.

12 MR. RUSHKOFF: I think there is some
13 language in waste management on the last page of the
14 decision, I think it's 1123, I think fits very closely
15 to the situation we have here. The court appeal said
16 "The fact that waste management chose to concentrate
17 on avenues that reasonably may have appeared more
18 promising than an appeal does not excuse its delay in
19 noting an appeal."

20 I think that comes very close to the
21 situation we have here. It looked more promising to
22 American Towers to pursue a federal court litigation
23 and then D.C. Superior Court litigation, and this
24 looked less promising to them. That does not excuse
25 the failure to note an appeal.

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1 And I just wanted to make one comment.
2 Mr. Cooper suggested that the District Government had
3 once again misstated the facts in the Superior Court
4 case, and this is the sentence that refers to them not
5 pursuing their administrative remedy before BAR.
6 There was no representation to the Superior Court that
7 they hadn't filed an appeal to the BAR.

8 The representation that was made was that
9 they were not pursuing that appeal, and that is true,
10 because what they had sought and the parties agreed to
11 a stay. So that was just left there. They were not
12 pursuing a remedy actively. They had simply tried to
13 preserve before the BAR their right eventually to
14 pursue an administrative remedy there just as they
15 should have preserved their right to do that here.

16 CHAIRMAN GRIFFIS: That's sort of a
17 semantic, don't you think?

18 MR. RUSHKOFF: Well, it's an important
19 semantic, because it was a true statement. He is
20 suggesting that we misrepresented once again what was
21 going on before the BAR and, in fact, it was exactly
22 perfectly represented. They were not pursuing an
23 administrative remedy before the BAR.

24 That is very different from the statement
25 made two years earlier, which we do acknowledge was

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1 wrong, was when the District's attorney said that no
2 appeal was filed before the BZA. That is an incorrect
3 statement and we acknowledge that.

4 CHAIRMAN GRIFFIS: I see.

5 MR. RUSHKOFF: That's the difference
6 there.

7 CHAIRMAN GRIFFIS: Okay.

8 MR. RUSHKOFF: The more recent statement
9 was completely accurate. And then finally, I can see
10 really what benefit there would be, assuming that the
11 Board has what it needs to decide the motion to
12 dismiss. I don't see what possible benefit it would
13 be to leaving this case on the docket, kind of in a
14 state of limbo.

15 I think the status of these cases before
16 the BAR and the BZA has already been the subject of
17 confusion and, certainly, if the BZA were to dismiss
18 this case, everyone in the Superior Court would be
19 told simply there is no case pending before the BZA.
20 It has been dismissed for lack of jurisdiction, and if
21 the court finds that significant, it can.

22 So, you know, I just don't see any
23 downside to dismissing the case from the point of view
24 of a, you know, case management perspective. I don't
25 see, you know, unless, you know, the Board were unable

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1 to reach a decision, you know, that would be grounds,
2 but I'm not sure what other information the Board
3 needs. It's really just a legal question.

4 CHAIRMAN GRIFFIS: Very well. Mr. Cooper,
5 last words?

6 MR. COOPER: Only that this is a
7 mischaracterization of the facts, to say that there is
8 nothing pending and we're not pursuing it when we all
9 agreed to stay the proceeding.

10 CHAIRMAN GRIFFIS: Yes, I don't think --

11 MR. COOPER: It's just another example to
12 me that --

13 CHAIRMAN GRIFFIS: I think we understand.

14 MR. COOPER: -- that there were -- I'm
15 sorry.

16 CHAIRMAN GRIFFIS: No, I don't want to cut
17 you off, but move us in a different direction if you
18 want to address it.

19 MR. COOPER: Well, the only direction I
20 wanted to go in was just again addresses the fact that
21 we were of the understanding, we had certain
22 understandings, and that's how we proceeded in this
23 action, the action, excuse me, that was filed, 16649.

24 We proceeded as if this were our appeal. We thought
25 we had intervened, and were pursuing our action as

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1 such.

2 CHAIRMAN GRIFFIS: Okay. Board members?
3 Let's take up the motion to dismiss. I will hear
4 discussion on that and any clarification notes if we
5 need. Ms. Mitten?

6 COMMISSIONER MITTEN: Well, Mr. Chairman,
7 I think that it's a pretty big stretch for American
8 Towers to have us believe that intervening, whether
9 they did that actively or whether they did that
10 passively by just being involved in the circle of
11 communication and weighing in at points where stays
12 were being considered and so forth, that if it was
13 constituted in one forum as the ANC appeal where the
14 decision being appealed was the issuance of the
15 permits and, you know, parties had been established, I
16 mean, the positions had been established by the
17 parties and, as Mr. Cooper said, American Towers and
18 DCRA were on the same side, at that point.

19 And then there was another decision, which
20 everybody, you know, the positions then changed and
21 DCRA was then more aligned with the original ANC
22 position, and it's that decision that is the trigger
23 point for the appeal that is now before us for
24 American Towers, 16990. Neither gentleman before us
25 today has suggested that American Towers didn't know

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1 when the appeal had been revoked and, in fact, I think
2 it was clear that they did know precisely when it had
3 been revoked.

4 CHAIRMAN GRIFFIS: You mean the permit?

5 COMMISSIONER MITTEN: What did I say?

6 CHAIRMAN GRIFFIS: Appeal.

7 COMMISSIONER MITTEN: Appeal? Yes, the
8 permit. Thank you.

9 CHAIRMAN GRIFFIS: Okay.

10 COMMISSIONER MITTEN: Yes, when the permit
11 had been revoked. So there is no lack of knowledge
12 about the action, and I don't know under what
13 circumstance it would be appropriate to think that now
14 two parties that are diametrically opposed to the
15 position of American Towers, that some action they
16 took regarding a previous decision would somehow
17 preserve the rights of American Towers. I just don't
18 find that convincing.

19 So, I mean, I think that while, you know,
20 it may have been considered to be redundant if
21 American Towers really thought that their position in
22 the original appeal was preserving their rights, you
23 know, to have their position known as it related to
24 this permit regardless of who was bringing the appeal,
25 I just think you have more responsibility if you are

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1 the one who is taking issue with an action, because
2 they have now changed their role, you know, they have
3 become the appellant.

4 CHAIRMAN GRIFFIS: Right.

5 COMMISSIONER MITTEN: So, you know, they
6 have changed their degree of responsibility and I
7 think that, in doing so, they should have taken an
8 overt action in a timely way as it related to the
9 October 5th or October 10th if you look at the final
10 notice, the revocation of the permit. So I am in
11 favor of dismissal for lack of timeliness.

12 CHAIRMAN GRIFFIS: Okay. I think you
13 bring up the pertinent point that there are two
14 distinct tracks, although, similar in nature, but they
15 are very distinct. One is protecting the permit and
16 one is reinstating the permit, and I think I would
17 tend to agree with the fact that, obviously, in the
18 appeals it is a final, firm decision of the
19 administrative body or DCRA, and the first appeal went
20 to the decision to grant the permit. The second went
21 directly to the removal of that permit or revoking
22 that permit.

23 Each would have taken distinct new action
24 in order to come before this Board, and as we do not
25 have appeals before us that can add on or increase

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1 issues or explore different areas, I don't see how we
2 tie or how we substantially tie the two together to
3 get us two years from the 2000 dates of each of those
4 actions, and so I do tend to agree.

5 Now, I guess I don't have difficulty
6 looking at the overall chronology of the events to see
7 and to explore what might have delayed, what might
8 have been there that would have created an assurance
9 that remedy could be sought or a reasoning for a
10 delay. Noting my Board's reaction to that, I am
11 making absolutely no sense, but the point being as we
12 go into the chronology of what the next milestones
13 are, are there other milestones of which we can attach
14 the beginning of the clock, right?

15 The 60 days or however we would
16 appropriate say the timing. What are the next? And I
17 can only go as far in my review of the record, I mean,
18 I think I have trouble going beyond June 14, 2001,
19 which is the District Court of Appeals or the U.S.
20 District Court, which gave an indication of the form
21 of which it could be filed.

22 So my point is I am in agreement with you,
23 Ms. Mitten, and even giving the benefit of the doubt
24 and moving on to further dates beyond, we still don't
25 fall within a reasonable timeliness to the January 10,

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1 2003 filing date.

2 COMMISSIONER MITTEN: Can I just add one
3 more point that occurred to me as you were talking
4 before Mr. Zaidain speaks, which is the appellant in
5 an appeal has the burden of proof, and let's say that
6 in the ANC appeal there was an intervenor who sided
7 with the ANC. They wanted to support the ANC's case,
8 but they hadn't filed the appeal. They weren't the
9 appellant. And then the ANC decides to withdraw and
10 the intervenor says no, no, I don't want you to
11 withdraw. I want it to continue. I want to step in
12 the shoes of the appellant. I think we would have a
13 struggle in that circumstance to allow the intervenor
14 to take over for the appellant, because they had the
15 right to file the appeal or join in the appeal as an
16 appellant and bear the burden of proof.

17 In this case, we don't even have American
18 Towers joining with the appellant, sharing the burden
19 of proof. We have them joining with the appellee,
20 DCRA, on the original appeal. Now, in this latest
21 appeal, 16990, they now have the burden of proof. So
22 I think, you know, that just kind of amplifies that
23 things have shifted dramatically, and the trigger
24 point, again, was the October 2000 revocation of the
25 permit. So I guess I just wanted to say that, because

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1 I think it adds weight to the notion of dismissing.

2 CHAIRMAN GRIFFIS: Okay. And I
3 understand, you are holding onto October 10, 2000. Is
4 there anything that brings you to the court decisions,
5 be it June or be it, I believe I'm correct, October
6 30, 2002?

7 COMMISSIONER MITTEN: Well, I guess, the
8 closest I could get to the date that the appeal was
9 filed would be the withdrawal of the ANC appeal, which
10 would be November.

11 CHAIRMAN GRIFFIS: Okay.

12 COMMISSIONER MITTEN: That would be the
13 closest I could get, but still, I mean, even then, as
14 I said, they were not in the position in the ANC
15 appeal of bearing the burden of proof.

16 CHAIRMAN GRIFFIS: Right.

17 COMMISSIONER MITTEN: And the burden of
18 proof was totally different because of the nature of
19 the appeal. So, you know, I could wed myself to that
20 date, but even if I did, I don't think that it's
21 appropriate for that being the trigger point even
22 though I could see them being put on notice as it
23 related to the 16649 appeal, but that only relates to
24 that appeal. It doesn't, in my mind, relate to the
25 current appeal of the October 2000 decision.

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1 CHAIRMAN GRIFFIS: Okay. I see.

2 BOARD MEMBER ZAIDAIN: Right. And just to
3 add onto that, even going by the most lenient of
4 standards, I mean, one could possibly make the
5 argument about the November date as being when the
6 clocks started running and going by that, the fact
7 that they filed January 10th is still outside of that
8 two month window.

9 So even kind of shifting it, like I said,
10 to the most lenient of standards in applying a
11 technical, you know, here is the window, did they file
12 even if it's six days outside of it? This Board in
13 the past has always taken that stricter standard,
14 because, you know, we have a specific rule we have to
15 follow in terms of timely appeals.

16 And like I said, even taking that
17 standard, it still fails on that account. But like I
18 said, I'm not sure that I would even take that most
19 lenient standard. I think I agree with Ms. Mitten's
20 point regarding the original appeal.

21 CHAIRMAN GRIFFIS: Okay.

22 COMMISSIONER MITTEN: So, Mr. Chairman, if
23 it's appropriate, at this time, I would move that
24 appeal 16990 be dismissed for lack of timeliness.

25 BOARD MEMBER ZAIDAIN: I'll 2nd.

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1 CHAIRMAN GRIFFIS: Deliberation on the
2 motion?

3 COMMISSIONER MITTEN: I don't have
4 anything to add, other than what was stated earlier.

5 BOARD MEMBER ZAIDAIN: Neither do I, Mr.
6 Chair.

7 CHAIRMAN GRIFFIS: Mr. Zaidain?

8 BOARD MEMBER ZAIDAIN: No.

9 CHAIRMAN GRIFFIS: Very well. We have a
10 motion, of course, to dismiss. I would ask for all
11 those in favor of the motion to, please, respond by
12 saying aye.

13 ALL: Aye.

14 CHAIRMAN GRIFFIS: And opposed? Staff
15 will record the vote.

16 MS. BAILEY: The vote is recorded as 3-0-2
17 to dismiss the appeal, because it was untimely filed.

18 The motion was made by Ms. Mitten, seconded by Mr.
19 Zaidain. Mr. Griffis is in agreement. Mr. Etherly is
20 not present today, and the third mayoral appointee is
21 not present, as well.

22 CHAIRMAN GRIFFIS: Good. Thank you, Ms.
23 Bailey. Thank you all very much. Thank you all for
24 being here. Have a pleasant afternoon. Is there any
25 other business for the Board in this afternoon's

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1 session of 29 April 2003?

2 MS. BAILEY: No, sir.

3 CHAIRMAN GRIFFIS: Thank you very much.

4 Then I will conclude our hearing.

5 (Whereupon, the hearing was adjourned at
6 3:50 p.m.)

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