

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

JULY 22, 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
CURTIS ETHERLY, JR.	Board Member
PETER MAY	Board Member
RUTHANNE MILLER	Board Member
DAVID ZAIDAIN	Board Member (NCPC)

COMMISSION STAFF PRESENT:

Beverly Bailey	Office of Zoning
Clifford Moy	Office of Zoning
John Nyarku	Office of Zoning

OTHER AGENCY STAFF PRESENT:

John Moore	Office of Planning
Karen Thomas	Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Mary Nagelhout, Esq.

I-N-D-E-X

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HOLLAND AND KNIGHT, LLP
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2099 Pennsylvania Avenue, N.W.
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P-R-O-C-E-E-D-I-N-G-S

9:45 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. I'm going to call to order the 22 July 2003 public hearing of the Board of Zoning Adjustment in the District of Columbia. My name is Geoff Griffis. With me today is Mr. Etherly, also Ms. Miller, representing the Zoning Commission with us this morning is Mr. May, and representing the National Capital Planning Commission is Mr. Zaidain.

Copies of today's hearing agenda are available for you. They are located close to the door where you entered into the hearing room. Please pick one up if you do not have one. I'm going to run through a few things of great importance.

First of all, it should be noted that all public hearings before the Board of Zoning Adjustment are recorded. Therefore we ask several things of you. First of all, I need everyone to refrain from making any disruptive noises or actions in the hearing room. Secondly, however, when coming forward to speak to the Board, you need to fill out two witness cards. Witness

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1 cards are available at the table where you entered
2 into and also in front of the Board. Those two
3 witness cards go to the recorder who is sitting on
4 the floor to my right. Those go before you come
5 forward so that they can accurately document your
6 statements.

7 Then when preparing to present the
8 Board, please have a seat and make yourself
9 comfortable. I need you to turn a microphone on
10 and give me your name and your address for the
11 record. You only need to do that once so that the
12 record is complete.

13 The order of the public hearing today
14 for the special exceptions and variances will be
15 (1) we will hear the statement and witnesses of the
16 applicant. (2) We will hear government reports
17 attendant to the applications such as the Office of
18 Planning, Department of Transportation, and any
19 other agencies attendant to the application. (3) We
20 will hear from the Advisory Neighborhood
21 Commission. (4) Parties or persons in support. (5)
22 Parties or persons in opposition. (6) We'll have
23 closing remarks by the applicant.

24 Cross examination of witnesses is
25 permitted by the applicant or parties. The ANC

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1 within which the property is located is
2 automatically a party in all cases. The record
3 will be closed at the conclusion of each case
4 except for any material that is specifically
5 requested by the Board. The Board will be very
6 specific on what is to be submitted and when it is
7 to be submitted into the Office of Zoning. After
8 that material is received, of course, it goes
9 without saying that the record would then be
10 finally closed.

11 The Sunshine Act requires that this
12 Board conduct public hearings in the open, and of
13 course in its definition, before the public.
14 However this Board, consistent with its rules of
15 procedure and the Sunshine Act, can enter executive
16 session either during or after a case. This would
17 be for the purposes of reviewing the record or
18 deliberating on the case.

19 The decision of this Board in all
20 contested cases, of which the special exceptions
21 and variances are, must be based exclusively on the
22 record. That is the record that's created here
23 before us today in the public hearing. Therefore
24 we ask several things: people present today not
25 engage Board Members in conversation so that we

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1 don't give the appearance of having outside
2 information in which to deliberate on, and also to
3 note the great importance of making sure the record
4 is filled and submissions are made timely.

5 Let me just ask if everyone will turn
6 off cell phones and beepers so that we don't
7 disrupt anything else that happens today. Let's
8 move on to any preliminary matters. Preliminary
9 matters are those which relate to whether a case
10 will or should be heard today such as requests for
11 postponements, continuances, or withdrawals or
12 whether proper and adequate notice of an
13 application has been provided.

14 If you are not prepared to go forward
15 today or you believe the Board should not proceed
16 with the case, now is the time to bring such a
17 matter to our attention. I will take an indication
18 of preliminary matters if you would come forward
19 and have a seat at the table. I will ask staff if
20 they have anything for our attention at this point.

21 MS. BAILEY: Good morning to all, Mr.
22 Chairman. There is a preliminary matter. It has
23 to do with one of the cases. Ms. Gladys Hicks is
24 in the audience and perhaps would address the Board
25 at this point.

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1 CHAIRPERSON GRIFFIS: Excellent. I
2 have overlooked in fact wishing you a very good
3 morning. The Office of Zoning staff more than
4 assists us, keeps us in order, Ms. Bailey, also Mr.
5 Moy, and Mr. Nyarku is in and out and is also
6 assisting us today. Yes.

7 MS. HICKS: Good morning. My name is
8 Gladys Hicks. I'm a zoning consultant. I'm
9 representing Mr. William Miller at 4417 Garfield
10 Street, N.W. Mr. Miller is not here today. We put
11 in a request in the early part of July for a
12 postponement until a later date for his public
13 hearing. We have not had a chance to meet with the
14 Advisory Neighborhood Commissioner due to his
15 travel schedule.

16 CHAIRPERSON GRIFFIS: Okay. Any
17 questions from the Board? Is there a proposed
18 month that will work?

19 MS. HICKS: Mr. Miller said his
20 calendar will be clear the latter part of October.

21 CHAIRPERSON GRIFFIS: Indeed. There it
22 is. It seemed so far away I couldn't believe it.
23 Any concerns? Questions?

24 MEMBER ETHERLY: Just a quick question,
25 Mr. Chair. Ms. Hicks, is it your understanding

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1 that the ANC has yet to actually take action on any
2 kind of vote on the application as well?

3 MS. HICKS: That's correct.

4 MEMBER ETHERLY: Thank you.

5 CHAIRPERSON GRIFFIS: Any other
6 questions? Ms. Bailey, what's our availability in
7 October?

8 MS. BAILEY: Mr. Chairman, if you have
9 your schedule in front of you, it looks as if the
10 morning on the 21st and 28th are open or even the
11 14th again in the morning.

12 CHAIRPERSON GRIFFIS: Ms. Hicks, is
13 your client available on the 21st in the morning?

14 MS. HICKS: Yes.

15 CHAIRPERSON GRIFFIS: Good. Then let's
16 set it for the first meeting on the 21st beginning
17 at 9:30 a.m.

18 MS. HICKS: Okay. Thank you.

19 CHAIRPERSON GRIFFIS: Thank you very
20 much. Ms. Bailey, any other preliminary matters at
21 this time?

22 MS. BAILEY: Not from staff, Mr.
23 Chairman.

24 CHAIRPERSON GRIFFIS: Okay. I do note
25 and staff will bring it to our attention that we do

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1 have a motion to discuss today. What I would like
2 to do is go through our cases that were already
3 scheduled and are ready to go. Then we'll take
4 that up after we finish the applications in the
5 morning. So Ms. Bailey, if you would, remind us if
6 we move quickly on without dealing with that. With
7 that, let's call the first case of the morning.

8 MS. BAILEY: That is Application Number
9 17030 of JBG/JER E Street, LLC, pursuant to 11 DCMR
10 3104.1, for a special exception from the roof
11 structure setback and enclosure requirements under
12 section 411 (770.6(b)), and pursuant to 11 DCMR
13 3103.2, a variance from the residential recreation
14 space dimension requirements under section 773, to
15 allow the construction of a twelve-story apartment
16 house with ground floor retail/arts related uses in
17 the DD/C-4 District at premises 913-919 E Street,
18 N.W. The property is also located in Square 377,
19 Lots 37, 42, 806 and 7000. Please stand to take
20 the oath and please raise your right hands.

21 WHEREUPON,

22 JEFF MILLER AND C.R. DOVE

23 were called as witnesses and, having been first
24 duly sworn, were examined and testified as follows:

25 MS. BAILEY: Thank you.

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1 CHAIRPERSON GRIFFIS: Good morning.

2 MS. SHIKER: Good morning. My name is
3 Christine Shiker. I'm with Holland and Knight. I
4 represent the Applicant in this case today. I
5 would like to make a brief opening statement if
6 that's okay.

7 CHAIRPERSON GRIFFIS: Excellent.

8 MS. SHIKER: I am joined today by Jeff
9 Miller of the JBG Companies to my right, further to
10 my right George Dove of WDG Architects, and Steven
11 Sher behind me also with Holland and Knight. The
12 application before you provides the opportunity to
13 continue development of residential units in the
14 downtown Washington, D.C. area while at the same
15 time allowing preservation of three historic but
16 contributing buildings along E Street.

17 The subject property is located at 911-
18 919 E Street across the street from the FBI
19 Building. The project includes Lots 37, 42, and
20 806 as well as Lot 7000 which is the air rights
21 above the existing McDonald's facility. The
22 project will include approximately 160 units and
23 will have arts related and retail uses on the
24 ground floor. We are pleased to have the support
25 for this project from both the Advisory

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1 Neighborhood Commission 2C and the Office of
2 Planning.

3 In addition, the Applicant has been in
4 touch with nearby and adjacent property owners. We
5 are unaware of any opposition to the project. I
6 would like to confirm that the Board has a copy of
7 the pre-hearing submission as well as the Office of
8 Planning report which details the areas of relief
9 and the basis for the same.

10 CHAIRPERSON GRIFFIS: We absolutely
11 have it and read it.

12 MS. SHIKER: Great. In addition, we
13 have submitted some revised drawings this morning
14 that show refinements to the roof structure. These
15 refinements have resulted from getting further into
16 the design of the building.

17 Specifically the refinements show two
18 things: (1) a reduction in height for the roof and
19 the parapet of the two stair enclosures and (2) an
20 elongation of the primary penthouse at the rear of
21 the roof in order to accommodate some additional
22 mechanical equipment that was needed. That
23 elongates over to the eastern side of the project.

24 We are happy to provide as little or as much
25 testimony as you would like today. So if you would

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1 let us know how to proceed, we would appreciate
2 that.

3 CHAIRPERSON GRIFFIS: That's an
4 excellent point to bring up. I think we can get
5 through this very quickly. Clearly we're here for
6 the variance of the residential rec and then the
7 special exception. It's pretty clear in the
8 submissions. What we might want to do is go
9 through a very brief statement if you have from
10 your witnesses. Then it's going to be more
11 productive if we just have direct questions from
12 the Board.

13 Here's one question I'll put out. In
14 all of the roof plans, there aren't dimensions.
15 Now there are dimensions on one of the flat plans
16 that came through. So I just think a fundamental
17 instruction of what that is will help us.

18 MS. SHIKER: I will do a brief
19 statement. Then I will go directly to George Dove,
20 the project architect to go through those plans for
21 you.

22 CHAIRPERSON GRIFFIS: Okay.

23 MS. SHIKER: As you are aware, we are
24 here today to request a special exception from the
25 roof structure requirements under section 411 and a

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1 variance from the residential recreation space
2 dimension requirement under Section 773. The
3 special exception is to allow multiple roof
4 structures which are necessary to provide access to
5 the roof deck under the building code.

6 As a result of the shape of the roof,
7 the internal courtyard and the setbacks provided is
8 part of the historic preservation. These roof
9 structures are unable comply with the one to one
10 setback. Mr. Dove will discuss that in detail in
11 just a moment.

12 In addition, the variance also relates
13 to the shape of the roof. The proposed roof deck
14 is approximately 5,460 square feet. But because of
15 the shape of the roof, the internal courtyard,
16 these setbacks for historic preservation, and the
17 required location of the roof structures, there are
18 places on the roof deck that are not able to comply
19 with the 25 foot minimum dimension requirement.
20 However as you will see, the roof deck will be very
21 meaningful residential recreation space for the
22 tenants of the building.

23 CHAIRPERSON GRIFFIS: What's your
24 understanding in terms of the roof rec requirement
25 of 25 feet? Would that mean in your understanding

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1 that if you had a walkway to a deck that you would
2 not count that walkway towards complying with the
3 residential rec?

4 MS. SHIKER: Typically in these plans
5 when we come before the Board, we do not count
6 small walkways as part of the residential
7 recreation space. Therefore there's no need for
8 compliance with the 25 foot dimension. However it
9 has been our experience if there are dimensions
10 within the area of the residential recreation space
11 that are less than 25 then we have come to the
12 Board. If you like, I can have Steven Sher address
13 that in more detail.

14 CHAIRPERSON GRIFFIS: I think it's
15 simple enough. Obviously what we're looking at in
16 this application is one might say the more usable
17 area, not just the circulation which is trying to
18 be counted.

19 MS. SHIKER: And I don't believe when
20 you see the roof plan and the roof deck plan -- We
21 have not used areas of circulation. Really all of
22 the area is being accounted for.

23 CHAIRPERSON GRIFFIS: Right. I wasn't
24 assuming that's what happened here. It was just
25 interesting me how that dimension came to be.

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1 MS. SHIKER: I'd like to call Mr.
2 George Dove from WDG Architects as our first
3 witness. He has testified before this Board on
4 numerous occasions. However we have submitted a
5 copy of his resume for your review as we would like
6 him qualified as an expert in architecture.

7 CHAIRPERSON GRIFFIS: I see. Any
8 questions of Mr. Dove at this time? What was the
9 last project you presented? Do you recall?

10 MR. DOVE: It was within the last year.
11 I can't remember the specific project. It may
12 have been monuments project in southwest
13 Washington, but I'm not certain.

14 CHAIRPERSON GRIFFIS: I think it was
15 24th and M.

16 MR. DOVE: It probably was, yes.

17 CHAIRPERSON GRIFFIS: There it is.
18 Only one of hundreds that we've seen. Am I right?
19 Any questions of Mr. Dove at this time? Was he an
20 expert witness in that case? Do you recall?

21 MS. SHIKER: That's correct. He was.

22 CHAIRPERSON GRIFFIS: Mr. Zaidain.

23 MEMBER ZAIDAIN: I actually have a
24 question regarded to the relief before we get into
25 the description of the project. We've seen a lot

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1 of residential rec space. This may be a different
2 twist on it from what we have seen in the past at
3 least as far as I've been sitting here.

4 CHAIRPERSON GRIFFIS: Yes.

5 MEMBER ZAIDAIN: The requested relief
6 is any area less than 25 feet under the regulations
7 cannot be counted. So the application is to allow
8 that area to be counted so as to meet the
9 residential rec space. It's not to grant less
10 residential rec space. Do you follow me?

11 CHAIRPERSON GRIFFIS: In fact, what's
12 being provided in the submission if I'm
13 understanding correctly is they are providing more
14 than required residential recreation space. But it
15 is to count the terrace that doesn't fulfill the 25
16 foot minimum dimension for the entire terrace.

17 MEMBER ZAIDAIN: It will be more
18 residential rec space if we grant the variance.

19 CHAIRPERSON GRIFFIS: Am I correct?

20 MS. SHIKER: That's correct. We're
21 providing over 8,400 square feet.

22 MEMBER ZAIDAIN: Does that include the
23 areas less than 25 feet?

24 MS. SHIKER: That's correct.

25 MEMBER ZAIDAIN: Do you follow?

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1 MEMBER MAY: Now I'm confused.

2 CHAIRPERSON GRIFFIS: Actually, let's
3 finish Mr. Dove because he'll be able to answer all
4 of these questions. Whether he's an expert or not
5 is what we need to ascertain. Is there any
6 objection to granting expert status to Mr. Dove at
7 this time? If I don't note any objection, then I
8 can take it as consensus of the Board, Mr. Dove,
9 and let's continue from there. Are there any other
10 expert witnesses being proffered today?

11 MS. SHIKER: We have Steven Sher as our
12 land planner who has been qualified as an expert
13 before this Board.

14 CHAIRPERSON GRIFFIS: He's coming in as
15 an expert today also.

16 MS. SHIKER: Yes. Then we have Jeff
17 Miller with the JBG Companies. Unless you have
18 questions for him, in an effort to be brief, we
19 were not going to present him. But we would offer
20 if you have questions that he is an expert in real
21 estate development and that his resume is before
22 you.

23 CHAIRPERSON GRIFFIS: Okay. I think we
24 may have some that would question. Board Members,
25 take a moment to look at Mr. Miller's resume, and

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1 let me hear any questions that you might have of
2 him. If not, do I have any objection to granting
3 expert status Mr. Miller of JBG? Yes, Mr. May.

4 MEMBER MAY: I just have a question.
5 Maybe it's just my memory failing me, but I don't
6 recall too many instances where the Applicant in
7 essence is admitted as an expert. Hired
8 professionals are regularly of course.

9 CHAIRPERSON GRIFFIS: Right.

10 MEMBER MAY: In fact, an outside expert
11 on development.

12 CHAIRPERSON GRIFFIS: This is what
13 we've done. It is not in every case. But in
14 numerous cases, we do in fact have an expert
15 proffered to the Board in the development. So his
16 aspects are not necessarily directly tied to
17 architecture. I don't think it's pertinent in this
18 case, but some of the issues that come up are
19 answered by the developer's perspective and
20 understanding. It may get into the complexities of
21 the construction or the ability to cite certain
22 things in certain ways that the architect as an
23 expert wouldn't answer as an expert in architecture
24 and design but in development.

25 MEMBER MAY: I'm not questioning

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1 whether expertise in development is relevant or
2 should be considered expert testimony. It's just
3 the question of having the Applicant essentially
4 entered as an expert. Again, it's just a question
5 of what we have done in the past. I just don't
6 recall cases where we've done it. It may be my
7 memory that is faulty on this. It just seemed a
8 little unusual to have the Applicant in essence
9 admitted as an expert, not that his expertise is
10 not valid or worthwhile or worthy of being
11 considered. It's just a question of what we've
12 done.

13 CHAIRPERSON GRIFFIS: Right. I don't
14 see any inherent conflict in doing it. I know we
15 have done it before.

16 MEMBER MAY: You say we have done this
17 before.

18 CHAIRPERSON GRIFFIS: Yes.

19 MEMBER ZAIDAIN: I guess my question is
20 when you say "the Applicant" are you talking about
21 the person who physically files the application
22 because it kind of comes to us in various forms,
23 but there is always an architect on the project
24 that we usually have to qualify.

25 MEMBER MILLER: Yes, I mean the

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1 Applicant being the entity that has the primary
2 financial interest in the project essentially. The
3 architect normally doesn't have financial interest
4 in the profitability of the project.

5 CHAIRPERSON GRIFFIS: Really? We ought
6 to remedy that. I think it's an excellent point.
7 On its own time, the Board should probably
8 investigate that and the appropriateness and what
9 would move us to either accept or not. In terms of
10 Mr. Miller, I have absolutely no objection giving
11 him expert status and having him present to the
12 Board in that fashion.

13 In some respects, I think what I'm
14 hearing you say, Mr. May, is Mr. Miller is not JBG
15 Companies but rather, as his resume is telling us,
16 the Vice President of it. So he does represent an
17 expertise in this development but not necessarily
18 the entire company. It might rise to a different
19 level if we looked at bestowing JBG Companies and
20 anyone that was associated with it as expert but
21 rather taking Mr. Miller as an individual.

22 I know it doesn't remove him from the
23 tie that you have in that he's the Applicant and
24 the developer. But he is a small piece in the
25 larger company. That's my thinking. I know it

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1 doesn't address you totally, but that's my
2 thinking.

3 MEMBER MAY: Yes, that doesn't really
4 address the question that I have. But I appreciate
5 the difference.

6 MEMBER MILLER: I have some concern as
7 well because he has a vested interest and he's the
8 same party as the Applicant. I'm wondering if we
9 can just accept his testimony without qualifying
10 him as an expert.

11 CHAIRPERSON GRIFFIS: All right. We'll
12 spend 30 more seconds on this because it's not
13 worth the time. However I don't see any inherent
14 controversy in one having a vested interest in the
15 project and also being able to be qualified as an
16 expert witness. It was brought up before in a
17 controversial case that their transportation
18 engineer shouldn't be an expert witness because
19 he's paid by the Applicant.

20 Well, of course they are paid by the
21 Applicant, and they have a vested interest in this.

22 I'm not sure Mr. Dove, if is denied and the
23 project goes away, is going to be his full fee. So
24 there's a direct vested interest in it.

25 MEMBER MAY: The fact of payment

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1 doesn't have the same implication as ownership.
2 When you are talking about professionals,
3 particularly licensed professionals like
4 architects, there is a certain duty to protect
5 health, safety, and welfare, et cetera. That is
6 all part of becoming a licensed professional.
7 That's different from being an owner of the
8 project. Now if the architect were an owner, I
9 would have the same issue.

10 CHAIRPERSON GRIFFIS: Right. Very
11 well. Any comments?

12 MS. SHIKER: No.

13 CHAIRPERSON GRIFFIS: As far as I
14 understand what my Board is telling me, I think
15 that they would absolutely appreciate hearing from
16 Mr. Miller today and in his expertise but they have
17 some hesitation without further information of
18 granting expert status to Mr. Miller. I do not
19 believe that diminishes anything or his
20 qualifications, and it is not a reflection of that.

21 So if that's not objectionable, we can proceed in
22 that manner.

23 MS. SHIKER: No objection.

24 CHAIRPERSON GRIFFIS: Okay. Thank you.
25 Where were we? Let's turn it over to you. We'll

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1 run through this. Then we'll ask some brief
2 questions.

3 MS. SHIKER: We'll go ahead and begin
4 with Mr. Dove, the project architect, to describe
5 the project. Then to the extent that you have any
6 questions for Mr. Miller, we can come back to him.

7 CHAIRPERSON GRIFFIS: Excellent.

8 MR. DOVE: My name is C.R. George Dove.
9 I'm a principal at WDG Architects located at 1025
10 Connecticut Avenue, N.W., Washington, D.C. This
11 morning's hearing is the last of a significant
12 number of previous approvals on a very complex
13 project in an interesting area downtown.

14 It's on E Street between 9th and 10th
15 on the north side of the FBI Building. It is
16 between two existing buildings, one on the east and
17 one on the west. As part of the approval from the
18 HPRB and Mayor's Agent, we were successful in
19 retaining the front 20 feet of three historic
20 buildings which occur on the left side of the image
21 that you are seeing here. (Indicating.)

22 In addition, the project anticipates
23 retaining the building on the far right hand side
24 of the property which is an existing McDonald's
25 building. That will be retained and built around.

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1 Aside from the fact that this is a residential
2 project in a mid-block location which requires a
3 significant design challenge to create light and
4 air for all the units, we also are retaining the
5 historic structures and existing structure.

6 The concept on this particular plan
7 does involve the creation of a courtyard
8 perpendicular to E Street around which the
9 apartments are configured with the historic
10 buildings being on the front, the existing building
11 being under here, and the result being a massive
12 building which is linear in nature. Part of the
13 problem that we are asking for relief on today is
14 the aspect of penthouses which are not necessarily
15 in one enclosure. That is not atypical for an
16 apartment building because of code requirements
17 where the stairs need to be at the ends of the
18 hallways and the mechanical equipment usually is in
19 the center of the building. So that is generating
20 part of our issue.

21 In addition, on this particular
22 building, because of the need and interest to
23 retain as much store front and retail activity
24 contiguous along the main street, the main entrance
25 of the building was chosen on the far western

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1 location of the building. This entrance here will
2 be the main lobby entrance for the building which
3 puts it at the left hand or western part of the
4 site. (Indicating.)

5 This created the need to locate an
6 elevator shaft in a convenient location so as to
7 not destroy either the artist studios along the
8 alley in the back or the retail along the front.
9 So it ended up being in this particular location
10 right here which is most simply done on the
11 property line of the western portion site. Therein
12 lies our request for relief of the setback for the
13 elevator penthouse from the western property line.

14 The elevator machine room and the mechanical
15 equipment room are at 18 feet six inches high. In
16 fact, one of the aspects of it is the western
17 property line.

18 In addition, one of the changes that we
19 have presented today is there is a small piece of
20 equipment which sits right here which is only six
21 feet high. (Indicating.) It is critically located
22 at this point. However it has to do with the
23 common air ventilation. This was the only place
24 that the shaft could be in the building.

25 In fact, we are strictly in compliance

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1 with the requirement that the penthouse be all at
2 one height all the way over this area. But in fact
3 - and this is at your pleasure - this portion of
4 the penthouse could easily be only seven feet tall
5 instead of the 18 feet six inches. We might offer
6 that for your consideration. Right now we have
7 tied it all together in the linear east-west
8 element that is all the same height all the way
9 from one side to the next.

10 The other aspect of the relief is that
11 the stairs are very critically located in
12 relatively narrow wings that come out to the
13 street. These are single-loaded corridors, so we
14 don't have the usual distance to setback. That
15 necessitates these stairs being closer to the
16 property line than typical. Again, they are
17 relatively small structures, but that is the second
18 part of the request.

19 The third part is the residential
20 recreation space. We are in compliance with the
21 amount of recreation space. I would mention that
22 it's in three locations. One is within the
23 building where we have party rooms and other
24 activity areas for the tenants enclosed. Second is
25 at a courtyard level which is at the roof of the

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1 second floor at the center of the building. The
2 third aspect of it is rooftop recreation space
3 which is being kept towards the south part of the
4 building which is the best for the sunlight
5 standpoint and extends to the end of both wings.

6 Specific deviation is not an area but
7 is in areas like this where we need to go from one
8 part to the next, and we have a constricted area of
9 about five feet as a minimum dimension. I think
10 that what this whole recreation area involves is a
11 series of patio areas that can be used by multiple
12 people at the same time. I think generally that
13 explains where we are.

14 CHAIRPERSON GRIFFIS: Did I understand
15 you to say that you have a residential rec space on
16 the second level which is above the arts related
17 space?

18 MR. DOVE: No, it's in the front of the
19 building in the bottom of this courtyard which
20 happens to be the roof of the second floor.

21 CHAIRPERSON GRIFFIS: Right, which is
22 above the arts related space.

23 MR. DOVE: I don't have a plan of it.
24 It's in your package. But at the second floor,
25 there's a part that runs across the front, and the

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1 public can get into that courtyard for community
2 activities.

3 CHAIRPERSON GRIFFIS: Do some of the
4 units access that also?

5 MR. DOVE: Yes, they have private
6 courtyards which are not counted in the recreation
7 space.

8 CHAIRPERSON GRIFFIS: I see. What kind
9 of scaping is that? Is that hard scape?

10 MR. DOVE: In that courtyard?

11 CHAIRPERSON GRIFFIS: Yes.

12 MR. DOVE: There are planters around
13 the parameter that give privacy from the private
14 courtyards to the public aspect of that.

15 CHAIRPERSON GRIFFIS: In the revised
16 roof plan which is going to be the east side on the
17 sheet we're looking at, yes, at the front of the
18 building, if you take the dimension from the
19 stairwell to the extent of the terrace, actually
20 the other direction towards the street, go south on
21 the sheet to the bottom of the sheet.

22 MR. DOVE: Pardon me while I put my
23 glasses on.

24 CHAIRPERSON GRIFFIS: You have a
25 dimension that was given in the surveyor's plot of

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1 30 feet five inches. Has that changed?

2 MR. DOVE: I see a 21 foot dimension
3 from the edge of the stairs to the edge of the
4 roof.

5 CHAIRPERSON GRIFFIS: Okay. I've been
6 handed a great technical piece here. Look at the
7 drawing and that. (Indicating.)

8 MR. DOVE: This dimension?

9 CHAIRPERSON GRIFFIS: Yes.

10 MR. DOVE: It has not changed.

11 CHAIRPERSON GRIFFIS: So that's 30.

12 MR. DOVE: Yes.

13 CHAIRPERSON GRIFFIS: And what's the
14 dimension across, the width?

15 MR. DOVE: It's 45 feet seven inches.

16 CHAIRPERSON GRIFFIS: So that puts in
17 perspective what kind of scale we're looking at.
18 That's 45 and change width. That's a substantial
19 area of 45 by 30.

20 MR. DOVE: Yes.

21 CHAIRPERSON GRIFFIS: It helps me
22 understand a little bit more of the scale of what
23 we are looking at. Any other questions for the
24 architect at this time?

25 MEMBER ETHERLY: Yes, just very

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1 briefly, Mr. Chair. With respect to the placement
2 of the front entrance of the building, Mr. Dove,
3 you have spoken to the fact that it's heading
4 westward. Could you just speak again to why you
5 chose to place it there as opposed to along any
6 other parts of the front facade?

7 MR. DOVE: First of all, the garage
8 entrance is necessitated at this particular
9 location which allows us to get down and have an
10 efficient garage circulation. (Indicating.) This
11 particular piece of facade that I'm pointing to is
12 the retained McDonald's site which is not
13 available.

14 Then we had the choice of three. We
15 had it back and forth in different areas. The
16 general consensus was that keeping the central
17 portion, which could be the most depth for retail
18 and contiguous, made sense. Plus we really like
19 this particular building as the image for the front
20 entrance to the building. So holding it on the
21 left side or west side seemed to make the most
22 sense.

23 The reason I pointed that out is once
24 you get into the lobby you have to get back to the
25 elevator lobby. You obviously want to keep that

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1 away from the retail so that you allow more
2 flexibility on retail planning. Hence that's where
3 the elevator lobby ends up.

4 MEMBER ETHERLY: Thank you. Thank you,
5 Mr. Chair.

6 MEMBER ZAIDAIN: I have a quick
7 semantical question. Your drawing is playing
8 tricks with my eyes. Is the facade above the
9 McDonald's building pulled out to the building line
10 or is that set back?

11 MEMBER ETHERLY: Yes, this is flush out
12 to the building line. (Indicating.) This is set
13 back 20 feet.

14 MEMBER ZAIDAIN: Right. The court in
15 the center is open to the sky. Correct?

16 MR. DOVE: Yes.

17 MEMBER ZAIDAIN: Why do you have to
18 retain the McDonald's facade? That was through
19 HPRB or through the Mayor's Agent.

20 MR. DOVE: Retaining the McDonald's is
21 a property ownership issue.

22 MEMBER ZAIDAIN: Okay.

23 MR. DOVE: It has nothing to do with
24 historic preservation. It has to do with the
25 desire of a corporate entity to retain activity in

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1 that area as long as possible.

2 MEMBER ZAIDAIN: Is McDonald's still in
3 there?

4 MR. DOVE: Yes.

5 MEMBER ZAIDAIN: Is it still operating?
6 I quit going down there because the Wendy's
7 closed.

8 MR. DOVE: This is a grand orchestrated
9 thing. They actually can stay open up to a certain
10 point. Then they close down for a short period of
11 time while certain columns are built. Then they
12 are back in operation. So the whole thing is
13 geared around keeping their systems operational.

14 CHAIRPERSON GRIFFIS: Other questions,
15 Mr. Zaidain?

16 MEMBER ZAIDAIN: No.

17 CHAIRPERSON GRIFFIS: I noticed in the
18 Mayor's Agent report, which is out of our purview,
19 that there was a comment that DCPL picked up. That
20 was the treatment of the alley. You just mentioned
21 that the artist lofts or artist space is accessed
22 off the alley.

23 MR. DOVE: And from the inside.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. DOVE: There are actually four

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1 units on the back which have outside entrances and
2 windows facing north.

3 CHAIRPERSON GRIFFIS: Is the rear
4 elevation shown? I wasn't clear. Is it A-303?

5 MR. DOVE: It is A-303.

6 CHAIRPERSON GRIFFIS: So those stairs
7 that we've been seeing on the plans are actually
8 accessing some useable space.

9 MR. DOVE: Yes, the building is set
10 back at that point. Those stairs provide access
11 from the alley. Just some information you may not
12 need, but the whole alley experience is being
13 reconsidered because it's the Fords Theater alley
14 and the egress for the escape route. What we're
15 trying to do is assist the city in returning that
16 alley into a little bit more than a service alley
17 and actually encourage pedestrians in that area.
18 Therefore the artists would have accessibility to
19 their spaces.

20 CHAIRPERSON GRIFFIS: Excellent. You
21 submitted photographs of the existing alley. I was
22 picturing this very picturesque, cobble stone, well
23 lit alley walking down, but clearly that's not it
24 looking at this photograph. It was the comment
25 from DCPL that was concerned about the future of

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1 that alley. Here you have an opportunity. So I
2 think you've taken that on. If I'm not mistaken,
3 the elevation shows that the brick facade continues
4 at the rear. Is that correct?

5 MR. DOVE: That's correct.

6 CHAIRPERSON GRIFFIS: Then the east and
7 west elevation - I guess it would just be the west
8 --

9 MR. DOVE: They have been shown as
10 stucco primarily at the request of HPRB's approval.
11 They treat it as party walls.

12 CHAIRPERSON GRIFFIS: Right. Indeed.
13 Then the material for the penthouse is the same.

14 MR. DOVE: Yes, the obvious reason is
15 we want it to be as light and as disappearing as
16 possible.

17 CHAIRPERSON GRIFFIS: Right. Any other
18 questions?

19 MEMBER ZAIDAIN: Yes, I have a quick
20 question. We see this a lot in the downtown
21 overlay. It's my understanding that artist loft
22 spaces are a requirement of the downtown overlay.

23 CHAIRPERSON GRIFFIS: Preferred use.

24 MR. DOVE: It's a preferred use.

25 MEMBER ZAIDAIN: There's a lot of these

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1 spaces coming online downtown. What defines an
2 artist loft? Do you have to be an artist to live
3 there and prove you are an artist?

4 CHAIRPERSON GRIFFIS: You have to wear
5 really funky clothes when you are in the leasing
6 office. It's an excellent question.

7 MEMBER ZAIDAIN: I know it doesn't tie
8 to relief, but at some time it might. I could see
9 a permit being appealed at some point.

10 CHAIRPERSON GRIFFIS: Let's take a
11 quick minute. Mr. Dove, maybe you know. My
12 familiarity is actually in New York. You can be
13 registered as an artist. That way you can live in
14 spaces that may not be habitable, lofts in the Soho
15 area. At least it used to be. It's not like that
16 anymore.

17 MEMBER ZAIDAIN: Is it tied to the
18 person that's living there, or is it tied to the
19 design of the space?

20 CHAIRPERSON GRIFFIS: Tied to the
21 person living there I believe. Mr. Dove, what's
22 your product that's being proposed?

23 MR. DOVE: The product is a relatively
24 simple space. It does have a bathroom. It does
25 have a small kitchen. It could be a living

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1 environment. It also has large windows facing
2 north which is normally good for artist studios.
3 As far as a specific program in place, I would have
4 to defer to the owner in terms of how that would be
5 controlled.

6 MEMBER ZAIDAIN: I see Mr. Sher surfing
7 through the Zoning Regulations.

8 CHAIRPERSON GRIFFIS: Actually what
9 we're more interested in, Mr. Miller, if you are
10 able to answer just quickly, how you are looking to
11 lease the space and what the program is to get in.

12 MR. MILLER: These are intended to be
13 for sale units. So it's our intent to have some
14 kind of deed restriction on the use or the sale of
15 the unit itself.

16 MEMBER ZAIDAIN: That you have to be an
17 artist to live there.

18 MR. MILLER: Yes, and it's still a
19 relatively new program in this city.

20 MEMBER ZAIDAIN: Right. That's what
21 I'm questioning.

22 MR. MILLER: We understand we need to
23 work this through. Just off the top of our heads,
24 it's a condominium building which is what is
25 intended here. We would have some kind of deed

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1 restriction or restriction of use there.

2 CHAIRPERSON GRIFFIS: Fascinating. I
3 know that we've had applications before in this
4 area actually with the artists.

5 MR. MILLER: Right. There's a lot of
6 them coming online downtown.

7 CHAIRPERSON GRIFFIS: My point is the
8 Cultural Development Corporation which is a non-
9 profit that was organized. I think they were doing
10 a lot to organize the artists and identify uses,
11 areas, and then artists themselves. Mr. May, did
12 you have a question?

13 MEMBER MAY: Actually I wanted to hear
14 what he had to say really quick.

15 CHAIRPERSON GRIFFIS: Okay, briefly.

16 MR. SHER: For the record, my name is
17 Steven Sher, the Director of Zoning and Land use
18 Services with the law firm of Holland and Knight.
19 Zoning Regulations Chapter 199 define an artist
20 studio as follows: "place of work of one or more
21 persons who are engaged actively and either
22 gainfully or as a vocation in the following: fine
23 arts including but not limited to painting, print
24 making, or sculpturing; performing and visual arts
25 including but not limited dance, choreography,

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1 photography or film making, ceramics, or the
2 composition of music."

3 CHAIRPERSON GRIFFIS: So you are saying
4 --

5 MEMBER ZAIDAIN: I don't have my Zoning
6 Regulations in front of me, so I probably could
7 have saved us all a lot of time.

8 CHAIRPERSON GRIFFIS: But the point
9 being that it's a defined entity and use.

10 MEMBER ZAIDAIN: Yes.

11 CHAIRPERSON GRIFFIS: So it seems to be
12 fairly easy to tie that into any of the deed
13 restrictions or anything of that nature.

14 MEMBER ZAIDAIN: It will be interesting
15 to see when they go to pull permits how DCRA
16 verifies whether or not it's artist space. I don't
17 know if that's a big part of the process or not.

18 CHAIRPERSON GRIFFIS: I think for this
19 area it would be, but that's a good question. Mr.
20 May.

21 MEMBER MAY: Yes, I have a couple of
22 questions. I got very confused by Mr. Zaidain's
23 first questions which had to do with the 25 foot
24 rule with regard to the use of the roof terrace. I
25 guess my essential question is without excusing the

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1 25 foot rule you would not meet the five percent.

2 Is that right? Otherwise, why would you be here?

3 MR. DOVE: That is correct.

4 MEMBER MAY: So how much do you have
5 without that?

6 MR. DOVE: It's a relatively complex
7 calculation.

8 MEMBER MAY: I believe it is. That's
9 why I'm asking. I couldn't imagine how it worked
10 out.

11 MEMBER ZAIDAIN: Are you looking for
12 what the amount would be?

13 MEMBER MAY: Yes, I'm trying to get a
14 sense of this. Without this, there's one percent
15 or without this there's 4.99 percent.

16 MEMBER ZAIDAIN: Exactly. That was the
17 point of my question too.

18 MR. DOVE: Off the top of my head, it
19 would be no less than 4.8 or 4.9 percent. It's
20 minimum area. In other words, it's where you are
21 passing through here. (Indicating.) That's about 16
22 feet. It's about 16 feet there. Not much.

23 CHAIRPERSON GRIFFIS: So you are saying
24 the areas that are 25 feet that meet the
25 requirement would bring it up to about 4.8 or 4.9

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1 percent.

2 MR. DOVE: I haven't done the
3 calculation. It's over 8,000 square feet. We're
4 talking at most 300 or 400 square feet that would
5 be considered non-compliant.

6 MEMBER MAY: I'm particularly
7 interested in this in terms of how we interpret
8 this particular regulation. I think it would be
9 very helpful in making a clear decision on this to
10 know what qualifies without making this grant for
11 this outdoor space. You could probably do that in
12 a diagram form and quantify what the space is so
13 that we know without it we have 4.8 percent but
14 with it we have 5 percent.

15 MEMBER ZAIDAIN: In my mind, you have
16 two avenues here. One is to apply for the variance
17 as it is or just simply apply for a reduction in
18 the rec space.

19 MEMBER MAY: Right.

20 MEMBER ZAIDAIN: I think the hardship
21 analysis is probably essentially the same. At
22 least that's my initial impression.

23 CHAIRPERSON GRIFFIS: I had the same
24 thoughts when I was reviewing this case. This is
25 what moved me to say that we can move ahead with

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1 this without specific calculations. That is if we
2 were looking at an area, which is what my first
3 question was in terms of the circulation, and all
4 of a sudden we were counting square footages of
5 three foot wide accesses up to it, what I looked at
6 and what I think that this shows very clearly is -
7 and the intent of that regulation is to provide
8 usable space I would think. That's my
9 interpretation of it. Usable, functional
10 recreational areas.

11 At some point, someone thought 25 feet
12 is a minimum. I think in a great commercial office
13 building with a straight roof and one penthouse
14 that makes a lot of sense. What we see in
15 residential, and specifically this that has the
16 courtyard and the setbacks, we can't always look to
17 these great square and rectangular shapes. So my
18 point in looking at this was how much was usable,
19 how much was functional area for recreation. I see
20 perhaps five or ten square feet up there that you
21 would say wouldn't be. When I look at that, I say
22 we can minus that off.

23 However it actually is not just
24 circulation, but it is part of the connections to
25 the rest of the area. So I see things happening up

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1 there in all those different areas. This is not
2 going directly to this, but actually it's an
3 intriguing layout because you have fairly
4 independent or fairly private spaces that are
5 broken down within the same roof terrace.

6 So my point is what we need to do is to
7 see whether it complies with the intent of the 25
8 and that's being functional, usable space, not
9 necessarily to get the direct calculation to see
10 what kind of percentages are actually changing. I
11 don't think it goes to the real value of the space
12 that's there. At 21 feet nine inches, it's still
13 as usable as the areas at 25. But that's just my
14 opinion.

15 MEMBER ZAIDAIN: I was there with you
16 for a little bit, but then you lost me.

17 MEMBER MAY: Yes, I think I agree in
18 principle that it's more important to understand
19 what's usable, and I think that 25 feet is an
20 excessive requirement because it's hard to
21 understand why 20 feet wouldn't be just as useful
22 in that circumstance.

23 CHAIRPERSON GRIFFIS: Right.

24 MEMBER MAY: However to me, that
25 reinforces the need to understand better what it is

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1 that we're granting here. I don't think it's that
2 difficult a thing to come up with to say this area
3 complies and this area doesn't and this is how it
4 adds up to the required space. It makes it clearer
5 for us exactly what it is we're considering and
6 granting. Otherwise I would almost be
7 more inclined to look at the other side of this
8 variance question which is making some deviation on
9 the five percent. There's a good case to be made
10 here. With a little bit more documentation, it
11 would be easier for me to make.

12 MEMBER ZAIDAIN: Right. If we're
13 talking about the 25 foot standard as being the
14 point of our debate, it's going to lead us down the
15 path of debating whether 25 foot is a good standard
16 for usable space or not. Whereas the analysis
17 could be whether or not there are some practical
18 difficulty and hardship in just providing space.
19 Do you follow what I'm saying?

20 CHAIRPERSON GRIFFIS: Yes.

21 MEMBER ZAIDAIN: I don't think I'm
22 proposing a solution unfortunately.

23 CHAIRPERSON GRIFFIS: I'm not convinced
24 that we can't continue this today.

25 MEMBER ZAIDAIN: I'm not either. I

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1 think the arguments are there. I just think we
2 want to be clear on how we we're moving forward.

3 CHAIRPERSON GRIFFIS: Then let's be
4 clear. Mr. May is going to ask for additional
5 submissions which does put this off for today.
6 Maybe we can finish the case, and we'll set it for
7 decision making. Any other questions from the
8 Board Members before we decide whether that's the
9 way to go?

10 MEMBER MAY: Yes I do. Can we go back
11 to the other drawing? Looking at that elevation,
12 either the penthouse is painted perfect sky blue or
13 it's not shown. Right?

14 MR. DOVE: They are painted perfect
15 blue.

16 MEMBER MAY: You also did that with the
17 neighboring penthouses as well. Right?

18 MR. DOVE: Yes.

19 MEMBER MAY: That really is my
20 question. Are there other penthouses that we
21 should be seeing?

22 MR. DOVE: Yes, there are penthouses on
23 both adjacent buildings. I don't have that
24 specific information documented. In your package,
25 you do have our true elevation which shows all the

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1 penthouses on it.

2 MEMBER MAY: Yes.

3 MR. DOVE: Obviously this document is
4 left over from our HPRB approval which was
5 primarily a facade study.

6 MEMBER MAY: It would be helpful to
7 understand the context of this. Seeing your
8 drawing and not seeing the neighboring penthouses
9 doesn't --

10 MR. DOVE: Yes.

11 MEMBER MAY: We're already seeing
12 multiple rooftop structures. It's a very city
13 scape up there in itself. It would be helpful to
14 see it all. But that's okay. I'm not going to
15 require that.

16 MR. DOVE: The thing it doesn't show
17 also is there's a taller element of this building
18 that occurs behind and over. So it's not like this
19 is really a short building. It's just the fore
20 part of it.

21 MEMBER MAY: Is that the building
22 that's on the corner?

23 MR. DOVE: It goes all the way to the
24 corner. This is just a portion of it.

25 MEMBER MAY: I see.

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1 MR. DOVE: It becomes a full height
2 building right after this line. (Indicating.)

3 MEMBER MAY: Okay. Good. The Chairman
4 is showing it to me in the picture.

5 CHAIRPERSON GRIFFIS: It's photograph
6 number --

7 MEMBER MAY: It doesn't look like
8 there's a penthouse on that portion of that
9 building, but on the building next to it of course
10 it's full height. Then the next question is - and
11 I guess this is probably in the drawings - what is
12 the setback at -- You have this unusual situation
13 of this front courtyard. You are across the
14 street.

15 You could actually get a very good look
16 at that penthouse which is not normally the case
17 even when it doesn't meet the setback because the
18 building is usually fronted right on the street.
19 Because we have this indentation, you get a better
20 angle. Have you actually looked at that to see how
21 visible it is looking into the courtyard from
22 either side?

23 MR. DOVE: The majority of it is
24 setback over 23 feet. It's 22 feet plus inches
25 from right here which is more than the one to one

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1 setback for the height. (Indicating.) So it meets
2 the typical requirement of a penthouse setback.

3 MEMBER MAY: Right.

4 MR. DOVE: Yes, to answer your
5 question, there is a plane that runs across the
6 back. It's relatively uniform across the back of
7 the building. But it's setback from the most
8 visible part by more than the required
9 relationship.

10 CHAIRPERSON GRIFFIS: Wouldn't you
11 think that you would be better in the penthouse
12 because of the courtyard if you are standing on the
13 street in front of the building?

14 MEMBER MAY: If you're standing across
15 the street looking through the courtyard and
16 looking at the corner where the elevator is, you
17 have a better shot at seeing it. I don't know if
18 you can really see it or not.

19 MR. DOVE: If you could walk on that
20 sidewalk, but it's a secured area right now.

21 MEMBER MAY: You can't even walk on the
22 sidewalk area.

23 MR. DOVE: Not on the other side.

24 MEMBER MAY: All right. I was just
25 curious about that. Thank you.

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1 CHAIRPERSON GRIFFIS: Any other
2 questions of the architect at this time?

3 MS. SHIKER: We'd like to call Steve
4 Sher as our next witness.

5 MR. SHER: Mr. Chairman, Members of the
6 Board, I think the Board is aware of what this case
7 is about. It's roof conditions on a building that
8 is residential. That by itself creates the issues
9 which the Board has to look at this morning.

10 If this were an office building and
11 were a solid block without that courtyard in the
12 middle and with a typical office lobby in the
13 center of the building, the penthouse would be in
14 the middle, there wouldn't be any residential
15 recreation on the roof, and we wouldn't be here.
16 Because this is a residential building, because
17 it's required as part of housing priority area C in
18 the downtown development district, you have that
19 courtyard in the middle, a single loaded car row
20 running in the U shaped building roughly around it
21 so that the units need the courtyard for the light
22 and air.

23 Hence the operational difficulties when
24 associated with the retail on the ground floor to
25 (a) push the elevator core to the west side of the

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1 site, (b) require extra stairs to the roof in order
2 to provide the code required access to that point,
3 (c) resulting in dimensions on the roof that run
4 less than 25 feet because of those things. As a
5 consequence we need the one variance and the one
6 special exception.

7 The Board has already been through
8 enough of these issues to understand how that
9 impacts on the design of the site. Mr. Dove has
10 clearly explained why he has designed it the way he
11 has and what that results in the roof top
12 condition. I believe all of that meets the
13 requirements of the regulations, and the Board
14 should grant the relief that's here.

15 CHAIRPERSON GRIFFIS: Thank you, Mr.
16 Sher. Do you have an opinion about the dimension
17 and some of the concern that's come up from the
18 Board?

19 MR. SHER: Well, we have indicated this
20 in the plans. You actually have to look at both A-
21 2.12 which actually shows the area that's devoted
22 to the roof deck and then 2.13 which has the
23 dimensions on it. You can see where the roof deck
24 narrows as it goes past the elevator area and
25 machine room on the northwest side of the courtyard

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1 and then the constrictions caused by the placement
2 of the two stair towers.

3 But as the Chair noted before, there
4 are substantial usable areas created both north and
5 south of the two stair tower enclosures and in an
6 east-west direction along the north side of the
7 courtyard. So from a functional and usable point
8 of view, that one combined with the residential
9 recreation space on the lower level of the
10 courtyard and within the building I believe
11 constitutes a significant amenity for the building.

12 CHAIRPERSON GRIFFIS: Okay. Any other
13 questions for Mr. Sher? Very well. Thank you very
14 much. Anything else?

15 MS. SHIKER: Not at this time.

16 CHAIRPERSON GRIFFIS: Let's go through
17 then quickly the government's reports. Office of
18 Planning is here with us and has submitted a timely
19 memo. Good morning.

20 MS. THOMAS: Good morning, Mr. Chair
21 and Members of the Board. I'm Karen Thomas
22 representing the Office of Planning. Based on the
23 Applicant's testimony before us, OP has no
24 objection to the changes made on the plans
25 subsequent to its filing since it does not

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1 materially change the facts of the case and the
2 variance and special exception test.

3 As such, we would stand on our
4 submitted report and recommend relief from the
5 special exception to waive the setback and single
6 enclosure requirements relating to the roof
7 structures and for variance relief from the
8 dimension of the proposed rec space where it does
9 not meet the 25 feet requirement of section 773.
10 That's all we have today. Thank you.

11 CHAIRPERSON GRIFFIS: Excellent. You
12 heard Mr. Dove state this morning that there was
13 the enclosure for the required ventilation machine
14 room that could conceivably be at seven feet as
15 opposed to equal height of 18.5 or 18.6 whatever
16 has been provided on the back. Do you have an
17 opinion on that? Mr. Dove, correct me if I'm
18 misreading this. That would be an extent of close
19 to 39 feet four and a half inches. Is that
20 correct?

21 MR. DOVE: That is correct.

22 CHAIRPERSON GRIFFIS: So conceivably it
23 almost aligns to the lot -- Well, kind of. It
24 seems to line up not perfectly with the addition
25 that's over the existing McDonald's.

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1 MS. THOMAS: Right. So they are saying
2 that the boiler room section would be at about 18
3 feet, and the new addition part would be less than
4 that.

5 MR. DOVE: It is currently shown as 18
6 foot six. I just offered the fact that we have the
7 capability to make it much less visible.

8 MS. THOMAS: Yes.

9 MR. DOVE: We were trying to comply
10 specifically with the code there.

11 MS. THOMAS: We have no objection to
12 lower because then that way it would reduce the
13 mass on the roof.

14 CHAIRPERSON GRIFFIS: Excellent. Any
15 questions from the Board of the Office of Planning?
16 We appreciate your comprehensive report as usual.
17 Does the Applicant have any questions of the
18 Office of Planning?

19 MS. SHIKER: No questions.

20 CHAIRPERSON GRIFFIS: Very well. We do
21 have the Mayor's Agent report that was submitted.
22 It is Exhibit 20, Tab E. Is there any
23 clarification needed regarding that? Very well.
24 My understanding is HPRB found this to be selective
25 demolition that then required the Mayor's Agent

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1 approval. Is that correct?

2 MR. DOVE: Correct.

3 CHAIRPERSON GRIFFIS: Okay. ANC-2C
4 then. Is there any ANC member represented today?
5 Not seeing anybody here, we do have Exhibit 18.
6 They have a letter of support. It was timely
7 filed. Questions, concerns from the Board.

8 MEMBER MILLER: We've been noting in
9 some of these ANC reports that they don't exactly
10 meet every single criteria that they are supposed
11 to meet to get great weight under 3115.1. In this
12 case, the ANC didn't tell us what their quorum was.
13 They said they had a quorum, but they didn't tell
14 us how many members it takes to meet a quorum.

15 So in this case and in many others, we
16 can give them great consideration but not
17 necessarily the great weight meaning that we
18 address each of their issues with particularity.
19 Though I would note in this case they are very
20 similar to OP in which we are giving OP great
21 weight. We would really just like to remind the
22 ANC somehow to go down the checklist so that they
23 can be sure that they get this great weight under
24 the law.

25 CHAIRPERSON GRIFFIS: Good. It's an

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1 important point to bring up in a non-controversial
2 case. Maybe it's the summer months and people are
3 relaxing a little bit. But rather than put the
4 burden on us to have to decide these things -- What
5 I would suggest is Mr. Moy, Office of Zoning staff,
6 and the Board work together to write a quick letter
7 to the ANC chairs re-noting and then giving the
8 Zoning Requirements for the granting of great
9 weight. We can handle that at another time. If
10 there aren't any other questions, does the
11 Applicant have any comments about the ANC?

12 MS. SHIKER: No.

13 CHAIRPERSON GRIFFIS: Good. Then let's
14 move on. Is anyone here today attendant to
15 Application 17030 of JBG/JER E Street LLC to give
16 testimony either in support or in opposition? Not
17 seeing anyone present to give testimony, we can go
18 to closing remarks.

19 MR. SHER: Mr. Chairman, we've done
20 some calculations quickly here in an attempt to
21 respond to the question raised by Mr. May. Our
22 estimate is that approximately at a maximum 1,200
23 square feet would be not counted if we reduced it.
24 So we wind up with an area that would be the
25 equivalent of about 4.26 percent rather than five

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1 percent which would be the minimum required if we
2 didn't count those areas. So that's the order of
3 magnitude. My computer says 4.26. It might be 4.3
4 or 4.2, but that's the range where we are.

5 MEMBER ZAIDAIN: That clarifies it for
6 me. I'm sitting here working through this in my
7 head. In practicality, whether or not we count it
8 or not, that space is still being used for
9 recreation space. That's the difference here.

10 CHAIRPERSON GRIFFIS: Right.

11 MEMBER ZAIDAIN: I was struggling on
12 whether or not this is just a reduction in the
13 space. It's not really a reduction of the space
14 because practically this space is still going to be
15 used for recreational purposes. It's just a matter
16 of whether we count it or not.

17 CHAIRPERSON GRIFFIS: Right. That was
18 my point earlier on. If you look at the west
19 portion, there's a portion that's about ten feet,
20 and there's a portion that's about nine feet in
21 width. I could conceivably remove that, but that
22 is not where the 1,200 square feet are coming from.
23 It's from an awful lot of usable areas. Mr. May.

24 MEMBER MAY: I appreciate knowing that.
25 The more I think about it, unfortunately, the more

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1 I want to know about the entire recreation space
2 picture. There is another solution to this issue.

3 The solution to this issue is to create more
4 recreational space within the building. I
5 understand why it's desirable not to do that in
6 this circumstance.

7 In fact, I would prefer to see this
8 lovely roof deck built as it's being proposed. I'm
9 amenable to granting credit for it. But I think we
10 need to understand better the context of this. You
11 can meet that five percent by having roof decks,
12 but you can also meet that five percent by having
13 other space within the building. Other space is
14 counted toward this.

15 CHAIRPERSON GRIFFIS: I'm not sure I'm
16 following you. They have provided other spaces.

17 MEMBER MAY: I know, but in order to
18 meet the minimum five percent, rather than coming
19 to us and asking for this, they could as a matter
20 of right without any variance whatsoever simply
21 build more recreation space within the building.

22 CHAIRPERSON GRIFFIS: But that's
23 changing the nature of the relief that's being
24 sought.

25 MEMBER MAY: What I'm saying is relief

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1 isn't absolutely necessary in this circumstance.
2 What they want to do is take advantage of the space
3 that they have for the sake of saving space within
4 the building in essence.

5 CHAIRPERSON GRIFFIS: But that's always
6 the balance of any project. Isn't it?

7 MEMBER MAY: It is, and all I'm asking
8 for is more information so that I can understand
9 that balance.

10 CHAIRPERSON GRIFFIS: But I think those
11 decisions have already been made. We need to
12 assume that those decisions have already been made
13 that it was maximized in the building itself. What
14 you are asking them to do is rethink this
15 application in a different direction.

16 MEMBER MAY: No I'm not. I'm asking
17 for documentation of what the circumstance is of
18 this recreation space so that I understand better
19 in the drawings they have what qualifies and what
20 doesn't. All I really want to see is that diagram
21 that says this meets the 25 foot rule and this
22 doesn't. That's all I would really like to see to
23 be able to evaluate this. Now then I have a
24 separate question as to whether in fact it should
25 be granted. But in order to understand it, I would

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1 like to see that diagram.

2 CHAIRPERSON GRIFFIS: Do others have an
3 opinion on this subject? Mr. Etherly.

4 MEMBER ETHERLY: I understand, as I
5 tend to always do, Mr. May's concern.
6 Unfortunately I'm not in agreement in this
7 particular instance. Clearly of course retail
8 space cannot be counted as recreation space, but
9 when you look at the entire, for me, context of
10 building; the retail space, of course you have a
11 party room, you have a fitness room which is on-
12 site, you have the interior courtyard, and you have
13 the roof deck space. Quite simply, it's there for
14 me.

15 Once again, I understand Mr. May's
16 concern. I'm inclined somewhat to agree with the
17 Chairman. It might not necessarily be all the way
18 in terms of does Mr. May's comment suggest perhaps
19 a rethinking of the overall project, but I'm
20 somewhere in between. In this instance, I'm
21 satisfied, as the Applicant noted in its written
22 submission, that the spirit and intent of the
23 residential rec space requirement is in my opinion
24 being very clearly met.

25 CHAIRPERSON GRIFFIS: Thank you, Mr.

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1 Etherly. Others? Ms. Miller.

2 MEMBER MILLER: I would just like to
3 hear the Applicant respond to Mr. May. My
4 understanding from reading the papers is that they
5 were constrained by all sorts of constraints,
6 Historic Preservation and whatever, everything that
7 was documented in here to make their case that this
8 actually was the maximum residential recreation
9 space that could be provided. If you could just
10 clarify that, that would be great.

11 MR. MILLER: For the record, Jeff
12 Miller with the JBG Companies, 5301 Wisconsin
13 Avenue, N.W. I know you folks saw a lot on the
14 roof today. George Dove speaks with such
15 confidence that he understates the complexity of
16 this project from preserving the 20 feet of the
17 historic contributing facades to bridging over an
18 existing McDonald's and keeping it in place and
19 operating to digging a three story hole in soils
20 that are going to cave in on us without special
21 engineering requirements, and of course the arts
22 requirements in the rear and also the arts retail
23 on the E Street frontage.

24 When we identified this site three
25 years ago, not only were we faced with the

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1 construction complexities but also the decision of
2 what direction to take this site, whether it be
3 commercial or residential. JBG shares the
4 District's vision for a live-in downtown. We've
5 made a substantial investment in that vision with
6 1,200 units either under construction or about to
7 be in construction in the downtown area.

8 This is by far the most complex project
9 we've had so far. We've been designing this for
10 the last two years with the cooperation of the
11 community, HPRB, D.C. Preservation League, Mayor's
12 Agent, and Office of Planning. We feel very
13 pleased with our design team that we're here today
14 talking to you about such a complex project with
15 really only asking for two areas of relief that are
16 specific to the historic and arts requirements as
17 well as the residential use and the configuration
18 required by residential use.

19 CHAIRPERSON GRIFFIS: Good. Thank you
20 very much.

21 MEMBER ETHERLY: Mr. Miller, could you
22 speak a little bit perhaps following up on Ms.
23 Miller's question? When we're talking about the
24 retail space, without going into great specificity,
25 what type of retail space or what type of retail

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1 tenant do you envision in those spaces?

2 MR. MILLER: I defer to the specifics
3 in the code to our friends at Holland and Knight.
4 But one of the opportunities in this retail/arts
5 space is a restaurant use and giving the street
6 life that we're trying to not only market to but
7 also create. We think a restaurant would be a
8 great use here. We have an internal group that
9 deals specifically with retail who would be
10 marketing this for us.

11 MEMBER ETHERLY: Okay. Just to better
12 understand that, the retail space, are we talking
13 three separate spaces, or is it really one
14 continuous space that encompasses those three?

15 MR. MILLER: Right now, we envision it
16 as one continuous space of about 7,000 square feet.
17 That's a big space, but if we could get a user to
18 use it that's terrific. We do have an opportunity
19 to subdivide it into different spaces, although I
20 personally see it as one contiguous space.

21 MEMBER ETHERLY: Was there any
22 consideration given to incorporating that more into
23 the more residential use and perhaps adding another
24 party room or making a larger space?

25 MR. MILLER: We had a requirement for a

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1 minimum amount of retail space in those areas, and
2 we have met that requirement with the space we
3 provided.

4 MEMBER ETHERLY: Thank you.

5 CHAIRPERSON GRIFFIS: An excellent
6 point to bring up and that of the additional
7 complexity that we lose when we don't have that as
8 part of an application is all the other competing
9 uses for square footage and how the whole matrix of
10 the program fits together. Any other questions for
11 the Applicant at this time? Mr. Dove, are you
12 required to go back to HPRB at all for final
13 approval?

14 MR. DOVE: No, we have final approval
15 from HPRB.

16 CHAIRPERSON GRIFFIS: So you're in that
17 submission of permits. It doesn't go through
18 because of the Mayor's Agent. Is that correct?

19 MR. DOVE: The permit is in process at
20 this point. HPRB remanded it to the staff which
21 has been satisfied. It has been given us a sign
22 off for permit.

23 CHAIRPERSON GRIFFIS: I bring this up
24 directly. If we went to varying heights of the
25 penthouse, of which I'm very supportive of allowing

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1 that portion to be of a different height than the
2 existing, and whether that would be an amendment.
3 Well, it certainly would be. It would be a change
4 to the permit documents. Is it your understanding
5 that it would then go through HPRB or the staff?

6 MR. DOVE: The penthouses themselves
7 were moot during the discussions of HPRB. It was
8 more form, configuration, facade. To the best of
9 my knowledge, there is no specific reference to the
10 penthouses in the HPRB order.

11 CHAIRPERSON GRIFFIS: Interesting.
12 Okay. There it is. I think that's the direction I
13 would like to go. I'll put it to a motion and see
14 what the Board thinks. But to allow varying
15 heights in the penthouse structure, my point was
16 just to get clarification about whether there was
17 flexibility needed with that from your end in terms
18 of what might happen with HPRB if they were looking
19 at it and wanted it to be ten feet or so.

20 At this point then I think it would be
21 appropriate and fruitful to have deliberation under
22 a motion and continue it in that frame. I would
23 move approval of Application 17030 for the E Street
24 LLC. That is pursuant to the special exception for
25 the roof structure setback and enclosure

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1 requirements. I would add to the varying height
2 requirement as noted in the application today.
3 That's under section 411 and also attendant
4 770.6(b) and also for a variance for the
5 dimensional requirements under 773 which would of
6 course allow the construction of the twelve story
7 apartment house and ground floor retail arts
8 related uses at the premises 913-919 E Street, N.W.
9 I would ask for a second.

10 MEMBER ETHERLY: Second, Mr. Chair.

11 CHAIRPERSON GRIFFIS: Thank you very
12 much, Mr. Etherly. It's been clearly laid out for
13 special exceptions and how we got through that. I
14 think more importantly is the variance. We've had
15 very fruitful discussions on the 25 foot. Clearly
16 the test for the variance is strongly met in
17 numerous ways.

18 First, the building shape itself, the
19 historic facade that needed to be incorporated, the
20 requirements for the residential that creates a
21 courtyard. Also attendant essentially back to the
22 special exceptions of not having a single enclosure
23 is the separation of residential. We see that all
24 too often. That this distance separation is
25 obviously code requirements.

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1 This has come up throughout this
2 application. When you add into it the fact there
3 were other additional requirements, all of which
4 are being met, there is this balance of how you put
5 everything together. You have the preferred uses
6 requirement and that is met. You have the
7 penthouse requirements but they can't be met. You
8 have the residential recreation space of which 50
9 percent needs to be outdoors. Obviously you need
10 to maximize your outdoor space.

11 This plan and the specific details of
12 this I think are doing exactly that. That is
13 maximizing the amount of recreation space on the
14 roof with their roof terrace. The fact of the
15 matter, in coming together with the situation of
16 the stairs, the situation of the other penthouse
17 mechanical space, is they cannot meet the 25 foot
18 minimum requirement at every area. I do believe
19 that they have created usable and have created
20 valuable recreation space.

21 It is correct that the variance be for
22 the 25 foot dimension because that is what is
23 directly dealt with in that. Bear in mind, it is
24 not an incredible reduction in the requirement of
25 residential if you subtract out everything that

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1 didn't meet that. But rather than having them come
2 in for the requirement of reducing the residential
3 recreation space which we see often, I don't think
4 it would be appropriate at this building because of
5 its location, the adjacent uses and structures.

6 Rather than coming in for a reduction,
7 they came in in order to be approved for the relief
8 of the 25 foot which again I think is very
9 appropriate. I heard Mr. May. He made some
10 excellent comments, and I'm sure he will follow up.

11 The point of his is let's look at the area, let's
12 look at the other programming in the building and
13 how it was utilized to see if they could bring it
14 up to five percent.

15 I'm convinced that we don't need to
16 progress in that direction based on the fact of the
17 numerous requirements that are already on this
18 building, most being zoning but also those being
19 historic, the animation of the alley in the back
20 which takes a whole different circulation, takes a
21 different use. There's a site sloping there, the
22 historic buildings, the preferred uses, the retail
23 that's being anticipated, then a large percentage,
24 five percent, of the total square footage to go to
25 residential. I think it's struck an excellent

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1 balance here. I strongly support the motion. Let
2 me hear from others if they have comments.

3 MEMBER MAY: Okay. Let me say first of
4 all I understand very thoroughly the complexity of
5 all of the pieces that have to go into this project
6 from a design point of view. It is clearly quite a
7 puzzle, and it's been very successfully handled. I
8 think that in terms of the relief that's being
9 requested, there's no question in my mind that the
10 special exception regarding the roof structures is
11 necessary as part of solving that design puzzle.

12 I still have concerns about the
13 recreation space requirement and the impact of the
14 25 foot rule since we're talking about a variance
15 here that could have come in a lot of different
16 forms. Now I'm not suggesting that it should be
17 brought to us in a different form nor am I
18 suggesting that the owner of the property should go
19 back and redesign it to meet the residential
20 requirement in some other way. I just think that
21 it's prudent for this Board to have the best
22 information available before making a decision
23 about a variance on residential recreation space in
24 this circumstance.

25 All I would really like to see is a

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1 diagram that shows of the square footage that is
2 residential recreation space on the roof what is
3 usable under the 25 foot rule and what is not.
4 That would make the case very clearly that overall
5 the residential recreation space is quite usable
6 and that it will be a benefit and that there is no
7 need to supplement that with additional space
8 within the building because essentially that is the
9 question.

10 If we decided not to grant this
11 variance, in order to build this building, they
12 would have to create additional recreation space in
13 the building, make the party room larger, something
14 like that. I don't believe that's absolutely
15 necessary, but I think that in order to make this
16 decision that we're being asked to make that we
17 should have that one piece of information. If we
18 were being asked to reduce the residential
19 requirement to 4.25 percent or whatever would be
20 needed here, that would be a different situation.
21 I think different information would be necessary.

22 But all I really want to do is
23 understand the 25 foot rule and its impact on that
24 roof space. I would like the Board to have the
25 benefit of that information before making a

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1 decision. So I would be reluctant to pursue that
2 today. I would prefer that we simply get that
3 diagram and then make a decision at a regular
4 decision meeting or have a special decision
5 meeting. I hate to drag everybody out here again,
6 but I do think it is important for us to make this
7 decision with the best information available.

8 CHAIRPERSON GRIFFIS: Okay. Others?
9 Mr. May, picking that up, I understand what you are
10 asking. I guess I have confidence in my opinion
11 based on the fact that I think I understand it
12 which is why I had Mr. Dove walk through some of
13 the dimensions. My confidence in terms of
14 the usable and the proportion and basically the
15 spacial relation of the terrace and the layout
16 comes from looking at three documents that are
17 submitted in the record. The first is the Office
18 of the Surveyors. The second is sheet A-102. The
19 third is A-213. In combination of looking at all
20 of those, which I have done today and previously
21 when I reviewed the application, I believe I fully
22 understand the usable areas and the dimensioning
23 and the proportion of what that space actually is.

24 Again, I would reiterate I'm moved by
25 the fact and it seems to me that there are three to

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1 four primary areas of which make up more than 90
2 percent of the terrace. The smallest dimensions of
3 those spaces are anywhere from 25 by 30 and they go
4 upwards to 45 by 30 to even larger than 30 feet.
5 So they are substantial areas there. I put those
6 into proportions and look at the areas based on the
7 unique shape and layout of the building itself and
8 the penthouse and mechanical units that don't
9 strictly meet the 25 foot dimension.

10 Anything else then? The motion is
11 before us and has been seconded. Last
12 deliberations on it. Very well. Then I would ask
13 that all those in favor of the motion signify by
14 saying aye.

15 (Chorus of ayes.)

16 CHAIRPERSON GRIFFIS: Opposed.

17 (No response.)

18 CHAIRPERSON GRIFFIS: Abstain.

19 (No response.)

20 CHAIRPERSON GRIFFIS: Very well. Ms.
21 Bailey, if you have a moment, you could record the
22 vote.

23 MS. BAILEY: Mr. May, how did you vote?

24 MEMBER MAY: I voted in favor
25 reluctantly.

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1 MS. BAILEY: The vote is recorded as 5-
2 0-0 to approve the application. The motion was
3 made by Mr. Griffis and seconded by Mr. Etherly.
4 Mr. May, Mr. Zaidain, and Ms. Miller are in
5 support.

6 CHAIRPERSON GRIFFIS: Good. Thank you
7 all very much.

8 MS. BAILEY: Summary order, Mr.
9 Chairman.

10 CHAIRPERSON GRIFFIS: Let me put it to
11 the Board if there's any objection to have a
12 summary order on this.

13 MEMBER ETHERLY: No objection, Mr.
14 Chair.

15 MEMBER MILLER: No objection.

16 CHAIRPERSON GRIFFIS: I don't see any
17 difficulty. Is that amenable to the Applicant?

18 MS. SHIKER: That is. We'll coordinate
19 with staff for that.

20 CHAIRPERSON GRIFFIS: Excellent.

21 MS. SHIKER: Thank you.

22 CHAIRPERSON GRIFFIS: That would be
23 well received I'm sure. Very well. Let's move
24 then to the next case in the morning.

25 MS. BAILEY: The next case is

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1 Application Number 17041 of Arthur G. Stewart, Jr.
2 and Nilva R. Da Silva, pursuant to 11 DCMR 3104.1,
3 for a special exception to allow an addition to a
4 single family dwelling under section 223, not
5 meeting the rear yard requirements (section 404) in
6 the R-1-B District at premises 3920 Ingomar Street,
7 N.W. That's in Square 1754, Lot 910. Would you
8 please stand and be sworn in? Please raise your
9 right hand.

10 WHEREUPON,

11 ARTHUR STEWART AND NILVA DA SILVA

12 were called as witnesses and, having been first
13 duly sworn, were examined and testified as follows:

14 MS. BAILEY: Thank you.

15 MS. DA SILVA: Good morning.

16 CHAIRPERSON GRIFFIS: Good morning.

17 How are you?

18 MS. DA SILVA: Good. How are you?

19 CHAIRPERSON GRIFFIS: Good.

20 MS. DA SILVA: Hopefully this will be
21 short after your long last one. My name is Nilva
22 Da Silva, and this is my husband. We own the
23 property where we are seeking a relief to build an
24 addition in the back yard.

25 CHAIRPERSON GRIFFIS: Good. Before you

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1 get too far into it, we have one procedural
2 difficulty with this. That is the posting of the
3 property.

4 MS. DA SILVA: Yes, I'm sorry. I think
5 I need to request a waiver. I actually posted it
6 two days late. I was waiting for it to come in the
7 mail, and I was actually to come here and pick it
8 up. It obviously was my mistake.

9 CHAIRPERSON GRIFFIS: I see.

10 MS. DA SILVA: I did come and pick it
11 up, so it was two days late. I understand we have
12 no opposition. I have talked to all of the
13 neighbors and all of that. I would like to request
14 a waiver on those two days.

15 CHAIRPERSON GRIFFIS: So it was posted
16 properly for 12 full days.

17 MS. DA SILVA: Correct, and I brought
18 in pictures and an affidavit.

19 CHAIRPERSON GRIFFIS: Okay. I'm going
20 to give the Board another additional minute to
21 deliberate on that and ask for any questions they
22 have. Let me state obviously it's very important
23 for us in terms of notification. There's two forms
24 of notification that go out for all applications.
25 One is the mailing of the residents within the 200

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1 foot dimension of the property. The other is the
2 posting which we find is always very important
3 because that's where most people get the attention
4 that this is happening. Yes, clearly you are
5 coming in with support of the Office of Planning
6 and the ANC. There is no noted opposition.

7 MS. DA SILVA: And actually I also have
8 support of the neighbors. Through all the notices,
9 I actually spoke to all but two of the neighbors on
10 the entire list. They all said that's fine. Some
11 of them even volunteered to give me written
12 letters. There was zero opposition. I actually
13 personally spoke to all but a couple on the list.

14 CHAIRPERSON GRIFFIS: Good. Very well.
15 Any questions then? Is there any opposition to
16 waiving our procedural requirements for the posting
17 of the property? If there is no voiced opposition,
18 I will take it as consensus, and we can waive that
19 portion of our rules. Let's continue on.

20 MS. DA SILVA: Thank you. I actually
21 need to file a modified plan showing where the off-
22 street parking will be. Ms. Bailey had been so
23 kind and called me last week and figured out that I
24 was missing it. Should I hand it to you?

25 CHAIRPERSON GRIFFIS: How many copies

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1 do you have?

2 MS. DA SILVA: I have two copies.

3 CHAIRPERSON GRIFFIS: Do you need to
4 retain one?

5 MS. DA SILVA: No, not really.

6 CHAIRPERSON GRIFFIS: Anything you put
7 into the record obviously you won't be getting
8 back. If you would, give it to Ms. Bailey. She
9 can document it in, and then we'll take a look at
10 it.

11 MS. DA SILVA: Should I continue?

12 CHAIRPERSON GRIFFIS: Yes please.

13 MS. DA SILVA: Several months ago we
14 applied. We went through the process. As I've
15 mentioned, I've spoken to the neighbors. We've
16 gone through the ANC process. We're seeking an
17 addition on the back of the house. We could
18 actually have had an addition on either the front
19 of the house or one of the sides. However we
20 wanted to maintain the old Tudor structure of the
21 single dwelling.

22 So we decided to have an addition in
23 the back. Because we failed to meet the required
24 25 feet clearance under section 223, we had to come
25 and seek relief. We will indeed have about 9.8

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1 feet clearance once the addition is constructed.

2 CHAIRPERSON GRIFFIS: Okay. What you
3 just handed us is the plan. You are showing that
4 you are going to have a parking pad then.

5 MS. DA SILVA: Correct. We currently
6 have a two car garage in that space. However the
7 addition will take a portion of the garage. The
8 garage will be removed, and we will have an off
9 street parking space. Actually we could have two.
10 That is adjacent to the alley. But we will just
11 have one. Normally we do park on the street as do
12 most of the neighbors on the street.

13 CHAIRPERSON GRIFFIS: Okay. You are
14 fairly convinced it's a good idea to remove the
15 garage then.

16 MS. DA SILVA: Well, in all honesty, we
17 don't use the garage at all.

18 CHAIRPERSON GRIFFIS: I see. We see
19 more applications trying to put a garage in rather
20 than taking it out.

21 MS. DA SILVA: Right.

22 CHAIRPERSON GRIFFIS: Very well. I
23 think it's fairly clear of what's happening in
24 terms of the plans and all that. Let me run down a
25 couple of questions that go directly to 223 and

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1 obviously need to be addressed and answered by you
2 prior to getting approval.

3 MS. DA SILVA: Okay.

4 CHAIRPERSON GRIFFIS: First of all, 223
5 is set up, and I think it's an excellent section
6 written for existing non-conforming structures so
7 that they might be able to come in for additions or
8 reconfigurations at a special exception as opposed
9 to a variance. A variance is a much harder test.

10 MS. DA SILVA: Right.

11 CHAIRPERSON GRIFFIS: You saw in a non-
12 controversial case previously the difficulty
13 oftentimes of getting clarity on variances and
14 making that test. You are not in a variance
15 situation. Is it your testimony that the addition
16 would not have any substantial adverse effect, use,
17 or enjoyment of the adjacent properties?

18 MS. DA SILVA: No, actually we will
19 continue to have the clearance we currently have on
20 the side yards. We are not proposing additional
21 windows where we would directly look into our
22 neighbor's houses.

23 CHAIRPERSON GRIFFIS: Are you aware of
24 any conversations that people have voiced concern
25 that this might in fact impede light and air to

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1 adjacent properties?

2 MS. DA SILVA: No, actually at the very
3 least it will improve. We are going to remove a
4 very old cherry tree in our backyard. It will
5 actually provide a little more light into one of
6 our neighbor's yards and definitely to ours. No,
7 they are not concerned.

8 CHAIRPERSON GRIFFIS: It's your
9 testimony that the addition to the house maintains
10 the character and the integrity of the architecture
11 in the area.

12 MS. DA SILVA: Absolutely. That is one
13 of the major considerations in having the addition
14 in the back versus the front of the house which I
15 wouldn't be here and it wouldn't have taken a year.

16 CHAIRPERSON GRIFFIS: Yes, but you find
17 that the addition is actually in scale with the
18 house and the rest of the neighborhood.

19 MS. DA SILVA: Actually it is. Most of
20 the houses in the area have bigger additions
21 consuming quite a bit more of the lot. Even after
22 the addition, we will still only consume about 30
23 percent of our lot. A great percentage of the
24 houses on the block consume more of their lot.

25 CHAIRPERSON GRIFFIS: The material of

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1 the existing structure.

2 MS. DA SILVA: It's a stucco.

3 CHAIRPERSON GRIFFIS: A stucco finish.

4 MS. DA SILVA: Yes, it's an old Tudor
5 stucco house.

6 CHAIRPERSON GRIFFIS: The addition is
7 going to be?

8 MS. DA SILVA: The same thing.

9 CHAIRPERSON GRIFFIS: Indeed.

10 MEMBER MAY: Can I ask a question?

11 CHAIRPERSON GRIFFIS: Yes.

12 MEMBER MAY: I'm sorry. The addition
13 will be stucco.

14 MS. DA SILVA: Yes.

15 MEMBER MAY: Because it's drawn as some
16 kind of siding.

17 MS. DA SILVA: No, actually she didn't
18 pick a material. Those are not final drawings.
19 When we started the process in November, at that
20 point, it made no sense to finalize drawings when
21 we really didn't know how this worked.

22 MEMBER MAY: Okay. That's fine. It
23 just looks like siding.

24 CHAIRPERSON GRIFFIS: Any additional
25 questions of the Applicant? Anything you would

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1 like to add?

2 MS. DA SILVA: No, we're here just to
3 request a final decision.

4 CHAIRPERSON GRIFFIS: Okay. How are
5 you going to use that portion of the rear yard?
6 The dimension was around 14 feet.

7 MS. DA SILVA: Right.

8 MR. STEWART: For the addition, it's 14
9 feet.

10 CHAIRPERSON GRIFFIS: Right, what's
11 remaining of the rear yard.

12 MR. STEWART: Right. It's just for the
13 back yard. It's inside the fence adjacent to the
14 back of the property.

15 CHAIRPERSON GRIFFIS: I see. Okay.

16 MS. DA SILVA: We'll probably just
17 grass it like the sides and the front if that's
18 what you are asking. We currently have a little
19 playground for our kids. That would be removed as
20 they are getting older. The little one is eight.

21 CHAIRPERSON GRIFFIS: Okay.

22 MEMBER ETHERLY: Mr. Chair, if I may,
23 just to be clear. We'll get into some detail in
24 the Office of Planning report, but there were some
25 excellent pictures and renderings of what the

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1 addition would look like. Just to be clear though,
2 you do have a privacy fence that encompasses a
3 portion of the rear of your property.

4 MS. DA SILVA: We do. It's six feet.

5 MEMBER ETHERLY: Does it follow all the
6 way through, or is there an opening to the alley?

7 MR. STEWART: Currently there is a door
8 in the fence. The fence runs all the way near the
9 property line along the alley until you get to
10 current garage shown in pink there.

11 MEMBER ETHERLY: Okay.

12 MS. DA SILVA: I don't think any of the
13 pictures actually show the fence. Oh yes, this
14 one.

15 MEMBER ETHERLY: Just to follow up, Ms.
16 Da Silva, you noted that you had spoken to a number
17 of the neighbors. Did you speak to the two
18 adjacent neighbors?

19 MS. DA SILVA: Yes, one has been out of
20 the country for the past year. He has been in
21 London. His house has been occupied by some school
22 kids, his relations from North Carolina. The
23 neighbor that actually would probably be affected
24 the most by losing perhaps a little light on his
25 backyard is actually in full agreement. He even

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1 volunteered to write a letter of support because he
2 feels there's plenty of space, there's plenty of
3 privacy, and the addition would not impose on his
4 property in any way whatsoever.

5 CHAIRPERSON GRIFFIS: The front of your
6 property faces north.

7 MS. DA SILVA: Correct.

8 CHAIRPERSON GRIFFIS: It would be hard
9 to convince me that there would be a substantial
10 amount of light and air blocked. You have a 16
11 foot setback there.

12 MS. DA SILVA: Correct.

13 CHAIRPERSON GRIFFIS: It's running
14 north-south. So I would be surprised if they
15 actually came in with difficulties. Any other
16 questions?

17 MEMBER ETHERLY: Just one follow up on
18 that. In terms of the property that's opposite
19 your property from the alley side, what do you see
20 presently when you look out your backyard?

21 MS. DA SILVA: Actually both of us have
22 a privacy fence. Although the end of our house to
23 the fence is about 25 feet, they are across the
24 alley. They have an eight feet tall fence. They
25 have about 35 feet between the fence and the

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1 beginning of their property. They actually have
2 some pretty tall bushes or whatever you want to
3 call them.

4 MEMBER ETHERLY: Okay.

5 MS. DA SILVA: Actually I spoke to them
6 as well. They were surprised they were notified at
7 all.

8 MEMBER ETHERLY: Thank you. So in
9 terms of the sight line between your proposed
10 addition to that house, that's going to be fairly
11 low key.

12 MS. DA SILVA: Yes.

13 MEMBER ETHERLY: Thank you. Thank you,
14 Mr. Chair.

15 CHAIRPERSON GRIFFIS: Ms. Miller.

16 MEMBER MILLER: With the proposed
17 addition, would you not have the privacy fence
18 anymore?

19 MS. DA SILVA: No, we're still going to
20 have a fence because it's an alley. It is lit, but
21 it's not really populated other than the trash
22 truck going through it. We will continue to have
23 the privacy fence.

24 MEMBER MILLER: Okay. I just couldn't
25 tell that by the pictures.

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1 MS. DA SILVA: Actually I noticed that
2 one of the pictures in one of the pictures done by
3 Mr. Moore. He did a great job here with the
4 digital camera. I noticed that on one of the pages
5 the proposed addition - I think it's the second
6 page of his report - seems to go all the way back
7 to the fence. The addition actually wouldn't quite
8 come this far. It would be nice, but it won't
9 quite come this far.

10 CHAIRPERSON GRIFFIS: Yes, that's the
11 one image that was a little confusing. It's very
12 helpful to see that. It's excellent to see that
13 with the diagram above it.

14 MS. DA SILVA: Right. It's great.

15 CHAIRPERSON GRIFFIS: We'll let Office
16 of Planning get to their report. Is there anything
17 else?

18 MS. DA SILVA: No, that's it.

19 CHAIRPERSON GRIFFIS: Very well. Then
20 let's move on to Office of Planning's report which
21 is recommending approval. It is Exhibit 22. Good
22 morning.

23 MR. MOORE: Good morning, Mr. Chair and
24 Members of the Board. I'm John Moore of the Office
25 of Planning. In general, the Office of Planning

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1 will stand on the record in terms of supporting the
2 application. I would like to address the question
3 from the Board Member on the end whose name I don't
4 know because I have not had the pleasure to meet
5 him yet.

6 If you look at the bottom of page 2,
7 the Office of Planning's rendering reflects
8 artistic freedoms. The addition will be stucco.
9 It does appear in the proposal to be siding. We're
10 not that good yet. We'll get there someday but not
11 right now. It's not to scale, so it may not
12 reflect the exact distance to the alley. It was
13 just done to give the Board some understanding of
14 the relationship between where the addition will be
15 and the alley. I'd be glad to try to address any
16 specific questions.

17 CHAIRPERSON GRIFFIS: Okay. Thank you
18 very much, Mr. Moore. Actually it is always
19 appreciated the extra steps you go in terms of
20 graphically representing. I think we assumed that
21 it was not to scale, but we have now clarified it.

22 Frankly, as I just said, with the diagram above
23 and then with the photographs and then with the
24 drawings that were submitted, it's fairly clear
25 what's happening here. Any other questions for the

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1 Office of Planning, Mr. Moore, at this time? Does
2 the Applicant have any cross examination questions
3 of the Office of Planning?

4 MS. DA SILVA: No.

5 CHAIRPERSON GRIFFIS: Good. Thank you
6 very much. Then the ANC. I don't see anyone here
7 representing the ANC today. It is Exhibit 21. It
8 was timely filed. They are recommending approval.

9 Are there questions or clarifications on this from
10 the Board?

11 MEMBER MILLER: I would just like to
12 note that the ANC in this case did meet the
13 statutory requirements for great weight.

14 CHAIRPERSON GRIFFIS: Because they have
15 their ANC members listed on the letterhead. Is
16 that correct?

17 MEMBER MILLER: Yes. They showed their
18 vote. They showed their quorum.

19 MS. DA SILVA: They came by to visit
20 the location. Does that count?

21 MEMBER MILLER: They what?

22 MS. DA SILVA: They actually came by
23 and looked at the lot before they voted.

24 MEMBER MILLER: That's great.

25 CHAIRPERSON GRIFFIS: What we're

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1 briefly talking about is in our regulations there
2 are specific things that the letter has to say, not
3 necessarily the process and what they have done.

4 MS. DA SILVA: Okay.

5 CHAIRPERSON GRIFFIS: Very well.
6 Obviously they came by, as you just said, but you
7 also presented to the ANC. Is that correct?

8 MS. DA SILVA: Correct.

9 CHAIRPERSON GRIFFIS: If there's
10 nothing else, I don't have any other government
11 reports attendant to this application. Let me turn
12 it over to the Applicant if you have any final
13 closing remarks, information, testimony for us.

14 MS. DA SILVA: No, I think we have
15 complied with all of the requirements for the
16 application. As I mentioned earlier, we just seek
17 the final decision now from the Board.

18 CHAIRPERSON GRIFFIS: Okay.
19 Clarifications? If not, I would move approval of
20 Application 17041 pursuant to a special exception
21 to allow the addition to a single family dwelling
22 under section 223 which is not meeting the rear
23 yard requirements at premises 3920 Ingomar Street,
24 N.W. I would add that the relief sought is also
25 attendant to the parking pad that is provided as is

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1 documented today. I would ask for a second of the
2 motion.

3 MEMBER MAY: Second.

4 CHAIRPERSON GRIFFIS: Thank you, Mr.
5 May. It goes without saying that the requirements
6 for the 223 have been met. Greater clarification
7 was brought. I would also strongly advocate,
8 although it's not decisive or definitive on the
9 deliberation of the approval or non-approval, to
10 keep the privacy fence in back. It frames that
11 alley fairly well and obviously adds some privacy
12 to your use of the property. That being said, any
13 other questions or deliberation on the motion? If
14 not, I would ask for all those in favor signify by
15 saying aye.

16 (Chorus of ayes.)

17 CHAIRPERSON GRIFFIS: Opposed?

18 (No response.)

19 CHAIRPERSON GRIFFIS: Very well. Ms.
20 Bailey.

21 MS. BAILEY: The vote is recorded as 5-
22 0-0 to approve the application. Mr. Griffis made
23 the motion. Mr. May second. Mr. Zaidain, Mr.
24 Etherly, and Ms. Miller are in support.

25 CHAIRPERSON GRIFFIS: Thank you very

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1 much. I don't see any objection to having a
2 summary order on this. Unless anyone sees
3 differently, we can issue a summary order. That
4 will get you going a little bit quicker.

5 MS. DA SILVA: Thank you very much.

6 CHAIRPERSON GRIFFIS: When do you start
7 construction?

8 MS. DA SILVA: Hopefully the first week
9 of September.

10 CHAIRPERSON GRIFFIS: Excellent. Good
11 luck to you. Enjoy the addition.

12 MS. DA SILVA: Yes, the kids will enjoy
13 having another bathroom. Thank you.

14 CHAIRPERSON GRIFFIS: Indeed. Ms.
15 Bailey, are you aware of any other business for
16 Board in the morning session?

17 MS. BAILEY: Yes, Mr. Chairman, there
18 is a motion.

19 CHAIRPERSON GRIFFIS: Right. Nobody go
20 anywhere. There is a motion before us. I know it
21 was delivered to Board Members. We can take it up
22 very quickly. It is a motion of a request for the
23 BZA to expedite a hearing to July 29 and not on
24 September 9. I believe that this application of 33
25 P Street LLC was advertised. It would have been

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1 noticed by now. Is that correct?

2 MS. BAILEY: Mr. Chairman, in all
3 honestly, I have not been working on this.

4 CHAIRPERSON GRIFFIS: Okay. That's
5 fine. It goes directly to where I land on this
6 particular situation. I think it would be fairly
7 important for it to be advertised and noticed even
8 if there is no indication that there may be
9 opposition. Oh, it has already been noticed.

10 So it has been fully noticed for the
11 September 9. There are several difficulties that I
12 have in entertaining moving this up. First of all,
13 our July 29 has already been advertised, scheduled,
14 and it's full. It doesn't mean that we can't
15 squeeze another 13 to 15 hour day in. But I have
16 more concern with the fact that moving this ahead
17 six weeks first of all throws everyone's schedule
18 off.

19 Part of the requirements, which the
20 staff has ably pointed me to, is that the Board
21 shall have the authority to expedite applications.

22 Clearly that's what this motion is coming in for.

23 But 3116.1(a) indicates the Office of Planning
24 recommends expediting the case and indicates the
25 reason an expedited process is necessary and

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1 desirable. For us to have the authority to
2 expedite applications that would have to be
3 provided. It is not my understanding we have that
4 from the Office of Planning. Is that everyone's
5 understanding also?

6 In which case, I don't think we can
7 even entertain moving this up. Not to mention I
8 think it has numerous difficulties in trying to do
9 that. So I would move the denial of the motion to
10 expedite the hearing to July 29 and to maintain it
11 as scheduled on September 9 and ask for a second.

12 MEMBER ZAIDAIN: Second.

13 CHAIRPERSON GRIFFIS: Thank you, Mr.
14 Zaidain. Any further deliberation?

15 MEMBER ZAIDAIN: Scheduling is a
16 challenge that we have to deal with every hearing,
17 despite the fact that I will not be here on July 29
18 which has no bearing on this whatsoever. I think
19 at minimum the precedential impact this may have,
20 if we start letting this happen, it could spiral
21 the schedule out of control in my mind.

22 CHAIRPERSON GRIFFIS: Good. That
23 brings up an interesting point, Mr. Zaidain, in
24 terms of the precedent. I was not in the motion
25 submission compelled to move the schedule for any

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1 very high threshold issue.

2 MEMBER ZAIDAIN: Right.

3 CHAIRPERSON GRIFFIS: There didn't seem
4 to be a whole lot of compelling issues to bring us
5 there, understanding that the Board is very well
6 aware of construction schedules and delays. But
7 that being said, if there is no other comments or
8 deliberation, I would ask for all those who support
9 the motion signify by saying aye.

10 (Chorus of ayes.)

11 CHAIRPERSON GRIFFIS: Opposed?

12 (No response.)

13 CHAIRPERSON GRIFFIS: Abstain.

14 (No response.)

15 CHAIRPERSON GRIFFIS: Thank you very
16 much. Ms. Bailey.

17 MS. BAILEY: The vote is recorded as 4-
18 0-1 to deny the motion for Mr. Jay Helman to move
19 the Case Number 17047 to July 29. Mr. Griffis made
20 the motion. Mr. Zaidain second. Mr. Etherly and
21 Ms. Miller are in support. There is not a Zoning
22 Commission member present at this time.

23 CHAIRPERSON GRIFFIS: Good. Thank you
24 very much. Any other business then for the Board?

25 MS. BAILEY: No, sir.

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1 CHAIRPERSON GRIFFIS: Excellent. If
2 there is no other business, then let's conclude the
3 morning session of July 22, 2003.

4 (Whereupon, the above-entitled matter
5 concluded at 11:26 a.m.)

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A-F-T-E-R-N-O-O-N P-R-O-C-E-E-D-I-N-G-S

1:16 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. Let me call to order the afternoon session of the Board of Zoning Adjustment 22 July 2003. My name is Geoff Griffis. I am Chairperson today. With me is Mr. Etherly on my right and Ms. Miller. Representing the Zoning Commission is for our first case this afternoon is Mr. Hannaham. Representing the National Capital Planning Commission is Mr. Zaidain.

Sitting to my far right is our Office of Zoning staff. A very good afternoon to Ms. Bailey and Mr. Moy. Copies of today's hearing agenda are available for you. They are located on the wall where you entered into the hearing room. Please take a copy if you need to see where you are on the agenda. Our agenda is not that complicated this afternoon. You are either first or second, or you are part of a big application this afternoon and you would know it.

So let me run through a few things that are very important in presenting to the Board of Zoning Adjustment. First of all, all public hearings are required to be in the open and before

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1 the public. It should be known to you that all
2 proceedings are recorded. The recordings become
3 part of the permanent record in the case.

4 Therefore I ask several things. First
5 of all, when coming forward to speak to the Board,
6 you need to fill out witness cards. Witness cards
7 are available at the table you entered into. They
8 are also available at the table in front of us.
9 Those two witness cards should be filled out and
10 handed to the recorder who is sitting on the floor
11 to my right. When coming forward, please make
12 yourself comfortable in front of a microphone, turn
13 the microphone on and state your name and your
14 address for the record. You only need to do that
15 once. Then you can proceed.

16 The order of special exceptions and
17 variances this afternoon in our hearings will be
18 the following. First, we will hear from the
19 applicant and any testimony of witnesses that they
20 have. Second, we will hear government reports,
21 Office of Planning, Department of Transportation,
22 and other agencies that are attendant to the
23 application.

24 Third, we will hear from the Advisory
25 Neighborhood Commission. Fourth, we will hear

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1 persons or parties in support of the application.
2 Fifth would be persons or parties in opposition.
3 Sixth would be closing remarks by the applicant.
4 Cross examination of witnesses is permitted by the
5 applicant and parties. The ANC within which the
6 property is located is automatically a party in the
7 case.

8 The record on each case will be closed
9 at the conclusion of the hearing except for any
10 materials specifically requested by the Board. The
11 Board will be very specific on what is to be
12 submitted and when it is to be submitted into the
13 Office of Zoning. After that information is
14 received of course the record would then be finally
15 closed, and no other additional information would
16 be accepted into the record.

17 The Sunshine Act requires that public
18 hearings on each case be held in the open and
19 before the public. This Board may, however,
20 consistent with its rules and procedure and the
21 Sunshine Act, enter executive session during or
22 after a hearing on a case. That would be for the
23 purposes of deliberating on the case or for just
24 reviewing the record on the case.

25 The decision of this Board in contested

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1 cases must be based exclusively on the public
2 record. Therefore we ask people present today not
3 engage Board Members in any conversation so that we
4 do not give the appearance of not deliberating
5 solely on the record. I would ask at this point if
6 everyone could turn off their cell phones and
7 beepers so that we don't have any disruptions in
8 the hearing room.

9 Let me move to any preliminary matters.

10 Preliminary matters are those which relate to
11 whether a case can or should be heard today such as
12 request for postponements, withdrawals, or
13 continuances or whether proper and adequate notice
14 has been provided. If you are not prepared to go
15 forward with a case today or if you believe the
16 Board should not proceed with a case today, I would
17 ask that you signify having a preliminary matter by
18 coming forward and having a seat at the table. Let
19 me ask staff first of all if they have any
20 preliminary matters for the Board that they are
21 aware of.

22 MS. BAILEY: Members of the Board and
23 to all, good afternoon. Mr. Chairman, there is a
24 preliminary matter. It does not concern the cases
25 of the afternoon. However it was a matter that was

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1 dealt with earlier this morning. That concerns a
2 request from Mr. Jay Hullman (PH) concerning
3 Application 17047.

4 CHAIRPERSON GRIFFIS: Excellent. Thank
5 you very much for that reminder. Let's continue,
6 Board Members, very quickly and briefly. The
7 motion was deliberated on this morning in terms of
8 denying the request for expedited hearing. One
9 point the Board was fully aware of however did not
10 on the record deliberate directly to or take any
11 action of is our rules that require the motions to
12 be allowed seven days for response of parties.

13 We had received a submission from the
14 ANC which was supportive of an expedited. We had
15 not received any other submissions and specifically
16 Office of Planning. We did address the Office of
17 Planning as part of the requirement of the section
18 that would allow us to expedite hearings, but I
19 would move that we waive our rules for the seven
20 day response and ask for a second.

21 MEMBER ZAIDAIN: I'll second that.

22 CHAIRPERSON GRIFFIS: Thank you. The
23 reasoning for that is clearly, as we had
24 deliberated briefly on this morning, if we look to
25 not waiving that rule and not taking action on this

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1 motion, by allowing seven days to pass, we would be
2 the Friday before the Tuesday of the hearing itself
3 which is being requested on the 29th. That would
4 leave us the time to decide it on the 29th, the day
5 the hearing might take place if so approved.

6 I think it would be overwhelmingly
7 prejudicial to any participants and the parties in
8 the case if we were to postpone it that long while.

9 So I have no difficulty waiving our response time
10 so that we might expedite action on this motion and
11 look for this case to be heard on the September 9.

12 Any other comments? Very well. Let me just ask
13 for all those in favor of -- I guess we do need a
14 motion for that.

15 MEMBER ZAIDAIN: You made the motion,
16 and I seconded it.

17 CHAIRPERSON GRIFFIS: Indeed. Let me
18 ask for all those in favor of waiving our rules for
19 notification response time signify by saying aye.

20 (Chorus of ayes.)

21 CHAIRPERSON GRIFFIS: Opposed?

22 (No response.)

23 CHAIRPERSON GRIFFIS: Thank you all
24 very much.

25 MS. BAILEY: That's the only

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1 preliminary matter that staff has, Mr. Chairman.

2 CHAIRPERSON GRIFFIS: Excellent. Why
3 don't we call our first case of the afternoon then?

4 MS. BAILEY: That is Application Number
5 17042 of Carol Miller, pursuant to 11 DCMR 3104.1,
6 for a special exception to allow a two story rear
7 addition to an existing single family dwelling
8 under section 223, in the R-4 District at premises
9 518 9th Street, S.E. That's in Square 949, Lot 48.

10 Would you please stand to take the oath? Would
11 you please raise your right hand?

12 WHEREUPON,

13 CAROL MILLER AND FREDERICK TAYLOR
14 were called as witnesses and, having been first
15 duly sworn, were examined and testified as follows:

16 MS. BAILEY: Thank you. Please have a
17 seat at the table.

18 CHAIRPERSON GRIFFIS: Good afternoon.

19 MR. TAYLOR: Good afternoon. As you
20 just heard, we're seeking a special exception to
21 build a two story addition to a shotgun house on
22 518 9th Street, S.E. The existing lot is zoned R-
23 4. It's 20 feet and change by just over 100 feet
24 in depth.

25 CHAIRPERSON GRIFFIS: Can I interrupt

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1 you just briefly?

2 MR. TAYLOR: Sure.

3 CHAIRPERSON GRIFFIS: Can you state
4 your name and your address?

5 MR. TAYLOR: Pardon me. I'm Frederick
6 Taylor, 1433 Otis Street, N.E.

7 CHAIRPERSON GRIFFIS: You are the
8 architect. Is that correct?

9 MR. TAYLOR: Yes, sir.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. TAYLOR: Because the house doesn't
12 extend the full width of the lot, it's classified
13 as a semi-detached dwelling and is subject to a
14 smaller lot coverage requirement. Furthermore
15 because the side yard that's there is less than
16 five feet, that's included in the building area.
17 As a consequence, the existing house, which is 950
18 gross square feet, counts toward a lot coverage of
19 1,176.9 square feet or 56 percent of the lot.

20 So the existing house is already over
21 the allowable lot coverage with one bedroom. What
22 we're asking permission to do is to make an
23 addition just large enough to put a kitchen in
24 place of the existing kitchen which is to enlarge
25 it slightly and add a stair and enough space for a

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1 second bedroom above. That will bring it up to be
2 a two bedroom, two bathroom house.

3 Obviously the simplest way to have done
4 that would have been to build another story on top
5 of what was already there which wouldn't have
6 changed the lot coverage. But because of historic
7 preservation constraints, we simply didn't have
8 that option. We had to beat on the addition we
9 have with a sledgehammer to get Historic
10 Preservation Review Board to be willing to approve
11 it which they seemed pretty enthusiastic about at
12 the time. That's about the story in a nutshell.
13 If you have any questions, I'll be happy to take
14 them.

15 CHAIRPERSON GRIFFIS: Excellent. Thank
16 you for that background. You are not aware of any
17 opposition to this case at this time. Are you?

18 MR. TAYLOR: I am not aware of any
19 opposition to it. We have a letter of support that
20 is probably in the record that was sent by the
21 adjoining neighbor to the ANC. We have a copy of
22 that also.

23 CHAIRPERSON GRIFFIS: Okay. As you may
24 know, and it is very clear, the Board doesn't rule
25 based on the popularity contest. Obviously letters

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1 of opposition bring to light certain issues that
2 should come to the attention of the Board. Let me
3 ask you a few preliminary questions as you are
4 coming out under special exception 223 which it was
5 written to allow additions to non-conforming
6 structures. It's your testimony and your
7 understanding as the architect and having dealt in
8 the neighborhood that the light and air available
9 to the neighboring properties wouldn't be impeded
10 or unduly restricted.

11 MR. TAYLOR: Well, obviously a two
12 story addition is going to be shading a lot more
13 than the one story extension houses there now. But
14 it doesn't go further back or up than a house in
15 that location by right could. It's my
16 understanding that the amount of shade that is
17 going to create for the adjacent lot is not an
18 undue amount. It is not more than the Zoning Code
19 itself anticipated.

20 CHAIRPERSON GRIFFIS: The neighbor in
21 the rendering that we're looking at which is also
22 in the record, if you are facing house, it's the
23 house on the left. That's a neighbor that's in
24 support of the application. They have seen the
25 plans and the renderings.

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1 MR. TAYLOR: That's correct.

2 CHAIRPERSON GRIFFIS: You don't find
3 that the privacy or enjoyment of the adjacent
4 neighborhoods would be somehow compromised.

5 MR. TAYLOR: Because it's on the lot
6 line, we can't put in windows facing the neighbor
7 to the north. So there's not going to be any
8 privacy issues with that property. To the back and
9 to the side, you are on an alley. So I think
10 there's no meaningful reduction of privacy for any
11 other adjoining property. The location of
12 where the house is now is similar to all the other
13 properties in the neighborhood. We're pretty far
14 back actually from the rear setback line. There's
15 a 20 foot, and we're 28 feet back from the rear lot
16 line. There's a minimal amount of fenestration on
17 the side. I don't see that as being any sort of
18 problem.

19 CHAIRPERSON GRIFFIS: Okay. In your
20 understanding as the architect and also
21 representing the property owner, the addition along
22 with the original building you don't find or have
23 any evidence that it would visually or in
24 character, scale, or materials intrude on the
25 street line or any views from the neighbors.

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1 MR. TAYLOR: The rendering was chosen
2 specifically to show as much of the addition as
3 would possibly be visible from the street. A
4 couple of steps further north or further south and
5 it's completely hidden. Because it's on an alley
6 it is visible. Again this is where Historic
7 Preservation Review Board and I got down to inches
8 of discussion. The height of it is actually a one
9 and a half story addition. The eve where it meets
10 the wall is slightly lower than full height of this
11 door. We pulled the roof down on it to minimize
12 that.

13 CHAIRPERSON GRIFFIS: I see. To be
14 clear, our regulations don't preclude it from being
15 visible. The language is actually "visually
16 intrude" which seems to put some negative
17 connotation. Then in the entire regulation section
18 that you have to satisfy it talks about scale and
19 character. So the point is does it fit in the
20 neighborhood.

21 MR. TAYLOR: Well, I designed it, so
22 naturally I think that it fits wonderfully.

23 CHAIRPERSON GRIFFIS: You need to say
24 that.

25 MR. TAYLOR: This is the view from the

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1 alley side which shows the addition relative to the
2 house. There was some debate with the Historic
3 Preservation Review Board about directions of
4 gables. Other suggestions were made by someone
5 from Capitol Hill Restoration Society as a way to
6 run the gables. The board members thought about
7 that and said no we like the way it is.

8 They felt that it was a strong addition
9 to the neighborhood that showed that you could do a
10 substantial addition to a small house in a way that
11 was sensitive and not overpowering and preserved
12 the general form of the original which is a little
13 shotgun. As you know, Historic Preservation has
14 grappled with that quite a bit in the past couple
15 of years. They had some concerns, and they felt
16 this addition met their concerns.

17 CHAIRPERSON GRIFFIS: Excellent. The
18 material of the existing building is wood siding.

19 MR. TAYLOR: It's wood siding. That's
20 correct.

21 CHAIRPERSON GRIFFIS: You have a
22 cement.

23 MR. TAYLOR: A cement fiber siding.
24 It's a paint grade material so that visibly it can
25 be made to match wood. You have probably dealt

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1 with this or seen it. It goes under the trade name
2 of Hardy Plank. It paints well, and it holds well.

3 CHAIRPERSON GRIFFIS: I think it's an
4 excellent alternative to vinyl siding.

5 MR. TAYLOR: That was never an option.

6 CHAIRPERSON GRIFFIS: Indeed. Very
7 well. That's the questions I have. Just a small
8 comment, when I was first reviewing this case, of
9 course I go to the drawings first, so I always look
10 at that to understand the project. I looked and I
11 thought -forgive me for saying this - that's a
12 miserable addition. Of course, I was looking at
13 the one story out front thinking that the two story
14 was the original house and then the original was
15 being built on. Although in special
16 exception 223 this Board does have full
17 jurisdiction over all of the design, so we could
18 meddle if we felt like it. However I don't think
19 in this case it's actually needed. Actually one of
20 the strongest points of it is the step in that you
21 made in terms of transition from the existing to
22 the new. That really helps facilitate each
23 standing alone.

24 With the addition, the shotgun existing
25 is helped quite a bit in terms of just siting on

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1 the lot but also giving it a little bit more
2 presence and massing on the site. That's all I
3 need to say with this. Other questions from the
4 Board at this time? Mr. Zaidain.

5 MEMBER ZAIDAIN: Yes, I have a question
6 regarding the side yard. Actually I will open this
7 question up to anybody who wants to answer it. I
8 think the situation we have before us, even though
9 it's under 223, is one that we have dealt with in
10 the past in the sense that this is a semi-detached
11 dwelling that's required to have a side yard on the
12 resulting free standing side.

13 We've had this problem before. This is
14 a similar situation in terms of what's existing in
15 other cases, i.e. Pritchard. This is not
16 Pritchard. I guess I'm struggling with if this
17 were a variance case why the five foot would be
18 required. It seems to me that it would have to be
19 eight. I just want to make sure I'm clear.

20 I know we're under 223, and this is
21 minorly relevant I guess I should say. When a
22 semi-detached dwelling has a common division wall
23 that's not a party wall. Correct? This is not a
24 party wall.

25 MR. TAYLOR: That's correct.

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1 MEMBER ZAIDAIN: That it's required to
2 have a side yard on each free standing side. R-4
3 there are no side yards required. So I'm wondering
4 where the five foot comes from. It seems to me
5 that I would read that R-4 is one of those zoning
6 regulations that says you are not required to have
7 a side yard but if you are it should be a minimum
8 of eight feet.

9 I'm getting a lot of perplexed looks
10 here. If I'm completely out of the realm of
11 understanding, please tell me. I think it's
12 important to understand because we get these semi-
13 detached dwellings that do not share any party
14 wall, but it's a free standing wall with no side
15 yard. What happens on the resulting free standing
16 side? For some Board Members that have been here
17 for a while that should ring some bells in
18 submissions we've had. I just want to make sure
19 I'm clear.

20 CHAIRPERSON GRIFFIS: That's probably
21 why you are not getting any comments.

22 MEMBER ZAIDAIN: Yes, maybe, I don't
23 know. I guess my first question is where is the
24 five foot side yard. Maybe I should wait and ask
25 this question of OP when they give their report.

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1 CHAIRPERSON GRIFFIS: Well, they are
2 certainly able to answer if they have answer if
3 they want to address that.

4 MR. TAYLOR: This is my reading of this
5 side yard and rear yard setback requirement in the
6 Zoning Code. There's a provision that states that
7 yes eight foot is the required side yard for a
8 detached or semi-detached dwelling.

9 MEMBER ZAIDAIN: Right.

10 MR. TAYLOR: There's also a provision
11 in that section that says in the case of a house
12 built before 1958 an extension may be made to a
13 house with a less than required side yard. You can
14 have a smaller side yard provided it's not less
15 than five feet. There's a dead minimum of five
16 feet.

17 MEMBER ZAIDAIN: I do recall that.
18 You're right. That settles my question. I have
19 some strong --

20 CHAIRPERSON GRIFFIS: I'm sorry, Mr.
21 Zaidain. What I was doing was trying to find that.
22 It is under 405.8. "In the case of buildings
23 built before May 1958, a side yard less than eight
24 feet wide, an extension or addition may be made to
25 the building provided that the width of the

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1 existing side yard shall not be decreased" - of
2 which this is not decreasing the side yard - "and
3 provide further that the width of the existing side
4 yard shall be a minimum of five feet."

5 MEMBER ZAIDAIN: Okay. That provided
6 the clarification I need. We've had some other
7 issues before the Board regarding whether or not
8 that side yard is required, how big it should be,
9 et cetera when it comes to semi-detached houses
10 that don't share a party wall. I saw the five
11 foot. I did not see that regulation in it. So
12 that explains my confusion. Thank you. I have no
13 other questions, Mr. Chair.

14 CHAIRPERSON GRIFFIS: Any other
15 questions from the Board?

16 MEMBER ETHERLY: Just two very quick
17 questions. Is there any plan to extend the
18 retaining wall? I notice from the pictures that
19 are provided in Exhibit 5 - and they are great
20 pictures - the retaining wall stops at a certain
21 point.

22 MR. TAYLOR: Right.

23 MEMBER ETHERLY: Is there any plan to
24 continue that to the end of the alley?

25 MR. TAYLOR: Toward the back you mean.

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1 MEMBER ETHERLY: Yes, sir.

2 MR. TAYLOR: I would hope so. At this
3 point, we are designing to meet concerns of boards.
4 We're not getting into any more issues than we
5 have to. I would love to. Quite honestly part of
6 it will be an issue of budget.

7 MEMBER ETHERLY: I understand. My
8 second question. I'm just curious. You really
9 can't see it on this illustration, but that's okay.
10 There's a dormer window that's just on the top
11 there.

12 MR. TAYLOR: That's correct.

13 MEMBER ETHERLY: What is that window
14 view from? Is that the second floor bathroom? I
15 note that there is also a closet up there as well.

16 MR. TAYLOR: What we're doing is
17 parking a bathroom in the middle. Again we will
18 have to massage that plan some to make that work.
19 It's a very small bathroom. Having a bathroom with
20 an intrusion into the head room, which is within
21 the amount that's allowable under code, but still
22 it's not fully eight feet the whole size of the
23 room. If we put the dormer in, we can get that
24 little part of the house up to eight feet and get
25 some light in. It will be above shoulder height so

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1 that it won't cause problems in the shower.

2 MEMBER ETHERLY: Excellent. Let's deal
3 with the privacy issue. As you are looking out
4 with regard to adjacent neighbors, that window
5 doesn't present any issue in terms of sight-lines
6 either into the bathroom from your privacy
7 standpoint but as well as going out.

8 MR. TAYLOR: No.

9 MEMBER ETHERLY: Okay. Thank you.
10 Thank you, Mr. Chair.

11 CHAIRPERSON GRIFFIS: Yes, Ms. Miller.

12 MEMBER MILLER: I was wondering if you
13 could just address the claim set forth in Exhibit
14 27 by Capitol Hill Restoration Society that you
15 miscalculated the lot occupancy.

16 MR. TAYLOR: Yes, we have addressed
17 that actually. What we did the first time, through
18 the first numbers you got was we didn't include the
19 little side yard that is less than five feet. The
20 definitions in the Zoning Code is any side yard
21 that's less than five feet, which is what we have
22 here, has to be counted toward the building area.
23 So we miscalculated the existing building size by
24 definition as well as the addition, so we had to go
25 back and recalculate the numbers.

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1 The other thing that required us to do
2 was to shave off about five inches of the width of
3 the addition to make sure that there were five feet
4 remaining beside that so that you didn't have to
5 count that or we would have been in trouble. It
6 actually increased the amount of the existing
7 building from 45 percent lot coverage to 56 adding
8 that 200 square feet of side yard.

9 It pushed the total area of the
10 building proposed up to 66 and change. We amended
11 the numbers in the application, and I dropped that
12 off with Mr. Nero. If there is any miscalculation
13 now, it's nickel and dimes not big numbers. So
14 we're within what we can ask you to give us.

15 MEMBER ZAIDAIN: It's below 70 percent
16 is what you are testifying.

17 MR. TAYLOR: Yes.

18 MEMBER ZAIDAIN: Has the Capitol Hill
19 Restoration Society seen those revised plans?

20 MR. TAYLOR: I haven't sent them
21 revised plans. They called me on Thursday and
22 brought this to my attention. I called Mr. Nero
23 and said what do I need to do to address this.

24 MEMBER ZAIDAIN: We're not requiring
25 you to resubmit to them. I was under the

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1 understanding that this letter came in, you
2 addressed the issue, and this is the amended
3 calculation sheet.

4 MR. TAYLOR: Is it a real mess? I'm
5 sorry. If it's a real mess, it's the amended
6 calculation sheet.

7 MEMBER ZAIDAIN: No, but I can read it
8 so it's fine. Thank you.

9 CHAIRPERSON GRIFFIS: Other questions?

10 MEMBER ZAIDAIN: Just as a matter of
11 speaking, I would clear the matter up with the
12 Capitol Hill Restoration Society and let them know
13 that you took care of the issue.

14 MR. TAYLOR: Well, I told them I would
15 give them credit for helping me prevent wasting
16 everybody's time today.

17 MEMBER ZAIDAIN: Okay. Thank you.

18 CHAIRPERSON GRIFFIS: Any other
19 questions? Anything further you want to illuminate
20 for the Board?

21 MR. TAYLOR: I'm satisfied.

22 CHAIRPERSON GRIFFIS: Okay. We'll come
23 back to you for closing remarks. Let's go to
24 Office of Planning which is Exhibit 25 in the
25 record. They are recommending approval, and they

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1 have a very thorough report. Good afternoon, sir.

2 MR. LAWSON: Good afternoon, Mr.
3 Chairman and Members of the Board. My name is Joel
4 Lawson. I'm a development review specialist with
5 the D.C. Office of Planning. Just very briefly,
6 the subject property is located in the Capitol Hill
7 Historic District. It's mid-block and fronts onto
8 9th Street, S.E. Directly to the south is an alley
9 and to the rear is a wider alley.

10 The property is currently developed
11 with a small shotgun type house. The existing
12 dwelling is not connected to the adjacent two story
13 house which provides a setback along the common lot
14 line. But it is considered a semi-detached
15 dwelling rather than a detached dwelling because
16 the Zoning Regulations define a dwelling as semi-
17 detached when one side wall is either a party wall
18 or a lot line wall as is the case here.

19 The owners wish to remove a small
20 existing back addition and construct a new addition
21 to the rear of the house. The overall style and
22 materials of the addition would match those of the
23 existing house. The proposed lot coverage would be
24 greater than existing resulting in a special
25 exception request pursuant to section 223. The

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1 addition was originally proposed to continue the
2 current slightly non-conforming setback line of the
3 house resulting in the special exception request
4 for side yard setbacks.

5 Subsequent to filing the report, OP was
6 informed that the calculations pertaining to lot
7 occupancy were done incorrectly and that a side
8 yard of less than five feet of width was required
9 to be included in lot coverage. In this case, by
10 OPs calculations, the existing side yard setback is
11 about 4.6 feet. So the existing lot occupancy is
12 about 60 percent. The proposed lot occupancy would
13 be about 73 percent under the former plan.

14 Section 223.3 permits by special
15 exception the lot occupancy of a maximum of 70
16 percent. As such, the Applicant has decided to
17 reduce the requested lot occupancy to approximately
18 66.7 percent by making the addition conform to the
19 five foot required setback. This is within the
20 amount for which the BZA can grant a special
21 exception. This also removes one special exception
22 request as the addition would provide the required
23 five foot setback. OP supports this change and
24 continues to feel that the addition meets the
25 section 223 test.

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1 It would have minimum impact on the
2 streetscape and in OP's opinion would add less of
3 an impact on air, light, and privacy for the
4 neighboring lot than a conforming solution would.
5 The change to increase the side yard setback would
6 add minimal impact on the design which has received
7 recommendations of approval from both the Historic
8 Preservation Review Board and ANC-6B.

9 No other district, department, or
10 agency has expressed opposition to the proposal.
11 As such, OP recommends approval of the special
12 exception request. This recommendation is
13 consistent with the Comprehensive Plan and
14 generalized line use map and would not undermine
15 the integrity of the Zoning Regulations. This
16 concludes my report. I'm available for questions
17 or clarification. Thank you.

18 CHAIRPERSON GRIFFIS: Great. Thank you
19 very much. One quick clarification in section --
20 First of all, do you have a copy of the Office of
21 Planning's memo?

22 MR. TAYLOR: Not with me.

23 CHAIRPERSON GRIFFIS: You have seen it
24 though. You have reviewed it.

25 MR. TAYLOR: Yes.

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1 CHAIRPERSON GRIFFIS: Very well. Just
2 for clarification, item number 2 in the graph
3 that's 405 which is the side yard. Is that
4 correct? I think it is. You say 401 then side
5 yard five foot minimum, and 401 is the minimum lot
6 dimension.

7 MR. LAWSON: I'm sorry.

8 CHAIRPERSON GRIFFIS: It's fine. I
9 just wanted to clarify that because actually what I
10 was looking at after I read 405.8 which dealt with
11 the side yards is the fact that to allow that you
12 have to have a five foot minimum which is what I
13 read. However 405 is covered under 223. That was
14 your understanding as you wrote this and reviewed
15 it. Correct?

16 MR. LAWSON: That's correct.

17 CHAIRPERSON GRIFFIS: Okay. In which
18 case, we're all set to go. Any other questions
19 from the Board Members at this time? Does the
20 Applicant have any questions of Office of Planning?

21 MR. TAYLOR: No, I'm fine.

22 CHAIRPERSON GRIFFIS: I could say it
23 very officially and procedurally. Do you have any
24 cross examination of the Office of Planning?

25 MR. TAYLOR: No, sir.

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1 CHAIRPERSON GRIFFIS: That usually
2 clears up what that is. In which case, again it's
3 an excellent report. If there's no other
4 clarifications or information needed, let's move
5 on. Oh, one quick question. Why do we have so
6 many agencies reporting on this one?

7 MR. LAWSON: The application was
8 referred to those agencies as a standard matter of
9 course.

10 CHAIRPERSON GRIFFIS: Right, as most
11 are. But why would we have responses?

12 MR. LAWSON: I think it's partly
13 because we're getting better at referring them and
14 even more so because we're getting better at
15 nagging them for responses.

16 CHAIRPERSON GRIFFIS: Interesting.
17 Okay. I thought this was a huge case coming in.
18 We have WASA. We have Fire. We have DHCD. You
19 guys are pretty important down there in Capitol
20 Hill.

21 MR. TAYLOR: I may have some questions
22 subsequent to this but not now.

23 CHAIRPERSON GRIFFIS: Okay. Well,
24 let's get through the government reports then you
25 can ask or you can give your information. I bring

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1 that up because we just note that all of those are
2 attached. Of course they are exhibits. ANC-6B,
3 what exhibit number is that? Do we have a report?

4 MEMBER MILLER: I have in my notes that
5 the ANC phoned in their support.

6 CHAIRPERSON GRIFFIS: You presented to
7 the ANC. Is that correct?

8 MR. TAYLOR: Yes.

9 CHAIRPERSON GRIFFIS: Did you get a
10 written letter from them?

11 MR. TAYLOR: We did not get a written
12 response from the ANC.

13 CHAIRPERSON GRIFFIS: Okay. Is the
14 Office of Planning aware of any written response.

15 MR. LAWSON: We're not aware of a
16 written response. I did speak to the chair of the
17 commission who indicated that the commission voted
18 to support the application. The chair indicated
19 that she would send in a written response, but I
20 never received one.

21 CHAIRPERSON GRIFFIS: Okay. Well,
22 there it is. That's all the government reports I
23 have attendant to this application unless other
24 Board Members are aware of others or the Applicant
25 is aware of others. Is there anyone here today

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1 attendant to Application 17042 to give testimony
2 either in support or opposition? You can come
3 forward at this time. If there is not anyone here
4 to give testimony, let's turn it over to you for
5 any closing remarks that you might have.

6 MR. TAYLOR: I'm pretty remarked out at
7 this point.

8 CHAIRPERSON GRIFFIS: That's okay.

9 MR. TAYLOR: I see no reason to delay.
10 The questions have all been asked that needed to
11 be aired out today.

12 CHAIRPERSON GRIFFIS: Okay. You
13 indicated that you might have a quick question.

14 MR. TAYLOR: It's a question about the
15 way the rules work for future reference that I
16 don't need to deal with right now. I can call Mr.
17 Lawson on my own time.

18 CHAIRPERSON GRIFFIS: Okay. That
19 sounds great.

20 MEMBER ZAIDAIN: I was informally
21 discussing with the Chair there for a second. You
22 say that there are revised plans where you shaved
23 off five foot of the addition.

24 MR. TAYLOR: Five inches.

25 MEMBER ZAIDAIN: Five inches.

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1 MR. TAYLOR: And all I did was change
2 the dimension that was indicated so that you have
3 in the record something that yielded the five foot
4 side yard.

5 CHAIRPERSON GRIFFIS: Right. We have
6 two land surveys. One has an indication of a five
7 foot.

8 MR. TAYLOR: That's correct.

9 CHAIRPERSON GRIFFIS: That is to deal
10 with the lot occupancy issue.

11 MR. TAYLOR: That's correct.

12 MEMBER ZAIDAIN: So the existing
13 setback went from roughly 4.6 to approximately
14 five.

15 MR. TAYLOR: It has to be a minimum of
16 five.

17 MEMBER ZAIDAIN: Minimum of five,
18 right. But that's the alteration.

19 MR. TAYLOR: That's correct. That's
20 the only change. We'll just squeeze everything in.

21 MEMBER ZAIDAIN: Okay. Thank you for
22 the clarification. Five inches and five feet are a
23 big difference.

24 MR. TAYLOR: Yes.

25 CHAIRPERSON GRIFFIS: Then for

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1 clarification in terms of procedure, if this was to
2 move ahead to a motion and approval, of course,
3 we're approving the plans that were in the record.

4 In order to facilitate that, we need to you put in
5 that plan. So if you would provide that into the
6 record if it's not already in.

7 MR. TAYLOR: I gave copies of that to
8 Mr. Nero. I dropped those off on Friday.

9 CHAIRPERSON GRIFFIS: I see.

10 MR. TAYLOR: They should be there. If
11 they are not, I can certainly make an extra copy.

12 CHAIRPERSON GRIFFIS: No, I have it.
13 I'm sorry. Just note when you go down to pull
14 permits for this, this is what they are going to
15 reference. So it won't change from what you show
16 here in terms of anything that would affect the
17 relief that was granted. Does that make sense?

18 MR. TAYLOR: I think so. In other
19 words, we're going to show them a five foot setback
20 on that side of the house and they are going to
21 check against that and not the 4.6.

22 CHAIRPERSON GRIFFIS: That's correct.
23 You are going to show the same footprint, the same
24 lot occupancy, same side yards as you represented.
25 I wouldn't imagine anything would be dramatically

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1 changing anyway. Very well. Anything else then?

2 Any other questions, clarifications,
3 comments at this time? If not, then I would move
4 approval of Application 17042 of Carol Miller for
5 the special exception under 223 to allow a two
6 story addition to the rear of an existing single
7 family dwelling at premises 518 9th Street, S.E. I
8 would ask for a second.

9 MEMBER ZAIDAIN: I second, Mr. Chair.

10 CHAIRPERSON GRIFFIS: Thank you, Mr.
11 Zaidain. I think it's pretty clear in the record
12 and full on this in terms of the special exception.

13 It was clear that this addition not only won't
14 impede the light and air use, enjoyment, or the
15 visual aspect of the neighboring and surrounding
16 area but will in fact provide a fairly nice
17 improvement to an existing structure of some
18 character.

19 Actually, it didn't come out but it's
20 pretty clear in the drawings that you are going to
21 have one heck of a nice alley elevation. So you
22 may be using that more than your front door. Who
23 knows? That's just my opinion. Any other comments
24 or deliberation on the motion at this time? If
25 not, I would ask all of those in favor of the

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1 motion signify by saying aye.

2 (Chorus of ayes.)

3 CHAIRPERSON GRIFFIS: Opposed?

4 (No response.)

5 CHAIRPERSON GRIFFIS: Any abstaining?

6 (No response.)

7 CHAIRPERSON GRIFFIS: Thank you.

8 Please record the vote.

9 MS. BAILEY: The vote is recorded as 5-
10 0-0 to approve the application. Mr. Griffis made
11 the motion. Mr. Zaidain seconded. Ms. Miller, Mr.
12 Etherly, and Mr. Hannaham are in agreement.

13 CHAIRPERSON GRIFFIS: Excellent. Thank
14 you very much. If you also have questions about
15 procedure, the Office of Zoning staff is incredibly
16 able to help you with that. So you can actually
17 stop next door or give them a call anytime.
18 Anyway, enjoy the afternoon. Thank you for your
19 patience.

20 MS. BAILEY: Is this a summary order,
21 Mr. Chairman?

22 CHAIRPERSON GRIFFIS: Yes, I have no
23 objection to a summary order. Ms. Bailey, when you
24 are ready.

25 MS. BAILEY: The next case is

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1 Application Number 17039 of Mr. and Mrs. John
2 McAdams, pursuant to 11 DCMR 3103.2, for a variance
3 from the building height and story limitations
4 under section 400, and a variance from the gross
5 floor area (GFA) restrictions of the Wesley Heights
6 Overlay District under subsection 1543.3, to allow
7 the attic dormers and additional GFA of an existing
8 single family detached dwelling to remain in the
9 Wesley Heights Overlay District/R-1-B District at
10 premises 2708 44th Street, N.W. The property is
11 located in Square 1340 on Lot 35. Please stand to
12 take the oath all those persons who will be
13 testifying in this case. Please raise your right
14 hand.

15 WHEREUPON,

16 PATRICIA MCADAMS, JOHN MCADAMS, AND ROSALIND
17 LAZARUS

18 were called as witnesses and, having been first
19 duly sworn, were examined and testified as follows:

20 MS. BAILEY: Thank you.

21 CHAIRPERSON GRIFFIS: Good afternoon.

22 MR. GELL: Good afternoon, Mr. Chairman
23 and Members of the Board.

24 CHAIRPERSON GRIFFIS: Jump right in.

25 MR. GELL: Thank you, Mr. Chairman.

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1 The case before you is a request for variances for
2 2708 44th Street, N.W. which is an area that faces
3 the park on the east side and is an area of fairly
4 substantial houses. The Wesley Heights Overlay
5 District has certain requirements that the Zoning
6 Administrator felt were not met in this case.

7 The house was built back in `98, was
8 finished in `99, and sold in `99. It wasn't until
9 sometime after that the Zoning Administrator
10 notified the builder that there were some
11 violations of the Zoning Code particularly with
12 respect to the number of stories on the building
13 and also the gross square footage. We don't know
14 what the builder did with that letter, but it never
15 got to the owner because at that point the house
16 had been sold. I guess the builder felt it wasn't
17 his problem.

18 So the owner wasn't aware back in `99
19 of any problems. There were a series of exchanges
20 of letters back and forth between Mr. Timmons and
21 the Zoning Administrator and council members and a
22 number of other people.

23 CHAIRPERSON GRIFFIS: Let me interrupt
24 you, Mr. Gell. The letter you just referenced in
25 1999 that the owners, your clients, didn't receive,

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1 was that an official designation from the DCRA, or
2 was it one of these communication letters?

3 MR. GELL: I'll take a look at the
4 letter.

5 CHAIRPERSON GRIFFIS: Is the letter in
6 the record now?

7 MR. GELL: It's in the record, yes.

8 CHAIRPERSON GRIFFIS: Then we've read
9 it.

10 MR. GELL: You have it. I think it was
11 in November.

12 CHAIRPERSON GRIFFIS: I thought you
13 were referencing a letter that was out there, but
14 you hadn't ever seen it.

15 MR. GELL: No, the letter I believe was
16 in November of that year, and the house was sold in
17 April.

18 CHAIRPERSON GRIFFIS: Right.

19 MR. GELL: So it was some time after.
20 As I said, there was an exchange of letters back
21 and forth because Mr. Timmons, rightly as it turned
22 out, was saying that the house had been built
23 improperly, didn't comply with the code. But it
24 wasn't until the end of last year that any
25 communication came to Mr. and Mrs. McAdams.

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1 That's three and a half years later
2 when they were copied on a letter which said that
3 there were problems with the house. Subsequently
4 they received an order - this was back in March -
5 telling them that they had to abate the violations,
6 specifically gross floor area and the numbers of
7 stories.

8 CHAIRPERSON GRIFFIS: Where are we with
9 the gross floor area?

10 MR. GELL: The two are tied in
11 together. Subsequently the Zoning Administrator
12 has determined that in fact the gross floor area
13 was not exceeded.

14 CHAIRPERSON GRIFFIS: Do we have that?
15 We have notes all over the record saying that DCRA
16 is trying to figure it out and they're going to let
17 us know.

18 MR. GELL: You should have that letter.
19 I'd be happy to give you the copy that I have.

20 CHAIRPERSON GRIFFIS: When did you get
21 it?

22 MR. GELL: What he says is that there's
23 5,600 square feet that's countable under the Wesley
24 Heights Overlay zone. They are allowed over 6,300.
25 So they are substantially below the gross floor

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1 area which prompted a letter from me to you asking
2 for a refund of the \$800 that we paid for the
3 variance.

4 We don't contest that the numbers of
5 stories was improper. The way the District counts
6 stories is you count at the grade in front of the
7 house. Indeed the grade is really at the garage
8 level, that is the basement level.

9 CHAIRPERSON GRIFFIS: Right.

10 MR. GELL: To get to the first story,
11 you have to walk up a flight of stairs. In the
12 back however, the grade is at the first floor level
13 so there's a substantial slope.

14 CHAIRPERSON GRIFFIS: Okay. Let me
15 just try to follow the whole chronology with this.

16 Then we have some specific things that we would
17 like you to address. Your resubmitting or
18 reclarification, the July 16, 2003 submission is
19 the calculations of the GFA. You have listed out
20 helpfully yours, the builders, and the Zoning
21 Administrator. What numbers are these taken from
22 for the Zoning Administrator? Is that tied to the
23 letter that we're going to get from DCRA?

24 MR. GELL: I have no idea how he
25 reached his conclusion, but he came out amazingly

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1 close to what I had. I had a few --

2 CHAIRPERSON GRIFFIS: When were they
3 done then? When did the ZA do it?

4 MR. GELL: Within the last couple of
5 days.

6 CHAIRPERSON GRIFFIS: I got you. So
7 conceivably it's the same numbers we're about to
8 get from the DCRA letter.

9 MR. GELL: The letter that you have is
10 from the ZA.

11 CHAIRPERSON GRIFFIS: Okay. I don't
12 have it yet. It's coming down. It's getting
13 logged in and copied.

14 MR. GELL: He's saying 5,600. I said
15 5,570.

16 CHAIRPERSON GRIFFIS: So these are the
17 numbers.

18 MR. GELL: And I have no idea how he
19 reached his. He didn't lay out his method.
20 Presumably he followed the method that I did
21 because that's what the overlay zone calls for. In
22 the Wesley Heights Overlay District, you count the
23 basement gross floor area first by excluding the
24 first 600 square feet of the garage. In this case,
25 the garage is less than 600 square feet so that's

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1 excluded. Then you take the area of the windows.
2 In this case, there were two not large windows.
3 You multiply that by five. That's your basement
4 gross square footage.

5 CHAIRPERSON GRIFFIS: Right. Is the
6 Board fairly clear on the square footage
7 calculations and the uniqueness of the overlay? If
8 not, we can spend time clarifying, but I think
9 we're pretty clear on that. What I'd like to do,
10 Mr. Gell, in trying to be a little expeditious with
11 this, I think the Board clearly acknowledges that
12 this is not your every day normal variance case.

13 We have actually spent quite a bit of
14 time looking at this and reading the record. What
15 I would like you to do is briefly go through the
16 tests for the variance and how you believe that
17 this makes it. Then, and I think more importantly,
18 I'd like you to discuss the estoppel and laches.
19 We will have some specific questions regarding the
20 estoppel and laches when we get there.

21 If you wouldn't mind, I know it will be
22 a little bit of a reiteration. But I'd like you
23 just to run through the uniqueness, practical
24 difficulty, and not impairing the intent or
25 integrity of the zone plan.

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1 MR. GELL: Would the Board prefer that
2 I not put on Mr. and Mrs. McAdams to talk about
3 their involvement in this?

4 CHAIRPERSON GRIFFIS: I'll leave that
5 up to you whether that supports your case. I think
6 the record is pretty clear on the chronology and
7 what's happened here. But I'm not precluding you
8 from doing that since they can be a very important
9 part. What I don't think we need to do is get into
10 a lot of discussion. I have no idea what they are
11 prepared to testify, but I don't need to hear a lot
12 about we didn't know and the miscommunication and
13 all of that. I think it's substantial on
14 the record of when notification was made. There
15 was at minimum three years that passed before the
16 owners of the house were even notified that there
17 might have been a problem, and then it became a
18 problem. So the foundation is there for that.
19 Board Members, if you feel differently. I think
20 that's the point of which we now need to decide.

21 I'll be quite frank. In my review of
22 the case - and I haven't heard the entire case yet
23 - I think that the case for a variance is perhaps a
24 little weak. However the case for estoppel and
25 laches is quite compelling.

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1 So that is a huge move for this Board
2 to entertain and to go in that direction as I know
3 you are aware. So what I want to do is really air
4 all of the issues that are going to need to be
5 involved. That's why I say I think we're going to
6 have some specific questions regarding that.

7 MEMBER MILLER: Mr. Chairman, this
8 might be a question of order, but I just want to
9 say if we are thinking about going in the direction
10 of estoppel and laches I would just want to make
11 sure that we have in the record exactly the
12 chronology of what the owners knew when and what
13 they relied on and didn't know.

14 Mr. Gell, you made reference to an
15 exchange of letters. I'm not sure we have the
16 exchange of letters or whether we need to. I want
17 to make sure if you intend us to have them that we
18 know exactly what they are. Also, you made
19 reference generally to three and a half later that
20 you were copied on the letter. I want to make sure
21 that I know exactly what that letter is.

22 MR. GELL: Yes, Mr. McAdams, when he
23 received the notice from the Zoning Administrator,
24 did ask for whatever was in their file. That's how
25 we got the letters. That's how we know that there

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1 were indeed some letters. The letters were not to
2 him or from him. He wasn't aware of them. But
3 they were really Mr. Timmons trying to get the
4 Zoning Administrator to cite the building for being
5 non-conformant.

6 We're agreeing that in fact there were
7 more stories than would be required. By the way,
8 the builder got approvals on all the plans - I
9 guess this is something else you are aware of -
10 including the plans that show the dormers. So the
11 Zoning Administrator right from the beginning had
12 approved the plans. They were built in accordance
13 with the plans that were approved.

14 It was subsequent to the sale that the
15 Zoning Administrator looked and decided that they
16 had not looked enough at the plans and in fact
17 there were four stories based on the way they
18 calculated. I want to be sure I don't leave
19 anything out. You would like Mr. McAdams to talk
20 to you a little bit about what he knew and when he
21 received notice.

22 CHAIRPERSON GRIFFIS: Well, conceivably
23 that's chronology you can put together.

24 MR. GELL: That's all in my
25 submissions, but I'd be happy to have him repeat

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1 it.

2 CHAIRPERSON GRIFFIS: I like a nice
3 ordered bullet pointed schedule. For instance, I'm
4 writing down events, of which we have a lot of. We
5 have two permits, the permit approvals, and we'll
6 get the dates on those. Let's make sure that we
7 have the letters that you keep talking about. We
8 have Exhibit 8 which is August 29, 2002. It is to
9 Parker Woolridge. It's on Timmons letterhead, and
10 it's signed by Wililam Timmons. That's one.

11 MR. GELL: We did not include all of
12 the letters that were in the file. What we
13 included were the ones that we thought were
14 relevant.

15 CHAIRPERSON GRIFFIS: Right. Let's
16 make sure that we have what you think we have.
17 Exhibit 11 is to Council Member Patterson from
18 Armando Larenko. We also have Exhibit 12 from DCRA
19 to Mr. Lipnick signed by also Mr. Armando Larenko.

20 I have the Densel Noble of July 21, 2003. You are
21 saying that this is the first document that went to
22 the McAdams.

23 MR. GELL: That's in November.

24 CHAIRPERSON GRIFFIS: No, July. No, it
25 would have been before that. So November 26 from,

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1 no, it says from Mr. McAdams.

2 MR. GELL: I think I have here all of
3 the ones that I submitted to you. Working
4 backwards it's November 26, 2002, November 21,
5 2002, August 29, 2002 from Mr. Timmons, the
6 inspection notes from the department along with
7 some pictures.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. GELL: The February 26 letter to
10 Mr. Timmons from Mr. Love in which he says he
11 doesn't see there's anything the District can do
12 about this.

13 CHAIRPERSON GRIFFIS: February 26,
14 2002?

15 MR. GELL: February 26, 2002.

16 MR. MOY: It's Exhibit 9, Mr. Chairman.

17 MR. GELL: In that letter, he says that
18 the property presents a quandary of retroactive
19 enforcement.

20 CHAIRPERSON GRIFFIS: Right.

21 MR. GELL: So the District even as late
22 as February 26, 2002 didn't believe that there was
23 anything they could do. So they didn't take
24 action. But then subsequently they did. There's
25 the December 21 letter to Kathy Patterson from

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1 David Clark. There's the January 21, '99 letter
2 from Larenko to Council Member Patterson and a June
3 18, '99 letter from Larenko to Lipnick. I believe
4 that's the first one that told him that the
5 District had decided that there were violations.
6 That was a few months after he had sold the
7 property.

8 CHAIRPERSON GRIFFIS: This is two
9 months after the sale of the property.

10 MR. GELL: The property was sold April
11 14, '99.

12 CHAIRPERSON GRIFFIS: Right.

13 MR. GELL: What I left out were all the
14 letters from Mr. Timmons saying why isn't the
15 District doing something. There are a slew of
16 those, but none of them went to the owners. They
17 all went to the District, one official or the
18 other.

19 CHAIRPERSON GRIFFIS: So there would be
20 no reason for this to show up in any title search.

21 It's a new house, but there wouldn't be anything
22 on the record that would have evidenced itself at
23 the sale of the property.

24 MR. GELL: Mr. McAdams has recently
25 refinanced, and there was nothing on the title even

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1 now. When did you refinance, Mr. McAdams?

2 MR. MCADAMS: Yesterday.

3 MR. GELL: Yesterday.

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. GELL: You have the petitions.
6 That was something else I was going to have the
7 McAdams talk to. It's the fact that nearly all the
8 neighbors have signed a petition. We're not aware
9 of anybody that wants to see the building changed.
10 The ANC voted 5-0 to approve it.

11 I shouldn't testify, but the chairman
12 of the ANC said he heard from Mr. Timmons just
13 before the meeting and that Mr. Timmons was
14 satisfied that we were doing the right thing and
15 had no problem with the variance. I think Mr.
16 Timmons was simply concerned that if something was
17 going to happen that was different from what the
18 Wesley Heights Overlay District permitted that it
19 be done properly. This is why we're pursuing this
20 application.

21 CHAIRPERSON GRIFFIS: Okay. Very well.

22 Let's have you speak directly to the estoppel
23 first. Then we'll go to laches. Then we'll go
24 into the quick variance. Your submissions for the
25 variance are fairly clear as are the others. But I

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1 do think we need to invoke a little more
2 information on this.

3 One of the things we just talked about
4 is clearly nothing would show up in title search or
5 in closing or as just testified refinancing. So
6 there was an act of good faith that everything was
7 okay at least in regards to zoning. What other
8 issues address that issue? Are there any other
9 facts that revolve around that? It's hard to have
10 additional facts of there was no evidence of
11 anything wrong.

12 MR. GELL: Give me one second.

13 CHAIRPERSON GRIFFIS: Sure.

14 MR. GELL: On the estoppel issue, the
15 major case in this area is Wieck versus the
16 District of Columbia Board of Zoning Adjustment.
17 It's a '77 case decided in '78. In the Wieck Case,
18 that's the test for estoppel. That is (1) a party
19 who is acting in good faith, (2) acting on
20 affirmative acts of a municipal corporation, (3)
21 makes expensive and permanent improvements and
22 reliance there on, (4) the equity strongly favor
23 the party invoking the doctrine, and that of course
24 the reliance of the party must be justifiable.

25 Clearly the McAdams are acting in good

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1 faith. I think even the Board recognizes that.
2 Clearly there were affirmative acts of a municiple
3 corporation in approving the permits. The builder
4 went and made the improvements and in fact built
5 the building in reliance there on. Now I can't
6 speak to the builder. We don't have him here. I
7 have not talked with him. We're not trying to
8 defend the builder in any way here. But we also
9 haven't seen evidence that the builder acted in bad
10 faith.

11 We think the equity strongly favor the
12 party envoking the doctrine. The reliance on a
13 building permit was justifiable. The District
14 Zoning Office takes on the responsibility of
15 checking all of the plans and making sure that they
16 do comply. We think it's justifiable to rely on
17 that unless there was some other notice at some
18 point to the contrary.

19 CHAIRPERSON GRIFFIS: Very well. Is
20 Mr. McAdams able to answer some of those points
21 also? It would be good to have him introduce into
22 evidence his testimony about acting in good faith.

23 I think that's a good idea.

24 MR. GELL: Let me at this point invite
25 him to come forward and Ms. McAdams if she would

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1 like to as well.

2 MR. MCADAMS: My name is John McAdams.
3 I'm pleased to be here. I'm not really pleased to
4 be here.

5 CHAIRPERSON GRIFFIS: That's okay. We
6 like honesty.

7 MR. MCADAMS: Obviously whenever you
8 are buying a home, you work through brokers. That
9 is the process we went through. We were
10 transferred here. We weren't familiar with
11 Washington when we moved here. This is our first
12 purchase in Washington having moved from Chicago.

13 So we worked with multiple brokers over
14 time. We visited, primarily my wife, probably 100
15 homes. You'll remember the market in '98 and '99
16 was extremely hot. So it was hard to find a home
17 and then be the lucky bidder. So we had a high
18 degree of reliance on our brokers finding homes and
19 showing them to us and being led down the way that
20 way.

21 CHAIRPERSON GRIFFIS: Was there any
22 indication when you put a contract on this or were
23 looking at it or was there any even anecdotal
24 information that said this is a house that's
25 saddled with an issue? Nothing at all was ever

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1 given to you.

2 MR. MCADAMS: No, when we first visited
3 the house, we were with a realtor. The builder,
4 Billy Lipnick, was actually there. He showed us
5 around. We literally bought it on the spot.

6 CHAIRPERSON GRIFFIS: So from that time
7 seeing it even going through closing, the builder
8 never disclosed that there were these letters going
9 back and forth or that there might be an issue.

10 MR. GELL: The letters didn't start
11 until after the sale. The first letter came some
12 months later.

13 CHAIRPERSON GRIFFIS: That would be
14 first indication that the builder had that there
15 was somebody looking at this as problematic.

16 MR. GELL: That's right. The file that
17 we were provided with has nothing to Lipnick before
18 that time. Now there was another issue that had
19 been brought to the attention of the Zoning
20 Administrator. That had to do with the siding of
21 the house. Lipnick was told that he had to move it
22 back which he did. So he complied with that order,
23 but there was nothing about the dormers or the top
24 story or anything like that.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MS. MCADAMS: I'd like to add to the
2 situation. When I spoke to the builder, right
3 after we had purchased the home, I asked him why he
4 didn't put closets in the attic. He said because
5 it's really not set up to be a bedroom space. So
6 that was one issue.

7 The second issue was that I asked the
8 builder for a set of plans on the house. I said
9 may I have them because if there needs to be an
10 electrical problem fixed or plumbing problem that
11 it would be very helpful to have a set of plans.
12 He said our company's policy is that we do not give
13 out any set of plans to you. I said why is that.
14 He said that's just our company policy. So we
15 never had a set of plans to our home. That was
16 another issue.

17 CHAIRPERSON GRIFFIS: Okay.

18 MS. MCADAMS: But I might add thirdly
19 that when you are in the process of moving your
20 life is very hectic. I had a daughter who was a
21 teenager. My push was to move into a house, to get
22 settled, and to spend as much time as I could with
23 her because it was going to be over in four years.
24 So I wasn't particularly focusing on problems
25 within the house.

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1 CHAIRPERSON GRIFFIS: Right. How
2 familiar were you with D.C. zoning and looking at
3 these houses?

4 MS. MCADAMS: Well, any house that I
5 looked at really was a much older house that needed
6 renovation. I can't tell you. I think my
7 husband's wrong. I think I looked at more than 100
8 homes.

9 CHAIRPERSON GRIFFIS: But did you have
10 any familiarity with D.C. zoning? If you walked up
11 to this house, could you have said according to the
12 D.C. Zoning Regulations this is clearly four
13 stories?

14 MR. MCADAMS: If I could answer that --

15 CHAIRPERSON GRIFFIS: Actually let me
16 just investigate something briefly here.

17 MS. MCADAMS: No.

18 CHAIRPERSON GRIFFIS: When you said
19 that the builder indicated that attic level was not
20 set up for bedrooms, how did you understand that to
21 be, that money wasn't expended to finish off that
22 level?

23 MS. MCADAMS: Well, at least coming
24 from Chicago, I know that a room is considered an
25 addition or whatever you want to call it if it has

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1 closet space to it. If it doesn't have closet
2 space, it's really not considered a viable room.
3 So that was my question to him of why didn't you
4 put a closet in here so it could become a viable
5 space.

6 CHAIRPERSON GRIFFIS: What does
7 "viable" mean?

8 MS. MCADAMS: For me, it would be --

9 CHAIRPERSON GRIFFIS: No, for Chicago
10 building or zoning laws.

11 MS. MCADAMS: Usable. My space in my
12 attic --

13 CHAIRPERSON GRIFFIS: You mean usable
14 as a bedroom or usable as any room. Every room to
15 be usable has a closet.

16 MS. MCADAMS: No, well, I guess I
17 wanted some storage space not open space. So for
18 me, it had to be practical.

19 CHAIRPERSON GRIFFIS: Okay.

20 MS. MCADAMS: It was just open. It is
21 open.

22 CHAIRPERSON GRIFFIS: What I'm trying
23 to understand is what was your understanding coming
24 after the builder indicated that he didn't put
25 closets in that top level. Your thought was --

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1 MS. MCADAMS: Gee, I would like to have
2 some storage here to put something away in.

3 CHAIRPERSON GRIFFIS: That's where he
4 let the carpenter stop and didn't want to pay him
5 to build closets. Or was there a fundamental
6 reason why closets weren't built on that level?

7 MS. MCADAMS: I asked where's the
8 storage. Our house is an open house. It's all
9 open. There's very little storage in our house.

10 CHAIRPERSON GRIFFIS: I see.

11 MS. MCADAMS: Everything is open. You
12 go from the first floor to the attic. It's not
13 like an older home. Older homes are more
14 compartmentalized.

15 CHAIRPERSON GRIFFIS: I have an older
16 home, and I don't have a lot of closets.

17 MS. MCADAMS: Right.

18 CHAIRPERSON GRIFFIS: Nonetheless, I
19 understand your point.

20 MS. MCADAMS: And you would think in a
21 newer home you would have more closet space, but I
22 didn't.

23 CHAIRPERSON GRIFFIS: I see. So your
24 concern in looking at that was more how you are
25 going to use it. You wanted storage. Why weren't

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1 closets built on that level?

2 MS. MCADAMS: Right. How would I use
3 the space?

4 CHAIRPERSON GRIFFIS: I'm sorry. I
5 interrupted you. You were going to say something,
6 Mr. McAdams.

7 MR. MCADAMS: I really don't have
8 anything to add. My point was we don't know the
9 zoning laws here. I can't say we really know the
10 zoning laws in Chicago. In looking at various
11 homes throughout Washington and particularly in
12 Wesley Heights to my eye anyhow this didn't appear
13 to be out of line with other homes.

14 CHAIRPERSON GRIFFIS: Okay. That
15 brings up an excellent point. Mr. Gell, can I have
16 you turn off your mic so that we don't have
17 feedback? I'm going to have you guys leave your
18 mics on. You did most of the looking at these
19 houses. How many did you look at in this
20 neighborhood adjacent to this area?

21 MS. MCADAMS: In Wesley Heights?

22 CHAIRPERSON GRIFFIS: Yes.

23 MS. MCADAMS: I in fact looked at two
24 other homes.

25 CHAIRPERSON GRIFFIS: In looking at

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1 your houses and the profile you were giving your
2 brokers, it was analogous or they were similar in
3 terms of square footage and lot size, not exact,
4 but you were looking for a 5,000 square foot house.

5 MS. MCADAMS: We actually did not give
6 our brokers square footage idea of what we were
7 looking for.

8 CHAIRPERSON GRIFFIS: Let me ask it a
9 different way then. How many houses did you look
10 at that were similar to this one, and did you see
11 similar situations in terms of utilization of
12 floors?

13 MS. MCADAMS: Okay. We never looked at
14 a house this large.

15 CHAIRPERSON GRIFFIS: Large but just in
16 terms of floor layout, was there something outside
17 of size that struck you as terribly unique about
18 this house?

19 MS. MCADAMS: Yes, it was new and it
20 was finished. I have in the past renovated five
21 homes. They have all been old homes, and I know
22 what it is like to go through renovation. We
23 started on that path in Washington. All the homes
24 that we looked at were all old.

25 As a matter of fact, the way that we

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1 bought this home was that we were going to make
2 another bid on a home in Wesley Heights because it
3 was still on the market. I was so stunned that it
4 was still on the market. I mentioned the home to
5 the realtor. To the realtor, I said as a back up
6 let's look at two or three other homes that are for
7 sale in the neighborhood so that we have some idea
8 of what's comparable. The home that we looked at
9 in size was not comparable, but it had appeared to
10 me to be the most finished home in the sense that I
11 wouldn't have to hire a contractor to take out the
12 kitchen, to take out a bathroom.

13 CHAIRPERSON GRIFFIS: Okay. But in
14 terms of the comparables then on other houses you
15 looked at, the utilization of floors --

16 MS. MCADAMS: We didn't look at any
17 other house comparable to ours. This was the first
18 house and only home that we had seen at this size
19 and I might add price. We were not in the price
20 range of the house that we bought when I did all my
21 looking.

22 CHAIRPERSON GRIFFIS: When you first
23 saw this driving up to the house, did this house
24 seem out of character to you for the neighborhood?

25 MS. MCADAMS: No, what I was really

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1 focusing on were the trees and the landscaping.

2 CHAIRPERSON GRIFFIS: Okay. Good. I
3 think I've gone as far as I can with those. Do you
4 have anything to add, Mr. McAdams?

5 MR. MCADAMS: No.

6 CHAIRPERSON GRIFFIS: All right. As I
7 understand your testimony, essentially you went
8 about it in a normal course of action of getting a
9 broker and looking at hundreds of houses. It was a
10 hot market. There were different levels and
11 variances of houses conditions and such. You found
12 this, and it didn't seem that odd for the
13 neighborhood or obviously for the price because you
14 bought it or the utilization of the space. There
15 was no other indication that there might have been
16 something in error regarding this building. Is
17 that correct?

18 MS. MCADAMS: Yes.

19 CHAIRPERSON GRIFFIS: In terms of the
20 affirmative acts of the municiple corporation, Mr.
21 Gell, you have addressed most of it. It really
22 goes back to the builder in terms of building this.

23 I think I could expand on the record at this point
24 that the McAdams had a reliance on the municipal
25 corporations act that had a new house built. Is

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1 that what you are proposing today in the record?

2 MR. GELL: Would you repeat that
3 please?

4 CHAIRPERSON GRIFFIS: That the reliance
5 in terms of the McAdams on the affirmative acts of
6 the municipal corporation of which they would have
7 relied would have not been directly to them. They
8 were not relying specifically on the act but had
9 basis for their faith in the fact that the house
10 was new, recently completed, and therefore would
11 have had the assumption that it was approved by
12 municipal acts.

13 MR. GELL: I think more than that. Had
14 the Zoning Administrator discovered his mistake,
15 that would have been made known to the builder. I
16 think the builder would have had to disclose to the
17 purchaser that there was indeed a problem. As it
18 was, I don't know of any evidence that shows that
19 he had a reason to believe that there was a problem
20 at the time that he sold the house.

21 So the affirmative act also comes in a
22 failure or a lack of any notice that indeed the
23 Zoning Administrator had a problem with the house.

24 More than that, had Mr. McAdams or the title
25 company or anybody else looked at the plans that

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1 were on file down at the DCRA, they would have seen
2 that the Zoning Administrator had signed off on the
3 original plans and the revisions. So there
4 certainly is an affirmative action in the respect
5 that had there been anything other than that they
6 would have had notice and would have acted
7 accordingly.

8 CHAIRPERSON GRIFFIS: Okay. Mr. Gell,
9 do you want to direct witnesses or point us in the
10 record of expensive and permanent improvements that
11 the reliance is based on?

12 MR. GELL: Mr. McAdams said something
13 when you were talking. I'm sorry.

14 CHAIRPERSON GRIFFIS: The third point.
15 Just reiterate again how expensive and permanent
16 improvements were made on the reliance of these
17 acts.

18 MR. GELL: Well, the house sold for
19 nearly \$2 million. Indeed, according to the
20 advertisement, it was supposed to have 7,000 square
21 feet. That's also in the record. Obviously it's
22 substantially less than that. I don't know if
23 that's an answer to your question or not. Perhaps
24 I didn't understand it.

25 CHAIRPERSON GRIFFIS: Well, what other

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1 permanent improvement costs were put into it? For
2 instance, why isn't the argument on that the house
3 could easily be sold?

4 MR. GELL: The house can be sold now?

5 CHAIRPERSON GRIFFIS: Yes, if it found
6 that the house was purchased on the thought that
7 they had this additional story that they were going
8 to utilize, as they may be doing now, and they find
9 that's not a livable situation, could they not
10 regain any of their investment by reselling it?

11 MR. GELL: There are a number of ways
12 that I would say that they would not come out
13 whole. The one obvious question is why can't they
14 sue the builder for the trouble he's caused.
15 That's a very speculative situation. He's going to
16 rely on laches and estoppel just as we are
17 asserting laches and estoppel.

18 I can't say now that the McAdams are
19 going to, will definitely, are guaranteed a win in
20 a suit with a builder. So we're left with the fact
21 that the McAdams may very well be the only ones to
22 lose in this situation. If they were to sell the
23 house and they didn't have this zoning relief, they
24 would have to sell it with an understanding on the
25 buyer that there were these problems which means

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1 they would get far less money than they would have
2 gotten had they been able to sell the house with
3 the relief.

4 CHAIRPERSON GRIFFIS: What's your idea
5 of what this is really talking about in terms of
6 estoppel? Is it not the actual, as it states,
7 permanent improvements one made to a property?

8 MR. GELL: The permanent improvement
9 was the fact that the house was built in accordance
10 with the plans that had the dormers.

11 CHAIRPERSON GRIFFIS: Okay. Well,
12 there it is. If the McAdams wouldn't mind sitting
13 at the table because this is much more legal
14 argument than normal for a variance. Let me just
15 state out first of all the Board, in order to make
16 a decision and deliberate on this, needs to ask all
17 sorts of questions.

18 So it may come across that we're going
19 in one direction. It is not worth assuming what
20 direction we're going to because we have to explore
21 all these. I may be talking to two attorneys, so I
22 don't need to explain all that. But I am not one,
23 so I often find great intrigue with this.

24 It's important for us to flush out both
25 sides of these arguments. That's why obviously Mr.

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1 Gell is here to assist you with that. This may be
2 pushing the realm of it, but was it a permanent
3 situation or improvement to purchase this house and
4 to relocate into Washington, D.C.?

5 MS. MCADAMS: Yes.

6 MR. MCADAMS: The reason we came here
7 was a job transfer. So we were coming to
8 Washington and chose to live in the District.

9 CHAIRPERSON GRIFFIS: So someone
10 indirectly one might assert that there was an
11 expensive and certainly substantial change or
12 improvement in terms of purchasing a building that
13 was already built. I think Mr. Gell brought out a
14 very important point in that the permanent
15 improvement was to build the structure itself.
16 That allowed you to have the opportunity to move
17 into it which would have gone back to the reliance
18 on the municipal actions. Ms. Miller, did you have
19 questions?

20 MEMBER MILLER: Yes, could you confirm
21 to me the date that you purchased your house?

22 MR. MCADAMS: April 14, 1999.

23 MEMBER MILLER: When was the first time
24 that you had any notice that there was a problem
25 with the zoning?

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1 MR. MCADAMS: Official notice, I can't
2 tell you the date. I believe it was November `02.

3 MR. GELL: The one you were copied on
4 was November `02.

5 MR. MCADAMS: In November `02, there
6 was a letter written to Mr. Timmons that I was
7 copied on which gave me notice, if that's official
8 notice. But nothing was addressed to me at that
9 point.

10 MEMBER MILLER: Could you state for the
11 record who Mr. Timmons is?

12 MR. MCADAMS: I'm sorry. Mr. Timmons
13 is a neighbor who has been active in informing the
14 city of the potential zoning violations.

15 MEMBER MILLER: I'm sorry. A neighbor?

16 MR. MCADAMS: He's a neighbor.

17 MEMBER MILLER: Who what?

18 MR. MCADAMS: He's the one who has
19 written to the city, or whoever he wrote to, the
20 Department of Consumer and Regulatory Affairs.
21 He's been writing to them about the house.

22 MEMBER MILLER: So was he a neighbor
23 who had a problem with the house?

24 MR. MCADAMS: He lives on Garfield
25 about two and a half blocks away. He doesn't have

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1 a specific problem with the house itself as far as
2 impacting his living.

3 MEMBER MILLER: What was his problem?
4 What was his interest in it?

5 MR. MCADAMS: You have to ask Mr.
6 Timmons.

7 MS. MCADAMS: If I may just comment on
8 this situation, when I realized that we were
9 notified of a problem with our home, first of all,
10 we received a phone call that there was a problem
11 with our house.

12 MEMBER MILLER: Okay. I want to just
13 make sure I have the chronology. April 14, 1999
14 you buy the house.

15 MS. MCADAMS: Right.

16 MEMBER MILLER: Then the letter from
17 Mr. Timmons is November 2002.

18 MR. MCADAMS: I have a copy of that
19 letter right now. The letter addressed to Mr.
20 Timmons that we were copied on is dated November
21 21, 2002.

22 MEMBER MILLER: Okay. Then you started
23 to say, Ms. McAdams, that you got a phone call
24 earlier.

25 MS. MCADAMS: I received a phone call

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1 earlier - and I can't tell you when - to tell us
2 that we were going to receive a letter that
3 notified us that there was a problem with our home.

4 I tried to ask the question I don't understand why
5 there's a problem and who is saying that this
6 problem is caused. The woman that answered the
7 question - and I don't know her title --

8 MR. MCADAMS: Dorris Woodridge.

9 MS. MCADAMS: Dorris Woodridge.

10 MEMBER MILLER: Excuse me. Dorris
11 Woodridge, is she the one who made the phone call
12 to you that you are talking about?

13 MS. MCADAMS: Yes. I said who is
14 complaining, I don't understand this. She went
15 through the issues. She said I cannot tell you the
16 person's name until you are officially cited. I
17 was extremely upset. I'm sorry to bore you with
18 this, but I think it's an important point.

19 CHAIRPERSON GRIFFIS: Let me just
20 interrupt. I would answer the question directly,
21 and we'll get through this a lot quicker. What we
22 need to know is more of timing. We'll get into
23 substance. What year was this that the call came?

24 You said it was earlier than the November 21, 2002
25 letter.

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1 MS. MCADAMS: Yes, maybe a month
2 before.

3 CHAIRPERSON GRIFFIS: Okay. So we're
4 talking whatever it is.

5 MS. MCADAMS: It was a warning call
6 that we would be receiving a citation.

7 CHAIRPERSON GRIFFIS: But you didn't
8 talk about the substance or anything.

9 MS. MCADAMS: Right.

10 MEMBER MILLER: But the November letter
11 is not the letter she was referring to. Is it?

12 MS. MCADAMS: I don't know. It was
13 when we were first getting a visit from the Zoning
14 Board to come to our house. They wanted to enter
15 our house to look at our house to see what was
16 wrong with it.

17 CHAIRPERSON GRIFFIS: Okay. We'll make
18 one clarification for the record. The Zoning Board
19 that you are in front of doesn't have a team that
20 goes and inspects but DCRA does. That's who was
21 looking at your house.

22 MS. MCADAMS: Okay. I'm sorry.

23 MEMBER MILLER: In this phone call from
24 Dorris Woodridge, she said you would be getting the
25 letter. She couldn't tell you who was making the

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1 complaints.

2 MS. MCADAMS: Right.

3 MEMBER MILLER: Did she also say that
4 you would be getting a visit by somebody dealing
5 with zoning in the District government?

6 MS. MCADAMS: Yes, she said someone has
7 to come and inspect your home.

8 MEMBER MILLER: Did someone do that?

9 MS. MCADAMS: Yes.

10 MEMBER MILLER: When was that?

11 MS. MCADAMS: I can't tell you. It's
12 been so long ago. I didn't keep a diary.

13 CHAIRPERSON GRIFFIS: Mr. Gell, is that
14 the inspection report that we have?

15 MR. GELL: Yes, I believe it is.

16 CHAIRPERSON GRIFFIS: Which would have
17 been 8/13/02. This is the note that makes some
18 difficulty in interpreting because there seems to
19 be a word scratched out.

20 MR. GELL: That's correct. But this
21 notice of violation says the inspection was on
22 November 18, 2002. I have another correction to
23 the record. I don't have a copy of the notice that
24 Ms. Woodridge was talking about, but there's a
25 reference in the letter that we were copied on.

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1 In fact, this is a letter back to Ms.
2 Woodridge from Mr. McAdams acknowledging the notice
3 of violation November 18. We're still talking
4 about a week or two. This is at the end of 2002.
5 So there was a notice of violation apparently on
6 November 18. That was the same day as the
7 inspection. That's when Mr. McAdams asked Ms.
8 Woodridge to send him copies of the file.

9 MEMBER MILLER: When did you get the
10 notice of violation?

11 MR. GELL: It was November 18.

12 MEMBER MILLER: I'm sorry. Ms.
13 McAdams, I assume you were the one who was given
14 the notice.

15 MS. MCADAMS: I was the one who signed
16 it, so I let the person into the house. They came
17 with a piece of paper in order for us to come to
18 the house you have to sign it. So I assume
19 whatever date it was. I didn't get a copy.

20 MR. MCADAMS: I'm looking at some form
21 that's dated November 18 that says date of notice.

22 MEMBER MILLER: Would it be fair to say
23 that November 18 notice of violation was your first
24 official notice that your house was in some type of
25 violation?

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1 MR. MCADAMS: First official written
2 notice, yes.

3 MEMBER MILLER: Okay. So we have that
4 established. Is there a time that you had first
5 unofficial notice?

6 MR. MCADAMS: Well, this phone call
7 that preceded it. I would call that an unofficial
8 notice. It's when we were told we might or might
9 not get an official notification. It was not
10 confirmed.

11 MS. MCADAMS: But my point is when I
12 received this I asked Ms. Woodridge if she could
13 name the complainer. I said who is doing this,
14 what's the point. She said she couldn't do it. I
15 asked if other homes had been cited as well as
16 mine. She said yes they had been. I said can you
17 at least give me the addresses. She said I can
18 give you one address. She gave me one address. I
19 walked by the house. It was a new home.

20 Then there was another new home built
21 across the street. I knocked on the door of the
22 new home and asked were you cited by this governing
23 body. They said yes we were. My point in bringing
24 this up is that any of the new homes that were
25 built in our area were cited. We just happened to

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1 be one of the new homes.

2 MEMBER MILLER: So you were one of
3 several homes were cited.

4 MS. MCADAMS: Yes, well there were
5 three new homes --

6 MR. GELL: We really don't know the
7 reasons they were cited. Ms. McAdams is obviously
8 giving you her experience. I'm not sure how
9 relevant it is to the fact that they got their
10 notice three and a half years after they bought the
11 house.

12 MS. MCADAMS: Right.

13 MR. GELL: I think we've established
14 that every which way.

15 MEMBER MILLER: Let me ask you this
16 just to stick to the elements we are looking at.
17 I'd like to ask the McAdams how they would say they
18 would be prejudiced if they don't get the relief
19 that they are asking for here.

20 MR. MCADAMS: Well, I'd personally feel
21 very much as a victim. I bought a home in good
22 faith. I spent I think a large sum of money to do
23 that. I had lawyers who checked it for the
24 closing. I filed immediately with the city to make
25 sure that the title changed. I had no

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1 notification. I feel as though I have been harmed
2 that this comes up at this stage of the game.

3 I believe the home fits into the
4 community well. I think it is an attractive home
5 physically. It is not out of line with the other
6 homes in the area, although I understand the
7 technicality that we are dealing with here. So I
8 feel harmed, prejudiced, and outraged over the
9 whole thing to be honest with you.

10 MEMBER MILLER: It may be obvious to
11 you, but can you articulate for the record how
12 exactly you are harmed?

13 MR. MCADAMS: I am harmed if there has
14 to be any corrections done to this home. I don't
15 know what action would be taken. But to the extent
16 that there is a requirement that action be taken to
17 adjust the home in any way, shape, or form, that
18 will be an expensive proposition I imagine.
19 Therefore I will be harmed out of pocket.

20 MEMBER MILLER: Thank you.

21 MR. GELL: In his letter, the Zoning
22 Administrator suggests that the problem is the
23 dormers. So presumably the dormers would have to
24 be removed in order to change that from a story
25 to not a story. It would not require reducing the

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1 size of the house because once it's not counted as
2 a story it's simply a three story house with a
3 gross square footage that's permitted in that
4 district. So the expense would be in the labor and
5 materials and so forth of removing the dormers.
6 Obviously it's also in the loss of value to the
7 house and loss of the use of a great deal of that
8 house.

9 MR. MCADAMS: If I can add to loss and
10 value, the resale value of the house would be hurt
11 because the aesthetics of the house would be
12 changed if anything were done to those dormers.
13 That would also be damaging to the whole
14 neighborhood if the value of that home went down.
15 So I think I'm injured financially for the cost of
16 any changes and for the reduction in the market
17 value of the house. I think the neighborhood is
18 equally hurt, not out of pocket for repairs but
19 certainly for the value of the property within the
20 immediate area.

21 CHAIRPERSON GRIFFIS: Okay. Very good.
22 Additional questions, Ms. Miller?

23 MEMBER MILLER: No.

24 CHAIRPERSON GRIFFIS: Any other
25 questions from the Board? Let's move on very

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1 quickly then. Let's go to the Office of Planning
2 report. We have quite a bit of what they are
3 putting in. If they would like to introduce
4 themselves and highlight anything in their report.

5 MS. ROBERTS: Good afternoon, Mr.
6 Chairman and Members of the Board. I'm Maxine
7 Brown Roberts representing the Office of Planning.

8 Here's our analysis of this application. We
9 looked at or concentrated on the variance portion.

10 The estoppel we're not involved in since that is
11 something outside of our purview. So we did not
12 comment on that portion. The variance, we
13 do not think from the submissions that the
14 Applicant has met all the provisions of the
15 variance test. Therefore based on those things,
16 our report recommended denial. We did have some
17 conversations with DCRA. However it is not our
18 opinion that we got any direction from them on how
19 this case could be resolved. Therefore based on
20 that, we are looking at recommending denial of the
21 variance. If we had additional information, we
22 would definitely take a second look at it.

23 CHAIRPERSON GRIFFIS: What sort of
24 additional information would you be looking for?

25 MS. ROBERTS: Some of the calculations,

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1 a little bit more explanation on what were some of
2 the things that -- In an interpretation from DCRA,
3 they did say something about the definition of what
4 a top story is from another story. I don't think
5 the Office of Planning got a handle on that.

6 CHAIRPERSON GRIFFIS: Okay.

7 MS. ROBERTS: We did try to get some
8 additional information from them. We did ask them
9 to come here today, but they declined. So we're
10 turning over the recommendation to the Board.
11 Thank you, Mr. Chairman.

12 CHAIRPERSON GRIFFIS: Good. Thank you
13 very much. We appreciate it. Mr. Gell, any cross
14 examination of the Office of Planning?

15 MR. GELL: Yes, thank you, Mr.
16 Chairman. Has the Office of Planning now concluded
17 that the gross floor area is less than what is
18 permitted in Wesley Heights under the overlay zone?

19 MS. ROBERTS: We were depending on DCRA
20 to tell us whether that was correct or not. We
21 didn't receive this letter that they sent us. It
22 would take us another day or so. We did not
23 analyze what they gave us. Based on our
24 calculations, it was our interpretation that the
25 variance for gross floor area was not required.

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1 But like I said, we were depending on DCRA to lead
2 us in that direction.

3 CHAIRPERSON GRIFFIS: Okay. But you
4 are open to reinterpretation after looking at that
5 information.

6 MS. ROBERTS: Yes.

7 CHAIRPERSON GRIFFIS: Next question,
8 Mr. Gell.

9 MR. GELL: Yes, have you seen the
10 houses on either side of this house?

11 MS. ROBERTS: I did not personally see
12 them. Just for clarification, this is not my case.

13 I'm just sitting in today. But from discussions
14 with Mr. McGettigan, he said he did go for a site
15 visit and looked at the houses and looked at the
16 area and did not believe that this house stood out
17 or was any different from any of the others. There
18 are others in the area that are much larger than
19 this.

20 MR. GELL: Yes, thank you very much for
21 that. In the two houses that are shown in the
22 pictures in your report, would you agree that the
23 two houses are on hills putting them at a much
24 higher grade than the street?

25 MS. ROBERTS: Yes, I would agree with

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1 that.

2 MR. GELL: And both houses are three
3 story houses.

4 MS. ROBERTS: I don't think I want to
5 comment on that because I didn't see the houses.
6 I'm just looking at the pictures here. I don't
7 think I have enough information to make that
8 judgement.

9 MR. GELL: You would probably prefer to
10 be on a beach in the Bahamas like Mr. McGettigan.
11 I can't imagine why he would want to miss this
12 hearing.

13 MS. ROBERTS: I won't comment.

14 MR. GELL: On page 3 of the report,
15 there's a reference to the Comprehensive Plan. It
16 says that "granting the variance would allow an
17 increase in gross liveable floor area that
18 represents an over use of land and would not
19 stabilize the neighborhood." It further says that
20 "granting this variance would be inconsistent with
21 the objectives and policies of the Comprehensive
22 Plan." Given that the only thing cited there was
23 gross floor area, and now that we know the gross
24 floor area is much less than was originally
25 believed, would you agree therefore that the

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1 Comprehensive Plan is not affected or is not
2 violated in any way?

3 MS. ROBERTS: I would agree with that.

4 MR. GELL: You also cite in the report
5 section 1541, the Wesley Heights Overlay District
6 regulations, which says that "the purpose is to
7 preserve in general the current density of the
8 neighborhood and to preserve existing trees, access
9 to light and air, and the harmonious design and
10 attractive appearance of the neighborhood." Would
11 you say that if the dormers were taken out there
12 would be any significant difference in the way the
13 trees are affected by this?

14 MS. ROBERTS: No, I don't think so.
15 However, the overlay also requires three stories.
16 Based on the interpretation, I think when this
17 report was made was that is was four stories.

18 MR. GELL: But what makes it a story is
19 the dormers and not the height of the building, so
20 the building would remain the same height. Would
21 there be any difference with respect to the trees?

22 MS. ROBERTS: No, I don't think so.

23 MR. GELL: Or access to air or light?

24 MS. ROBERTS: No.

25 MR. GELL: Would the neighborhood be

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1 more attractive if the dormers were taken off?

2 MS. ROBERTS: I don't believe so. I
3 think the overlay has three portions. Our
4 concentration was how it met the requirement in
5 (a).

6 MR. GELL: I'm sorry. That's on the
7 trees.

8 MS. ROBERTS: Pardon me?

9 MR. GELL: How it met the requirement.

10 MS. ROBERTS: On (a) because it says
11 the Wesley Heights Overlay has three purposes with
12 (a), (b), and (c).

13 MR. GELL: Right.

14 MS. ROBERTS: So where we may differ is
15 on (a). When this report was written, I think we
16 were concentrating on (a). It doesn't have an
17 impact on the existing trees.

18 MR. GELL: Right. What's the impact on
19 (a)?

20 MS. ROBERTS: Where it talks about the
21 current density in the neighborhood. The
22 requirement under the overlay would be for three
23 stories instead of four. When we looked at it and
24 what this report is based on was that it had four
25 stories.

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1 MR. GELL: Now on page 6 of the report,
2 you conclude that the error in granting a building
3 permit for the dormers and interior renovations
4 does create an exceptional situation.

5 MS. ROBERTS: Right.

6 MR. GELL: So is it fair to say that
7 the Office of Planning agrees that there is indeed
8 a uniqueness here, an exceptional situation?

9 MS. ROBERTS: Yes, but there is also
10 three portions to the variance request.

11 MR. GELL: I understand.

12 MS. ROBERTS: If you look further down,
13 it talks about practical difficulty. Those were
14 also included.

15 MR. GELL: I'm only referring to the
16 exceptional situation.

17 MS. ROBERTS: Okay. I agree with that.

18 MR. GELL: Mr. Chairman, those are all
19 the questions I have for the Office of Planning.
20 Did you want me to say a few words about practical
21 difficulty and anything further on estoppel and
22 laches?

23 CHAIRPERSON GRIFFIS: Let me first of
24 all see if there is anyone here from the ANC. Yes
25 I do. What I'd like to do is put that into a

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1 conclusion for you, so you can wrap it up. Then
2 we'll go from there. Let's get through the rest of
3 the pieces which should not take that much more
4 time.

5 Is a representative from ANC-3D here
6 today to present a report? If not, we can note it
7 in the record. It is dated July 9. It's Exhibit
8 30. ANC did consider and recommended that BZA
9 approve the application in this case.

10 The basis for approval, if I might just
11 paraphrase and go to the last paragraph, is "to
12 bring to an end a long tangled case." That would
13 be through approving the variances. It's not
14 necessarily the test we always look at for approval
15 of variances, but I think we get the message. Is
16 there anyone else here attendant to this
17 application to give testimony today? You can
18 give an indication by coming forward and having a
19 seat at the table. It's Application 17039 of Mr.
20 and Mrs. John McAdams. Have a seat at the table.
21 What I would like you to do as you are starting off
22 is just give me your name and address and that you
23 are here testifying in support or in opposition to
24 the application. Each individual person of course
25 is allotted three minutes. Rather than turn on the

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1 buzzer, I'm just going to watch the clock that is
2 right behind you.

3 MS. LAZARUS: My name is Rosalind
4 Lazarus. I live next door. Before the house was
5 built, I owned with my former husband and children
6 the only house between Dexter and Edmonds Street on
7 44th Street. You will be able to tell right away
8 that I have these enormous reservations about your
9 granting this variance.

10 As you know, zoning is here to protect
11 all of us. In my view, to allow this variance
12 without further justice is first to perpetuate the
13 acts of a scoundrel of a builder and second to
14 engrave in stone a gross failure of the Office of
15 Zoning. I live next door, and the solid brick
16 walls of the garage of the McAdams' house are what
17 I see now from my living room. The house's top
18 story looms over mine.

19 How did this happen? In 1998 when I
20 saw the construction start and realized what was
21 happening, I asked the local historical society
22 what to do. I got a list of lawyers to call. I
23 discovered early that most wouldn't help because
24 they had a conflict of interest. When I reached
25 one female lawyer and said that I believed that the

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1 proposed building would violate the Wesley Heights
2 Overlay and other zoning requirements, she laughed
3 at me.

4 Oh that couldn't be, she said, we did
5 all the permitting for Mr. Lipnick. I wrote a
6 letter to Gladys Hicks on May 28, 1998. I have it,
7 and it must somewhere be in the Zoning Office. In
8 it, I, who knew nothing about zoning except tried
9 to learn a little bit about the Wesley Heights and
10 came to the meetings when the overlay was done,
11 managed somehow to get right two or three of the
12 issues that turned out to be the problems.

13 I wrote it out of my understanding and
14 out of going down to the Zoning Office. I only
15 bought a few pages of the plans because they were
16 \$10 a page. Obviously it turned out that Mr.
17 Lipnick's permitting lawyer was wrong. Lipnick had
18 to tear down the frame and start over, but he was
19 furious.

20 When I got the pages of the plan, I
21 asked him to put some windows in the garage so that
22 I wouldn't look out onto a solid 12 foot brick
23 wall. He said no. Now listening to the prior
24 application and even talking to Mr. Gell I
25 understand that windows count for certain kinds of

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1 things, and maybe he didn't want to do that for
2 that reason. Nonetheless, I look out onto a solid
3 brick wall.

4 But it was the Wesley Heights Overlay
5 that he resented the most. When he advertised a
6 house containing hundreds of square feet more than
7 the plans that he had obtained a permit for, we the
8 citizens of Wesley Heights were terribly upset. We
9 heard from the historic society that the original
10 Lipnick plans were no longer available at the
11 Zoning Office.

12 We were concerned that Lipnick had
13 gotten away with putting dormers on the top floor,
14 dormers that I was told were not in the approved
15 plans. Now today I've been told somehow that they
16 were approved. I'm the only person who is under
17 those dormers.

18 Then these lovely neighbors moved in.
19 That causes pain to me to be here because I live
20 next door to people I like a great deal. I told
21 them there was a great brew-ha-ha about the house.

22 Stories that Alfie (PH) told this morning here at
23 the witness table were the same stories that she
24 told me. I told her that I understood that the
25 plans had disappeared. She also told me that the

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1 builder wouldn't give her plans.

2 I could not understand how something
3 that was a matter of public record would not remain
4 a public record. It seems to me there's a
5 violation of law that's obvious there. When John
6 told me that the house had been inspected and he
7 was asked to alter the square footage and remove
8 the dormers, I asked him why he didn't just remove
9 them. He explained that it would be very expensive
10 and that he was not at fault.

11 That may be true, but his builder had
12 actual notice of the laws and requirements. The
13 builder is responsible for what he built in
14 violation of the District law. If Mr. Lipnick is
15 not forced to change the structure he profited from
16 and if no real justice is brought about, Mr.
17 Lipnick will end up laughing at you just as his
18 lawyer laughed at me.

19 Now in my letter to Gladys, I just want
20 to mention that immediately I noted then that the
21 house doesn't look like any other house in Wesley
22 Heights. No other house in Wesley Heights have
23 street level garages that are in front of the
24 facade. This has a garage in front then a stairway
25 that you go up. The first floor is in front of the

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1 garage.

2 CHAIRPERSON GRIFFIS: Right. We have
3 the photographs.

4 MS. LAZARUS: There are none. Garages
5 are on the side or in the back. So that was in
6 here too. I heard that question this morning.

7 CHAIRPERSON GRIFFIS: If I can ask you
8 just to sum up.

9 MS. LAZARUS: In making your
10 deliberations, you have to carefully go over the
11 issues of the variance in terms of meeting the
12 standards for the variance as well as the standards
13 for the law you cited this morning of estoppel and
14 laches. I did not know that was an issue, so I
15 didn't try to go over the legal issues.

16 But in the questioning this morning, I
17 noted to myself that after the standards for
18 estoppel and laches were read that you in your
19 questioning and Mr. Gell and the McAdams in their
20 answers were switching from who relied on what. In
21 other words, in response to one question, it was
22 the builder that was said to rely on the District's
23 laws and to make expensive improvements in
24 reliance. I gathered what you meant here was the
25 permit. So you have to be careful in figuring out

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1 whether or not you want to go with the law that the
2 builder relied on something that the District did
3 or as a separate matter whether Mr. McAdams relied.

4 CHAIRPERSON GRIFFIS: Indeed. I think
5 we are aware of that. Is there anything else you
6 would like to testify?

7 MS. LAZARUS: I felt that not all the
8 issues were covered this morning in the
9 questioning. For example, from the point of view
10 of the neighborhood, I was not told about the ANC
11 meeting. A lot of things go on here without
12 official notice to anyone. We are expected to
13 learn of these things on our own.

14 CHAIRPERSON GRIFFIS: Let me just make
15 total clarification. You brought up quite a bit.
16 We appreciate you coming down and testifying.
17 First of all, some of the things that you cite -
18 and obviously they are important - that are part
19 and parcel of everything that's going on are well
20 outside our jurisdiction. Let me use one quick
21 example. You have a problem with the 12 foot high
22 garage wall. That has not been evidenced as in
23 violation of any zoning. Therefore there's nothing
24 we can do about it. In fact, it's not before us.

25 MS. LAZARUS: I understand.

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1 CHAIRPERSON GRIFFIS: I just want to be
2 clear so that you don't feel like the testimony you
3 give doesn't get any deference or any attention
4 from the Board or wouldn't be part of our
5 deliberation. Clearly deliberation would go to
6 exactly what's being asked for in relief. That
7 brings up the other point. We often get
8 frustration of where were these meetings, how come
9 I wasn't told.

10 Again, these aren't our meetings. They
11 are the ANC meetings. We don't have any control,
12 notification, jurisdiction over the ANC. The ANC
13 does have the opportunity to report to us on any
14 application if that makes sense to you. I'm sure
15 you are fairly aware of that.

16 MS. LAZARUS: The ANC doesn't have to
17 notify neighbors.

18 CHAIRPERSON GRIFFIS: Well, they do
19 have to publicly notice their meetings.

20 MS. LAZARUS: So I don't know the
21 answer to that. I do know that Council Member
22 Kathy Patterson was one of the most rational and
23 helpful people when I had the problem initially.
24 When we gave up, we only gave up because the house
25 appeared to a fact sanctioned by the District of

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1 Columbia.

2 CHAIRPERSON GRIFFIS: Right. Well, you
3 heard today that it was in fact correctly built
4 according to the permitting process. It wasn't
5 until a certain date, much later, that it became
6 the opinion of DCRA that it was not built in
7 accordance to the regulation.

8 MS. LAZARUS: So what happens when DCRA
9 makes mistakes like that?

10 CHAIRPERSON GRIFFIS: That's why we're
11 here perhaps. Just wait until the next one. Hang
12 around for this afternoon.

13 MS. LAZARUS: I just see that there are
14 a lot of people present. Other than being
15 completely crushed as a citizen because I never had
16 --

17 CHAIRPERSON GRIFFIS: Let me interrupt
18 you please. Not to make total light of it, my
19 point of saying it for this afternoon is there is a
20 remedy if DCRA seems to have made a mistake or
21 someone believes that the government has made a
22 mistake. We do have a full appeal process. What's
23 interesting with this one is it's a little bit more
24 complicated than what our procedure lays out for
25 the appropriate avenue for recourse. But I think

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1 we understand what we have. Any questions?

2 MEMBER ZAIDAIN: Yes, I just have two
3 quick ones. Are you to the north or to the south
4 of the property?

5 MS. LAZARUS: I'm to the south. To the
6 north is a house that has an Edmonds Street
7 address. That house was originally situated where
8 it still is. The current house was built on its
9 back yard.

10 MEMBER ZAIDAIN: Okay.

11 MS. LAZARUS: The pool of the current
12 house was a pool house that belonged to that house
13 originally.

14 MEMBER ZAIDAIN: What would you say
15 just generally is the distance between your
16 structure and their structure?

17 MS. LAZARUS: It's the minimum required
18 by the District.

19 MEMBER ZAIDAIN: Well, there's minimum
20 side yards required.

21 MS. LAZARUS: Yes, nine feet on each
22 side.

23 MEMBER ZAIDAIN: So your building is
24 built to the minimum side yard of nine feet and
25 their building is built to the minimum side yard.

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1 MS. LAZARUS: Yes, but before there was
2 roughly a third of an acre when I purchased my
3 house between my side yard and the house that was
4 there, the Slewinsky's original house, now owned by
5 the Gibbons. This structure was placed in between.

6 MEMBER ZAIDAIN: Okay.

7 MEMBER ETHERLY: Mr. Chair, very
8 briefly. We may have been fortunate enough to have
9 gotten a picture of your residence included in the
10 Office of Planning report. Is your residence
11 shudders on your upstairs window, on the second
12 floor window --

13 MS. LAZARUS: Yes, 2706.

14 MEMBER ETHERLY: What would you call
15 that? (Indicating.)

16 MS. LAZARUS: A little half portico
17 with columns in the front.

18 MEMBER ETHERLY: Yes, ma'am. Ms.
19 Lazarus' house is pictured on page 7 of the Office
20 of Planning report as the property to the south of
21 the subject site.

22 MS. LAZARUS: Do you encounter problems
23 like this where the stories are set so askew that
24 my living room looks into the garage and my bedroom
25 looks into their living room?

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1 CHAIRPERSON GRIFFIS: Do we encounter
2 those problems?

3 MS. LAZARUS: Yes.

4 CHAIRPERSON GRIFFIS: We have. The
5 Board Members can get last questions together on
6 this. Then we're going to go to closing. Frankly,
7 that's something that the regulations are set out
8 to try and prevent. That's why we have setbacks
9 and lot occupancy and minimum lot requirements.

10 Again, that's not something that's
11 coming forward in this case as that it has been in
12 non-compliance. There was evidence today about
13 this siding that was remedied. So that being said,
14 Board Members, questions? Ms. Miller.

15 MEMBER MILLER: I think you made
16 reference to telling the McAdams at some point that
17 there was some brew-ha-ha over the plans for this
18 building or for their house. When was that? Was
19 it before they purchased or after they purchased?

20 MS. LAZARUS: After.

21 MEMBER MILLER: Do you remember when?

22 MS. LAZARUS: When I met them roughly,
23 somewhere that spring or summer.

24 MEMBER MILLER: What would you like to
25 see happen in this case?

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1 MS. LAZARUS: I am conflicted. I don't
2 feel that it's right for Mr. McAdams to bear the
3 cost of the change. I really do not having the
4 dormers there. It feels like you are looking up
5 and someone can look down on you. I understand
6 that he's being charged for something that he
7 didn't have responsibility for. I understand that
8 someone who profitted extensively, that's not in
9 this room and not before you --

10 CHAIRPERSON GRIFFIS: What would you
11 like to see happen?

12 MS. LAZARUS: I feel that somehow or
13 other you are the court of last resort to some
14 degree for this fiasco.

15 CHAIRPERSON GRIFFIS: Ms. Miller is
16 saying put yourself in her position. What would
17 you do?

18 MS. LAZARUS: Well, I don't think you
19 should force Mr. McAdams to have to pay for any
20 changes. But if the zoning is not legal, then it
21 shouldn't stand.

22 MEMBER MILLER: Okay. I just want to
23 also make a comment about the ANC. There is a
24 provision 3115.1 that sets forth different
25 requirements for ANCs in order for us to give the

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1 ANC report great weight. That includes notice to
2 the public and the vote and how many members were
3 present. It's not just something we just do.

4 We do have a letter from the ANC
5 supporting the McAdams. One thing that's not in
6 here is what constitutes a quorum. So what we do
7 is we give certainly due consideration to the
8 position of the ANC. It just means that we don't
9 necessarily have to address every argument that
10 they make. Basically they are just saying they are
11 in support of the McAdams.

12 MS. LAZARUS: What I meant was I would
13 have testified there if I had known about it.

14 MEMBER MILLER: I think that's
15 something you should bring up with your ANC.

16 CHAIRPERSON GRIFFIS: Indeed.

17 MS. LAZARUS: If Mr. McAdams is correct
18 that taking the dormers off would make the house
19 even less valuable, then that would be something to
20 be considered too. I don't know where we could
21 find the kind of professional opinion that might
22 alleviate that question, but that would matter to
23 me too.

24 CHAIRPERSON GRIFFIS: Good. Thank you
25 very much. We appreciate you coming down here

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1 today. I think you have full understanding of the
2 difficulty and issues that we will need to decide
3 on this case. So thank you. We appreciate your
4 testimony.

5 MS. LAZARUS: Thank you to you all.

6 CHAIRPERSON GRIFFIS: Mr. Gell, let me
7 turn to you for brief closing remarks. This is
8 what I'd like to do in anticipation. I'm going to
9 set this for decision making on September 9.
10 Clearly there's no action in terms of enforcement
11 that can proceed with DCRA as this is a pending
12 case before the Board of Zoning Adjustment.

13 I see a great deal of pressure to get
14 this finalized for our own purposes and for your
15 client's purposes. But I don't see a rush to get
16 there in terms of trying to decide this today as we
17 do have a very full schedule this afternoon.
18 There's a lot of information that we need to
19 deliberate on.

20 So what I would like to do is give you
21 a moment to summarize here. Then I'm going to ask
22 for additional submissions. That is just the
23 restatement of the variance cases, the restatement
24 of estoppel and laches based on the testimony that
25 we heard today and based on information in the

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1 record. As you well know, we have six to ten cases
2 a week. We read everything and absolutely
3 everything.

4 For our own record keeping - and I
5 think we've done a great chronology - I would ask
6 you also just to put together a bullet point
7 chronology of the actions that went through. I
8 would start with the first permit approval, the
9 second permit approval. I would go to the purchase
10 date, the letters, whatever else you think that
11 sets in port.

12 If there are things that you cite
13 obviously in that chronology that aren't in the
14 record of course those would also need to be
15 submitted, and we could accept those into the
16 record. I don't see this as generating a lot of
17 new work but reassembling a lot of the information
18 that's already been put in. I think that we will
19 be able to utilize that in our own notes as we
20 deliberate this towards the 9th. So with that, let
21 me turn it over to you for comments that you feel
22 at this time you might need to make.

23 MR. GELL: First, let me ask about the
24 chronology. Would you want in the chronology the
25 dates of all of the letters back and forth between

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1 Mr. Timmons and the District?

2 CHAIRPERSON GRIFFIS: I don't think all
3 letters. Of course, the only ones I've read are
4 the ones in the record. I tend to agree those are
5 important letters and they establish. As you are
6 doing it, yes, that would be important just to give
7 the letters from to who. It does substantiate the
8 record in terms of the lack of communication and
9 when communication was actually happening. Again,
10 that's not that critical. We have that and we can
11 put it together. Quite frankly, it saves us time.

12 MR. GELL: In that respect, there is a
13 chronology by the way in a letter that is dated
14 July 17 from Mr. Thomas Gibson to you. Mr. Gibson
15 lives next door on the other side of the McAdams.
16 I believe he's the son-in-law of Mr. Timmons. He
17 supports the variance. But he, as Ms. Lazarus has
18 spoken very strongly against the fact that the
19 District had approved these plans, also says that
20 something ought to be changed in the way that the
21 District deals with these kinds of issues and
22 provides a fairly substantial chronology. You
23 might want to refer to that as well. Do you have
24 that letter?

25 CHAIRPERSON GRIFFIS: See my problem.

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1 MEMBER ZAIDAIN: Do you have an exhibit
2 number?

3 MEMBER MILLER: What year?

4 CHAIRPERSON GRIFFIS: Yes, what's the
5 exhibit number?

6 MR. GELL: I don't because this is from
7 a copy that was given directly to us. I don't
8 know. It would have been very recent. It's July
9 17.

10 CHAIRPERSON GRIFFIS: I have July 18
11 from you, July 9, July 15, something else.

12 MR. GELL: Well, if there's some
13 question about whether you have it, I will be glad
14 to make sure that Ms. Bailey or Mr. Moy puts it in
15 the record.

16 CHAIRPERSON GRIFFIS: I would put that
17 back in unless it's attached to one of your
18 submissions. Is it attached to your submission?

19 MR. GELL: No, this just came.

20 CHAIRPERSON GRIFFIS: No, it's not in
21 my record.

22 MR. GELL: In any event, it underscores
23 the fact that Mr. Gibson, the neighbor next door,
24 really wants to see the variance approved. But we
25 agree that the Wesley Heights rules ought to be

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1 followed. You may or may not be aware of the fact
2 that I wrote the original Wesley Heights Overlay
3 zone. I was employed by Wesley Heights to file the
4 application.

5 Although there were some changes that
6 were made subsequent to that because the group felt
7 that they really didn't need the services of a
8 lawyer once it had been filed - and they did a
9 perfectly fine job of bringing it through the
10 Zoning Commission - I of course know a great deal
11 about what was in their minds. I'm very
12 sympathetic to the needs of the citizens in Wesley
13 Heights. They had some serious problems to deal
14 with.

15 There were very small houses that were
16 being overpowered by very large houses. I think to
17 a great degree Wesley Heights Overlay zone has had
18 the kind of impact that they wanted it to have.
19 Clearly these things have to be enforced. We don't
20 have any problem with the fact that Mr. Timmons
21 wrote the letters. I think he did his civic duty
22 in bringing it to the attention of the District.

23 Unfortunately it impacted some very
24 nice people. But that's not Mr. Timmons' problem
25 nor is he guilty for anything. I think he's done

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1 the right thing. We in coming to you for a
2 variance feel that we're doing the most practical
3 thing that we can do, recognizing that in fact the
4 overlay zone is important but also pointing out
5 those aspects of the situation we feel merit the
6 variance. We're told that Mr. Timmons feels this
7 is the appropriate way to resolve the issue.

8 I mentioned the estoppel and laches
9 issue in Wieck. In Wieck, when the various changes
10 in the plans were approved by the Zoning
11 Administrator in a case similar to this, in fact
12 and the court found that Wieck had not been
13 truthful to the Zoning Administrator about what
14 they were going to do, what sorts of plumbing
15 changes they were making, and why they were making
16 them in this building that was behind the main
17 structure and felt that there was therefore not a
18 reliance but nonetheless found that laches were
19 appropriate.

20 In our case, we've shown that in fact
21 there was complete reliance and by people who, it
22 has not been shown, had any reason to believe that
23 they were doing the wrong thing and certainly not
24 Mr. and Ms. McAdams. So we feel that under the
25 rules set down in Wieck that this would be squarely

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1 - at least the Board of Appeals would find - an
2 issue in which both estoppel and laches would
3 apply.

4 I would refer you also to the Saar Case
5 where, similar to Wieck, improper information was
6 given to the Zoning Administrator. That's not the
7 case here, but in that case, improper information
8 was given on which the Zoning Administrator relied.

9 In that case, because of the length of time before
10 the Zoning Administrator found the mistake - and
11 even though he was dealing I believe with the same
12 people - they said that estoppel and laches would
13 apply.

14 So we think we have a much stronger
15 case than those cases. Now let me say a word about
16 practical difficulty. While we don't have an
17 irregularly shaped lot, we do indeed have a lot
18 that has a slope. Other houses in that
19 neighborhood dealt with it differently. Both
20 houses on either side started their construction at
21 a level roughly a story above where the McAdams
22 house starts.

23 So they have the full three stories
24 plus their basement, presumably with full benefit
25 of all. The one on the north is an extremely large

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1 house horizontally as well. So the house fits in
2 very well in the neighborhood, but it's quite
3 different from the others in that it starts at the
4 street level whereas the others start up on the
5 hill. Therefore the heights are not dissimilar.

6 What the McAdams would experience if
7 they were to lose the dormers is they would lose
8 the use of the space on that top level. Perhaps it
9 could be used for storage, but it certainly
10 couldn't be used for rooms and so forth without the
11 availability of the windows. Since the house was
12 already built and since it was built under the
13 authority of the Zoning Administrator, at least the
14 approval, we feel that creates for the McAdams a
15 practical difficulty which also creates not only a
16 large expense in order to correct it but also a
17 severe loss of value in the house.

18 You are all familiar with the Tyler
19 Case in which the Court of Appeals said that the
20 Board of Zoning Adjustment can look at economics as
21 a basis for practical difficulty. We think in this
22 case the extreme loss of value and the cost to
23 correct would fall in that category. If the Board
24 is leaving the record open, we will see if we can
25 find some information along those lines for you.

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1 We think it's important to note that
2 changing these dormers is not going to benefit
3 anybody in Wesley Heights. Even Ms. Lazarus, who
4 is a personal friend, said that she doesn't think
5 that she really wants to see the dormers gone. She
6 said it's very difficult --

7 CHAIRPERSON GRIFFIS: Be careful.
8 She's here. She could tell us. Right, Mr. Gell?

9 MR. GELL: And will.

10 CHAIRPERSON GRIFFIS: Unfortunately we
11 don't have time to get into that.

12 MR. GELL: I realize it gives her pain.
13 I have no problem with the fact that she came and
14 gave her opinion on this. I realize too that the
15 depth feeling that people have when they feel
16 somebody has gotten away with something that they
17 shouldn't have done. It's very hard to speak to
18 that.

19 But all I can say is that the District
20 played a role here, and it was not a positive role.

21 It's one that we hope that the District will be
22 able to correct in the future. I think the real
23 answer to this is to make sure that if people are
24 getting things that it does not happen in the
25 future and that the inspections be right and that

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1 the people read the plans correctly and that they
2 follow the rules and make sure that the buildings
3 do the same.

4 That's really the best answer to this
5 case. Thank you very much for your time. I think
6 there was one other point I was going to make.
7 Yes, I think I already mentioned about the \$800.

8 CHAIRPERSON GRIFFIS: Yes.

9 MR. GELL: Thank you again.

10 CHAIRPERSON GRIFFIS: In terms of that,
11 that is something that can be taken up with the
12 Office of Zoning and the director of that. Any
13 last questions or clarification of Mr. Gell? Mr.
14 Gell, are you aware of what we are asking for as
15 far as submissions?

16 MR. GELL: You asked for a chronology
17 which we would be happy to provide.

18 CHAIRPERSON GRIFFIS: Great.
19 Chronology and also a briefing on your arguments
20 for laches, estoppel, and the variance case if you
21 are so moved to add, supplement, or restate what is
22 already in the record. Ms. Bailey, we're going to
23 set this for a decision at the public meeting on
24 September 9. I would like to have submissions in
25 mid-August. Mr. Gell, is that timely enough for

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1 you?

2 MR. GELL: If we could make it a little
3 bit --

4 CHAIRPERSON GRIFFIS: What date?

5 MR. GELL: I'm away the first week in
6 August, so if we could make it perhaps a week later
7 after I come back.

8 CHAIRPERSON GRIFFIS: The 20th.

9 MR. GELL: The 20th would be fine I
10 think. What day of the week is that?

11 MS. BAILEY: That's on a Wednesday.
12 Mr. Gell, while you are looking at that, Ms.
13 Lazarus is not a party, but I'm assuming just to be
14 neighborly I want to give her a copy of whatever
15 you submit.

16 MR. GELL: I'd be happy to give her a
17 copy. Would you say the 20th or the 22nd? Would
18 the 22nd be all right?

19 CHAIRPERSON GRIFFIS: The 22nd.

20 MR. GELL: Thank you.

21 CHAIRPERSON GRIFFIS: Good. Any other
22 questions or clarifications? Everyone is clear.
23 Okay. We'll get those on the 22nd. Obviously it
24 will be distributed to the Board. We'll see you on
25 the 9th. It will be our first session in

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1 September.

2 MR. GELL: Would the record be open for
3 any other -- No, never mind. I was just wondering
4 if we found some other information that goes to --

5 CHAIRPERSON GRIFFIS: As I said, I'll
6 keep the record open for additional information
7 that supports your case. It will be limited. We
8 will review everything. At this point, I'm giving
9 you an awful lot of latitude of putting in what you
10 need.

11 MR. GELL: Thank you.

12 CHAIRPERSON GRIFFIS: Okay. That being
13 said, thank you all very much. We appreciate your
14 patience this afternoon. We're going to take
15 probably a ten minute break and let people get set
16 up and organized. Then we'll return. Off the
17 record.

18 (Whereupon, the foregoing matter went
19 off the record at 3:31 p.m. and went
20 back on the record at 3:49 p.m.)

21 CHAIRPERSON GRIFFIS: Good afternoon,
22 ladies and gentlemen. Let's resume our afternoon
23 hearing. Ms. Bailey, when you are able or ready,
24 we can call the last case of the afternoon.

25 MS. BAILEY: That is Application Number

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1 16998. This is an appeal of Advisory Neighborhood
2 Commission 5B, pursuant to 11 DCMR 3100 and 3101,
3 from the administrative decision of David Clark,
4 Director, Department of Consumer and Regulatory
5 Affairs (DCRA) for the issuance of Building Permit
6 Number B425438, for the renovation of a warehouse
7 for use by a community corrections center.

8 Appellant alleges that DCRA erred by
9 issuing the building permit as the proposed use
10 will allegedly be operated as a community based
11 residential facility (halfway house) and therefore
12 in violation of the prohibition of new residential
13 use in a C-M District pursuant to section 801. The
14 subject property is located in the C-M-2 District
15 at premises 2210 Adams Place, N.E. in Square 4259
16 also known as Parcel 154/81.

17 Mr. Chairman, all the witnesses were
18 sworn in previously. Is there anyone testifying
19 today who has not been sworn in and who needs to be
20 sworn in at this time? Is there anyone who will be
21 testifying today who has not been previously sworn
22 in? I think the case is ready to go forth, Mr.
23 Chairman.

24 CHAIRPERSON GRIFFIS: Good. Thank you
25 very much. As this is a continuation, I know that

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1 folks weren't here all afternoon and perhaps did
2 not hear my opening statement. It is my standard
3 opening statement. I just want to reiterate
4 several things of importance.

5 First of all, of course during the
6 proceedings, all public hearings are recorded. So
7 we ask that people speak into the microphone so
8 that they can be put on the record. Secondly, we
9 deliberate only on that information that is in the
10 record. So anything said needs to be said into a
11 microphone. That brings up a very important point.

12 Comments in the hearing room, disturbing noises,
13 actions, we cannot tolerate nor are they part of
14 the record. So they are just more of a distraction
15 than anything else.

16 I think we're all well aware, having
17 been here so often, and now are very comfortable
18 with the hearing room. Perhaps you want to move on
19 and get to a new venue. Meaning let's keep this a
20 very expeditious afternoon and keep moving on. The
21 Board will be focusing on those people who are
22 speaking in front of us.

23 If you feel you need to speak or not
24 given the recourse or time, you can easily talk to
25 staff that sits to our far right, and they can

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1 instruct you when would be the applicable time for
2 that if there is a time. If that is not a great
3 remedy, you can draw the attention appropriately
4 and civilly to the Board. I will try to
5 acknowledge you at the appropriate time to do that.

6 When we left off, we were at the point
7 of finishing the Bannum Case. I believe the record
8 shows that we were going to allow, with Mr.
9 Temple's graciousness, additional time. We are
10 going to put on the clock 40 minutes. Although the
11 specific time in the record was 41 minutes 30
12 seconds, I'll put 40 minutes on. Of course, that's
13 time you don't have to use but you are obviously
14 allowed to.

15 After which, we will go to rebuttal and
16 closing statements. Is that everyone's
17 understanding at this point? Everyone is clear.
18 Excellent then. Why don't we move ahead with that?

19 Lastly, let me just note for the record we have
20 additional submissions that were requested. I want
21 to go through those for those that we received, did
22 not receive, and then any corrections that people
23 have to give us.

24 First of all, we had asked for the
25 flier of the public notice to be submitted. That

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1 was submitted today. Well, let's go through the
2 list of those that we didn't receive. That's
3 probably faster. I'll go through DCRA submissions
4 threefold. There were two that were submitted.
5 The Board had some quick question on the issue of
6 course of action for permanent solutions. That
7 wasn't directly addressed in the submission. Do
8 you want to address that?

9 MR. RUSHKOFF: I guess maybe I missed
10 this one. Maybe I can address it right now.

11 CHAIRPERSON GRIFFIS: As outlined in
12 our notes, what we thought we had asked for is that
13 you would research with the city the process of
14 formulating a permanent solution to the current
15 temporary answer of housing inmates in the
16 temporary detention and correctional institution on
17 leased property. If this was temporary - and it
18 was written in the regulations - was there, as was
19 essentially established, some sort of permanent
20 remedy and solution in the works and whether you
21 knew of that?

22 MR. RUSHKOFF: Back in the 1970s or
23 now? Presently?

24 CHAIRPERSON GRIFFIS: It would be
25 presently.

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1 MR. RUSHKOFF: I didn't specifically
2 research this question of a permanent solution. I
3 think the closest item that I have in terms of
4 addressing long-term policy concerns would be that
5 siting report that I mentioned but did not produce.

6 I brought copies with me if anyone wanted them,
7 but I didn't want to introduce it at this late
8 stage because some people might object. It's just
9 a whole other submission of information without
10 appropriate cross examination or anything.

11 There is a report by this Advisory
12 Commission in the District on the siting of halfway
13 houses. That report is available to the public.
14 It goes through various issues such as community
15 input and application of zoning rules and other
16 considerations in the siting of these facilities.
17 It talks about CBRF in general to some extent. I
18 thought that might be useful, but it didn't come to
19 my attention until late in the game. So I thought
20 it was a little too late to submit it.

21 MEMBER ZAIDAIN: What's the date of the
22 study?

23 MR. RUSHKOFF: April 2003. I was a
24 commission that went on for quite a number of
25 months studying this problem and getting input. I

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1 believe that they issued a preliminary report.
2 They got some public feedback and a couple weeks
3 later issued their final report. It's about 70
4 pages long.

5 CHAIRPERSON GRIFFIS: I think that's an
6 interesting direction to take. I'll hear from
7 Board Members if they want that entire study. I'm
8 not sure that we need it. It's important to know
9 that there is that going on. However it takes on a
10 different avenue of thought. If one looks at
11 legislative history of how this section of
12 regulation established the temporary detention
13 centers, there is substance in there that speaks of
14 overflow population.

15 I believe it was you that brought up in
16 testimony the fact of the closing of Lorton and the
17 transition of different things. So I thought that
18 the Board was asking more of what is the permanent
19 facility, what is the plan for permanent facility
20 as opposed to needing temporary facilities for
21 overflow. Is that your understanding?

22 MR. RUSHKOFF: Okay. I'm not sure that
23 I've seen a plan for a temporary solution versus a
24 permanent solution. We're taking terms from the
25 Zoning Rules and trying to impose them. I'm not

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1 sure that there is a distinction being made out
2 there, temporary versus permanent. As far as I can
3 tell, the Bureau of Prisons is soliciting from
4 people proposals for different kinds of facilities.

5 For example, as far as I can tell, this
6 particular solicitation, just looking at the
7 record, doesn't seem to be characterized as a
8 temporary versus a permanent. It's just a
9 solicitation for one year at a time for a period of
10 years. I think that is the way they do it. They
11 are not characterizing it as a temporary solution
12 as opposed to a permanent solution.

13 CHAIRPERSON GRIFFIS: Right. Okay. I
14 understand that. Ms. Miller, follow up?

15 MEMBER MILLER: I just want to clarify.
16 You are saying that you don't know of anything out
17 there that addresses a permanent facility being
18 needed and that this temporary detention facility
19 is just temporary until there is a permanent.

20 MR. RUSHKOFF: Actually I'm saying the
21 opposite. I'm not sure there's anything out there
22 saying that there should be a temporary facility.
23 As far as I can tell, they just from time-to-time
24 give out solicitations for facilities without
25 characterizing them as temporary or permanent. So

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1 I'm just not sure that the people who are making
2 correctional policy out there are thinking in terms
3 of temporary versus permanent at this time. At
4 least I haven't seen any evidence of it.

5 MEMBER MILLER: Okay. The reason this
6 came up was when we were looking at the legislative
7 history it looked like this particular regulation
8 was originally enacted because there was a need for
9 a temporary solution until there was a permanent
10 solution. Now we're looking at it years later.
11 We're just wondering whether it's a similar context
12 now. It sounds like you are saying it's not
13 necessarily.

14 MR. RUSHKOFF: Right. Back then, I'm
15 not sure. As I explained in the memorandum, I
16 don't see any evidence that this tool that was made
17 available for temporary facilities was used back
18 them, but it's still out there and available. I
19 guess the bottom line is that the Federal Bureau of
20 Prisons is putting solicitations out there. The
21 one that we looked at in this case was up to five
22 years, one year at a time.

23 It seems to me that one way of
24 responding perhaps would be to come up with a
25 particular location for up to five years and call

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1 it permanent under the local zoning rules. I
2 suppose another solution might be for the company
3 or the entrepreneur to come up with a temporary
4 facility and offer that. I'm not sure. It seems
5 to me in this situation that's what happened. They
6 came up with a three year temporary arrangement,
7 offered that facility to the Bureau of Prisons, and
8 got the contract.

9 MEMBER MILLER: Thank you.

10 CHAIRPERSON GRIFFIS: Very well. Thank
11 you. The next is we had asked Bannum to provide
12 data to us to identify the inmate population. That
13 was also received. Did all the parties receive all
14 the information so far that I've evidenced?

15 COMMISSIONER PARSONS: Mr. Chairman?

16 CHAIRPERSON GRIFFIS: Yes.

17 COMMISSIONER PARSONS: I have a
18 question I wanted to ask Mr. Rushkoff. In your
19 memorandum, you identified a number of facilities,
20 ten to twelve. Are these all characterized on the
21 Certificate of Occupancy or elsewhere as community
22 correctional facilities?

23 MR. RUSHKOFF: Not necessarily, no.
24 Where I got that list of facilities was facilities
25 that are recognized in D.C. either as being part of

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1 the correctional system and not a jail or
2 facilities that are recognized as halfway houses.
3 Again, the term "halfway house" here I'm using in
4 the general sense rather than the technical sense.

5 I can't say for sure, for example, what the status
6 of the residents are, whether they are still
7 serving sentences versus having completed sentences
8 perhaps and that kind of thing. I didn't have time
9 to do that.

10 COMMISSIONER PARSONS: Okay. Do you
11 know whether these are temporary facilities as we
12 have discussed? I don't mean in the context of
13 801.

14 MR. RUSHKOFF: Just temporary in any
15 sense.

16 COMMISSIONER PARSONS: Rather that they
17 come and go.

18 MR. RUSHKOFF: I don't believe that any
19 of them are temporary in that sense.

20 COMMISSIONER PARSONS: But do you know
21 whether any of them have a relationship with the
22 Bureau of Prisons?

23 MR. RUSHKOFF: Yes, some have
24 relationships with the Bureau of Prisons. Let's
25 see --

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1 COMMISSIONER PARSONS: That's all
2 right. I'm not trying to delay this. The one that
3 was located on New York Avenue, which is no longer
4 in operation, was that shown as a temporary
5 facility?

6 MR. RUSHKOFF: I don't believe it was.
7 The problem is I didn't know this until we started
8 pulling them. My understanding from the DCRA staff
9 is they pulled Certificates of Occupancy for these
10 facilities, but the Certificates of Occupancy did
11 not contain information indicating the regulation
12 that was the basis for issuance of the certificate.

13 In other words, they didn't cite to say this is a
14 CBRF.

15 COMMISSIONER PARSONS: Okay.

16 MR. RUSHKOFF: We didn't get much
17 information from them. In pulling it all, I was
18 trying to determine whether or not there were other
19 facilities that had received permits or
20 certificates pursuant to 801.7(k). It appears that
21 there is not a single facility that is operating
22 under that authority.

23 COMMISSIONER PARSONS: So then how did
24 the one on New York Avenue come to be?

25 MR. RUSHKOFF: I know it's been there a

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1 long time. Unless it's moved - and I doubt that's
2 the case. There's references to CCC4 going back to
3 the '70s and court decisions involving inmates at
4 CCC4. While I don't know the situation in the '70s
5 in terms of the zoning rules as to how it would
6 have gotten set up there, the one possibility is
7 that it was a variance or an exception or something
8 under those rules that once it was there for a
9 certain period of time that's where it got to stay.

10 COMMISSIONER PARSONS: You have no
11 knowledge of why it stopped operation.

12 MR. RUSHKOFF: No. One of the first
13 gentlemen who testified for Bannum had actually
14 worked at CCC4 recently. I don't recall if he
15 discussed what happened there.

16 COMMISSIONER PARSONS: I don't think
17 so.

18 MR. RUSHKOFF: I'm not sure why it was
19 closed down. I do know it was around a long time.

20 COMMISSIONER PARSONS: But as far as
21 you know it was a voluntary closure. It wasn't
22 something the city did to stop it.

23 MR. RUSHKOFF: I just don't know. I
24 don't know anything about its closure.

25 COMMISSIONER PARSONS: Fine. Thank

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1 you.

2 CHAIRPERSON GRIFFIS: Are any of the
3 others not in operation?

4 MR. RUSHKOFF: Yes. Well I shouldn't
5 say yes. I don't know for sure. In the report
6 that I had referred to - it's called "A Community
7 Corrections Facility Siting Advisory Commission" -
8 they list a number of community correctional
9 centers or halfway houses. There are only about
10 six or seven of them listed there. Plus you have
11 Bannum's.

12 Now I believe that recently there have
13 been a number of closures. I don't really know the
14 circumstances, but I suspect it has to do with the
15 transition of authority from the Department of
16 Corrections over to the Bureau of Prisons for a lot
17 of this work. But if you look, for example, in a
18 phone book from several years ago, which I did,
19 you'll see quite a long list of halfway houses that
20 seem to be part of the Department of Corrections.
21 Then it seems like they have a much smaller list
22 today.

23 So it seems like in the last few years
24 there's been a period of transition. What I was
25 trying to do was go through and just try to find

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1 everything in the last few years that has been
2 operating as a halfway house to look and see what
3 zone it's in and try to determine are any of these
4 temporary detention or correctional institutions.
5 The answer seems to be no.

6 The only one that was in the C-M
7 District - and actually I'm even questioning to
8 myself whether or not it's actually in the C-M-2
9 District because I noticed that the address is an
10 odd number. I believe those are on the north side
11 of New York Avenue, and I believe the C-M-2
12 District is on the south side of New York Avenue.

13 So I even wonder whether the one
14 example of C-M-2 that we have is actually correct,
15 but that's what was reported to me by the DCRA
16 staff. In any event, the CCC4 was the only one
17 that could possibly be authorized under 801.7(k).
18 When I saw that it's been around for three decades,
19 I knew that obviously couldn't be the case.

20 CHAIRPERSON GRIFFIS: Okay. Thank you.

21 Any other questions? Very well. As I said, we
22 asked Bannum for the data to provide identification
23 of inmate population that's housed which we did
24 receive. We had made note that Bannum had
25 volunteered to provide certain sections of the

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1 lease. Was that submitted?

2 MR. CAMARNO: It hasn't been submitted.
3 I have it with me right now though.

4 CHAIRPERSON GRIFFIS: You are
5 anticipating submitting that.

6 MR. CAMARNO: I can submit it right now
7 if you would like. I was just going to make some
8 comments about it and briefly tell you what I have.

9 CHAIRPERSON GRIFFIS: That's fine. On
10 your time, we don't need it right now.

11 MR. TEMPLE: Excuse me, Mr. Griffis,
12 two things. One is just for Mr. Parsons reference.

13 At our Exhibit 15, we have attached copies of the
14 Certificate of Occupancies for the existing halfway
15 houses or rehabilitation facilities.

16 Two is to the extent that they have the
17 lease and they are going to submit it today, we
18 would like to have a copy of it so we can review
19 it. It was supposed to be submitted in advance.
20 We would like to have an opportunity to read it to
21 the extent that it's going to be admitted into
22 evidence.

23 CHAIRPERSON GRIFFIS: Yes, I would
24 assume copies are going to be provided. Then once
25 we ascertain what its relevancy is for the

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1 submission, we'll figure out what kind of timing is
2 needed to respond to that. Anything else to
3 clarify before we jump right into this? Is
4 everyone set? Very well. Then we'll turn it over
5 to you when you are ready.

6 MR. CAMARNO: I brought two documents
7 with me, Mr. Chairman. I brought portions of the
8 lease, and I brought portions of our negotiation
9 documents that we had with the Bureau of Prisons.
10 Now I'm not going to argue that these should go
11 into evidence because I really don't think that
12 they are relevant.

13 I was just responding to a comment made
14 last time from Mr. Temple. He was all hung up on
15 this lease. I really think it has no relevance
16 whatsoever because the Certificate of Occupancy is
17 limited to three years and so is the building
18 permit.

19 So as to what relevance the lease has
20 on anything, I don't think it has any relevance
21 whatsoever. But I'm going to voluntarily produce
22 portions of those documents. I'm not arguing that
23 they should go into evidence. I don't think they
24 are relevant whatsoever. I'm just doing it to
25 satisfy Mr. Temple.

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1 CHAIRPERSON GRIFFIS: Okay. What are
2 the portions of the lease going to tell us?

3 MR. CAMARNO: As you know, there is a
4 lot of proprietary information in the lease
5 document that I have just produced. Those portions
6 talk about the three year limit.

7 CHAIRPERSON GRIFFIS: Okay, on the
8 lease itself.

9 MR. CAMARNO: On the lease itself.

10 CHAIRPERSON GRIFFIS: So the lease is
11 for three years.

12 MR. CAMARNO: Why don't I just give it
13 to you? We can go through it quickly.

14 CHAIRPERSON GRIFFIS: That sounds like
15 a darn good idea. Mr. Camarno, are you also going
16 to be calling a witness today?

17 MR. CAMARNO: No, I am not.

18 CHAIRPERSON GRIFFIS: Okay. So you are
19 not going to need all 40 minutes. Is that correct?

20 MR. CAMARNO: I am not going to need
21 all 40 minutes. If we can get to Mr. Temple's
22 rebuttal --

23 CHAIRPERSON GRIFFIS: Very well. What
24 I want to do on this lease, as we note several
25 times that you have held some objection to putting

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1 it in, but we do appreciate your accommodating
2 that. With that, let's not spend a lot of time. I
3 want you to highlight what you think we should look
4 at, what you think is not pertinent and not
5 relevant, and what may well be and let it go at
6 that.

7 That will afford us some time to review
8 the document itself. The pertinent piece you have
9 already labeled and what is important to the Board
10 is the term of the lease. It may have obviously
11 raised some questions if it was for 99 years or so.

12 But there it is. I'll turn it over to you.

13 MR. CAMARNO: First of all, I have
14 handed out four pages just for the record. You
15 have the signed signature page on page 23. It's a
16 rather long lease. Addressing the time and
17 duration of the lease, you can see a 2.01. It
18 talks about "the term of the lease shall begin on
19 the first day of December 2002 or later to conform
20 to and run concurrently with the performance of
21 Bannum's federal contract." So it's contingent
22 upon the federal contract that Bannum has. We
23 heard testimony at the last proceeding that it's a
24 one year base contract with four one year option
25 periods.

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1 If you just flip over for a second,
2 leading into page 6 there's covenant of tenant.
3 At 5.02, "Tenant is hereby making certain covenant
4 and agrees as follows." I'll skip down to the
5 appropriate portion. "Tenant acknowledges it has
6 investigated zoning, building code, and other local
7 laws and regulations. Tenant acknowledges the
8 current zoning applicable to the premises may place
9 a three year restriction on the plan and permitted
10 use within the premises."

11 So we do acknowledge there's a three
12 year restriction, and we also make it contingent
13 upon Bannum's government contract which has a one
14 year base and four one year options. With that
15 being said, I have another document here which is
16 our final negotiation position with the BOP.
17 There's a lot of give and take back and forth on
18 these government contracts and a lot of
19 negotiations going back and forth.

20 As you can see, on page 2 - and I have
21 redacted out the amounts of the contract - it says
22 "The property discussed herein above is properly
23 zoned for a three year period." So we told BOP it
24 was for three years. That's the basis of our
25 negotiations. A contract was entered into for one

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1 year with four one year options. The BOP is fully
2 aware of the three year limit.

3 There's been absolutely no intent here
4 whatsoever to deceive or fool anybody. We have a
5 zoning permit that says three year. We have a
6 Certificate of Occupancy that says three years. We
7 went to BOP and told them it's three years. Our
8 lease is contingent upon Bannum's contract. But I
9 hopefully have addressed those issues and we can
10 put those issues to rest.

11 I might add once again that the
12 building permit and the C of O are limited to three
13 years anyways. So if Bannum is stupid enough to go
14 and enter into a 50 year contract, they only have
15 zoning for three years. It doesn't really make any
16 difference.

17 MR. TEMPLE: May I be heard, Mr.
18 Griffis?

19 CHAIRPERSON GRIFFIS: Yes, let me see
20 if the Board has any quick questions at this time.

21 MEMBER ZAIDAIN: Just a clarification
22 for me. These documents I assume were not issued
23 to DCRA when the permit was pulled. Correct? DCRA
24 did not required on these documents, the lease,
25 this letter or anything when the permit was issued

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1 or the C of O was issued. Correct?

2 MR. CAMARNO: We can go back and look
3 at that, but let me make the representation right
4 now I don't think so.

5 MEMBER ZAIDAIN: I don't think so
6 either. I think Mr. Rushkoff stated that the three
7 year issue was not really dealt with when DCRA
8 issued the permit other than to say the C of O be
9 pulled after three years. I just wanted to make
10 sure. These may have been different documents than
11 what we were referencing before. I just wanted to
12 make sure that's clear.

13 MR. RUSHKOFF: Yes, I don't believe
14 DCRA reviewed these documents.

15 CHAIRPERSON GRIFFIS: Would there be a
16 normal course of action in a permit review that a
17 lease would be reviewed by DCRA?

18 MR. RUSHKOFF: Back in December, no.

19 CHAIRPERSON GRIFFIS: Any other
20 questions? Ms. Miller.

21 MEMBER MILLER: I'm wondering if you
22 want to comment on the line in 2.01 that says "It
23 is further provided that in no event shall the
24 expiration of Bannum's occupancy of the premises
25 under this lease be later than December 31, 2009."

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1 MR. CAMARNO: That's what our options
2 plus extensions would say in our government
3 contract, but that doesn't mean that we can't stay
4 at this particular facility for three years and
5 then move some place else with the permission and
6 consent of the BOP. It doesn't mean the facility
7 is going to go beyond three years. We are limited
8 to three years. And let me just say here that
9 throughout negotiations the BOP was well aware of
10 this. That term has been negotiated technically
11 into the contract because that was our offer. We
12 told them three years.

13 CHAIRPERSON GRIFFIS: Anything else?
14 Board questions?

15 MEMBER ETHERLY: A quick question, Mr.
16 Chair. So if you were to take the lease in concert
17 with your BOP contract and look at 801.7(k), would
18 it be your contention then that 801.7(k) would
19 allow you to renew at the end of your three year C
20 of O for an additional three years or an additional
21 one year? Is it essentially your understanding
22 that under 801.7(k) that provision would
23 countenance that kind of arrangement? That you
24 could essentially renew --

25 MR. CAMARNO: Well, three years down

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1 the road, sir, I don't know where we're going to
2 be. Anybody can propose anything they want.
3 Obviously Bannum could come in later on and try
4 special exceptions or a variance or renew it or
5 something. I mean, we're talking right now.

6 MEMBER ETHERLY: Well, let's make it a
7 hypothetical. We remove the difficulty of speaking
8 for your client per se. Could corporation X, which
9 chooses to operate a temporary correctional
10 facility under 801.7(k), have a three year
11 Certificate of Occupancy, later renew that
12 Certificate of Occupancy for another three years,
13 and stay at the same site?

14 MR. CAMARNO: I don't think there's any
15 automatic way to renew it. I think they would have
16 to go through the application process again.

17 MEMBER ETHERLY: But conceivably, you
18 are saying that under 801.7(k) you could renew and
19 stay at that same location.

20 MR. CAMARNO: I don't like using the
21 word "renew." I like to use the word "apply."

22 MEMBER ETHERLY: Okay. So you could
23 apply again.

24 MR. CAMARNO: We could apply again.

25 MEMBER ETHERLY: For that same

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1 location.

2 MR. CAMARNO: Renew connotates to me
3 that you have some automatic right to exercise or
4 continue on.

5 MEMBER ETHERLY: Under 801.7(k), it
6 would be your position that you could apply for
7 another Certificate of Occupancy. As long as that
8 Certificate of Occupancy is for three years or
9 less, that would not be in violation or be contrary
10 to 801.7(k).

11 MR. CAMARNO: It would all depend on
12 the circumstances at the time. I don't know the
13 needs of the BOP and how much of an emergency there
14 is for inmates to locate here. We're just
15 projecting down the road. It's a situation that
16 we're just speculating on right now.

17 MEMBER ETHERLY: Okay.

18 MR. CAMARNO: Obviously Bannum would
19 have the right at the end of three years to move
20 the facility somewhere else, seek zoning in another
21 portion. Bannum would go back to the BOP saying we
22 have to change our location. Here's our plans.
23 Would you approve it and extend the contract for
24 another year or two? That's all part of
25 negotiations.

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1 Or they could come in and say we would
2 like to stay here for another year. What do you
3 have to say about that? It's all up to the
4 District at that point in time as to what they want
5 to do with it.

6 MEMBER ETHERLY: So let me just be sure
7 I'm clear on your answer. What I'm probing is the
8 scenario where if at the end of your three years,
9 could you stay at the same site under 801.7(k) and
10 just simply apply for another Certificate of
11 Occupancy. Part of the issue with 801.7(k) is this
12 word "temporary" and the attachment of that three
13 year timeframe.

14 What I'm trying to ascertain is would
15 it be your position that an applicant, not
16 necessarily Bannum but just any mythical or
17 hypothetical applicant, could at the end of their
18 initial three years apply again for another three
19 year renewal of their C of O and stay at that same
20 location. If I understand your answer correctly,
21 it's your statement that at the end of that three
22 years an applicant could decide to apply again, and
23 it would simply be up to the District of Columbia
24 government as to whether or not it wants to grant
25 that C of O application. Is that correct?

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1 MR. CAMARNO: That's correct. I have
2 to say here this situation with the District has
3 been going on since the early '70s. So when you
4 look at three or six years in comparison to 25
5 years or 30 years that it's been going on, perhaps
6 another three years could construe to be temporary.

7 MEMBER ETHERLY: So it's your position
8 that an applicant would not be prevented from
9 making the decision to stay at the same location
10 and apply for a Certificate of Occupancy.

11 MR. CAMARNO: Let me answer it this
12 way. I see nothing in the code that says you
13 cannot.

14 MEMBER ETHERLY: Thank you. Thank you,
15 Mr. Chair.

16 CHAIRPERSON GRIFFIS: Any other
17 questions from the Board? Mr. Temple.

18 MR. TEMPLE: Thank you. I wanted to
19 speak to the first document. I think this is
20 appreciated that the gentleman has submitted four
21 pages of a 23 page lease. But even if he doesn't
22 show it to the parties, this Board should be
23 entitled to the entire lease. To provide only
24 segments of the lease, particularly when we are
25 talking about a three year issue - and this lease

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1 speaks to a potential six year term - I think that
2 it's just not complete and it presents a problem.

3 Additionally, the lease that has been
4 provided does not have a date on it. It references
5 in print the blank date of July 2002. There's no
6 date on the last page. You should have the
7 opportunity to do an in camera review.

8 On the second issue, I'm a little
9 disturbed on page 2. Again, he speaks very clearly
10 to a five year scenario at three different points
11 here in terms of cost. However, and I don't know
12 why, but based on the fact that he has submitted
13 it, in the last sentence, it talks again about a
14 zoning for a three year period. Then it's blacked
15 out. To the extent that it's blacked out, perhaps
16 parties may not see it, but I think that this Board
17 should see an unredacted document so that it will
18 know what the context is of that particular
19 statement.

20 He suggested this letter is to the
21 Bureau of Prisons, and it appears to be. It speaks
22 about a negotiation. We don't know what's
23 negotiated. It appears to be in response to
24 something and whether or not there's a response
25 from the Bureau of Prisons. So merely from a point

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1 of completion, and I certainly don't need to see
2 it, to know it, but I think that you should to know
3 whether he's actually giving a full disclosure. We
4 have some concerns in that regard.

5 CHAIRPERSON GRIFFIS: Okay. First of
6 all, I don't think that's part of what we can do.
7 In fact, we review the entire record. As a party
8 and as the public, everyone would be able to
9 reference that document and review it. Otherwise
10 actually we would get strongly into the difficulty
11 of *ex parte* communication if we were actually
12 reviewing submissions by an applicant or a party in
13 the case and none of the other parties saw that or
14 could react to it.

15 I don't find difficulty necessarily in
16 having portions of the lease. As I stated, I think
17 it addresses some of the times. If you want to
18 conduct brief cross examination to elicit other
19 weaknesses outside of your statement which --

20 MR. TEMPLE: Who can I cross examine?

21 CHAIRPERSON GRIFFIS: Well, it's an
22 interesting point. But to bring some questions of
23 the lease or the different terms of it, it would
24 not be testimony but it is evidence and I think
25 they may well be able to answer it. In terms of

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1 the blacked out portion on the second page of the
2 second document, it is interesting. Do you know
3 was that portion of the sentence also attendant to
4 a dollar amount?

5 MR. CAMARNO: I can represent to the
6 Board the last sentence speaks to the number of
7 residents.

8 CHAIRPERSON GRIFFIS: I see.

9 MR. CAMARNO: We feel here that one of
10 the reasons why this appeal is being brought to
11 begin with was to the advantage of another
12 competitor. I think you heard some evidence of
13 that several sessions ago. So we have to be very
14 careful here of what we disseminate. Regina James
15 was speaking on behalf -- Remember we presented
16 that evidence.

17 CHAIRPERSON GRIFFIS: Right.

18 MR. CAMARNO: She was trying to solicit
19 one of her people that lived in the area there to
20 bid on the government contract.

21 CHAIRPERSON GRIFFIS: Let's not delve
22 too far in with that one.

23 MR. CAMARNO: But the point is I have
24 to be careful what I disseminate out to the public.

25 CHAIRPERSON GRIFFIS: I understand.

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1 There is information that the Board would not
2 expect to review nor need to. Mr. Temple, anything
3 further to bring to light for the Board?

4 MR. TEMPLE: I'm going to go back to
5 that point with your indulgence. This statement
6 where RFP stated and identified clearly the number
7 of potential residents at this facility, to the
8 extent that it's already open to the world, this is
9 150 bed facility. The gentleman submitted a
10 supplemental document. It noted there were 46
11 people there. That's no mystery.

12 I think again that particular language
13 - and it was only talking about the number of
14 people - there's no prejudice there. That should
15 be disclosed. I'm concern. I'll tell you why, Mr.
16 Griffis. He's saying this is for a three year
17 period. There's some real problems with that when
18 you look at both documents. I just think we need
19 to know. I don't want to know what his money is.
20 That's confidential. But I think he should
21 disclose to the public what this language says.

22 MEMBER ZAIDAIN: How would that relate
23 to us reviewing what DCRA relied upon when they
24 issued a permit?

25 MR. TEMPLE: It goes to two issues.

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1 One aspect of our argument is that is a component.

2 The other side of that coin is that the law is the
3 law. If you were to find out that they didn't
4 represent accurately the information, knowing that
5 they are telling the Bureau of Prisons and they are
6 telling the District of Columbia repeatedly that
7 it's a three year lease issue.

8 In other words, you can't have your
9 cake and eat it too. You can't tell D.C. to
10 squeeze into the zoning laws one thing and on the
11 other hand doing something else. It's our theory
12 that if they did that then that's illegal. So when
13 it comes to you, you can say that it was an illegal
14 zoned proposal and you can reject that on that
15 basis.

16 MEMBER ZAIDAIN: Well, I don't think
17 it's illegal. As the intervenor stated, it would
18 be bad business on their part to go into a lease
19 where they could lose their zoning after three
20 years. I understand your point. I had concerns
21 with the lease as well. I find it disappointing
22 that DCRA did not rely on reviewing a lease when
23 issuing a permit for a facility that needs to be
24 leased on leased property for a period to exceed
25 three years.

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1 Well, what does DCRA rely upon to issue
2 that permit to verify that it's leased and verify
3 that it's three years? Well, they didn't rely on
4 the lease. So unfortunately I find that hard to
5 really get that into this proceeding. Furthermore,
6 Mr. Rushkoff has said that the way they would
7 handle the three year period is they would revoke
8 the C of O after three years. With all due respect
9 to DCRA, that's a skeptical way to enforce that
10 portion of the law. But that's what we have to
11 rely upon.

12 MR. TEMPLE: Mr. Zaidain, with all due
13 respect, the community would be in trouble if you
14 found out today that what they did was illegal and
15 you couldn't terminate it. Then we would be left
16 with going to DCRA which has committed the very
17 illegal act in the first place, and they are not
18 likely to overturn what's illegal. Then we would
19 have no recourse.

20 MEMBER ZAIDAIN: Well, I think it would
21 be a more interesting question if this facility had
22 been operating for four years and the permit was
23 appealed to us and DCRA hadn't revoked it after
24 three.

25 MR. TEMPLE: But if you found out today

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1 that there was illegal zoning here and you knew
2 that they failed to give you an accurate
3 disclosure, then that would be significant.

4 MEMBER ZAIDAIN: Well, like I said,
5 I'll go back to what DCRA stated to us in regards
6 to the three year period. They would handle that
7 by revoking the C of O after three years.
8 Unfortunately we're not here to determine whether
9 or not that's going to happen or not. Like I said,
10 if this was the fourth year and the C of O had not
11 been revoked, I'd say you would have a hell of an
12 argument. But that's all we have to go on right
13 now.

14 MR. RUSHKOFF: On behalf of DCRA, I
15 would just say that I share Mr. Temple's concern
16 about the last sentence in the two page letter.
17 The fact that the blacked out language comes right
18 after three year period leads me to believe that it
19 somehow modifies the term "three year period." I
20 think that it would be helpful to have that
21 information.

22 With respect to whether or not the
23 lease itself has to be for three years, I believe
24 that the language of the regulation is that on
25 leased property for a period not to exceed three

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1 years. So I'm not sure that the lease itself has
2 to be a three year lease. I will just point that
3 out. For example, if you had a ten year lease but
4 it was on that property used as a detention
5 facility for three years, I believe that would
6 comply with 801.7(k).

7 MEMBER ZAIDAIN: Well, I'd go back to
8 my point of how did DCRA even know that it was
9 leased when they issued the permit? I haven't
10 gotten a sufficient answer to that. But let me
11 respond to your point, Mr. Rushkoff, in regards to
12 the blacked out area. Say this said for a three
13 year period automatically renewable for ten years,
14 for example. I'm being hypothetical. Would that
15 have changed DCRA's decision if they would have
16 seen this letter?

17 MR. RUSHKOFF: I don't know if it would
18 have changed. Would it have changed the decision
19 back in December? That's a hypothetical question.

20 I can't tell you what DCRA's decision would have
21 been, but it would have been presented with a
22 different set of facts back then.

23 MEMBER ZAIDAIN: Sure.

24 MR. RUSHKOFF: I guess my point is
25 given that we've gotten this far involved in it I

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1 don't want to give the appearance that we're facing
2 an issue and then putting our heads in the sand.
3 Now that we've gotten this close to resolving this
4 lease issue, it seems to me that it would make
5 sense at least to get on the record what the terms
6 of the lease are. Then DCRA would be in a position
7 to do whatever it thinks is appropriate. It may be
8 nothing. It may be something. At least we would
9 know what the terms of the lease are.

10 MEMBER ZAIDAIN: And that would be of
11 material value to DCRA.

12 MR. RUSHKOFF: I think it would be of
13 material value.

14 MEMBER ZAIDAIN: I would agree.

15 MR. TEMPLE: Can I just add? Just to
16 make a note, I think that as the Board looks at
17 this partial lease it has to look at the lease in
18 context, not just Section 5.01 on page 5. You talk
19 about a ten year lease. I note that the document
20 goes from page 1 to 5 and then from 6 to 23.

21 That says that they intend to use this
22 lease for the purpose of a residential community
23 correction center in accordance with Bannum's
24 government contract. That means that they are not
25 using it for any other purpose. Therefore they

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1 anticipate, consistent with the previous paragraph
2 which is paragraph 2.01, the possibility or
3 probability of it going beyond three years for
4 whatever that's worth. And I understand your
5 point, Mr. Zaidain. We can address that in our
6 closing arguments.

7 CHAIRPERSON GRIFFIS: Okay. Any follow
8 up, Mr. Zaidain?

9 MR. CAMARNO: I just want to add this
10 while everybody is talking about this thing. The
11 BOP is run by the Department of Justice. They are
12 not stupid. They have seen our certificates. They
13 have seen the lease. They have seen all of this
14 documentation. Everything is kosher. For Mr.
15 Temple here to take pot shots at a voluntarily
16 submitted document which has no relevance
17 whatsoever, and I'm going to object to strenuously
18 again because the C of O says three years, and
19 that's the end of this discussion.

20 CHAIRPERSON GRIFFIS: Okay. We
21 understand your point. Let's continue on with your
22 final case presentation then.

23 MEMBER ETHERLY: One quick question,
24 Mr. Chair, off of the lease issue. I wanted to
25 pose to Mr. Rushkoff the same question that I posed

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1 to Mr. Camarno. In the hypothetical, if we take it
2 out of the context of talking about a particular
3 applicant or entity, would it be your position that
4 under 801.7(k) that if a C of O is on its face
5 limited to simply three years could a property
6 owner or the operator of a temporary correctional
7 or detention facility simply renew that C of O for
8 another three years and stay at the same location?

9 Is it your understanding or belief that would be
10 an appropriate course of action under 801.7(k)?

11 MR. RUSHKOFF: The short answer is no.

12 The longer answer would be potentially there's a
13 hypothetical that one could come up with where that
14 would be appropriate. But certainly it seems to me
15 it completely undermines the three year limitation
16 if you can simply renew it.

17 So not having thought through every
18 possibility, just as a matter of course, if you
19 were then to get a renewal and it comes in we want
20 to renew for another three years, it seems to me
21 the answer is no, you cannot renew for another
22 three years. It's a temporary facility for up to
23 three years.

24 MEMBER ETHERLY: Let me then bring it
25 back to the instant case before us. It would be

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1 your position then at the conclusion of three years
2 the Adams Place facility would cease to operate at
3 that location. If it were of course allowed to
4 continue, it would be your understanding that at
5 the end of three years that facility would have to
6 cease operation.

7 MR. RUSHKOFF: At least as a matter of
8 course, yes. Again, I could imagine there could be
9 some sort of showing made to take it out of that.
10 But it seems to me you would need an extraordinary
11 showing at that point to continue it past three
12 years given the limitation in the regulation.

13 MEMBER ETHERLY: Thank you. Thank you,
14 Mr. Chair.

15 CHAIRPERSON GRIFFIS: Okay.

16 MEMBER MILLER: I just would like Mr.
17 Rushkoff's opinion. I think you said that you
18 think the lease is relevant. I'm not sure. Why is
19 it relevant if the C of O is only for three years?
20 Why does the Board need to consider looking at the
21 lease?

22 MR. RUSHKOFF: Okay. It would raise an
23 issue. I don't know what the answer would be. But
24 the issue it would raise would be whether or not
25 the institution was intended as a permanent

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1 institution. It seems to me that it's possible
2 that you could have something that's temporary that
3 lasts for a long time but its status is temporary.

4 At the same time, you could have a
5 permanent facility that the operation was cut short
6 by a revocation of the Certificate of Occupancy.
7 But it was something that was set up with the
8 intention of being a permanent facility. It seems
9 to me an argument could be made that if that were
10 the intent to have a permanent facility and to see
11 --

12 For example, one could set up a
13 facility and say we don't know what we'll do after
14 two or three years. We're going to try to find
15 some way. Maybe we'll get a variance. Maybe we'll
16 do this. We will try and get this facility up and
17 running under this provision for three years. We
18 will then try to come up with a legal strategy for
19 keeping it in place permanently.

20 If that were the intent all along, I
21 think that raises a serious issue as to whether or
22 not it was a temporary facility. I don't know.
23 Maybe the answer is it's temporary because DCRA is
24 going to revoke the Certificate of Occupancy. I'm
25 not sure how DCRA would come out on that. I would

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1 want to give them an opportunity to review that
2 information and make a decision.

3 I don't think it's for me as counsel to
4 make that decision. Basically I would present the
5 information saying here was the information that
6 was developed in the course of these proceedings
7 for your consideration. I would just leave it to
8 them. But I would want them to have that
9 opportunity.

10 MEMBER ZAIDAIN: When you say "them,"
11 who are you referring to?

12 MR. RUSHKOFF: I'm referring to the
13 Zoning Administrator. If there's evidence that the
14 intent all along was to have a permanent facility -
15 I'm not saying that's what the record shows -
16 hypothetically, it seemed to me I would have an
17 obligation to collect that information and provide
18 it to the Zoning Administrator for whatever action
19 he saw fit.

20 Maybe his conclusion would be there's
21 nothing that I need to do. I'm just going to
22 revoke the C of O in three years and that's it.
23 But he might not have that conclusion. A
24 reasonable person could decide differently. I
25 would just want him to be able to make that

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1 decision.

2 MR. CAMARNO: I just have to comment on
3 some of this stuff here because it really does not
4 sit right with me. Once again, I think that the
5 lease is very clear. It talks about our government
6 contract. It talks about the three year
7 restriction. Secondly, when we filed an
8 application, nothing was attached to the
9 application saying we're going to stay there for 50
10 years, 14 years. Basically we applied for a
11 temporary three year license from the District and
12 we got it. That's the key document that I think
13 you have to look at.

14 CHAIRPERSON GRIFFIS: For your
15 Certificate of Occupancy or for your permit.

16 MR. CAMARNO: I'm sorry?

17 CHAIRPERSON GRIFFIS: When you say
18 "application," for your C of O or for your permit?

19 MR. CAMARNO: Permit. The same thing
20 with the C of O, the same sort of application.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. CAMARNO: It was applied for on a
23 temporary three year basis. That's what we applied
24 for. That's what we received. That should be the
25 end of this discussion.

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1 MR. TEMPLE: Mr. Griffis, with all due
2 respect --

3 MR. CAMARNO: You can speculate for the
4 next thousand years why they are bringing this
5 appeal, what they have behind this appeal. Mr.
6 Temple hopes to get his picture in the newspaper.
7 We can go on and on and on about this thing.

8 CHAIRPERSON GRIFFIS: I understand.

9 MR. CAMARNO: But it's purely
10 speculation.

11 CHAIRPERSON GRIFFIS: Mr. Temple.

12 MR. TEMPLE: Mr. Griffis, with all due
13 respect, our only position on behalf of the
14 community is that the law is the law. Our concern
15 is very basic here. I think the record is actually
16 going to show and the reason why the lease is
17 important is because Bannum has intentionally
18 operated on the flawed premise of the temporary
19 correctional institution. I think what we should
20 do here rather than bantering back and forth is we
21 have an opportunity to do our closing arguments and
22 we can submit the case for the record.

23 CHAIRPERSON GRIFFIS: Let's go.

24 MR. TEMPLE: I just want to say I think
25 the gentleman owes me an apology. I think that the

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1 Board shouldn't allow him --

2 MR. CAMARNO: Mr. Temple, you are
3 taking --

4 CHAIRPERSON GRIFFIS: Excuse me,
5 gentlemen, your mics have been turned off.

6 MR. TEMPLE: I think that's critical,
7 Mr. Griffis.

8 CHAIRPERSON GRIFFIS: Mr. Temple, I can
9 always turn them off again. Please, let's not
10 break down into such --

11 (Inaudible.)

12 CHAIRPERSON GRIFFIS: I understand, but
13 I'm not going to be the arbitrator of that. I'll
14 keep a list and then I'll give it to you
15 afterwards. Then you guys can go remedy outside.
16 Let's continue on with this and get me what we need
17 in order to finish this case in order for us to
18 substantially deliberate on it. Mr. Camarno, let
19 me turn it over to you. Let's continue with the
20 presentation of what you want to in terms of
21 conclusions of your case. Then we'll set up in
22 order for closing and rebuttal if there are
23 rebuttal witnesses.

24 MR. CAMARNO: Okay. We presented our
25 position. We presented our witnesses. I have

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1 voluntarily come forth with certain documentation.

2 There's a lot of documentation in the record
3 already that supports our position. At this point
4 in time, we rest our case. I would like to have
5 the opportunity since the record is so massive to
6 present some sort of findings of fact/conclusions
7 of law after this proceeding so we can get some
8 sort of orderly arguments on this.

9 CHAIRPERSON GRIFFIS: Excellent. I
10 would agree. I think the Board will be requesting
11 that of all the parties in participation. In which
12 case, let's establish closings. Mr. Temple, are
13 you prepared? Well, let me put it to you in the
14 order we should go through closings. We can start
15 with this side and end with you. I'm assuming you
16 are wanting to be the final closing. Is that
17 correct?

18 MR. TEMPLE: Whatever is your pleasure.
19 We have no objection to that.

20 CHAIRPERSON GRIFFIS: Okay. Are you
21 calling rebuttal witnesses at all?

22 MR. TEMPLE: No.

23 CHAIRPERSON GRIFFIS: Why don't we do
24 this? Mr. Rushkoff, are you prepared to do your
25 closing now?

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1 MR. RUSHKOFF: Yes.

2 CHAIRPERSON GRIFFIS: Let's start with
3 you then. Then we can probably take a break if we
4 need to. We'll go to Bannum's closing. Then we'll
5 end with you, Mr. Temple. Also in anticipation of
6 closings, I would imagine none would be much more
7 than 15 minutes. Is that doable for you, Mr.
8 Rushkoff?

9 MR. RUSHKOFF: That's fine.

10 CHAIRPERSON GRIFFIS: Is that also
11 amenable to Bannum?

12 MR. CAMARNO: Yes.

13 CHAIRPERSON GRIFFIS: Excellent. Mr.
14 Temple?

15 MR. TEMPLE: Yes.

16 CHAIRPERSON GRIFFIS: All right. So
17 let's continue on. Mr. Rushkoff, it's all yours.

18 MR. RUSHKOFF: Okay. Thank you, Mr.
19 Chair. The issue raised in this appeal is how
20 community corrections centers ought to be treated
21 under the Zoning Regulations. Now the ANC's
22 position is that a community corrections center
23 fits within the definition of CBRF, community based
24 residential facility. They would say that if it's
25 a CBRF then it can't constitute any other use.

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1 Therefore it can't be a temporary detention or
2 correctional institution under 801.7(k).

3 They also argue - and I think they are
4 still making this argument - that if it's not a 24
5 hour lock down facility then it can't be considered
6 a detention or correctional center. I think we've
7 addressed that thoroughly in the papers. I'm not
8 going to go back over that. We rely on the fact
9 that halfway house inmates are treated as prison
10 inmates for legal purposes in the sense that if you
11 escape from a halfway house you are prosecuted
12 under D.C. law for a prison break.

13 There was also testimony about these
14 individuals being in the custody of the United
15 States Attorney General. So I think it's pretty
16 clear that they are in the correctional system even
17 if they are at a halfway house. I want to focus
18 more on the argument, which the Board was more
19 concerned with, that once you categorize an
20 institution as a CBRF then it can't constitute any
21 other use. Therefore you can't apply 801.7(k).

22 The primary problem that DCRA has with
23 this position is that any temporary detention or
24 correctional institution can also be described as a
25 CBRF. The result is that nothing can be a

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1 temporary detention or correctional institution
2 under 801.7(k). If we look at the definition of
3 adult rehabilitation home, which is part of the
4 definition of CBRF in the regulations, we have "a
5 facility providing residential care for any
6 individual 21 years of age or older under pre-trial
7 detention or sentenced court orders."

8 I would point out what appears to be a
9 typo. There's no such thing as a sentenced court
10 order. A court order is not sentenced. People are
11 sentenced. The intended meaning is probably
12 sentenced by court order right there.

13 I would also note that the definition
14 says "pre-trial detention or sentenced court
15 orders." Therefore the facility, in order to
16 qualify as a CBRF does not have to house both pre-
17 trial detainees and sentenced individuals. It can
18 house either detainees or sentenced individuals or
19 both and qualify as a CBRF.

20 Under this definition, any jail or
21 prison qualifies as an adult rehabilitation home.
22 A jail provides residential care for individuals
23 over 21 who are in either pre-trial detainment or
24 serving a sentence. The result is that a temporary
25 detention or correctional institution is always a

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1 CBRF and therefore not a temporary detention or
2 correctional institution.

3 Bannum's response to this little
4 conundrum is to try to read the definition of adult
5 rehabilitation home as narrowly as possible and
6 then argue that a community corrections tenant is
7 not a CBRF. Bannum's expert, Mr. Willingham, tried
8 to do this. He said that a community corrections
9 center does not provide "residential care" and that
10 residential care would be something more analogous
11 to care for an Alzheimer's patient.

12 He also said the phrase that I
13 interpret as sentenced by court order means
14 sentenced to that specific facility as opposed to
15 just sentenced. The problem here is that if you
16 are going to limit the definition of adult
17 rehabilitation home to disabled people requiring
18 care who are also criminal defendants and who are
19 sentenced to a specific facility then nothing will
20 qualify as an adult rehabilitation home. They do
21 not exist.

22 Now if you look at Bannum's own letters
23 to the Zoning Administrator describing what their
24 plans were, you will see that Bannum describes its
25 community corrections center as providing

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1 "residential rehabilitation services to individuals
2 referred by appropriate committing authorities."
3 Compare that to the general definition of CBRF in
4 the regulation. "A residential facility for
5 persons who have a common need for treatment,
6 rehabilitation, assistance, or supervision in their
7 daily living."

8 It's clear that Bannum in their letter
9 to the Zoning Administrator was proposing to
10 operate a CBRF. This general definition of CBRF
11 applies equally well to residents of halfway
12 houses, jails, and prisons. By the way, you might
13 take a look at the excerpt from the District of
14 Columbia's 1966 annual report which was attached to
15 the supplemental memo that DCRA filed last week.

16 There the Department of Corrections,
17 just in describing their mission, the mission of
18 the whole Department of Corrections is to "care
19 for, protect, instruct, and rehabilitate its
20 wards." That sounds like a CBRF. Caring and
21 rehabilitating. Reading the definition of adult
22 rehabilitation home very narrowly would produce a
23 favorable outcome for Bannum's facility and would
24 uphold DCRA's decision, but it would be bad for
25 halfway houses generally.

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1 CBRFs are allowed as a matter of right
2 in C-3 and C-4 business districts. If we were to
3 read the definition of CBRF to exclude all or most
4 halfway houses, then they will only be allowed as a
5 matter of right in C-M manufacturing districts and
6 then only on a temporary basis. DCRA's approach to
7 this problem is to accept that a temporary
8 community corrections center, which is what Bannum
9 is describing in its letters to DCRA, fits within
10 the definition of CBRF.

11 It also fits within the plain meaning
12 of temporary detention or correctional institution.

13 Indeed, it looks to us as if a temporary detention
14 or correctional institution is a narrow subset of
15 the CBRF category. Based on its status as a CBRF,
16 Bannum's facility could have been placed in a C-3
17 or C-4 District as a matter of right. Based on its
18 status as a temporary detention or correctional
19 institution, it could also be placed in the C-M
20 District as a matter of right but of course only
21 temporarily.

22 Now a number of concerns have been
23 raised in the course of the proceeding. A concern
24 that has been articulated is that DCRA's approach
25 would create a big loophole for anything that could

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1 be characterized as a temporary correctional
2 center. First, I would say it's not that big of a
3 loophole. CBRF's are already allowed as a matter
4 of right in C-3 and C-4 Districts. This loophole
5 allows a very narrow subset of CBRFs into C-M
6 Districts for up to three years.

7 Second, as far as we know, Bannum's
8 facility may be the first ever to be authorized
9 under 801.7(k). At this point in time, rather than
10 trying to weed 801.7(k) out of existence, after
11 DCRA has relied on it in issuing Bannum's permit,
12 it would be fairer to let DCRA's decision stand,
13 allow this one facility to have its three years of
14 temporary operation, and refer the issue of
15 801.7(k) to the Zoning Commission.

16 If 801.7(k) isn't being used and has
17 the potential for future mischief, let's just drop
18 it at this point. There really is not significant
19 harm in saying the regulation was in place when
20 DCRA made its decision, so let's honor that's
21 decision and allow this facility to continue for
22 its three year term. What about the language and
23 the definition of CBRF which goes "if an
24 establishment is a CBRF as defined in this section
25 it shall not be deemed to constitute any other use

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1 permitted under the authority of these
2 regulations?"

3 Now the literal meaning of the phrase
4 "any other use" in that sentence is any non-CBRF
5 use. A temporary detention or correctional
6 institution, we think we've shown, is always a CBRF
7 use. Therefore if an establishment is a CBRF, it
8 may also be deemed to be a temporary detention or
9 correctional institution just as it may also be
10 deemed to be an adult rehabilitation home or a
11 youth rehabilitation home.

12 Suppose instead of saying temporary
13 detention or correctional institution, suppose
14 801.7(k) had said temporary adult rehabilitation
15 home. I think we wouldn't be concerned about it
16 being an other use. It would have been clear in
17 that case that it was intended to be a subset of
18 CBRF because it would be using a term from the CBRF
19 definition.

20 Now we know that 801.7(k) came first.
21 Then the definitions of CBRF were developed later.

22 One question would be do we think the drafters of
23 the CBRF definition consciously intended to allow a
24 special treatment for temporary detention or
25 correctional institutions. There's a very good

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1 chance the answer to that is no. They may simply
2 have not been paying attention to 801.7(k) and just
3 focusing on what they were doing with defining
4 CBRF.

5 Just as it's unlikely that they
6 consciously intended to create this exception for
7 801.7(k), it's also very unlikely that they
8 consciously intended to do away with 801.7(k).
9 They probably would have done away with it rather
10 than leaving it there. But that's what the effect
11 will be if we say that CBRF can't be an 801.7(k)
12 use. What we're really saying is that the CBRF
13 regulation supplants 801.7(k). Treating an
14 801.7(k) use as a subset of CBRF does allow us to
15 harmonize the provision.

16 Another question is will this
17 interpretation create more problems than it's
18 solved, and will this allow CBRFs to be treated as
19 all sorts of other uses? Does this eviscerate the
20 language that seems to make sure that a CBRF is
21 treated as a CBRF? I think the answer is no. If
22 you look through the Zoning Regulations, 801.7(k)
23 appears to be the only use listed outside the CBRF
24 definition that is always a CBRF.

25 For example, if something were both a

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1 CBRF and a dry cleaning establishment, then
2 applying the CBRF definition it would be deemed to
3 be only a CBRF. That's because a dry cleaning
4 establishment is not a subset of a CBRF. It's not
5 a CBRF use. It's a different use.

6 So if you were to say it's both a CBRF
7 and a dry cleaning establishment and let's treat it
8 as a dry cleaning establishment, that would not be
9 permitted under our reading of the definition. On
10 the other hand, if you said all we're saying is
11 that a temporary detention or correctional
12 institution is different than dry cleaning
13 establishments because it is a subset of CBRF.

14 Now there's a policy argument that's
15 been raised that we don't want halfway house
16 inmates to be housed in manufacturing areas. The
17 short answer is that we prefer that no one be
18 housed in a manufacturing area. That's why
19 801.7(k) allows only temporary facilities. I would
20 add that this argument that we don't want anyone
21 housed in a manufacturing area does not provide a
22 persuasive basis for treating halfway houses
23 differently than more structured correctional
24 institutions.

25 There really is no problem with walking

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1 through a C-M District. The problem is it's tough
2 to live in one. That's a problem that affects
3 halfway house residents and jail residents equally.

4 So if we're going to allow lock down facilities in
5 C-M Districts, there doesn't seem to be a good
6 argument for not allowing an otherwise equally
7 situated halfway house.

8 With this issue of the lease and the
9 contract with BOP, I'm going to focus on what
10 appears to be a potential five year contractual
11 obligation with BOP. First of all, at the time it
12 issued the permit, DCRA did not know about a five
13 year contractual obligation with BOP.

14 The reason I call it a five year
15 contractual obligation is my understanding is that
16 BOP can exercise these options and in effect bind
17 Bannum for five years. Now had DCRA know, what
18 should DCRA have done? That's a hypothetical. I'm
19 not sure we're ready to give an answer. But it's
20 not an issue right now before the Board.

21 Then I guess there was a question of
22 should DCRA revoke the permit based on the
23 contractual relationship with BOP. That's a tough
24 question. I'm not sure we've really gotten answers
25 to all our questions about the contract. For

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1 example, if loss of the permit is a defense to
2 breach of the contract, then perhaps one could
3 argue that the contract allows -- It isn't really a
4 five year contract. It's really a three year
5 contract because the contract follows the
6 availability of the permit.

7 I guess what I would say here is again
8 this isn't an issue before the Board whether or not
9 DCRA should revoke the permit. I do think that
10 DCRA should enforce the three year limit on the
11 Certificate of Occupancy. There is not an issue
12 before the Board as to what to do if you go past
13 three years. It's fair in this situation for the
14 Board to express its view as to how it would expect
15 DCRA to handle any extension past the three year
16 period in terms of resolving issues before the
17 Board.

18 If the Board were to decide to affirm
19 DCRA's decision, it's perfectly reasonable for the
20 Board to express its own understanding of what it
21 is DCRA has approved. Part of that goes to the
22 issue of what DCRA should do in the event that
23 Bannum seeks a renewal of this three year term.
24 That concludes my comments.

25 CHAIRPERSON GRIFFIS: Thank you very

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1 much. Very well. Are you ready?

2 MR. CAMARNO: I just want to take my
3 argument out of order here because I want to
4 respond quickly to something Mr. Rushkoff has
5 brought up here about this issue of this five year
6 contract. Once again I want to go back to the fact
7 here that --

8 CHAIRPERSON GRIFFIS: You are going to
9 respond in your closing.

10 MR. CAMARNO: I'm giving my closing
11 right now. I'm going to go into my closing in one
12 second. I think there's a very important issue
13 that he's raised here. We're on the same side
14 arguing for the same purpose, but how we get there
15 is just a little bit different as to how we reach
16 our end goal. I do agree with him in goal, but
17 it's how we get there that I have a little
18 difference of opinion with him on.

19 It's a one year contract with four one
20 year options. There was negotiation involved. You
21 have a January 23, 2001 negotiation letter which is
22 one of our best and final offers to the government.

23 You can see we say in there a three year period.
24 When the government BOP issued a contract, it
25 incorporated this January 23, 2001 letter into the

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1 contract.

2 So they know full well we only have
3 zoning for three years. They issued a contract
4 based upon that. So it's not a five year
5 commitment. Everybody knows what's going on here.

6 Then the District has given us a C of O for three
7 years. So there is a lot of misrepresentations
8 floating around here. I just want to clarify a few
9 of these things.

10 I want to go back into my closing
11 argument. Mr. Temple alluded to the fact that we
12 want to follow the law. We should be following the
13 law. The law is very clear. The law basically
14 says that you can have zoning as a matter of right
15 within the C-M zone if you have a temporary
16 detention or correctional institution on lease
17 property for a period not to exceed three years.

18 You have heard a lot of testimony here
19 that we are a correctional institution. We do have
20 a lease on this property not to exceed three years.

21 Who has the burden of proof here? Bannum doesn't
22 have the burden of proof. Mr. Temple, whoever he
23 represents, the Appellant has the burden of proof.

24 I think they failed miserably to rebut
25 either my arguments or Mr. Rushkoff's arguments

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1 that we are a temporary detention or correctional
2 institution on leased property for a period not to
3 exceed three years. They brought forth absolutely
4 nothing. As a matter of fact, they brought forth
5 evidence that supports our position.

6 If you look at one of their
7 submissions, Exhibit 16 sub-Exhibit 3, he puts
8 forth the Statement of Work. What does the
9 Statement of Work say? A CCC, community
10 corrections center, is considered a penal or
11 correctional facility. I think that nails it right
12 on the head, correctional facility on leased
13 property for a period not to exceed three years.
14 That's what he put forth in his evidence, and he
15 has the burden to try to show that we're not a
16 correctional facility. But he put forth evidence
17 that shows that we are. His burden again.

18 When the Board reviews this, they have
19 to look at the reason of the District's
20 determination here. We can argue about this for
21 the next thousand years. Does the District have a
22 reasonable basis in the law and in their
23 interpretation of the Zoning Regulations to have
24 issued those permits?

25 I don't think this is a *de novo*

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1 argument. I don't think that Mr. Temple can come
2 forth, quickly file an appeal, offer absolutely no
3 evidence, and have this Board take up some sort of
4 *de novo* review and go back 20 years to try to
5 determine what the Zoning Regulation either means
6 or doesn't mean or what the intent of the Zoning
7 Regulation is. The Zoning Regulation is very
8 clear, and if it's very clear, we ought to follow
9 it. If we meet the criteria, that should be the
10 end of the argument.

11 Now Mr. Temple also put forth Mr.
12 Noble. His own witness again comes forth admits -
13 and it's his evidence that supports our position
14 without even going to any rebuttal that Bannum has
15 here - on 265 and 266 of the June 17, 2003
16 transcript that Bannum is a temporary correctional
17 facility that can be zoned as a matter of right.
18 His own witness.

19 He also put forth Regina James as the
20 chairman of the ANC. On a question from Mr.
21 Etherly, her big concern was whether or not this
22 facility would close down or the zoning would be
23 revoked after three years. She basically testified
24 if that was the case, if they only have a C of O
25 for three years, that would be satisfactory.

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1 That's what she said on the record. It would be
2 satisfactory. This is what she's saying on the
3 record.

4 Assuming that they have made some sort
5 of case, which I fail to see other than him calling
6 us a halfway house 1,000 times on the record and
7 engaging us in some sort of semantics argument,
8 assuming he has met some sort of burden, obviously
9 the burden would shift over to both Bannum, the
10 intervenor, and the District to put forth and show
11 how we meet the Zoning Regulations. We filed a
12 detailed Memorandum of Law. I think it's Exhibit
13 20 in the record. It has about 12 exhibits.

14 If that document is read very carefully
15 and one pays particular attention to the exhibits
16 that are attached there to, you would have to walk
17 away from this situation saying what is this all
18 about. You can see very clearly there that Bannum
19 applied for a building permit. Their application
20 is in there. They applied for a building permit
21 that says "proposed use three year temporary use
22 community corrections center." We all know that a
23 community corrections center is a place of
24 confinement as stated by Mr. Temple.

25 As a result of that, a building permit

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1 was issued, several building permits were issued.
2 The last building permit basically said three year
3 temporary use, temporary 150 bed community
4 correction center. It doesn't say halfway house.
5 It doesn't say CBRF. It says community correction
6 center on a leased property for a period not to
7 exceed three years. That's exactly what Bannum is
8 doing. That's Exhibit 4.

9 Notably the Board several times made a
10 statement which I disagree with. They basically
11 said that the minute the appeal file is filed by
12 Mr. Temple or his client all bets are off. In
13 other words, there can't be any reliance. I
14 disagree with that because on several occasions
15 Councilman Orange and Mr. Temple - and those
16 letters are attached to the record at Exhibits 5
17 and 6 and 7 - ask several times for a stop work
18 order to be issued. No stop work order was issued.

19 So I have to take a little disagreement
20 with the Board to say that all bets are off, and if
21 Bannum proceeds after an appeal has been filed that
22 you can't rely upon it. In this particular
23 situation, stop work orders were requested, and
24 they were denied by the District. Bannum relied
25 upon a denial of the stop work orders and proceeded

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1 on. We proceeded on in good faith.

2 You heard testimony of Mr. Laurey (PH)
3 of how we relied upon the building permits, how we
4 relied upon the zoning permits, and how we relied
5 upon the C of O and expended an exorbitant amount
6 of money on its facility. Mr. Laurey (PH)
7 testified that they have spent upwards of \$500,000
8 so far building this facility. They have entered
9 into a government contract that could be upwards to
10 \$26 million. There was reliance upon what the
11 District did.

12 Somehow if this Board goes back and
13 reconvenes and says the District is wrong, who is
14 the real party that's going to be harmed here?
15 Bannum. Bannum never misrepresented anything.
16 Bannum is a good company. They relied upon the
17 District sanctions. There is no intent here to
18 dupe or trick or swindle anybody. We said
19 community corrections center. That has a very
20 specific meaning in the law. As a matter of fact,
21 it has a very specific meaning in the case law.

22 We've also attached to one of our
23 filings the Howard Decision. That's a recent
24 decision that defines what a community corrections
25 center is. We summarize the relevant portions of

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1 that case in our motion for dismissal. I just want
2 to read for the Board again a couple of those
3 excerpts because they are very important in
4 describing what a community corrections center is.

5 This is the Howard versus Ashcroft
6 Case. This is a 2003 case. This is the Federal
7 District Court speaking which I think this Board
8 ought to take and give some deference to. The
9 Court says "So the question the Court faces would
10 appear to have evolved into the question whether
11 community confinement centers are penal or
12 correctional institutions."

13 As a matter of fact, let me back up for
14 a second. This court case revolved around Bannum's
15 place of business down in Orlando, Florida. It's
16 the exact same facility that we're running here in
17 D.C. The Court goes on to say here "It becomes
18 obvious without going far that a community
19 corrections center is in fact a penal or a
20 correctional institution.

21 The Court finds community confinement
22 centers are places of imprisonment. Placement in a
23 CCC allows an inmate to leave the CCC for the
24 purpose of employment. As a joint report for
25 Sentencing Commission and the Bureau pointed out,

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1 except for employment and other recorded
2 activities, the offenders in the CCC component must
3 remain at the facility at all times."

4 We heard both Mr. Willis testifying for
5 Bannum and Mr. Willingham (PH) testifying for
6 Bannum that you don't have to be Alcatraz. It
7 doesn't have to to be a lock down facility. You
8 can have maximum, and you can have minimum. The
9 point is here confinement. These people are
10 confined to the Department of Justice. They are
11 under the control of the Department of Justice.
12 They are not voluntarily in the program. They are
13 serving the last portion of their sentence.

14 The Court goes on to say here "The
15 inmates do not return to their homes. They do not
16 set their own schedules. They are confined for all
17 practical purposes and under the control of the
18 government through its agents. The degree of
19 confinement is not determinative or whether these
20 inmates are confined." The degree is not
21 determinative, so it doesn't have to be Alcatraz.

22 It doesn't have to be a lock down
23 facility. There's varying confinement procedures.
24 You can have minimum security. You can have
25 maximum security. The point is it's still a

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1 facility to confine inmates serving the last
2 portion of their sentence. They are not there to
3 get rehabilitated for drug abuse. They are not
4 there being rehabilitated for alcohol abuse. They
5 are there serving the last portion of their
6 sentence.

7 Again, this is a Federal District Court
8 speaking. So if one looks at the clear meaning of
9 the Zoning Regulations and if one looks at the
10 court cases and if one looks at Mr. Temple's
11 filings, you have to walk away saying a community
12 corrections center is a place of confinement. It
13 does meet the criteria of that Zoning Regulation.

14 I'd like to comment on one last thing,
15 this issue about the CBRF. Mr. Rushkoff gets into
16 the CBRF definition. I believe you don't have to
17 go there because if you read it very clearly, we
18 don't fit within an adult rehabilitation home.
19 I'll read you the definition again. You have to
20 read the words here. The words are very clear.

21 It's "A facility providing residential
22 care" - we don't provide residential care - "for
23 one or more individuals 16 years of age or older
24 who are charged" - these people are not charged by
25 the United States attorney with a phony offense.

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1 They are serving the last portion of their sentence
2 - "or any individual 21 years of age or older under
3 pre-trial detention" - they are not under pre-trial
4 detention. You heard testimony from both Mr.
5 Willingham (PH) and Mr. Willis that they are
6 basically handed over to the BOP, and the BOP
7 places them in what institution that they feel fit.

8 So they are not sentenced to a CBRF.
9 So we don't fall within this category of a CBRF.
10 The words are maybe a little confusing. I think we
11 unconfused it a couple of weeks ago with our
12 testimony. They are not sentenced court orders.
13 It is not a pre-trial detention. These people are
14 handed over by a judge to the Bureau of Prisons to
15 the Attorney General. The Attorney General will
16 therefore assign them to what institution he feel
17 fit, either maximum security or a community
18 corrections center. So it's not a CBRF.

19 With that being said, I realize this is
20 a very unfortunate situation. But Bannum in good
21 faith came to the District. We are serving a
22 public need. They invest a lot of money. They
23 relied upon the District in good faith. They
24 applied for a community corrections center. They
25 were granted the right to operate a community

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1 corrections center within the confines of the
2 regulation. So to say anything else, we would have
3 to stretch, speculate, twist, and we could go on
4 forever with this argument. The District made the
5 right determination to begin with. That
6 determination ought to be upheld. Thank you.

7 CHAIRPERSON GRIFFIS: Thank you. Mr.
8 Temple, we're going to take a ten minute recess.
9 You can get organized. Or are you so motivated
10 that you want to start right now? Give us ten
11 minutes and we'll be right back. Off the record.

12 (Whereupon, the foregoing matter went
13 off the record at 5:12 p.m. and went
14 back on the record at 5:25 p.m.)

15 CHAIRPERSON GRIFFIS: Okay. Let's
16 resume. Mr. Temple, when you are ready.

17 MR. TEMPLE: I'm ready. First of all,
18 on behalf of our community, we would like to thank
19 you for your time and your patience. The context
20 in which we bring this case is we believe that the
21 law in the District of the Columbia is the law and
22 that it should be enforced notwithstanding who is
23 on the other side based on your interpretation of
24 that law.

25 Counsel has made a number of statements

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1 here, but we want to at the outset state what the
2 law is. In the District of Columbia, not in
3 Louisiana, not in Florida, not in California, the
4 law is the law of the District of Columbia.
5 Relative to the zoning issues at hand, the law that
6 applies is the District of Columbia case law and
7 District of Columbia municipal regulations.

8 In that respect, our courts have said
9 that lower level decisions here in DCRA are not
10 pertinent in terms of the outcome of the law. What
11 is pertinent is what happens at this level with the
12 Board of Zoning Adjustment. The case at point is
13 Brawner (PH) which you have heard a cite for and
14 L'Enfante Plaza versus D.C. Redevelopment
15 Authority.

16 Additionally, I refer your attention to
17 DCMR 101.2 which talks about the character of the
18 communities of which our clients live. I'm talking
19 about the people of the District of Columbia.
20 People who have lived in your neighborhood for 10,
21 20, 30, 40, 50, 60 years, many generations. Our
22 zoning laws require this Board to take those
23 factors into consideration.

24 Additionally, the law that applies is
25 11 DCMR at section 199 and the 800 series which I

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1 will address. The issue at hand is a very basic
2 one. For some reason, we don't see the picture.
3 The question is this. Can Bannum put a 150 bed
4 halfway house in a D.C. community six blocks from
5 an elementary school, two blocks from a home
6 without one bit of scrutiny from our public agency?
7 Now they say they can.

8 There are three reasons why they can't
9 pertinent to the issue of the permit. The first
10 reason is because it is a rehabilitation home. The
11 Counsel for the DCRA has admitted that. It is not
12 insignificant.

13 The second reason is because the
14 facility is not a temporary correctional
15 institution. We don't look at what some case said.

16 We have to go to the legislative history in our
17 jurisdiction to get to that. Thirdly it hasn't
18 even complied with DCRA municipal regulations at 11
19 DCMR 805.2.

20 How do we prove this? I am going to
21 ask your indulgence. Bannum has essentially
22 manipulated the law in the District of Columbia to
23 its own end. I'm going to prove it to you. I'm
24 going to ask you to look at the documents in the
25 record, not what Temple says, not what this

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1 community says, but the evidence. The first
2 exhibit I'm going to direct your attention to is
3 Exhibit 17. What is significant about Exhibit 17,
4 and why is it in the record? It's in the record
5 because it was Bannum's lawyers, Holland and
6 Knight, that sent a letter on the very issue that's
7 before you. I direct your attention to paragraph 2
8 in that exhibit.

9 But more importantly what they state
10 and what they knew in May 2002 was that 801.2
11 specifically excludes "CBRFs from being considered
12 as a commercial use. CBRFs are therefore not
13 permitted in C-M Districts." It is there. All of
14 a sudden, notwithstanding the fact that this is a
15 letter to the Zoning Commission stating what the
16 law is, they are here trying to manipulate the law.

17 But not enough. That letter is written in May
18 2002.

19 Let's go to Bannum's letter at our
20 Exhibit 1. They say this is a ruling which it is
21 not. Our Exhibit 1 is a letter to Michael Johnson.

22 Note the date of the letter. It's December 11,
23 2000. Not once do they state that it's a halfway
24 house. We don't want to talk about halfway houses.

25 I gave you a tape. It's Exhibit 4. Kathy

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1 Campbell from the Bureau of Prisons, she's right
2 here today. She stated 13 times this is a halfway
3 house. Let's put that on the back burner. Nowhere
4 here is it mentioned that this is a halfway house.

5 What's the significance of that? We
6 now have to go to Exhibit 18. This letter is
7 December 11, 2000. Exhibit 18 is a letter to Mr.
8 Vincent Orange from Bannum. That letter which is
9 certified says in the first paragraph this. "The
10 purpose of this letter is to inform you that Bannum
11 has submitted an offer for a community corrections
12 center or halfway house and that they are doing a
13 residential rehabilitation program here." The
14 letter is clear. It's Exhibit 18.

15 They deny the residential aspect. They
16 deny the rehabilitation. It's right here. This
17 three page letter to Vincent Orange never got
18 submitted to the Zoning Administrator, not only in
19 December. Go to our Exhibit 2. They sent another
20 letter for concurrence. Note this letter is a very
21 general letter, not peculiar to the particular
22 contract that they had. They said that they have a
23 contract, et cetera. They don't say it's a halfway
24 house nor do they say what they said to Vincent
25 Orange which you must pay attention to.

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1 It's a five year contract. The last
2 paragraph of the letter in Exhibit 18 says it is a
3 five year contract. I will visit that again.
4 Let's go to Exhibit 3. They talk about the
5 statement of work. Look at the statement of work.

6 Our contention is this, lady and gentlemen, Bannum
7 knew that it couldn't do a halfway house community
8 based residential facility adult rehabilitation
9 home because in our city they just can't do that
10 without coming to you. So what they did was try to
11 go around the law and create the exception.

12 If you look at the statement of work,
13 the statement of work is very basic. You have seen
14 the submissions which I have no problem with. They
15 said they have a one year contract with four
16 options. What's significant about the options?
17 Bannum doesn't exercise the option. The Bureau
18 exercises the option. Very significant point.

19 In addition to that, they showed you a
20 lease. The lease said it wasn't a three year
21 lease. It was a very convoluted lease. The
22 gentleman said he was going to unconfuse us. What
23 he did was confuse us. Under that lease and under
24 the scenario - and you looked at it and you know
25 what's happening here - at the end of the three

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1 years -- And the city didn't help. They didn't say
2 except for *de novo* when you read his testimony. He
3 said it would stop.

4 But what happens here is we can't even
5 trust the city to enforce our own laws. That's the
6 tragedy of it all. What happens here is Bannum has
7 come in and said they have a three year deal and
8 therefore they are temporary. I'm going to get
9 back to that. In their lease - and Ms. Miller
10 aptly noted - why is it referred to the year 2009?

11 Then in the letter regarding the negotiation which
12 was deleted, redacted, what did they say? They
13 said we have a three year deal, but they cut it
14 out.

15 The point is this at the end of three
16 years if the Bureau exercises its options -- Bannum
17 didn't tell the Bureau of Prisons we're going to
18 default. Notably absent from your record is
19 Bannum's submission to the Bureau of Prison. They
20 showed you a two page letter, but they didn't show
21 you a 685 page submission to the Bureau. We all
22 know they wouldn't tell the District that they are
23 going to default in year four and five and have a
24 five year contract.

25 Wait a minute. This is not rocket

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1 science, lady and gentlemen. It's not rocket
2 science. The District is being manipulated.
3 Further proof. Vincent Orange is saying to David
4 Clark what are you doing, stop this, it's illegal.

5 What does Clark say? It's very important. Two
6 respects.

7 On January 31, he says it's
8 institutional. Well, we responded from the
9 community. We said Mr. Clark it's not
10 institutional. This is the law. February 6,
11 three page letter. What happens? On February 21,
12 Densel Noble comes back and testifies here before
13 you. He responded after consultation with Mr.
14 Clark it's institutional. Ladies and gentlemen,
15 that is not institutional. Let me develop the
16 analysis further.

17 An adult rehabilitation home. It is an
18 adult rehabilitation home. The gentleman said a
19 jail is a home. A jail is not a home. The two
20 don't fit. This is a CBRF. Section 199 does
21 something that's very peculiar. They talk about
22 199. It says you can't have alternative uses.

23 But then what it does is states in the
24 subsequent categories "All community based
25 residential facilities" - it doesn't say may - it

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1 says "shall be included in one or more of the
2 following subcategories." Then it lists several
3 categories. The one that's most significant is
4 adult rehabilitation facility. In a submission to
5 you which is Exhibit 20, Bannum, in your own
6 submission, talks about alternative uses on pages 6
7 and 7 of that submission. They distinguish the
8 temporary correctional institution from the adult
9 rehabilitation home.

10 Our point is when you look at what I
11 have given you in a chart with the zoning uses here
12 in the District of Columbia, our laws are reckless
13 or erroneous. We knew what we were doing. We
14 didn't state here what we didn't mean. It's very
15 basic. It's an adult rehabilitation home. It's a
16 CBRF. Under our law, a CBRF cannot have
17 alternative uses.

18 The case shuts down right there. And
19 these gentlemen knew that. So what did they do?
20 They said we have to figure this out. It's a \$25
21 million contract. So they went to the 800 series.

22 Nowhere in the District of Columbia do we allow
23 CBRFs to be established as a matter of right with
24 more than 20 people.

25 They go to the 800 series. In

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1 801.7(k), they look at it and they say C-M-2
2 District. We can't do this as a matter of right as
3 a CBRF. We're going to create a temporary
4 detention or correctional institution. Ms. Miller
5 hit the nail on the head. Let's look at the
6 legislative history. Bannum admits you can't
7 define that by definition in the dictionary. You
8 have to go to Webster's, and there's case law to
9 support that. So if you can't go to Webster's, you
10 go to legislative history.

11 Ladies and gentleman, you go to
12 legislative history. Cities admit it. Nobody has
13 ever used this provision for a halfway house.
14 Nobody. More importantly the legislative history
15 is pointed. It was used by the D.C. Jail pursuant
16 to a case in an overflow situation. I'm going to
17 help you with that. There's no emergency here.

18 The reason we know that is the D.C.
19 Code states that when there is an emergency it has
20 to be declared. That's 24-42-201.42. I have
21 copies for you. It's when there is a state of
22 emergency. There is no state of emergency here.

23 More importantly, I submit to you that
24 in the statement of work there's nothing whatsoever
25 that says we're doing temporary or emergency

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1 anything. It's simple as that. Again it's a play
2 on words to put Drusinda's foot into Cinderella's
3 shoe. That's all this is about. The law simply
4 does not support what they are saying.

5 Let me continue with the temporary
6 correction institution. What is it? There is a
7 distinction between a jail and a halfway house. I
8 gave you this exhibit. If you look at this exhibit
9 as very pointed, people in jail do not have --

10 MR. CAMARNO: I'm going to object to
11 this exhibit.

12 MR. TEMPLE: Excuse me.

13 MR. CAMARNO: I'm sorry for
14 interrupting you Mr. Temple, but we never took up
15 this issue of this exhibit. It's summarizing
16 evidence apparently that's not even in the record.
17 He keeps referring back to it in his closing
18 argument.

19 CHAIRPERSON GRIFFIS: It is in the
20 record.

21 MR. CAMARNO: The chart may be in the
22 record, Mr. Griffis, but it hasn't been developed
23 off any testimony.

24 MR. TEMPLE: It's from your statement
25 of work.

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1 MR. CAMARNO: But it talks about other
2 facilities, where Hope Village is, Washington
3 Halfway, where D.C. Jail is. There's absolutely no
4 --

5 MR. TEMPLE: I have their Certificate
6 of Occupancies attached to Exhibit 15.

7 CHAIRPERSON GRIFFIS: All right. Mr.
8 Temple, let's interrupt your closing for a brief
9 moment. Tell me why there's an objection for this
10 coming into the record that didn't come up before.
11 Any reasoning for that?

12 MR. CAMARNO: I didn't know what the
13 purpose of it was going to be. It was just a
14 document that was submitted. We never really even
15 took it up today. I thought this was going to be
16 coming in through the rebuttal witnesses to be
17 honest with you. I thought he was going to produce
18 a rebuttal witness and lay a foundation for this
19 document. He decided not to.

20 CHAIRPERSON GRIFFIS: Yes, Mr. Temple,
21 it's a little problematic at this point referencing
22 it in closing. We did just receive this today.

23 MR. TEMPLE: Let me tell you, Mr.
24 Griffis, why I'm doing that. Quite frankly, this
25 document is merely a summary of what's in the

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1 record. For example, you heard that people in D.C.
2 Jail can't use cell phones. You heard that people
3 in halfway houses have cell phones. They have
4 beepers.

5 It's in the statement of work that the
6 Bureau has submitted. It is a summary of what we
7 have heard. The Certificate of Occupancies that I
8 have provided are in Exhibit 15. It states that
9 the Bureau of Rehab is a halfway house or adult
10 rehabilitation home. He can't say that anything in
11 here is not in the record. All I'm trying to do
12 for purposes of my closing argument is give you a
13 snapshot of what we had before us. If the Board
14 deems it is prejudice, then I can withdraw it. But
15 I felt that it summarizes where we were.

16 CHAIRPERSON GRIFFIS: Okay. Quite
17 frankly, having been handed this, we briefly
18 reviewed it. I haven't gone into the substance of
19 it, but I take you at your word that this is a
20 summation to help you with your closing from that
21 information that's already in the record. Let's
22 move on.

23 MR. TEMPLE: Thank you, sir. A halfway
24 house has no armed guards. It has no parameter
25 fencing, no unlockable doors, no physical

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1 restraints. The gentlemen and women at halfway
2 houses sign in and out. Halfway house is not a
3 D.C. jail. Let's be clear. We have no problem
4 saying it's a correctional institution. It is not
5 a temporary correctional institution under the
6 legislative history that we know exists, and you
7 have that in front of you.

8 Essentially what we are asking you is
9 this. It is an adult rehabilitation home. Treat
10 it accordingly. If it's an adult rehabilitation
11 home, the District should not have allowed it to be
12 given a permit or for that matter a Certificate of
13 Occupancy as a temporary correctional center. That
14 is clearly not the case. The evidence is very
15 overwhelming.

16 The District is the party defendant.
17 The District is the one which issued the permit.
18 The District admits that it's a halfway house, that
19 it's a community based residential facility. In
20 so, you can't come back and say now what do I do to
21 try to deal with the fact that I made a mistake.
22 This is a problem for us.

23 We can't say we're going to be
24 convenient and let the halfway house exist when we
25 have hundreds and hundreds of people who live in

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1 that community. The charge before you is very
2 basic. What we ask you and my closing is please
3 apply the law as it is intended to be applied.
4 Thank you.

5 CHAIRPERSON GRIFFIS: Thank you very
6 much, Mr. Temple. That's going to conclude our
7 public hearing on this case.

8 MR. TEMPLE: Mr. Griffis?

9 CHAIRPERSON GRIFFIS: Yes.

10 MR. TEMPLE: With your indulgence
11 please, you indicated that you were going to
12 entertain a solution in terms of findings of fact
13 and conclusions of law.

14 CHAIRPERSON GRIFFIS: That's correct.

15 MR. TEMPLE: To that extent, we would
16 also just urge the Board, given the expeditious
17 nature of this proceeding to the extent that you
18 still consider it expeditious, that we do it as
19 quickly as possible. We are prepared to submit
20 that by Monday with the hope that you can at least
21 keep that on the top burner for the zoning. I know
22 you are busy. We appreciate your time. I think
23 that's fair. This is our fifth hearing. So we
24 would ask and urge that you take that into
25 consideration as you consider the case.

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1 CHAIRPERSON GRIFFIS: Okay. Let's
2 review the schedule. First of all, we don't have
3 meetings after August 5. So the closest it's going
4 to be to the 5th. We have public meeting decision
5 making which I think we're up to 11 cases already
6 on that day. The next meeting would be the 9th.
7 If we were to submit findings --

8 MR. TEMPLE: Was that the 9th of
9 August?

10 CHAIRPERSON GRIFFIS: No, September.
11 We have to set this for the 9th. I don't see any
12 conceivable way to do it on the 5th as much as we
13 would like to. That's not going to be possible.
14 Let's do three weeks for findings of fact and
15 conclusions. If we can get that in the Board's
16 hands, the Board would be perfectly prepared to
17 take this up first thing in the morning on the 9th
18 when we resume. The more time we have to review
19 the better and more deliberate we can be on the
20 9th.

21 So Ms. Bailey, if you wouldn't mind,
22 let's review the calendar. Let's do three weeks
23 for findings and conclusions. It is my
24 understanding we will not be accepting any other
25 submissions. Is that everyone's clear

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1 understanding? Excellent. So we will look for
2 those. Of course, those will not be responded to.

3 MR. TEMPLE: Mr. Griffis, with that in
4 mind, we have three pending cases. Prior to you
5 receiving the findings of fact and conclusions of
6 law, I would only ask that if something evidentiary
7 that would be helpful to you comes into play that
8 you accept that if you don't have any findings of
9 fact before you.

10 CHAIRPERSON GRIFFIS: Three pending
11 cases?

12 MR. TEMPLE: There is other information
13 that is becoming known to us through the other
14 litigation. If it's of help to you and we get it
15 before you have your findings of fact --

16 MR. CAMARNO: He hasn't done anything
17 in any other litigation. There's been no discovery
18 conducted.

19 MR. TEMPLE: There is discovery.
20 That's not correct. The Court ordered that they
21 submit. There's been a discovery for two months
22 that's been outstanding. All I'm saying to you is
23 if there is something I would just think that you
24 would want it if we can get it before you get the
25 findings of fact no matter how we get it.

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1 CHAIRPERSON GRIFFIS: I frankly will
2 not keep the record open to accept that kind of
3 information because anything that should have been
4 in the record for us to decide is in the record at
5 this point based on the case and the closing. I'm
6 not sure that we would have the ample time or the
7 ability to analyze information that came out of a
8 differing body without going through and actually
9 opening this entire proceeding up again to get
10 responses and then arguments on it. So at this
11 point, the record won't remain open for that.

12 MR. TEMPLE: Thank you.

13 CHAIRPERSON GRIFFIS: But it will for
14 findings and conclusion. Any other questions or
15 clarifications? Let's go to dates.

16 MR. CAMARNO: Just one thing, Mr.
17 Chairman. The last transcript of this proceeding
18 and the previous proceeding, I just want to make
19 sure we will have that in time.

20 CHAIRPERSON GRIFFIS: Indeed. The
21 transcript from today you mean?

22 MR. CAMARNO: Yes.

23 CHAIRPERSON GRIFFIS: In which case,
24 we're going to have to allow two weeks, Ms. Bailey.

25 MS. BAILEY: Yes, Mr. Chairman, in

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1 approximately two weeks the transcript should be
2 back. I would say by August 8 the transcript
3 should be in the office.

4 CHAIRPERSON GRIFFIS: There is an
5 availability on ones own accord to get an expedited
6 transcript. Is that correct?

7 MS. BAILEY: Yes, sir. It's costly,
8 but it definitely is an option.

9 CHAIRPERSON GRIFFIS: Okay. Let's do
10 that. We'll give the provision two weeks to allow
11 for the transcript and a week after for the
12 findings.

13 MS. BAILEY: That would be August 15
14 for the findings.

15 CHAIRPERSON GRIFFIS: Is that
16 acceptable?

17 MR. TEMPLE: That's fine.

18 CHAIRPERSON GRIFFIS: Okay.

19 MS. BAILEY: And the decision on
20 September 9.

21 CHAIRPERSON GRIFFIS: Correct. Any
22 other questions or clarifications?

23 MR. TEMPLE: What time would that
24 meeting be?

25 CHAIRPERSON GRIFFIS: We are scheduled

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1 to start at 9:30 a.m. for the public meeting on the
2 9th. As of now, we have only one other case. The
3 public meeting, it's deliberation. They do not
4 take very long. Obviously there's no testimony or
5 evidence. It is just the Board deliberating. So
6 if this was not the absolute first, it would
7 clearly be within half an hour or 45 minutes after
8 start.

9 MR. TEMPLE: I'm sorry for my not
10 knowing. Do you actually render a written
11 decision?

12 CHAIRPERSON GRIFFIS: Absolutely. On
13 September 9, it will be deliberation in public.
14 You will hear the Board argue between ourselves.
15 You will hear our points. You will hear motions
16 for directions. That motion will be voted. It
17 will either be upheld or it will fail. After
18 which, this will go to staff and Corporation
19 Counsel, and a full order will be written. That
20 order is then reviewed entirely by the Board for
21 approval, add its additions and subtractions, and
22 then it is issued. Full orders take some time.

23 MR. TEMPLE: But a decision will come
24 on the 9th.

25 CHAIRPERSON GRIFFIS: A decision will

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1 be made on the 9th if all goes according to plan.
2 Good. Any other questions or clarifications? Very
3 well. Thank you all very much. I appreciate
4 everyone's participation in this. This has been,
5 well, you put the word in. I'm glad we got through
6 today. We will see probably most of you on the
7 9th. Of course we won't be able to hear from
8 others. Again, I appreciate everyone's
9 participation and the amount of information that
10 the Board has before it now. With that, Ms.
11 Bailey, is there anything else for the Board?

12 MS. BAILEY: No, Mr. Chairman.

13 CHAIRPERSON GRIFFIS: Very well. Then
14 I can conclude the afternoon session of the Board
15 of Zoning Adjustment 22 July 2003. Off the record.

16 (Whereupon, the above-entitled matter
17 concluded at 5:50 p.m.)

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