

GOVERNMENT OF THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY

OCTOBER 21, 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 L. ETHERLY, JR.	Board Member
RUTHANNE G. MILLER	Board Member
DAVID ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION STAFF PRESENT:

Carol J. Mitten	Commissioner
John Parsons	Commissioner

OFFICE OF ZONING STAFF PRESENT:

Clifford Moy, Secretary
Beverley Bailey, Office of Zoning

OFFICE OF PLANNING STAFF PRESENT:

David McGhettigan, Office of Planning
John Nyarku, Office of Zoning
Travis Parker, Office of Planning
Jennifer Steingasser, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Sherry Glazer, Esq.

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

9:47 a.m.

CHAIRPERSON GRIFFIS: Good morning. I will now bring to order the 21 October 2003 public hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis. I am Chairperson. Joining me today is Mr. Etherly, the Vice Chair, also Ms. Miller.

Representing the National Capitol Planning Commission is Mr. Zaidain. Representing the Zoning Commission will be with us Ms. Mitten who was detained on official business this morning. We expect her shortly. Let me also say a very good morning to Ms. Bailey from the Office of Zoning and also Mr. Moy.

Copies of today's hearing agenda are available for you. They are located where you entered into the hearing room. Please pick one up, and you can see where you are on our agenda. Let me run through a few important aspects of public hearings before the BZA. First of all, all hearings are recorded. Therefore, we ask several things of you. First, please refrain from any disruptive noises or actions in the hearing room. Second, if you would turn off your cell phones and beepers at this time, that would be appreciated.

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1 Also when coming forward to speak to the
2 Board, you will need to fill out two witness cards.
3 Witness cards are available to you at the table in
4 front of us and also the table where you entered into
5 the hearing room. Those two witness cards go to the
6 recorder who is sitting to my right.

7 When coming forward to speak to the Board,
8 I would ask that you make yourself comfortable and
9 turn on a microphone. You will need to state your
10 name and your address once for the record. Then when
11 speaking to the Board you must of course speak into
12 the microphone. Otherwise you will not be on the
13 record.

14 The order of procedure for today for
15 special exceptions and variances. First, we hear from
16 the witnesses and the applicant and all of their
17 statements. Second, we will have government reports
18 attendant to the application. That would include such
19 reports as the Office of Planning's report or DDOT's
20 report. Third would be the report from the Advisory
21 Neighborhood Commission. Fourth would be parties or
22 persons in support of the application. Fifth would be
23 parties or persons in opposition of the application.
24 Finally, we would have closing remarks by the
25 Applicant.

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1 Cross examination of witnesses is
2 permitted by the applicant or parties. The ANC within
3 which the property is located is automatically a party
4 in the case. The record will be closed at the
5 conclusion of each hearing on each case except for any
6 material that is specifically requested by the Board.

7 We will be very specific as to what we require to be
8 put into the record and when it is to be submitted
9 into the Office of Zoning. After that is received of
10 course it goes without saying that the record would
11 then be finally closed and no other information would
12 be accepted.

13 The Sunshine Act requires that public
14 hearings on each case be held in the open and before
15 the public. This Board may however, consistent with
16 its rules and procedures and the Sunshine Act, enter
17 into executive session. That would be for the
18 purposes of reviewing the record or deliberating on
19 the case. The decision of this Board in contested
20 cases must be based exclusively on the record which is
21 why it is so important to speak into a microphone and
22 get on the record.

23 We ask that people present today not
24 engage Board Members in any conversation off the
25 record so that we do not give the appearance of not

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1 deliberating solely on the record that is created
2 before us. The Board will now consider any
3 preliminary matters. Preliminary matters are those
4 which relate to whether a case will or should be heard
5 today such as requests for postponements, withdrawals,
6 or a continuance or very importantly whether adequate
7 notice of the hearing has been given.

8 If you are not prepared to go forward with
9 the case today or you believe that the Board should
10 not hear a case that's on our morning agenda, now
11 would be the time to bring that to the Board's
12 attention. I would ask if you have a preliminary
13 matter to come forward and have a seat as an
14 indication that you have a preliminary matter.
15 Otherwise I would say a very good morning to Ms.
16 Mitten and also ask Ms. Bailey if she is aware of any
17 preliminary matters for the Board at this time.

18 MS. BAILEY: Mr. Chairman and Members of
19 the Board, good morning.

20 CHAIRPERSON GRIFFIS: Good morning.

21 MS. BAILEY: There are preliminary
22 matters. It concerns the posting of all of the
23 properties before the Board this morning, Mr.
24 Chairman. However, they are case specific. Staff
25 would recommend that the case be called and the

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1 applicant discuss with the Board the posting if that
2 is how the Board would like to proceed.

3 CHAIRPERSON GRIFFIS: Okay, or we could
4 dismiss them all and have the morning off. Either
5 way. Well, let's go with your choice. Why don't we
6 call the first case and take it up as we go?

7 MS. BAILEY: That is Application Number
8 17040 of William C. Miller, pursuant to 11 DCMR
9 3103.2, for a variance from the accessory structure
10 height limitation (15 feet) under subsection 2500.4,
11 to allow an existing detached garage serving a single
12 family dwelling in the WHOD, Wesley Heights Overlay
13 District, R-1-B at premises 4417 Garfield Street, N.W.
14 Square 1614, Lot 59. Is there anyone in the audience
15 associated with this case, Application 17040? Please
16 raise your right hand to take the oath.

17 WHEREUPON,

18 GLADYS HICKS, WILLIAM MILLER, NICK PITSCH
19 were called as witnesses and, having been first duly
20 sworn, assumed the witness stand, were examined and
21 testified as follows:

22 MS. BAILEY: Thank you. Mr. Chairman, the
23 affidavit was received this morning for this case. In
24 addition to that, the posting in the case for this
25 property was seven days. As you know, Mr. Chairman,

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1 our rules require that it be posted for 15 days. The
2 affidavit indicates that it was posted on 10/14/03.

3 CHAIRPERSON GRIFFIS: Thank you. Why
4 don't I have you introduce yourselves so I know who I
5 am addressing?

6 MS. HICKS: My name is Gladys Hicks. I'm
7 a zoning consultant.

8 MR. MILLER: William Miller, the owner of
9 the residence at 4417 Garfield Street.

10 CHAIRPERSON GRIFFIS: Indeed, good
11 morning.

12 MR. PITSCH: Nick Pitsch. I'm an employee
13 of Mr. Miller's. I worked on the construction of the
14 site.

15 CHAIRPERSON GRIFFIS: You are here for
16 moral support.

17 MR. PITSCH: Well, I was there when it
18 happened.

19 CHAIRPERSON GRIFFIS: Okay. Who is going
20 to address the posting notice?

21 MS. HICKS: I will.

22 CHAIRPERSON GRIFFIS: Yes.

23 MS. HICKS: The posting was done on
24 Wednesday at 1:00 p.m.

25 CHAIRPERSON GRIFFIS: What was the date

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1 Wednesday?

2 MS. HICKS: It was October 14 at 1:00 p.m.
3 I could not post earlier because of illness.

4 CHAIRPERSON GRIFFIS: Mr. Miller, you
5 weren't able to put a placard out in front of the
6 property.

7 MR. MILLER: In all candor, I wasn't aware
8 that I was obligated to do so. Ms. Hicks was handling
9 the case for me.

10 CHAIRPERSON GRIFFIS: We can note well
11 that our posters are very visible and also match your
12 pumpkin. In all seriousness, it's a very important
13 aspect of it. There's two important ways that
14 applications are noticed. That is of course the
15 mailings to the property owners around in a 200 foot
16 radius. We have found on the Board in all cases that
17 in fact the placard is the most important. Oftentimes
18 people don't read the letters or understand them but
19 they see a public hearing has been advertised.

20 So we do in all sincerity take this as a
21 very important issue. I can hear comments from other
22 Board Members if they are so inclined. We really have
23 two aspects or two directions to take on this: (1) we
24 waive our own rules and (2) we set this off for a date
25 that will allow for proper posting. Oftentimes I look

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1 at the application in terms of its content and also in
2 terms of the amount or lack of opposition that comes
3 in. So let me hear from others if there are any brief
4 comments regarding this.

5 MEMBER MILLER: I just want to note that
6 we have a letter from the ANC that indicates that they
7 had a meeting on October 1 that was properly noticed
8 through the newspaper, the website, and posting
9 notices around the neighborhood. There is some
10 indication that the community was notified in that
11 respect.

12 CHAIRPERSON GRIFFIS: So you have
13 confidence that clearly everyone that wanted to know
14 knew what they needed to in this application.

15 MEMBER MILLER: I do. I don't have a
16 problem with the notice.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. MILLER: May I add to that?

19 CHAIRPERSON GRIFFIS: Sure.

20 MR. MILLER: I do have letters from the
21 closest neighbors in support of the garage. They were
22 aware of it before the neighborhood commission
23 meeting.

24 CHAIRPERSON GRIFFIS: And you talked to
25 them before and told them this was all happening.

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1 MR. MILLER: Yes.

2 MS. HICKS: Yes, also I have a copy of the
3 agenda for the Advisory Neighborhood Commission 3-3D
4 on October 1, 2003. The meeting started at 7:30 p.m.

5 So there was an open meeting. The fifth item on the
6 agenda was BZA Case Number 17040.

7 CHAIRPERSON GRIFFIS: Does anyone have any
8 difficulty in proceeding with this case today? If
9 not, then I would take it as a consensus of the Board
10 and let's proceed. That would of course incorporate a
11 motion to waive our rules in the notice. Let's move
12 on. Who is going to present?

13 MS. HICKS: I will. This is a building
14 permit application for 4417 Garfield Street, N.W., Lot
15 59 in Square 1614. The original building permit was
16 issued on September 30, 1998 to construct a detached
17 single family dwelling with a detached accessory
18 structure. After the building permit was issued for
19 this property that's in the Wesley Heights Overlay
20 District with underlying R-1-B zone, complaints were
21 submitted to the Department of Consumer and Regulatory
22 Affairs, these complaints being for a number of years.

23 Almost everything in the Board of Zoning
24 Adjustment case folders is in chronological order
25 noting that the letters that were sent complaining

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1 about Mr. Miller's house. Then years passed and we
2 get to the final complaint. That was the height of
3 the detached garage. Nothing was ever found wrong
4 with the detached principal structure. Building
5 construction individuals went out and measured the
6 height of the garage. The height was measured at 17
7 and one half feet.

8 MR. MILLER: Sixteen and a half.

9 MS. HICKS: Sixteen and a half feet.

10 After that, Mr. Denzil Noble issued an order to abate
11 or remove the garage after it's been standing for X
12 number of years. The order was for us to either file
13 with the Board of Zoning Adjustment or lower the
14 height of the detached accessory structure which is
15 shown to my right on the photo from the easel.

16 It's to the rear of the property. It
17 cannot be seen from the 44th Street side of the
18 property because that side of the street has trees, a
19 shrubbery. It can only be seen from the Garfield
20 Street side of the property. Also I have a photo
21 which shows across the property line a garage that's
22 existing. There's not too much of a height
23 difference.

24 CHAIRPERSON GRIFFIS: We're not talking
25 about too much of a height problem here.

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1 MS. HICKS: Well, it's pretty close to the
2 height of the --

3 CHAIRPERSON GRIFFIS: What's pretty close?
4 What is the measurement of the garage?

5 MS. HICKS: I don't have a measurement.

6 CHAIRPERSON GRIFFIS: Let's move forward.

7 MS. HICKS: You can see it from this photo
8 which I can submit to the Board. The roof on the
9 principal structure and the detached accessory
10 structure is made of clay tile which would be
11 difficult to remove and lower the roof to the 15 feet
12 height limitation.

13 CHAIRPERSON GRIFFIS: Why is the tile
14 difficult to remove?

15 MS. HICKS: I would have to ask the
16 project manager who was on site.

17 CHAIRPERSON GRIFFIS: Is clay tile more
18 difficult to remove than any other roofing surface?

19 MR. PITSCH: No, it's not more difficult
20 to remove. The structure itself would be difficult to
21 lower.

22 CHAIRPERSON GRIFFIS: That I understand.

23 MR. MILLER: It's only the peak that is
24 taller.

25 CHAIRPERSON GRIFFIS: Right. No, we're

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1 very clear on exactly what we are talking about.

2 MR. MILLER: Okay.

3 CHAIRPERSON GRIFFIS: It's a small little
4 piece, but I will be giving you a hard time for a
5 little bit.

6 MR. MILLER: Okay.

7 CHAIRPERSON GRIFFIS: Let's continue.

8 MS. HICKS: The application was submitted
9 to request for a variance on May 19, 2003. We're here
10 now asking for a variance so we won't have to lower
11 the roof that's been existing for I would say at least
12 --

13 MR. MILLER: Three years, four years.

14 MS. HICKS: Four years. We have also
15 letters of support from the most adjacent neighbors in
16 support of the property of the detached accessory
17 structure to remain.

18 CHAIRPERSON GRIFFIS: I think there's
19 ample evidence in the record for us to deliberate on
20 whether this is a deterrent to the public good. Let's
21 get to the other two aspects that we need to really
22 address, that being what is this unique or special
23 circumstance and what is the practical difficulty.

24 MR. MILLER: "Special circumstance"
25 meaning, if you could elaborate on that. Why was it

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1 built to that height? Is that what you are asking?

2 CHAIRPERSON GRIFFIS: Ms. Hicks should
3 know exactly what I'm talking about. That's why you
4 are here. That's the test for the variance which you
5 applied for.

6 MS. HICKS: Well, the property is unique
7 because in this neighborhood I did not see any other
8 clay tile roofs. All of the other roofs on structures
9 --

10 CHAIRPERSON GRIFFIS: Are you saying a
11 clay tile roof has to be up at 16 and a half feet?

12 MS. HICKS: No, I'm not saying that. I'm
13 talking about the materials that were used.

14 CHAIRPERSON GRIFFIS: I understand, but
15 how does clay tile help me figure out the height of
16 the building? One of the submissions says that the
17 angles on the pitched roof for the accessory building
18 matches the existing structure or the principal
19 structure, is that correct?

20 MR. PITSCH: Yes, sir.

21 CHAIRPERSON GRIFFIS: What else? When the
22 permit was filed, was the accessory building
23 dimensioned?

24 MS. HICKS: No, the height and dimensions
25 and so forth were on the principal structure, but on

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1 the drawings showing the side elevation of the
2 detached accessory structure the height dimension was
3 not shown.

4 MR. MILLER: It is on the permit however.

5 CHAIRPERSON GRIFFIS: It is called out.

6 MR. MILLER: A 17 foot height is called
7 out on the permit.

8 MS. HICKS: On the building permit
9 application.

10 MR. MILLER: And the approved permit.

11 MR. PITSCH: The permit was written with
12 it on, 17 feet.

13 CHAIRPERSON GRIFFIS: So if I can glean
14 from what you is the fact that a permit was issued and
15 the permit actually addressed the height of the
16 accessory building that there is some extraordinary or
17 exceptional situation based on the reliance of that
18 permit, is that correct?

19 MS. HICKS: Yes.

20 MR. MILLER: Yes.

21 CHAIRPERSON GRIFFIS: Ms. Miller.

22 MEMBER MILLER: I would like to know when
23 Mr. Miller first had notice that the roof was not in
24 compliance with the Zoning Regs.

25 MR. MILLER: I believe it was October or

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1 November of last year.

2 MS. HICKS: It was November 4, 2002.

3 CHAIRPERSON GRIFFIS: And you bought the
4 house when?

5 MR. MILLER: The permit was dated 1998.

6 CHAIRPERSON GRIFFIS: But when did you buy
7 the house?

8 MR. MILLER: I actually purchased the
9 house in January 2000.

10 CHAIRPERSON GRIFFIS: So you didn't build
11 the house.

12 MR. MILLER: A construction company that
13 I'm affiliated with built the house. I purchased the
14 house from the construction company.

15 CHAIRPERSON GRIFFIS: I see.

16 MEMBER ZAIDAIN: It was the construction
17 company that pulled the permits. Who pulled the
18 permits originally?

19 MR. MILLER: The construction company.
20 The permits were actually pulled by the architect for
21 the construction company.

22 MEMBER ZAIDAIN: So you bought the house,
23 and it was constructed. Then after you had already
24 taken occupancy that was when the error --

25 MR. MILLER: Yes, if I may just digress

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1 for one moment, this was a long-term barrage of
2 letters from a particular neighbor that was for
3 whatever reason after us. The construction stopped
4 three times. We spent a lot of money trying to just
5 defend what was correct all through the process.

6 This was the last remaining thing I
7 suppose that he could find. Therefore, it appears to
8 be that it is in fact one and a half feet higher than
9 it should be. This is not habitational. There is no
10 reason for it other than the aesthetic of the
11 architect.

12 CHAIRPERSON GRIFFIS: So this person
13 brought up a whole host of issues and then got this
14 one right I guess, right?

15 MS. HICKS: Yes.

16 MEMBER MILLER: Could I just follow up and
17 ask you what happened on November 4, 2002 that you
18 said was the first time you had notice of being not in
19 compliance on this issue?

20 MR. MILLER: That was the day they showed
21 up to measure the garage. I got a call from Ms.
22 Woolridge in the legal, I guess corporation counsel --

23 MS. HICKS: It's the Office of Compliance.

24 MR. MILLER: That someone was going to
25 come out and measure. She was very apologetic about

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1 it.

2 MEMBER MILLER: "Someone" meaning someone
3 from DCRA.

4 MR. MILLER: Yes, someone from Zoning.

5 CHAIRPERSON GRIFFIS: DCRA.

6 MR. MILLER: Okay.

7 CHAIRPERSON GRIFFIS: Don't be confused.

8 It's DCRA.

9 MR. MILLER: I apologize.

10 CHAIRPERSON GRIFFIS: That's all right.

11 MEMBER MILLER: No, I'm just curious what
12 happened between November 4, 2002 and then you filed
13 the variance May 19, 2003.

14 MR. MILLER: The reason I hadn't filed a
15 variance was because Ms. Woolridge had told me that
16 the neighbor, Mr. Timmons, was very embarrassed that I
17 would know who was writing all the letters because I
18 had to have access to the file in order for this
19 variance to take place. I assumed that he was
20 dropping the charge.

21 MEMBER MILLER: So then the next official
22 action was March 18, order to abate, is that right?
23 There wasn't anything else in between.

24 MR. MILLER: That's correct.

25 MS. HICKS: Yes.

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1 CHAIRPERSON GRIFFIS: Any other questions?
2 Ms. Mitten.

3 COMMISSIONER MITTEN: I just want to get a
4 couple of things on the record. Ms. Hicks, were you
5 the person who signed off originally on the permit?

6 MS. HICKS: Yes.

7 COMMISSIONER MITTEN: Given that the
8 permit itself states the height of the garage, you I
9 assume were aware at that time what the height of the
10 garage was.

11 MS. HICKS: I'm more aware that the height
12 maximum allowed for detached structure is 15 feet
13 except for in an R-1-A and R-1-B Zone where you may
14 have a circumstance where it's 20 feet in height.

15 COMMISSIONER MITTEN: But how about in the
16 Wesley Heights Overlay District?

17 MS. HICKS: It would be the same
18 requirement of 15 feet maximum.

19 COMMISSIONER MITTEN: So there's no
20 question that when the permit was issued that was an
21 error.

22 MS. HICKS: In foresight, yes.

23 COMMISSIONER MITTEN: Well, it's really
24 just a fact thing. There was a permit issued for a 17
25 foot high garage. Fifteen foot is the limit. That's

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1 a mistake, right?

2 MS. HICKS: It is an error, yes.

3 COMMISSIONER MITTEN: Going back to Mr.
4 Miller noticed that there was a problem, there is a
5 lot of correspondence in the file that we have and
6 letters going back. There are certainly issues that
7 were raised from the beginning. There was a series of
8 meetings with Ms. Hicks and others from DCRA starting
9 in 1998. There were a number of issues clearly as far
10 back certainly as July 2000. The issue regarding the
11 height of the garage was raised rather than something
12 more recently. Are you saying that you didn't know
13 that the garage was too high prior to --

14 MR. MILLER: No, I did not know that. As
15 far as I knew, Zoning had sent representatives out to
16 check everything. In each case, I was told that
17 everything was in compliance until this November 4.

18 MS. HICKS: The initial complaints were
19 not about the detached accessory garage. It was about
20 the principal structure, the set backs, whether the
21 swimming pool would be accounted into lot occupancy,
22 and whether the retaining walls counted. There were a
23 lot of items and letters going back and forth. It
24 really got down to the point of the detached garage
25 height. That's when the department sent someone out

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1 to take an actual measurement.

2 CHAIRPERSON GRIFFIS: That's the only
3 official action that was taken with the letter that
4 went to Mr. Miller, is that correct?

5 MS. HICKS: To my knowledge.

6 MR. MILLER: The job was shut down in
7 order to check other things as I mentioned.

8 CHAIRPERSON GRIFFIS: During construction
9 in `98.

10 MR. MILLER: Yes, during construction in
11 `98 and `99. If it was mentioned in letters, I was
12 not privy to those letters until the Freedom For
13 Information Act with the filing of the variance.

14 CHAIRPERSON GRIFFIS: Right. If you would
15 have received those letters, conceivably you would
16 have had an idea, but there was nothing of directive
17 of those letters, is that correct?

18 MR. MILLER: Absolutely not.

19 CHAIRPERSON GRIFFIS: Ms. Mitten.

20 COMMISSIONER MITTEN: Perhaps the
21 correspondence just bypassed Mr. Miller and was
22 between the neighbor that was complaining and DCRA.
23 So perhaps they weren't informing Mr. Miller that
24 there was an ongoing dialogue. At page 46 of the big
25 packet of information, as early as July 2000 - and

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1 there may be something earlier, I'm not sure - there
2 was a specific reference to the height of the garage.

3 CHAIRPERSON GRIFFIS: Right, and actually
4 reviewing all of these, none of these - although they
5 may have been sent to others - appear to have a CC to
6 anybody else.

7 COMMISSIONER MITTEN: Right.

8 CHAIRPERSON GRIFFIS: They are back and
9 forth. As Mr. Miller stated now on the record today,
10 the fact that he thought that Mr. Timmons might be
11 embarrassed because he would have to receive entire
12 record and all the letters I think shows in many
13 respects that he obviously hadn't had those before.
14 Any other questions on this chronology of events or
15 anything else for that matter? Very well. Anything
16 else?

17 MS. HICKS: No.

18 CHAIRPERSON GRIFFIS: Let's move on then
19 to the Office of Planning who has submitted a report.
20 Do you have the Office of Planning's report? Have
21 you been able to review it, Mr. Miller?

22 MR. MILLER: I saw it this morning, yes.

23 CHAIRPERSON GRIFFIS: Let's go to it then.
24 Good morning, Mr. McGhettigan.

25 MR. MCGHETTIGAN: Good morning, Mr. Chair

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1 and Members of the Board. My name is David
2 McGhettigan from the Office of Planning. We looked at
3 this case, and it's almost an appeal of the zoning
4 decision in its nature. I think we concentrated in
5 that report on the third test because that's what we
6 felt was in the realm of planning as far as what we
7 would be looking at.

8 On page 5 of my report, we show an
9 elevation and plan view of the detached garage with
10 the areas that are approximately the areas that are
11 non-conformance. You can see that it's a very small
12 area. Also on the areal photo that's provided on page
13 2, you can get a feel for how the garage sits in the
14 landscape and that it would not have a large impact on
15 the neighboring properties. If the evidence presented
16 today and the Board's determination meets the test for
17 extraordinary situation and practical difficulty, we
18 would recommend that it be approved.

19 CHAIRPERSON GRIFFIS: Thank you. Any
20 questions of the Office of Planning from the Board?
21 The graphic was very helpful Mr. McGhettigan. I think
22 it brought great clarity to what otherwise might not
23 have been. Any cross examination of the Office of
24 Planning?

25 MS. HICKS: No.

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1 CHAIRPERSON GRIFFIS: Very well. Let's go
2 to ANC's report, ANC-3D. Is there a representative of
3 ANC here? If not, we can note that in Exhibit 25 they
4 did recommend approval. If I am correct, it does meet
5 our requirements to be given great weight. Did you
6 present this to the ANC, Mr. Miller?

7 MR. MILLER: Yes, I did.

8 CHAIRPERSON GRIFFIS: Actually the
9 question was you personally. You went and talked to
10 them.

11 MR. MILLER: I was along with Ms. Hicks
12 and Mr. Pitsch.

13 CHAIRPERSON GRIFFIS: Not that it matters
14 but is of interest. Anything else then? Any other
15 questions, clarifications for the Board?

16 MEMBER ZAIDAIN: I have a general
17 question. This is coming to us for a variance which
18 has certain requirements. There are certain tests
19 that the application has to meet. I think we have
20 heard from Mr. McGhettigan that the argument was to be
21 made to us today. What we're getting is a story of
22 circumstances which is always unfortunate when we hear
23 that here.

24 In sticking to that theme, my question is
25 to Ms. Hicks or whoever may want to answer. Once the

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1 order to abate was presented saying that something
2 clearly was wrong with the structure, what were the
3 options at that time? Obviously you could have
4 applied for a variance because that's what you have
5 done. What were the other avenues that could have
6 been taken to clarify the situation?

7 MS. HICKS: The other avenue besides
8 asking for the variance would be to reconstruct the
9 roof and bring it into compliance of the height
10 regulations.

11 MEMBER ZAIDAIN: Right, that's definitely
12 one. Is there any redress towards the person which
13 Mr. Miller bought the property from, an estoppel
14 argument against DCRA, any kind of issue like that?

15 MS. HICKS: In my opinion because so much
16 time had lapsed between the issuance of the permit and
17 Mr. Miller getting the order to abate or move the roof
18 would be to estop the Department of Consumer and
19 Regulatory Affairs from having to order Mr. Miller to
20 bring the roof into compliance.

21 MEMBER ZAIDAIN: The reason I'm asking
22 that question is I feel we're in an awkward situation.
23 The way I read Mr. McGhettigan's report - and he can
24 correct me if I'm wrong - is it's a two foot variance
25 for a structure. It's not the end of the world. It's

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1 not like a cell tower that was erected on your
2 property that it's going to remain.

3 However, there's an integrity to this
4 process that has to be maintained. There are certain
5 variance cases and tests that need to be made at least
6 the way it stands now. I would like to hear if any of
7 the other Board Member agree. I'm really not hearing
8 any evidence to support the variance case.

9 CHAIRPERSON GRIFFIS: Does anyone want to
10 address that?

11 COMMISSIONER MITTEN: Well, I think that
12 the testimony that the Chair was trying to elicit from
13 the Applicant and Ms. Hicks was that the extraordinary
14 circumstance is that there was a permit issued in
15 error and there was a series of repeated denials by
16 DCRA that it was issued in error. If you go back to
17 the page 46 that I had made reference to earlier, we
18 have the person who was raising these issues saying -
19 and this is in the third paragraph regarding garage
20 height - "Mr. Bellow stated he could tell by the
21 drawing that the garage at 4417 Garfield was not over
22 the 15 feet building limit. Please review the
23 enclosed drawing with one-quarter inch equals one foot
24 measurement, believe it measures 17 feet."

25 So first we have the error in issuing the

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1 permit in the first place. We have back and forth.
2 Mr. Miller is not aware of it with DCRA. DCRA
3 continues to insist for approximately a two year
4 period that there was no problem. Mr. Miller is
5 unaware of all of this. Basically he is being ham-
6 strung by mistakes that DCRA had made and refused to
7 acknowledge until more recently in November 2002. I
8 just have to say I find it very ironic that Ms. Hicks
9 would be the person being paid by the Applicant to
10 correct this mistake at this point given that she made
11 the mistake.

12 MEMBER ZAIDAIN: I understand all of that.

13 Obviously there are some unfortunate circumstances.
14 It's my understanding of what this Board can use that
15 particular issue for in terms of deliberating a
16 variance is that can be one factor. The circumstance
17 reference can be a part of it. But what I'm only
18 hearing is that's the whole entire pie that we're
19 looking at right now. There's no other pieces to it
20 in terms of the practical difficulty in terms of why
21 this garage should exceed the height limit.

22 CHAIRPERSON GRIFFIS: You only need one
23 answer to the test of exceptional situation. You
24 don't need four. If that is one that you can rely on,
25 that does address the exceptional or extraordinary

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1 circumstance. The practical difficulty I think is
2 pretty clear. Clearly with a pitched roof of this
3 nature if you cut the portion out to make it
4 accommodating to the regulations it would essentially
5 mean removing the entire roof in order to reframe it
6 at a different pitch that would hit up to the
7 allowable height.

8 So there is a practical difficulty there
9 clearly. I think OP addresses quite substantially
10 whether this would impair the intent and integrity
11 based on the limited height variance but also that
12 they didn't feel that it created any substantial
13 detrement to the public good. So all in all that's
14 the case presented to us.

15 MEMBER ZAIDAIN: Right, and I understand
16 that. That's why I said I glean from OP's report that
17 it's relatively minor. I was under the impression and
18 the way that I have always deliberated on these cases
19 is that the circumstances can just be a piece of it.
20 I'm not sure at this time whether or not how major or
21 minor the variance relief is. Does that mean because
22 it's only a two foot difference and because the
23 circumstances are --

24 CHAIRPERSON GRIFFIS: No, there's no
25 proportionality to the variance test in terms of

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1 inches to hundreds of feet. I think it informs the
2 entire record as we deliberate. Each of the tests
3 addresses that directly and indirectly. The matter of
4 the public good is there for the test for the variance
5 because this would be different if they were trying to
6 put 65 foot accessory building in the back as opposed
7 to what is existing at 16 and a half. Ms. Glazer had
8 a comment.

9 MS. GLAZER: Very briefly. Mr. Zaidain is
10 struggling with something that I think there's an
11 answer to right in the wording of the regulation. The
12 test for the variance does go through other types of
13 factors such as narrowness, shallowness, et cetera,
14 but I want to just draw the Board's attention - I'm
15 sure you are well aware of it - to the word "or."
16 That's a critical word.

17 The last part of the test is or other
18 extraordinary or exceptional situations or conditions
19 of a specific piece of property. So from a legal
20 perspective, the Board, if they are persuaded that the
21 burden of proof has been met, could determine that
22 these extraordinary circumstances could give rise to
23 at least meeting the first part of the variance
24 without looking at other factors.

25 CHAIRPERSON GRIFFIS: Any other questions

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1 or clarifications at this time? I think it's
2 appropriate then to continue our deliberation under a
3 motion. I would move approval of Application 17040 of
4 Mr. Miller pursuant to a variance from the accessory
5 structure height which has a limitation of 15 feet
6 under 2500.4. This would allow of course an existing
7 detached garage to remain at the premises of 4417
8 Garfield Street, N.W. I would ask for a second.

9 COMMISSIONER MITTEN: Second.

10 CHAIRPERSON GRIFFIS: Thank you, Ms.
11 Mitten. As I have stated, I have put some great
12 reliance on the Office of Planning's report in terms
13 of several of the prongs of the test. I do believe
14 that the existing structure plays into the specific
15 and unique circumstance and also the issuance of the
16 permit in '98, obviously several years ago. Without
17 any official notification to the owner or developer,
18 there was no reason to take action on that part.

19 So although we are balancing the facts
20 that might be presented in an appeal, also in a
21 variance, there's no difficulty in doing that. In
22 clarity as we look to the test, it has risen to the
23 appropriate level for my support. That being said, I
24 will hear from others.

25 MEMBER MILLER: I basically concur with

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1 your analysis. I also want to point out if it hasn't
2 been pointed out already that the ANC did submit a
3 report. It does meet the great weight requirements. I
4 would recommend that we give it the great weight. The
5 vote was 5-0 to approve the variance. They did
6 address the substantive issues here, the height of the
7 roof.

8 CHAIRPERSON GRIFFIS: Anything else? The
9 motion has been seconded for approval. I would ask
10 for all of those in favor signify by saying aye.

11 (Chorus of ayes.)

12 CHAIRPERSON GRIFFIS: Opposed?

13 (No response.)

14 CHAIRPERSON GRIFFIS: Abstaining?

15 (No response.)

16 CHAIRPERSON GRIFFIS: Very well. Mr. Moy,
17 if you wouldn't mind recording the vote.

18 MS. BAILEY: Mr. Chairman, may I do that?

19 CHAIRPERSON GRIFFIS: I'm sorry, yes,
20 absolutely.

21 MS. BAILEY: The vote is recorded as 5-0-0
22 to approve. Mr. Griffis made the motion. Ms. Mitten
23 seconded. Mr. Etherly, Mr. Zaidain, and Ms. Miller
24 are in support. Should we be issuing a summary order
25 in this, Mr. Chairman?

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1 CHAIRPERSON GRIFFIS: I don't see any
2 reason to not unless any Board Members have comments.
3 We can do a summary order.

4 MS. BAILEY: Thank you, sir.

5 CHAIRPERSON GRIFFIS: Thank you all very
6 much. We appreciate you coming down here.

7 MS. HICKS: Thank you.

8 MR. MILLER: Thank you.

9 CHAIRPERSON GRIFFIS: Have a good time
10 parking. Let's move on. Call the next case.

11 MS. BAILEY: That is Application 17060 of
12 Faud Alykhan, pursuant to 11 DCMR 3103.2, for a
13 variance from the nonconforming structure provisions
14 under subsection 2001.3, to allow a second story deck
15 addition to a single family row dwelling not meeting
16 the lot occupancy requirements (section 772) in the C-
17 1 District at premises 2609 P Street, N.W., Square
18 1265, Lot 95. Please stand to take the oath all those
19 persons who will be testifying. Raise your right
20 hand.

21 WHEREUPON,

22 CHRISTIAN ZAPATKA, MILTON M. GOTTESMAN
23 were called as witnesses and, having been first duly
24 sworn, assumed the witness stand, was examined and
25 testified as follows:

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1 MS. BAILEY: Thank you. Mr. Chairman, we
2 have a similar situation, well, not quite similar.
3 The affidavit was filed this morning, Mr. Chairman. I
4 have it in front of me. It does indicate however that
5 this property was posted on October 6 making the
6 posting timely.

7 CHAIRPERSON GRIFFIS: So the time of
8 posting was correct, is that right? Just the
9 submission of the affidavit was not timely. Ms.
10 Bailey, in this case - I'm sorry if I missed you say
11 it - there was a request for party status, is that
12 correct?

13 MS. BAILEY: There is a request for party
14 status. I didn't say that. Kevin Kelty.

15 CHAIRPERSON GRIFFIS: Is Mr. Kelty here?

16 MS. BAILEY: Milton Gottesman?

17 CHAIRPERSON GRIFFIS: Yes, he is present.

18 MS. BAILEY: And Kent Ozkum and William
19 Morrow.

20 CHAIRPERSON GRIFFIS: Are either of those
21 people present? Mr. Gottesman, were you sworn in?

22 MR. GOTTESMAN: Yes.

23 CHAIRPERSON GRIFFIS: Let's take up
24 Exhibit 22 then for deliberation on granting or
25 denying party status in this application.

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1 MEMBER ZAIDAIN: Mr. Chairman, I have no
2 objection to Mr. Gottesman's application given his
3 adjacency and the fact that his property abuts the
4 rear yard of the subject property.

5 CHAIRPERSON GRIFFIS: How does that work?
6 Mr. Gottesman's address is 1504 26th Street.

7 MS. BAILEY: This is the site. This is
8 Mr. Gottesman.

9 CHAIRPERSON GRIFFIS: Right. I see.

10 (Pause.)

11 CHAIRPERSON GRIFFIS: Are you representing
12 the Applicant? Would you mind introducing yourself
13 for the record?

14 MR. ZAPATKA: I'm Christian Zapatka.

15 CHAIRPERSON GRIFFIS: Do you have any
16 objection to the party status application of Mr.
17 Gottesman?

18 MR. ZAPATKA: I had a few photographs to
19 share with the Board Members.

20 CHAIRPERSON GRIFFIS: For what?

21 MR. ZAPATKA: In defense of the proposal
22 for --

23 CHAIRPERSON GRIFFIS: We're just talking
24 about application for party status. Do you have any
25 comments on this application?

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1 MR. ZAPATKA: I'm sorry. I'm not sure.
2 What is party status?

3 CHAIRPERSON GRIFFIS: Excellent point.
4 Mr. Gottesman, this would also be for your benefit of
5 course. There are two levels of participation in any
6 public hearing. One is to be granted party status.
7 That would be based on our review/deliberation of the
8 application that you put in. The most significant of
9 course is to understand that you would be distinctly
10 or uniquely affected if this was to be granted.

11 Party status comes with a high level of
12 responsibility and participation in the public
13 hearing. You will be afforded, if granted party
14 status, the ability to cross examine witnesses. You
15 will also have the responsibility of submitting
16 information to the Board that the Board requests.
17 That may include additional evidence. It may actually
18 include findings of facts, conclusions of law, draft
19 orders.

20 You will be asked to present a case also.
21 The other way to participate in any public hearing
22 before the Board of Zoning Adjustment is as a person
23 and to give testimony. That would mean coming forward
24 and just giving your statement. Do you understand
25 both of those levels?

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1 MR. GOTTESMAN: Yes.

2 CHAIRPERSON GRIFFIS: Do you have any
3 opinion about whether you still want to pursue party
4 status or whether you want to present as a person?

5 MR. GOTTESMAN: I do want to have party
6 status, and I do want to testify.

7 CHAIRPERSON GRIFFIS: Why don't you come
8 up also and have a seat? So your comment off the
9 record is essentially you do want to pursue party
10 status because you want to present a case.

11 MR. GOTTESMAN: Yes, sir, I do, and I do
12 want to testify in opposition.

13 CHAIRPERSON GRIFFIS: Yes, that's where
14 we're fully understanding.

15 MR. GOTTESMAN: Yes.

16 CHAIRPERSON GRIFFIS: But there's two
17 aspects. You could as a person just testify and give
18 us all of the information and all of that, or you
19 could go for party status. If granted, you are a full
20 participant in this case which means you are cross
21 examining, you are objecting to evidence, you are
22 submitting written documents into the Board.

23 MR. GOTTESMAN: Yes, I want full
24 participation.

25 CHAIRPERSON GRIFFIS: Very well.

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1 MR. ZAPATKA: So do I object to that? Is
2 that the question?

3 CHAIRPERSON GRIFFIS: That's correct.

4 MR. ZAPATKA: I don't have an objection to
5 that.

6 CHAIRPERSON GRIFFIS: Excellent. Any
7 objection from the Board to granting party status to
8 Mr. Gottesman, questions, concerns? I am not noting
9 any objections, so I think we can grant party status
10 to Mr. Gottesman. The critical piece of course is
11 that his property, which you listed as Lot 92 which
12 from our plan, it looks as if it's actually Lot 93.
13 It doesn't matter. The point of the fact is that the
14 rear yard abuts the property that is now in this
15 application.

16 That being said I take it as a consensus
17 of the Board to grant party status to Mr. Gottesman.
18 I would note we have our based atlas that has
19 indicated where the other requests from party status
20 are coming from in terms of property location. One is
21 actually well across 26th Street going down P Street.

22 The other is similar, Mr. Gottesman, to your property
23 but north. It does not directly abut the Applicant's
24 property.

25 Mr. Kelty's application - I will take them

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1 directly - speaks about how he might be uniquely or
2 distinctly affected. That is that it would be
3 detrimental to the historic district. First of all, I
4 don't find that to be a unique distinction of how it
5 would affect him nor do I see us having the
6 jurisdiction under regulating the historic district.
7 I would not support that application.

8 COMMISSIONER MITTEN: Mr. Chairman, I
9 think anyone who is not present and who applies for
10 party status really isn't interested in participating
11 in that level. I would recommend if these folks
12 aren't present that we just deny their requests and
13 move on.

14 CHAIRPERSON GRIFFIS: Okay. Has anyone
15 else come into the room since this application?

16 MR. ZAPATKA: The owner of 2609.

17 CHAIRPERSON GRIFFIS: But he is not
18 requesting party status.

19 MR. ZAPATKA: No, I just wanted to make
20 you aware of that.

21 CHAIRPERSON GRIFFIS: Indeed. I
22 appreciate that. That's actually what I was going for
23 clarification on. I perfectly understand Ms. Mitten's
24 point. This Board has acted in that direction
25 numerous times as the party status, as I have

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1 indicated, is a full participant in the public
2 hearing. That being said, is there any other
3 questions?

4 MEMBER ZAIDAIN: I'll just note very
5 briefly that the party status application for Kent
6 Ozkum and William Morrow actually is noted as support.

7 CHAIRPERSON GRIFFIS: I'm sorry. You are
8 absolutely right.

9 MEMBER ZAIDAIN: So I agree that it
10 definitely should not be treated as party status.
11 Since it was filled out that way, it should probably
12 be denied. But it could still be viewed perhaps as a
13 supporting documentation based on their comments.

14 CHAIRPERSON GRIFFIS: Excellent point. I
15 think we can look at everything that's submitted in
16 that frame, but that's a good point to bring up. That
17 being said, we can take it as a consensus of the Board
18 then we're granting one party in this case. Let us
19 proceed then and go to presentation of the case. Feel
20 free to have a seat back if you want and be
21 comfortable.

22 MR. GOTTESMAN: I am perfectly comfortable
23 here if this is all right.

24 CHAIRPERSON GRIFFIS: Okay. Then I will
25 just have you turn off your mic and we'll turn it

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1 over.

2 MR. ZAPATKA: Yes, the request for a
3 variance here is for building a wooden deck at the
4 second level of a single family dwelling at 2609 P
5 Street. The conditions of the open area behind the
6 house are quite restricted. I have photographs that I
7 would like to submit to the Board to illustrate that.

8 The house is unique in that it is the only single
9 family dwelling from the ground. In other words, a
10 house that occupies the property from the ground up,
11 the only structure on this block that does not have a
12 back yard.

13 It has a small paved area enclosed on one
14 side by a concrete wall and the other by wooden
15 fencing from the house at I believe 1504 26th Street.

16 The conditions are very tight for the use of any
17 outdoor space. Again, it's surrounded on both sides
18 by commercial occupancy. May I bring the photographs
19 forward?

20 CHAIRPERSON GRIFFIS: Yes, you can give
21 them to Ms. Bailey.

22 MR. ZAPATKA: The photographs show --

23 CHAIRPERSON GRIFFIS: Hold on. There's
24 just one set. Can we run copies? I need a copy to
25 Mr. Gottesman.

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1 MR. ZAPATKA: I'm sorry. I just brought
2 them in this morning. I wasn't aware of multiple
3 copies.

4 CHAIRPERSON GRIFFIS: Of course all
5 evidence submitted into the record needs to have 20
6 copies submitted. Well, let's proceed and we'll get
7 to that when we see them.

8 MR. ZAPATKA: So I'll just describe what
9 is shown in those photographs; views from the garden
10 of the next house up on 26th Street, William Morrow,
11 looking across the garden of the gentleman here today
12 acting as party status, looking to the back of the
13 house at 2609 P Street, showing that it's indeed a
14 three story red brick row house with an L projecting.
15 There's a twin of that house to the west of it.

16 In its corresponding side court, there is
17 a deck with a fence at the edge of it. That too is
18 looking directly over the garden of 1504 26th Street.

19 So there is a clear precedent for this proposal in
20 the neighboring house where the side court has a
21 wooden deck at that mid-level. You'll see it in the
22 photograph.

23 CHAIRPERSON GRIFFIS: That's an
24 interesting point. The property that you just
25 described, is that a residential property?

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1 MR. ZAPATKA: It's commercial at the
2 ground level and residential above. There is a
3 definite precedent visible in that photograph.

4 CHAIRPERSON GRIFFIS: Okay. Let me just
5 be direct here.

6 MR. ZAPATKA: Sure.

7 CHAIRPERSON GRIFFIS: Establishing that it
8 happened next door, establishing that there's a
9 precedent actually goes against you making a case for
10 a variance. What you are needing to show us is that
11 there's an extraordinary or exceptional situation, and
12 somehow this is unique.

13 MR. ZAPATKA: Right.

14 CHAIRPERSON GRIFFIS: That way we would be
15 able to grant a variance from the zoning. If everyone
16 is doing it, that means we probably ought to change
17 the Zoning Regs which is what we don't do.

18 MR. ZAPATKA: Right. I'm not hinging my
19 argument on that precedent. I'm just pointing out
20 that the next house happens to have that.

21 CHAIRPERSON GRIFFIS: So the adjacent
22 porch is illustrated for us in your presentation to
23 show that clearly there isn't any detrimental impact
24 to the adjacent neighbor. There is one that's been
25 there for some time.

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1 MR. ZAPATKA: Correct.

2 CHAIRPERSON GRIFFIS: I see.

3 MR. ZAPATKA: It's not the argument. It's
4 simply a comment that the neighboring house has a
5 similar situation that appears to have been there for
6 a while and has certainly not been brought to any
7 public attention such as this Board. It's an
8 incidental.

9 CHAIRPERSON GRIFFIS: This building is a
10 single family.

11 MR. ZAPATKA: Single family dwelling,
12 right.

13 CHAIRPERSON GRIFFIS: There's a
14 substantial amount of interior renovation that's going
15 on.

16 MR. ZAPATKA: Yes.

17 CHAIRPERSON GRIFFIS: Okay. So it's being
18 all updated and upgraded for a full --

19 MR. ZAPATKA: For occupancy as a single
20 family dwelling, yes.

21 CHAIRPERSON GRIFFIS: It is the only one
22 of that sort on P Street. That's what you are saying.

23 MR. ZAPATKA: That is correct, yes.

24 CHAIRPERSON GRIFFIS: Okay. Go ahead.

25 MR. ZAPATKA: Again, there are some other

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1 photographs there showing the conditions of that area
2 below which is quite clear that it is unusable as
3 agreeable outdoor space. The proposal is to have a
4 bit of outdoor space available from the mid-level
5 where light and air is afforded. Something else I
6 should point out is that the objection from the
7 neighbor is about looking into his yard, but from the
8 windows of this house at 2609, you can also look into
9 the yard. So it's not going to change anything in
10 terms of view or visibility into the neighboring yard.

11 CHAIRPERSON GRIFFIS: You said that this
12 porch is coming off the mid-level.

13 MR. ZAPATKA: Right.

14 CHAIRPERSON GRIFFIS: Is that the main
15 level of the residence?

16 MR. ZAPATKA: It's in effect, yes, the
17 piano nobile. That's where the living room, dining
18 room, kitchen are.

19 CHAIRPERSON GRIFFIS: Indeed.

20 MR. ZAPATKA: The other thing is we have
21 approval from the Commission of Fine Arts to build
22 such a deck and furthermore to introduce french doors
23 to the brick walls of the L. So those could be there
24 regardless. Again, my argument is that there's no
25 difference in the degree of privacy afforded or not

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1 afforded the neighboring garden because from those
2 windows and doors one would have a view into the
3 garden regardless.

4 If you go up another level, you are
5 looking right down into it. It's the condition of
6 Georgetown in general. The minute you are on an upper
7 level of a neighboring house, you are looking into
8 other gardens. It's part of the nature, excuse the
9 term, for living in Georgetown. It's not unusual.
10 Again, as I said earlier, every house on this block
11 already has a garden. There are also seven letters of
12 support from neighbors in this immediate block for
13 this proposal which we faxed in yesterday.

14 CHAIRPERSON GRIFFIS: Go ahead.

15 MR. ZAPATKA: Again, it seems like there
16 is one neighbor on the block concerned about privacy,
17 but my argument to that would be from all of the
18 windows from the second and floor one can look into
19 that garden anyway. Seven neighbors on the block who
20 have gardens as well are supportive of this idea of
21 having a bit of outdoor space made available to this
22 one single family dwelling on the P Street side of the
23 block.

24 It's also a very small deck, 9.8 by 4.5,
25 and doesn't go past the face of the L on the north

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1 side. So it does not in fact go right to the fence,
2 to the property line. There is another four or five
3 feet to the actual fence. So you would have to be a
4 giraffe to lean over that and look into the
5 neighboring property.

6 That should also be understood that the
7 limit of the deck is the north face of the L and that
8 there's another four feet until the fence property
9 line of the house at 1504 26th Street. So it would be
10 really virtually impossible to be looking down into
11 that neighboring garden. Again, if one wanted to, one
12 could go to the third floor and look directly down
13 into that neighboring garden.

14 I don't think that this would impede on
15 privacy particularly because of the four foot
16 difference and there has to be a three foot rail at
17 that edge. Imagine four feet maybe from here to there
18 and then the rail and then the fence. (Indicating.)
19 So I think it's virtually impossible to be peering
20 down into the neighboring garden.

21 COMMISSIONER MITTEN: Did you happen to
22 say what the height of the fence is?

23 MR. ZAPATKA: The neighboring fence?

24 COMMISSIONER MITTEN: Yes.

25 MR. ZAPATKA: I don't know it. I believe

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1 it's six or seven feet maybe.

2 COMMISSIONER MITTEN: Okay. Thank you.

3 MR. ZAPATKA: It's not unusually high but
4 six or seven feet I believe.

5 CHAIRPERSON GRIFFIS: Any other questions
6 from the Board?

7 MEMBER MILLER: I just have a few
8 clarifying questions.

9 MR. ZAPATKA: Yes, that fence is about
10 seven or eight feet is what I'm told by the owner of
11 2609.

12 CHAIRPERSON GRIFFIS: From the grade on
13 the adjacent property.

14 MR. ZAPATKA: The grade goes up on the
15 adjacent property.

16 CHAIRPERSON GRIFFIS: Right.

17 MEMBER MILLER: I just want to make sure I
18 understand what you said. I think you said that light
19 and air isn't afforded from the ground level but it is
20 from the mid-level. Why is that?

21 MR. ZAPATKA: Because at the mid-level,
22 there's a door at the ground level. As you exit
23 imagine exiting from that door. To the immediate
24 right is a concrete cynderblock wall that separates
25 the property from a commercial building to the right

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1 of it. That is a good seven feet high.

2 That's to the east, so no east light could
3 come in there in the morning. Then to the back, to
4 the north, is this wooden fence that's seven, possibly
5 eight, feet. Then of course to the left is the brick
6 wall of the house's L. So it's really only at the
7 mid-level where any light could be afforded from the
8 east side in the morning.

9 MEMBER MILLER: You made reference to
10 seven houses on a block having gardens as well that
11 don't object. What block were you talking about?

12 MR. ZAPATKA: I'm going to hold this up if
13 that's all right. This block which is bounded by P
14 Street, 26th Street, 27th Street, and East Place.
15 Again, the house in question is here. (Indicating.)
16 The garden to the side over here on 26th. There are
17 several owners of these houses with gardens who
18 approve as well on this side and particularly this
19 garden report from William and Kent is here. So it's
20 all within this block.

21 MEMBER MILLER: So you are referring to a
22 few different streets; 26th Street, 27th Street.

23 MR. ZAPATKA: Yes, there are three street
24 addresses for this particular block; 26th, 27th and P.
25 We have letters of support from residents on both

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1 26th and 27th as well as a commercial establishment on
2 P.

3 MEMBER MILLER: My last question is at one
4 point you said it's the nature of Georgetown to look
5 into other people's yards.

6 MR. ZAPATKA: As you go up in height.
7 It's not mandatory, but it's possible.

8 (Laughter.)

9 MEMBER MILLER: I thought that you also
10 said that it was impossible you thought to peer into a
11 neighbor's yard who is opposing this application.

12 MR. ZAPATKA: Well, what I am saying is at
13 that mid-level where the proposed deck is, the back of
14 the house stops four feet short of the property line.

15 CHAIRPERSON GRIFFIS: Let me see if I can
16 make a quick clarification. The point is on all of
17 these houses you are going to be able to see over back
18 yards. His point was the deck doesn't come to the
19 back property line of which you will be literally
20 leaning over into the next property to look straight
21 down on it. That's the differentiation he's making
22 because there's a four foot set back.

23 MR. ZAPATKA: Exactly.

24 CHAIRPERSON GRIFFIS: Any other questions?

25 MEMBER MILLER: Thank you.

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1 CHAIRPERSON GRIFFIS: Anything else?

2 MR. ZAPATKA: I think that's it.

3 CHAIRPERSON GRIFFIS: You will have an
4 opportunity for closing. Mr. Gottesman, it is now
5 your opportunity to cross examine Mr. Zapatka on the
6 testimony that you have just heard.

7 MR. GOTTESMAN: Is the owner going to
8 testify?

9 CHAIRPERSON GRIFFIS: Mr. Zapatka, is the
10 owner going to be called as a witness in your case
11 presentation?

12 MR. ZAPATKA: Yes.

13 CHAIRPERSON GRIFFIS: Okay. Hold on a
14 minute then. Let's be totally clear here. The first
15 step in this is for you to present your case and all
16 witnesses and statements. If you have done that, then
17 we're done. Mr. Gottesman will then cross examine any
18 of the testimony in the record or the oral testimony
19 today. Then we're going to go to the government
20 reports. Office of Planning is here. I think that's
21 the only one I have attendant to this application.
22 Well, Commission of Fine Arts we'll note.

23 Then we'll go to the ANC. Then we're
24 going to go to anyone that's here to testify to
25 support. Then Mr. Gottesman is going to put on his

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1 case in opposition of which you can cross examine.
2 Then you are going to have an opportunity to present
3 rebuttal witnesses and closing remarks all within 15
4 minutes. Are we clear?

5 MR. ZAPATKA: Yes.

6 CHAIRPERSON GRIFFIS: Now I will ask you
7 again is there anything else that you want to present
8 in your case today.

9 MR. ZAPATKA: I think I would like to
10 present Mr. Alykhan's view of the situation.
11 Otherwise he can testify at the end as you said. Does
12 it matter when he makes his comments?

13 CHAIRPERSON GRIFFIS: Yes, it does. In
14 the closing remarks, he's going to come in for
15 rebuttal. Rebuttal would be --

16 MR. ZAPATKA: Let's save him for rebuttal
17 then.

18 CHAIRPERSON GRIFFIS: Okay. So you can
19 address any questions that came up in the case
20 opposition.

21 MR. ZAPATKA: Right.

22 CHAIRPERSON GRIFFIS: In which case, Mr.
23 Gottesman, if I could have you turn on your
24 microphone. Do you have any cross examination of the
25 case that's been presented?

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1 MR. GOTTESMAN: This is Mr. Zapatka's
2 argument.

3 CHAIRPERSON GRIFFIS: Or anything that's
4 in the record. I can run through a little bit about
5 what cross examination is if you would like me to.

6 MR. GOTTESMAN: I understand what cross
7 examination is. The only thing that's in the record
8 as far as I know now is what Mr. Zapatka just said.

9 CHAIRPERSON GRIFFIS: Pretty much.

10 MR. GOTTESMAN: I'm going to testify
11 against it.

12 CHAIRPERSON GRIFFIS: So you don't have
13 any cross examination at this point for him, is that
14 what you are stating?

15 MR. GOTTESMAN: No.

16 CHAIRPERSON GRIFFIS: Thank you. Then
17 let's move on to the Office of Planning. Office of
18 Planning is here to present their report today.

19 MR. PARKER: Thank you, Mr. Chairman. I'm
20 Travis Parker with the Office of Planning. Mr.
21 Zapatka did a good job of looking at the third test,
22 the substantial determent. I think it's fairly clear
23 that there won't be any substantial determent to the
24 public good or that this will impair the purpose of
25 the zoning ordinance. I would like to focus briefly

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1 on the exceptional situation and the practical
2 difficulty on the lot.

3 From my site visit to the house and
4 looking at the back yard, it became clear to me that
5 this back yard is completely unusable and undesirable
6 in its existing situation. It is exceptionally
7 narrow. There is no light in the back yard. The
8 variance requested would alleviate that situation to
9 some extent. The practical difficulty results both
10 from the narrowness of the existing situation and from
11 the commercial uses on either side using their back
12 yards as storage. It's impossible to access that back
13 yard from anywhere except the narrow door.

14 So it becomes clear that the back yard is
15 for all practical purposes unusable. This would allow
16 some use of the open space on the lot for which the
17 set backs were originally intended. Other than that,
18 I would like to stand on the report as submitted and
19 would be happy to answer any questions that the Board
20 may have.

21 CHAIRPERSON GRIFFIS: Excellent. Thank
22 you very much. I do appreciate excellent graphics as
23 usual from the Office of Planning and laying out the
24 case. A quick question.

25 MR. PARKER: Certainly.

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1 CHAIRPERSON GRIFFIS: It shouldn't be read
2 as deeply substantive. One of the extraordinary
3 exceptional situations that you highlighted and also
4 the Applicant has highlighted is that this is a full
5 residential building as opposed to the others who may
6 have portions or all being commercial. You don't see
7 anything that would preclude the owner from converting
8 this to an entirely matter of right commercial in the
9 C-1 District, do you?

10 MR. PARKER: Of course not.

11 CHAIRPERSON GRIFFIS: Any other questions
12 from the Board?

13 MEMBER ZAIDAIN: Yes, a really quick one
14 just to clarify. Obviously we don't get the option to
15 do site visits like you do. When you say the back
16 yard is undesirable, are you just talking about from
17 the overgrowth of vegetation?

18 MR. PARKER: I don't know if you received
19 the pictures that went around today. There's one in
20 particular I will pass down.

21 MEMBER ZAIDAIN: Okay, yes.

22 MR. PARKER: This is what the back yard
23 looks like. That gives you an idea of how wide it is,
24 how it's used, and how completely unusable it is for
25 any recreation or outdoor space. There is no natural

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1 sunlight that gets to this area.

2 MEMBER ZAIDAIN: Is that because of the
3 overgrowth of the trees?

4 MR. PARKER: And mainly because of the
5 wall.

6 CHAIRPERSON GRIFFIS: What you are doing
7 is you are concurring with the Applicant's
8 representative's testimony today.

9 MR. PARKER: Right.

10 CHAIRPERSON GRIFFIS: The structure of
11 course would have a CMU wall and then the wood fence
12 wall.

13 MEMBER ZAIDAIN: Okay.

14 CHAIRPERSON GRIFFIS: Let's say it's a six
15 foot fence on the grade of the adjacent property.
16 From your observations, is the rear yard, the small
17 portion that you are saying is unusable, below the
18 grade of the adjacent property?

19 MR. PARKER: Yes, the six or seven foot
20 fence actually comes almost to the top of the bottom
21 story of this house.

22 CHAIRPERSON GRIFFIS: So it's conceivably
23 more like nine or ten feet in a four foot wide area
24 way.

25 MR. PARKER: Correct.

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1 MEMBER ZAIDAIN: That clarifies it. Thank
2 you.

3 CHAIRPERSON GRIFFIS: Ms. Mitten.

4 COMMISSIONER MITTEN: I just wanted to
5 clarify the response to your question a moment ago
6 about the opportunity to convert this building
7 entirely to commercial use. This is in the C-1 Zone.

8 CHAIRPERSON GRIFFIS: Right.

9 COMMISSIONER MITTEN: Just eyeballing it,
10 the existing three story structure, given its existing
11 lot occupancy, more than improves the site to the one
12 FAR limitation in the C-1 Zone. So only one FAR would
13 be able to be converted. So the entire building could
14 not be converted.

15 CHAIRPERSON GRIFFIS: I'm sorry. I
16 misspoke. I was thinking of converting any aspect of
17 the building within the C-1 Zone, but I appreciate
18 that. Any other questions from the Board?

19 MEMBER MILLER: I just want to make sure I
20 understand you correctly. Under practical difficulty,
21 you say that the neighboring commercial uses remove
22 all reasonable uses of this area. Is it because of
23 the height of the walls? What is it about the
24 commercial uses that make for the practical
25 difficulty?

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1 MR. PARKER: The commercial uses on either
2 side use their backyards as storage. When I made the
3 site visit, we tried to access this rear yard from the
4 side, from 26th Street and were completely unable to
5 just because of all of the not junk but debris in the
6 back. So this is unaccessible and for all practical
7 purposes unusable.

8 CHAIRPERSON GRIFFIS: Anything else for
9 the Board? Any cross examination, Mr. Zapatka?

10 MR. ZAPATKA: No.

11 CHAIRPERSON GRIFFIS: Very well. Mr.
12 Gottesman?

13 MR. GOTTESMAN: I can't read his nametag.

14 MR. PARKER: Travis Parker.

15 CHAIRPERSON GRIFFIS: Mr. Parker is
16 presenting from the Office of Planning.

17 MR. GOTTESMAN: Did you or anybody in your
18 office consult me as to how I would be affected by the
19 proposed deck?

20 MR. PARKER: No, sir.

21 CHAIRPERSON GRIFFIS: Can I interrupt you
22 quickly? Can you move the microphone or sit up
23 closer? Thank you.

24 MR. GOTTESMAN: Yes, sir. Did I have
25 notice of the planning board's consideration of this

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1 or of the hearing?

2 MR. PARKER: This is the hearing.

3 MR. GOTTESMAN: I know but of your
4 determination at the planning board.

5 MR. PARKER: No, sir.

6 MR. GOTTESMAN: So that was an *ex parte*
7 determination that you made.

8 MR. PARKER: It's a staff determination.

9 MR. GOTTESMAN: In your report that you
10 filed of record, you say that the Applicant has
11 informed the Office of Planning that ANC-2E is in
12 support of the application. Do you know is that a
13 fact?

14 MR. PARKER: I was unaware at the time
15 that the ANC has recommended against this application.

16 MR. GOTTESMAN: Right. So your report was
17 based on a misunderstanding of the ANC's position as
18 given to you by the Applicant.

19 MR. PARKER: Partially correct.

20 MR. GOTTESMAN: I have no more questions.

21 CHAIRPERSON GRIFFIS: Thank you. Any
22 follow up for the Board?

23 MEMBER ZAIDAIN: Yes, the ANC doesn't
24 weigh into your recommendation, right? That's
25 something you put into your report as an informative

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1 piece for us.

2 MR. PARKER: It's preferred, but in the
3 ones that I have done so far it hasn't reached me in
4 time for our submittal.

5 MEMBER ZAIDAIN: What do you mean "it's
6 preferred?"

7 MR. PARKER: Well, I'd like to know what
8 the ANC recommends before I submit my reports, but it
9 doesn't always get to me before the submission
10 requirements to you.

11 MEMBER ZAIDAIN: Right, but in terms of
12 your planning analysis, it's an independent thing.
13 This is something that gets brought up quite a bit.

14 MR. PARKER: Correct.

15 MEMBER ZAIDAIN: The Office of Planning's
16 role is to provide an independent report to us, not an
17 synopsis of the ANC/neighbor's feelings.

18 MR. PARKER: Correct.

19 MEMBER ZAIDAIN: Applicant's feelings for
20 that matter.

21 MR. PARKER: Correct.

22 CHAIRPERSON GRIFFIS: It reports the facts
23 of which you are doing your analysis.

24 MR. PARKER: Right.

25 CHAIRPERSON GRIFFIS: I see. Also just

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1 another quick clarification, Mr. Gottesman, there was
2 nothing *ex parte* about Office of Planning coming out
3 to the site. The Office of Planning submits a memo to
4 this Board. It is part of our consideration which is
5 given great weight.

6 This Board is not allowed to conduct site
7 visits. We base all of our deliberations on the
8 record that's created. Office of Planning, as far as
9 I understand and looking at this record, fully
10 complied with our procedures and rules and regulations
11 in presenting to the Board.

12 MR. GOTTESMAN: If you please, Mr.
13 Griffis, I didn't suggest that it was required for
14 them to make a site visit to my house. All I would
15 have wanted from them is what this Board is providing.

16 That is an opportunity to be heard before they made
17 their determination.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. GOTTESMAN: I did not get any notice.
20 Mr. Travis Parker said that they hadn't sent me one.
21 So I did not have an opportunity --

22 CHAIRPERSON GRIFFIS: Okay. But you got
23 notice of this hearing, is that correct?

24 MR. GOTTESMAN: Of this hearing but not of
25 the planning board's.

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1 CHAIRPERSON GRIFFIS: We don't have a
2 planning board, first of all. There was no hearing
3 for the planning.

4 MR. GOTTESMAN: So it is an *ex parte*
5 determination.

6 CHAIRPERSON GRIFFIS: It is not an *ex*
7 *parte*. It's an agency report to the application.
8 There's a big difference.

9 MR. GOTTESMAN: But it was based on a
10 hearing at which I was not present --

11 CHAIRPERSON GRIFFIS: Let me make it
12 absolutely clear. There was no other hearing that was
13 done attendant to this application. This is the
14 public hearing.

15 MR. GOTTESMAN: Well, I presumed that Mr.
16 Zapatka was heard.

17 CHAIRPERSON GRIFFIS: Where?

18 MR. GOTTESMAN: At the planning board.

19 CHAIRPERSON GRIFFIS: We don't have a
20 planning board in this city.

21 MR. GOTTESMAN: Or the planning
22 commission.

23 CHAIRPERSON GRIFFIS: We don't have a
24 planning commission. This is the only public hearing
25 outside of the ANC's meeting, is that clear?

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1 MR. GOTTESMAN: Yes.

2 CHAIRPERSON GRIFFIS: I want it to be
3 because there's no reason for you to leave here with a
4 misunderstanding. The Office of Planning gets the
5 submission from the Applicant of plans. It is
6 notified by the Office of Zoning that this application
7 is being submitted. The Office of Planning then
8 speaks to the Applicant, goes on a site visit, and
9 puts together this memo to this Board of which we will
10 look at and deliberate on. This is the only public
11 hearing outside of the ANC.

12 MR. GOTTESMAN: This is the only time that
13 I have to present my objections.

14 CHAIRPERSON GRIFFIS: That's correct.
15 This is the first time that Mr. Zapatka has presented
16 this application in public as far as we know.

17 MR. GOTTESMAN: Okay.

18 CHAIRPERSON GRIFFIS: Aside from the ANC.
19 Any other questions?

20 COMMISSIONER MITTEN: Since this is all
21 new for Mr. Gottesman. In providing the opportunity
22 for you to cross examine the Office of Planning, if
23 there was a question that you would like to have them
24 consider from your perspective, now would be the time
25 to ask it.

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1 MR. GOTTESMAN: I will present my
2 objections to the Planning Office's determination when
3 I testify.

4 COMMISSIONER MITTEN: Okay.

5 CHAIRPERSON GRIFFIS: Very well. Then let
6 us move on to the ANC's report which has been noted
7 several times. It is Exhibit 24. The ANC can be
8 afforded great weight by this Board. I'm reading the
9 letter of its motion that was approved 6-1 vote "is
10 unable to support the variance request for the
11 nonconforming structure of 2609 P Street due to
12 concerns regarding impairment of privacy recently
13 expressed by a neighbor whose property abuts the rear
14 of the property at 2609 P Street."

15 Commission of Fine Arts also as the
16 Applicant in the record shows, it is Exhibit 3, was
17 supportive of that portion of alteration of which we
18 are considering today. I take it they were against a
19 front porch which makes some sense. That's
20 interesting. Any other reports that I'm missing?

21 Mr. Gottesman, are you aware of any other
22 official reports that were submitted into the record
23 that the Board has not made note of at this time? If
24 not, is there anyone else here attendant to this
25 application to give testimony as a person in support?

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1 Not seeing any indication, Mr. Gottesman, let us turn
2 to you for the presentation of your case.

3 MR. GOTTESMAN: Thank you, sir. The
4 Applicant is asking this Board to rezone this
5 commercial property residential or to consider it
6 residential and he pleads hardship because what's left
7 of his over built rear yard does not get sun. If you
8 please, he is misguided in his thinking that the FAR
9 and lot occupancy requirements of the Zoning
10 Regulations are there to provide recreation for him,
11 the owner.

12 CHAIRPERSON GRIFFIS: Can you move your
13 mic closer to you? We're having a difficult time
14 hearing you which means you may not be making it on
15 the record.

16 MR. GOTTESMAN: The purpose of the lot
17 occupancy and the FAR regulations are not to provide
18 recreation for the owner but to avoid congestion in
19 the area, to avoid overcrowding in the area, and to
20 avoid overdevelopment. These regulations are there to
21 provide a buffer for neighboring property owners like
22 me. My yard provides a buffer for all of the other
23 properties on the block who may have supported it.

24 Mr. Morrow particularly, who asked for party
25 status and whose photographs have been introduced

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1 here, has a 30 foot buffer between his property and
2 the Applicant's property. That 30 foot buffer is
3 provided by my garden. I will not get even the open
4 space buffer that the Zoning Regulations require,
5 namely 40 percent of the lot or 20 feet. All that's
6 left after the old building that preceded the Zoning
7 Regulations is 10 percent of the lot or four feet.

8 I now have a fence that screens off his
9 rear yard, but the Applicant is asking the Board to
10 let him build a deck on top of the fence or above the
11 fence line. I will be prohibited by the Building and
12 Zoning Regulations from erecting a higher fence which
13 leaves me without any buffer at all. I want to point
14 out that the variance which the Applicant is
15 requesting is not for him personally. It is for the
16 property. That property continues to be zoned
17 commercial. There is nothing to prevent the Applicant
18 from renting it out next week to a retail store which
19 in fact is the way it has been in the past.

20 In the past, the ground floor has been
21 rented either for a hairdresser or for an office. The
22 two upper floors have generally been rented to groups,
23 sometimes groups of college kids. With the deck out
24 there, they could hold parties out on the deck and
25 toss their bottles tops out into my yard. They could

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1 bring their Hi-Fi and play loud rock and roll music on
2 the deck. They could bring out a charcoal burner and
3 have cook outs if they wanted to.

4 If that happened, I would have to retreat
5 inside my house and close my windows to avoid the
6 fumes or the noise. In effect, I would be deprived of
7 the quiet enjoyment of my garden and patio. The
8 variance that the Applicant is requesting may increase
9 the value of his property, but it will diminish the
10 value of mine by much more. I pay high taxes based on
11 a seven figure tax assessment most of which is
12 represented by the value of my patio and garden which
13 occupy 60 percent of my lot.

14 If I should try to sell my house in case a
15 deck was built and with the deck there, I wouldn't get
16 anywhere near the figure for which it's assessed now.

17 No one wants to pay that kind of money for a patio
18 without peace and quiet and without privacy. Mr.
19 Zapatka pointed out that they can look out the
20 upstairs windows right now. Sure they can. They have
21 a free ride on my garden, but they are inside. There
22 is a barrier. There is a wall there with a window
23 that gives me some kind of protection. They are not
24 out on top of my garden as a deck would be.

25 He points out that the house next door,

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1 which is a mirror image of his house, has a deck
2 there. I believe that deck is part of the
3 nonconforming use of the property before the Zoning
4 Regulations just as 40 percent of his building is a
5 nonconforming use that preceded the Zoning
6 Regulations. I have lived in my house for 35 years.
7 I have never had any other application for a variance
8 for a deck. Either that deck has been there since
9 before the Zoning Regulations or it too is illegal
10 because the BZA never granted a variance for it.

11 Finally, I want to emphasize that there is
12 nothing unique or exceptional about this property for
13 the variance sought. In urban areas like Georgetown
14 consisting of row houses without side yards, everyone
15 tries to shoe horn an addition of some sort into the
16 rear yard. It is only the Zoning Regulations that
17 restrain them. The only thing that is exceptional
18 about this property is that as a nonconforming
19 structure it is already grossly over built beyond what
20 the zoning now permits. Thank you.

21 CHAIRPERSON GRIFFIS: Thank you very much.

22 Mr. Zapatka, cross examination?

23 MR. ZAPATKA: Questions for Mr. Gottesman?

24 CHAIRPERSON GRIFFIS: That's correct.

25 MR. ZAPATKA: Do you know what the size of

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1 your yard is?

2 MR. GOTTESMAN: Approximately 30 by 120
3 feet. I don't know the arithmetic.

4 MR. ZAPATKA: So it's about 3,600 square
5 feet, your back yard.

6 MR. GOTTESMAN: I don't know. Those are
7 the dimensions.

8 MR. ZAPATKA: Yes, I think that would make
9 sense. Do you also know what the height of your fence
10 is on the property line?

11 MR. GOTTESMAN: I have never measured it.
12 I believe it's somewhere between six and seven feet.
13 It's close to what the limit is on the height of a
14 fence. I know I can't do anything higher than that.

15 MR. ZAPATKA: That's all.

16 MEMBER ZAIDAIN: Mr. Chair, I have a
17 question.

18 CHAIRPERSON GRIFFIS: Yes.

19 MEMBER ZAIDAIN: You stated that the fence
20 acts as a buffer and that this porch or deck addition
21 will erase that buffer or limit that buffer. Can you
22 hear me?

23 MR. GOTTESMAN: I'm sorry. I didn't
24 understand you.

25 MEMBER ZAIDAIN: You mentioned in your

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1 testimony that your fence acts as a buffer.

2 MR. GOTTESMAN: Yes.

3 MEMBER ZAIDAIN: And that this deck will
4 decrease that buffer or eliminate it.

5 MR. GOTTESMAN: It will eliminate it
6 completely because it will be on top of the fence. It
7 will be higher than the fence. Right now the rear
8 yard which has a commercial structure is there for
9 storage mainly. That is completely screened off by my
10 fence.

11 MEMBER ZAIDAIN: Right.

12 MR. GOTTESMAN: If he gets the right to
13 build a deck up on the second story, then my fence is
14 below it. It is completely exposed, and I am
15 completely exposed.

16 MEMBER ZAIDAIN: I don't think I
17 understand. Let me put it into a simple question.
18 What are you trying to buffer from, the back yard or
19 the building?

20 MR. GOTTESMAN: From the noise and from
21 the potential fumes and from a lot of people out there
22 on the deck peering over into my yard.

23 MEMBER ZAIDAIN: Okay.

24 MR. GOTTESMAN: And watching every
25 movement I make on my patio.

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1 CHAIRPERSON GRIFFIS: Mr. Gottesman, you
2 made a statement as you opened up your case
3 presentation that this was going to be a rezoning from
4 a commercial to a residential. Are you aware of the
5 fact in C-1 and the cumulative aspects of zoning that
6 residential 100 percent is actually allowable by
7 right?

8 MR. GOTTESMAN: I know it's allowable.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. GOTTESMAN: But it's also allowable to
11 put a commercial --

12 CHAIRPERSON GRIFFIS: To one FAR as Ms.
13 Mitten has pointed out.

14 MR. GOTTESMAN: And this variance will not
15 change that situation.

16 CHAIRPERSON GRIFFIS: This will always be
17 a mixed use building though. It will always be
18 residential.

19 MR. GOTTESMAN: It will always be able to
20 be rented out for an office or commercial.

21 CHAIRPERSON GRIFFIS: A portion of which
22 to one FAR, is that clear?

23 MR. GOTTESMAN: Well, yes, that's fine.
24 Sure, that's clear. But that was my point that even
25 though he says he's using all of the building as a

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1 residence, it's still zoned commercial. There's
2 nothing this Board is going to do now. It doesn't
3 have jurisdiction to rezone that property residential.

4 He can turn around next week after he gets the
5 variance and rent it out to a commercial tenant, a
6 retail store, or an office.

7 CHAIRPERSON GRIFFIS: Wouldn't you agree
8 that probably the best area for the commercial would
9 be on the first level on the street of P Street which
10 actually is the basement level?

11 MR. GOTTESMAN: That's where they all are.

12 CHAIRPERSON GRIFFIS: In the C-1, other
13 permitted uses, that is other than residential in this
14 zone, would only be allowed one FAR. So it would be a
15 small portion of the building. So if you occupied the
16 basement level, is it your understanding that then the
17 residential would happen at the second and third
18 floor?

19 MR. GOTTESMAN: That's what's happened
20 before. That's the way it's always been. It's always
21 been rented out to groups on the second floor.

22 CHAIRPERSON GRIFFIS: Okay. You heard Mr.
23 Zapatka indicate that the french doors have been
24 approved by the Commission of Fine Arts and they are
25 on both directions, north and east. There are

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1 obviously fenestration windows on the rear elevation.
2 You don't see anything precluding somebody from
3 looking out the windows clearly. That's somewhat
4 common sense. What would preclude people from playing
5 loud music and opening those windows? Does that not
6 happen?

7 MR. GOTTESMAN: Well, at least there's a
8 wall there.

9 CHAIRPERSON GRIFFIS: No, I'm talking
10 about the second and third floors.

11 MR. GOTTESMAN: The wall absorbs the
12 noise.

13 CHAIRPERSON GRIFFIS: On the second and
14 third floors?

15 MR. GOTTESMAN: On the second and third
16 floors, a window is an opening. It's not the whole
17 thing.

18 CHAIRPERSON GRIFFIS: I see. You are
19 saying the existing structure wall. I understand
20 that. Also you indicated that the resale value of
21 your property would be diminished if this deck was
22 added onto this. Do you have any substantive evidence
23 that would be the case?

24 MR. GOTTESMAN: It's human nature. When
25 somebody is going to pay a lot of money for a patio

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1 and garden which is the main feature of my property,
2 they want privacy. They don't want to be subject to
3 the whims of somebody out there on a deck looking over
4 them.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. GOTTESMAN: I'll tell you this. I
7 would not have bought my house if the deck had been
8 there at the time. I believe that other people might
9 have the same attitudes that I do.

10 CHAIRPERSON GRIFFIS: Have you ever
11 noticed any objectionable use of the existing adjacent
12 patio/porch?

13 MR. GOTTESMAN: You mean the open area on
14 the first floor, no, not at all.

15 CHAIRPERSON GRIFFIS: No, the building
16 adjacent to this, the building west of this which has
17 an existing balcony.

18 MR. GOTTESMAN: I don't even know that
19 there's access there to that if that is a balcony. I
20 don't know anything about that. It's never been
21 brought to my attention.

22 CHAIRPERSON GRIFFIS: You've never seen
23 anybody out there though. You have never noticed
24 anybody using it.

25 MR. GOTTESMAN: No, I have never seen

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1 anybody out there at all. I don't really know whether
2 there's access to it. I think they would probably
3 have to crawl out a window to get to it if it's there,
4 and I'm not at all sure it's there.

5 CHAIRPERSON GRIFFIS: Interesting.

6 MR. GOTTESMAN: But I have never been
7 notified of an application for a variance on that.

8 CHAIRPERSON GRIFFIS: Right. That's not
9 my concern.

10 MR. GOTTESMAN: I have never seen anybody
11 out there.

12 CHAIRPERSON GRIFFIS: Okay. Any other
13 questions from the Board? Very well. Thank you very
14 much. Closing remarks? Rebuttal testimony?

15 MR. ZAPATKA: Yes, again I would like to
16 emphasize that the Commission of Fine Arts has already
17 approved the proposed design. Indeed even without a
18 wooden deck, there can be four foot wide french doors
19 installed with rails. So with those open, it's not
20 really a wall anymore. It's quite open to the
21 outside. Also again for comparison, it's about 40 to
22 60 square feet of space back there. The neighboring
23 yard is 3,600. A lot of people in Georgetown plant
24 trees and vines and so on. I would like to just ask
25 my client, Dr. Alykhan, the owner of 2609 to make a

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1 few remarks about the proposal. Is this the correct
2 time for that?

3 CHAIRPERSON GRIFFIS: He can rebut
4 anything that was just presented in the case of
5 opposition, but no, we're not going to take new
6 testimony presentation right now.

7 MR. ZAPATKA: I see.

8 CHAIRPERSON GRIFFIS: Have you been sworn
9 in? Just stand right there and give Ms. Bailey your
10 attention.

11 WHEREUPON,

12 FAUD ALYKHAN

13 was called as a witness and, having been first duly
14 sworn, assumed the witness stand, was examined and
15 testified as follows:

16 DR. ALYKHAN: My name is Faud Alykhan.
17 I'm actually an Internist and Pediatrician in one of
18 the local hospitals here. I was taking notes as I was
19 listening to my neighbor. The first thing I think I
20 want to emphasize is I purchased this home nearly two
21 years ago. It was in November 2001.

22 Since then, I have been renovating this
23 home and have probably put over \$100,000 into it. I
24 have renovated the kitchen, the two bathrooms, and
25 putting so much cash into this, I think it would be

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1 very unlikely I would rent out this home to a bunch of
2 college students to come in and do whatever they may
3 please as he suggested.

4 Second of all, on the first floor I have
5 actually taken out the walls that were the prior
6 beauty salon or barber shop to utilize that as a
7 family room. So if I was to rent that out, I would
8 literally have to go seal that all the way up again.
9 I clearly have looked at the intent of my living.

10 CHAIRPERSON GRIFFIS: You have done enough
11 interior renovation to make this a single family
12 house.

13 DR. ALYKHAN: Yes.

14 CHAIRPERSON GRIFFIS: It's your idea at
15 this point to live in it.

16 DR. ALYKHAN: Definitely. Downstairs
17 there used to be a half bath. I put a steam shower in
18 there with a bench with the intent of bringing elderly
19 parent to stay with me at times because I can't visit
20 them.

21 CHAIRPERSON GRIFFIS: I think we
22 understand.

23 DR. ALYKHAN: Purchasing the property I
24 knew it was in Georgetown. It's overcrowded. I don't
25 have options either of any privacy. Somebody can look

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1 into my home from the roadside as well as from the
2 back. I think when you do purchase a home at any time
3 whether it be 35 years ago this area has not really
4 changed in regards to the privacy issues. It's urban.

5 It's overcrowded. I think that was always understood
6 and expected.

7 The deck that I am building as Mr. Zapatka
8 mentioned is not going to be overlooking directly into
9 his yard. I can see from every aspect on the back
10 side of my house my neighbor's patio, his garden,
11 every aspect of what's going on. Living there for two
12 years, that has not happened. I don't expect suddenly
13 I'm going to pop out onto my small deck to suddenly do
14 that.

15 The third reason I do need it is because
16 his back wall is so high from the back side as well as
17 the dry cleaner on the side that if I was to sit out
18 in the middle of winter and have a cup of tea or
19 anything it would do me no good. After you come back
20 from work, you want to relax. There's been points I
21 have actually sat on the front of my stoop to get some
22 light. I can't imagine having to redress into a pair
23 of jeans or something to go into a park because I'm
24 just looking to have a cup of coffee.

25 I'm barely ever there because I am a

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1 hospitalist. I take care of inpatient children who
2 are coming out of ICUs. I would like something when I
3 get home if I have had a difficult 36 hours. That's
4 actually why I was late today because I had an
5 emergency with a patient. It would be very nice to
6 get home, open those french doors, sit down, and maybe
7 have a cup of coffee, have something to eat.

8 I don't expect that many people to be able
9 to fit onto a deck of that size. I think being a
10 physician I know you can't load it up. There's always
11 a risk of injury, liability. So I definitely would
12 not have that. The neighbor had mentioned about the
13 complaint of garbage. The windows open, so that could
14 still happen if someone else was living in that house.

15 I think there's a matter of civility.

16 Clearly as I mentioned if I have been here
17 suffering through two years of renovation, I don't
18 plan to move very soon. I deliberately looked for a
19 home with two bedrooms because in that case I can
20 still settle and have children. I plan to live there
21 for a while. In regards to the real estate value of
22 his property, I think aesthetically --

23 CHAIRPERSON GRIFFIS: I don't want to have
24 opinions and speculation.

25 DR. ALYKHAN: Okay. Currently there are

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1 college students who live next door. There is
2 definitely a deck there that is the same size as what
3 I am looking for. I don't know if it was approved in
4 the past or not. I have not had issue with those
5 college students coming out screaming. As he is
6 mentioning he is not even acknowledging that they live
7 there or that anyone is on that deck. I can't imagine
8 that I would be any worse if I am barely there.

9 CHAIRPERSON GRIFFIS: Okay.

10 DR. ALYKHAN: There was a comment about
11 taxes. I don't know if I need to mention anything
12 about taxes because everyone in that area --

13 CHAIRPERSON GRIFFIS: Not unless you want
14 us to hike him up for you.

15 DR. ALYKHAN: No, please. Again, I'm not
16 building over his fence. His fence very much limits
17 any type of light I can get on the first floor. I
18 have an air conditioning unit on the first floor, so
19 in the summer when you are more likely to sit outside
20 I have that blaring over my head which I also would
21 like to avoid. The deck would allow light into my
22 kitchen, into my living room and dining room. It
23 allows a lot more living in the city. I think
24 actually it improves resale for the whole area.

25 CHAIRPERSON GRIFFIS: Okay.

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1 DR. ALYKHAN: Again, the difference
2 between the deck and that wall is near four feet. I
3 can't imagine any more to try to help that.

4 CHAIRPERSON GRIFFIS: Any questions from
5 the Board on the rebuttal?

6 MR. GOTTESMAN: Excuse me, Mr. Chairman,
7 may I have a point of order?

8 CHAIRPERSON GRIFFIS: No, that comes from
9 the Board. I promise I will get to you. We will have
10 the Board ask questions if there are any. Then we'll
11 move on to you. Any questions? Go ahead. Cross
12 examination, Mr. Gottesman?

13 MR. GOTTESMAN: You indicated that
14 Georgetown is an overcrowded area.

15 DR. ALYKHAN: Yes, I did.

16 MR. GOTTESMAN: And that the lots are over
17 built.

18 DR. ALYKHAN: I actually said that
19 Georgetown is very crowded and it's understood that
20 when you purchase into that area that you are moving
21 into an area that is very crowded. So I don't see
22 that as being an issue of overbuilding. The comment
23 initially about overbuilding, these are homes that are
24 over 100 years old. That was it.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MR. GOTTESMAN: That's why they are
2 permissible today. It's adding to those homes that
3 requires the variance. If I may address the Board on
4 this.

5 CHAIRPERSON GRIFFIS: What?

6 MR. GOTTESMAN: He points out that he's
7 going to do a french door or a window and that he can
8 look out the windows. I can't do anything about that.
9 The Board can't do anything about that. He doesn't
10 need a variance for that. What he needs a variance
11 for is the deck.

12 CHAIRPERSON GRIFFIS: I understand that.

13 MR. GOTTESMAN: He points out that he has
14 made alterations in the house and that he does not
15 intend to rent it out. But the Board is granting a
16 variance not to him personally but to the property.

17 CHAIRPERSON GRIFFIS: We're very clear on
18 that.

19 MR. GOTTESMAN: The property will continue
20 to permit --

21 CHAIRPERSON GRIFFIS: That's true. He
22 could rent this to a fraternity. He could sell it to
23 a fraternity.

24 MR. GOTTESMAN: In which case, the deck
25 would be there whether he lives there and whether its

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1 occupied as a residence or not.

2 CHAIRPERSON GRIFFIS: I absolutely
3 understand that. I hope you believe the fact that
4 this Board is very understanding of your points. I
5 thought you were going to put together something that
6 I could help you frame into a question of cross
7 examination. Do you have any other cross examination
8 questions?

9 MR. GOTTESMAN: Those are the two points I
10 wanted to emphasize.

11 CHAIRPERSON GRIFFIS: Okay. Excellent.

12 DR. ALYKHAN: Am I allowed to make one
13 more comment?

14 CHAIRPERSON GRIFFIS: If you want to be
15 crossed on it, yes, go ahead.

16 DR. ALYKHAN: Even if I did decide to rent
17 this place out, which I know I'm not doing --

18 CHAIRPERSON GRIFFIS: It doesn't matter.

19 DR. ALYKHAN: Okay.

20 CHAIRPERSON GRIFFIS: We can't do anything
21 about it. You can sell it. It's not germane to what
22 we're dealing with here. Very well. Closing?

23 MR. ZAPATKA: Yes, I would just like to
24 emphasize again that request for a variance is for a
25 deck, not an enclosed structure. I just wanted to

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1 emphasize that also.

2 MR. GOTTESMAN: That's the problem.

3 MR. ZAPATKA: Again, it's four feet back
4 from the property line. That's it.

5 CHAIRPERSON GRIFFIS: Thank you very much.
6 Board Members, what is your pleasure? I suggest that
7 we set this for decision-making. Do we need anything
8 further on this? Let me hear comments.

9 MEMBER MILLER: I don't think we need
10 anything further.

11 CHAIRPERSON GRIFFIS: Excellent. What is
12 today, still the 21st? Indeed. Our next decision-
13 making is the first meeting in November, is that
14 correct, Ms. Bailey?

15 MS. BAILEY: November 4, Mr. Chairman.

16 CHAIRPERSON GRIFFIS: What do we have on
17 the morning of the 28th?

18 MS. BAILEY: We don't have a special
19 meeting as yet.

20 CHAIRPERSON GRIFFIS: Let me hear any
21 comments. I would be prepared to take this up on the
22 special public meeting on the 28th if the Board is
23 amenable or we just set it for the 4th which is our
24 normal public meeting on which we can make our
25 decision at that point. Ms. Mitten?

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1 COMMISSIONER MITTEN: I would prefer the
2 4th because I will be here anyway on the 4th, and I
3 will not be here on the 28th.

4 CHAIRPERSON GRIFFIS: As always one to
5 accommodate our friends at the commission, we will
6 take that under advisement. Mr. Zaidain?

7 MEMBER ZAIDAIN: I would just going to
8 agree because the 28th is going to be a long day.

9 CHAIRPERSON GRIFFIS: Indeed. There it
10 is. We will set it for the first case of the morning
11 for decision on November 4. The Board is not
12 requesting any additional submissions from the
13 Applicant or parties. Very well. If there is nothing
14 further, thank you all very much.

15 MR. GOTTESMAN: I have a question.

16 CHAIRPERSON GRIFFIS: Absolutely.

17 MR. GOTTESMAN: I will get notice of the
18 Board's decision in time to note an appeal if
19 necessary. Will I get notice on whatever date it is?

20 CHAIRPERSON GRIFFIS: Yes.

21 MR. GOTTESMAN: Because I want to make
22 sure that I'm within time to note an appeal to the
23 Court of Appeals.

24 CHAIRPERSON GRIFFIS: That's 60 days.

25 MR. GOTTESMAN: Right.

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1 CHAIRPERSON GRIFFIS: Now, note that our
2 decision-making is when the Board will obviously
3 decide it which is on the 4th. The order and the
4 ruling, our decision does not become official until
5 the order is issued. The order will probably take a
6 week or two or could be more. So that's what we're
7 looking at. Are there any other questions of the
8 Applicant, any clarification questions?

9 COMMISSIONER MITTEN: May I just say
10 something to Mr. Gottesman? Mr. Gottesman, as a party
11 you will receive a copy of our order.

12 MR. GOTTESMAN: Thank you. But the time
13 for appeal runs from the date of issue I believe.

14 COMMISSIONER MITTEN: Correct.

15 MR. ZAPATKA: I just have a quick
16 question. Will I be able to submit clear photographs
17 to you?

18 CHAIRPERSON GRIFFIS: You mean different
19 photographs.

20 MR. ZAPATKA: From inside the structure.
21 Since my client is always at the hospital, I can't get
22 into his house normally. These are from the outside.
23 I want to show you photographs from the inside also
24 just for further clarification.

25 CHAIRPERSON GRIFFIS: I'm pretty clear on

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1 what the issue is. First of all, that's new evidence.

2 We would have to then serve it to the parties.

3 MR. ZAPATKA: Then no, never mind.

4 CHAIRPERSON GRIFFIS: That would set us
5 off another three to four weeks. Then we would decide
6 this at the first of December.

7 MR. ZAPATKA: Okay.

8 CHAIRPERSON GRIFFIS: I'm absolutely clear
9 on what it is. We have an excellent site plan that
10 was submitted on part of the documents that were done
11 for the renovation for this and the photographs that
12 you submitted in today.

13 MR. ZAPATKA: Okay. Thank you, Mr.
14 Chairman.

15 CHAIRPERSON GRIFFIS: Any other questions?
16 Clearly at our decision-making on the 4th, it's our
17 deliberation. There's no further testimony. The
18 record is closed now.

19 MEMBER ZAIDAIN: So the record is closed,
20 Mr. Chair.

21 CHAIRPERSON GRIFFIS: Absolutely, the
22 record is finally closed on this. We will take this
23 up in two weeks. We're going to take a five minute
24 break. Then we'll be back for the last case of the
25 morning.

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1 (Whereupon, the foregoing matter went off
2 the record at 11:39 a.m. and went back on
3 the record at 11:51 a.m.)

4 CHAIRPERSON GRIFFIS: Ms. Bailey, when you
5 are ready, we can call the next case for our
6 consideration this morning.

7 MS. BAILEY: Application Number 17061 of
8 Henry McKinnon, pursuant to 11 DCMR 3104.1, for a
9 special exception to allow a rear addition to a single
10 family semi-detached dwelling under section 223, not
11 meeting the lot occupancy requirements (section 403)
12 in the R-3 District at premises 2708 P Street, N.W.,
13 Square 1261, Lot 2. Please stand to take the oath.

14 WHEREUPON,

15 CHRISTIAN ZAPATKA

16 was called as a witness and, having been first duly
17 sworn, assumed the witness stand, was examined and
18 testified as follows:

19 MS. BAILEY: Thank you. Mr. Chairman, you
20 have in front of you a copy of the affidavit of
21 posting that was filed this morning.

22 CHAIRPERSON GRIFFIS: Indeed. Mr.
23 Zapatka, for future reference, you do know that this
24 is to be in to the Board prior to the hearing.

25 MR. ZAPATKA: The affidavit?

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1 CHAIRPERSON GRIFFIS: Yes.

2 MR. ZAPATKA: Yes, I do know that.

3 CHAIRPERSON GRIFFIS: Do you know how soon
4 before the Board hearing? It's a pop quiz.

5 MR. ZAPATKA: I can tell.

6 CHAIRPERSON GRIFFIS: It's at least five
7 days. Put it in a week before the hearing and then we
8 won't have to deal with it and it doesn't become an
9 issue and all of that.

10 MR. ZAPATKA: Sure. I had been focusing
11 on the post for 15 days before. I just neglected
12 that.

13 CHAIRPERSON GRIFFIS: Right, and that's
14 the most important part. But clearly if anything
15 comes in terms of a controversy or any other
16 applications, that often is a point of which it's
17 difficult to move on from. But we will move on from
18 it as I have probably addressed it too many times
19 already this morning. It is a very important aspect.

20 With that, why don't we turn it over to
21 you? This is a section 223 special exception. So
22 what I'm going to do is ask you to run through and
23 describe a little bit of the project. You have a
24 model that of course is now ours as part of the
25 record. You can point to that in terms of looking at

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1 the addition. It's a little bit of a joke.

2 MR. ZAPATKA: Thanks.

3 CHAIRPERSON GRIFFIS: We do have
4 photographs of the model which suffice for the record.

5 Anyway, the point is we're going to address the
6 specific aspects of 223 as we run down this. Go
7 ahead.

8 MR. ZAPATKA: I'll just make the
9 presentation then.

10 CHAIRPERSON GRIFFIS: Indeed.

11 MR. ZAPATKA: Yes, it is a request for a
12 special exception at 2708 P Street. We have gained
13 concept and permit approval from the Commission of
14 Fine Arts and from the ANC for this project. To just
15 summarize, currently there's a wooden shed-like
16 structure on the back of the house in this position
17 that was built after 1968. According to this design,
18 that would be removed and replaced by this addition
19 which I am holding right here and which is shown in
20 the plans.

21 The reason it comes under the special
22 exception category is that this is the original part
23 of the house from 1815. It's an unusual house with a
24 two story loge on the front. It is three feet away
25 from the neighboring houses. There are four houses

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1 here. So it does not occupy the lot property line to
2 property line. If it did, then according to the
3 Zoning Regulations we could propose a 60 percent lot
4 coverage.

5 What we're proposing instead is a 45
6 percent lot coverage. Since it's technically semi-
7 detached, being three feet short of the property line,
8 the Zoning Regulation of course is 40 percent. We're
9 asking for a five percent increase over that 40
10 percent. The reason for that is twofold. On the
11 front facade, we would not like to introduce a filler-
12 type of structure to the side of this already unique
13 facade. The Commission of Fine Arts is sympathetic to
14 that approach in terms of design.

15 Functionally there's a window in the small
16 house next door. We do not want to block that either.

17 So very simply what we're proposing with this
18 addition is a 45 percent lot occupancy. The house is
19 currently 35 percent. Again, this would be five
20 percent over the 40 percent allowable in a semi-
21 detached condition. Again, since we do not want to
22 fill that three foot gap and have the possibility for
23 60 percent lot coverage, this is our intended design.

24 CHAIRPERSON GRIFFIS: One clarification on
25 the presentation that you said. You are not here for

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1 a variance from lot occupancy but rather a special
2 exception for the addition. That's really what we are
3 looking at. Special exception is a lesser threshold
4 of tests than a variance. According to my records,
5 you also have a special exception from the lot area,
6 the lot width, and lot occupancy requirements.

7 Now, 223 is part of the regulations that
8 was written exactly for this type of project. That is
9 additions to nonconforming structures, that being when
10 the regulations came into effect they obviously made
11 huge portions of the city that we absolutely love and
12 hold as our highest esteemed nonconforming which is a
13 whole other afternoon of me talking.

14 Nonetheless, the point is section 223 was
15 written so you are allowed to put additions on
16 nonconforming within a certain allowable lot
17 occupancy. You are fully well under that. So we can
18 proceed. But the important point is to address the
19 specific requirements under 223. Let me ask you a
20 couple of things. First of all, if this addition is
21 built, do you think it would impair the light or the
22 air available to neighboring properties?

23 MR. ZAPATKA: No.

24 CHAIRPERSON GRIFFIS: You say that
25 because?

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1 MR. ZAPATKA: This house extends out.
2 With the addition, it would be the same depth as the
3 neighboring house with its porch. As you can see
4 here, there's a court of sorts made regardless of
5 whether this addition is here or the existing addition
6 remains. This whole side is brick of this house. So
7 there's no apparent obstruction of light or air.

8 CHAIRPERSON GRIFFIS: Would the privacy
9 use or the enjoyment of the adjacent properties be
10 unduly compromised?

11 MR. ZAPATKA: I don't believe so. Again,
12 the outdoor space provided by this design is all
13 towards Poplar Street in the back. Again, there's a
14 brick wall here. (Indicating.) So this would in fact
15 give privacy for both this house and this house.
16 There's a side court here with a fence along it. So I
17 don't believe so.

18 CHAIRPERSON GRIFFIS: Do you believe that
19 the character of the addition is in character with the
20 area? The existing structure, do you think it would
21 unduly compromise or visually intrude on the rest of
22 the neighborhood?

23 MR. ZAPATKA: No, not at all.

24 CHAIRPERSON GRIFFIS: Speaking as the
25 designer you say that with confidence.

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1 MR. ZAPATKA: With great confidence, yes.

2 CHAIRPERSON GRIFFIS: Okay. Anything else
3 from the Board? Very well. Let's move on to the
4 Office of Planning.

5 MR. PARKER: Thank you, Mr. Chairman and
6 Members of the Board. Once again, I'm Travis Parker
7 with the Office of Planning. I have nothing to add to
8 the OP report as submitted. I would like to stand on
9 it on the record, and I would be happy to answer any
10 questions you may have.

11 CHAIRPERSON GRIFFIS: Excellent. I
12 appreciate that. Also another excellent report. It's
13 great how the Office of Planning takes the elevations
14 and puts it all together for us. I imagine you
15 reviewed the Office of Planning's memo, is that
16 correct?

17 MR. ZAPATKA: I don't believe I have.

18 CHAIRPERSON GRIFFIS: I see. Well, let me
19 tell you what they are recommending. They are
20 recommending approval. They have found similarly to
21 you the answers to the questions of section 223 that
22 we have just gone through. Do you want a moment to
23 read this so that you might cross examine the Office
24 of Planning?

25 MR. ZAPATKA: I don't think it's

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1 necessary. I have confidence in the report.

2 CHAIRPERSON GRIFFIS: Any Board questions
3 for the Office of Planning? I have one question.
4 Where did we get the mid-century lean-to addition
5 characterization of this?

6 MR. PARKER: That was directly from the
7 Applicant's submittal.

8 CHAIRPERSON GRIFFIS: Is that what you
9 called it, a lean-to addition?

10 MR. ZAPATKA: The current or the proposed?

11 CHAIRPERSON GRIFFIS: No, the existing.

12 MR. ZAPATKA: The existing is a shed.

13 CHAIRPERSON GRIFFIS: A shed.

14 MR. ZAPATKA: But in fact, it's typed as a
15 lean-to, yes. It sounds a bit more rustic as a lean-
16 to, but it's a shed.

17 (Laughter.)

18 CHAIRPERSON GRIFFIS: That's something you
19 make in Boy Scouts. Well, we won't hold up the whole
20 application on that.

21 MEMBER ZAIDAIN: That's a discussion we
22 can have over lunch.

23 CHAIRPERSON GRIFFIS: That's right. If
24 there are no further questions of the Office of
25 Planning, let's go to the ANC-2E. Is anyone

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1 representing the ANC here? They are not today. They
2 are Exhibit 22 recommending approval. It was timely
3 filed. I believe it meets the requirements as stated
4 in our regulations, is that correct, Ms. Miller?

5 MEMBER MILLER: That's correct.

6 CHAIRPERSON GRIFFIS: Very well.

7 MEMBER MILLER: It doesn't really address
8 the issues, but it supports the application.

9 CHAIRPERSON GRIFFIS: So as they say we'll
10 take it for what it's worth. Commission of Fine Arts
11 also is Exhibit 3 which reviewed this and had no
12 objection. I don't have any other attendant reports
13 to this application unless anyone else is aware of
14 any. Not noting any, let us go to the Applicant for
15 closing remarks.

16 MR. ZAPATKA: Closing remarks, yes. None
17 other than thanks to the Office of Planning,
18 Commission of Fine Arts, ANC, and my patient and
19 enlightened client, Henry McKinnon.

20 CHAIRPERSON GRIFFIS: You are not winning
21 an Oscar.

22 (Laughter.)

23 MR. ZAPATKA: It feels like it after the
24 previous one.

25 CHAIRPERSON GRIFFIS: Okay. As I stated,

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1 this is a special exception. Of course, there are
2 certain things in a special exception and 223 I think
3 is one of the most pertinent aspects of the
4 regulation. Any other questions? I would move
5 approval of 17061 for the special exception to allow
6 the rear addition under section 223 for the single
7 family semi-detached dwelling at 2708 P Street, N.W.
8 and would ask for a second.

9 MEMBER ETHERLY: Seconded, Mr. Chair.

10 CHAIRPERSON GRIFFIS: Thank you, Mr.
11 Etherly. I think the record is full. We can have
12 great reliance on the Office of Planning's submission
13 on this and also in terms of the testimony today about
14 there would be no adverse impact in terms of use,
15 enjoyment, light, air. Certainly the documentation
16 was submitted as required under the regulations for
17 our full understanding of this. That's all I have.
18 Any other comments, deliberation? If not, I would ask
19 for all those in favor to signify by saying aye.

20 (Chorus of ayes.)

21 CHAIRPERSON GRIFFIS: Opposed?

22 (No response.)

23 CHAIRPERSON GRIFFIS: We can record the
24 vote.

25 MS. BAILEY: The vote is recorded as 5-0-0

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1 to approve the application. Mr. Griffis made the
2 motion. Mr. Etherly seconded. Ms. Miller, Ms.
3 Mitten, and Mr. Zaidain are in support.

4 CHAIRPERSON GRIFFIS: Good. Thank you
5 very much. Have an excellent afternoon. When does
6 construction start?

7 MR. ZAPATKA: As soon as possible.

8 CHAIRPERSON GRIFFIS: Good.
9 Congratulations. Have fun. Hopefully you will live
10 through that. Anything else for the rest of the
11 morning? If there is nothing further, I can conclude
12 and adjourn the 21st morning session of the BZA.

13 (Whereupon, at 12:05 p.m., the above-
14 entitled matter recessed to reconvene at
15 1:31 p.m. the same day.)

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

1:31 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. Let me call to order our afternoon session of 21 October 2003, the Board of Zoning Adjustments of the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today is Mr. Etherly, the Vice Chair and also Ms. Miller. Representing National Capitol Planning Commission is Mr. Zaidain. Representing the Zoning Commission with us this afternoon is Mr. Parsons.

Copies of today's agenda are available for you. I hope you don't need it because you should be here for one thing this afternoon. They are at the door where you entered into the hearing room. There's a couple of things that are very important to all hearings before the Board of Zoning Adjustments so I am going to run through a few of those now.

First of all, it should be understood that public hearings are recorded. They are recorded in order to establish the record on each case. So there are several things attendant to that. First of all, if you are going to address the Board today, I need you to fill out two witness cards. Witness cards are

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1 available at the table where you entered into. There
2 are also some left on the table in front of us.

3 Those two witness cards go to the recorder
4 who is sitting to my right. Upon coming forward, you
5 will need to have a seat, make yourself comfortable,
6 and you will need to speak into a microphone. That
7 microphone should be on. You are going to need to
8 state your name and your address only once for the
9 record.

10 The order of procedure for this afternoon
11 of which we are hearing an appeal will be as follows.

12 We will have the statement and witnesses of the
13 Appellant. We will have the Zoning Administrator or
14 other government officials present their case. We
15 will go to the owner, leasee, or operator as third.
16 Fourth we will have the ANC within which the property
17 is located. Fifth we would have an intervenors case.

18 Sixth we would have rebuttal and closing statements
19 by the Appellant.

20 Of course, before all of that, we also
21 have preliminary matters which may take up quite a bit
22 of time this afternoon, but I will get to that when we
23 call the case. Cross examination of witnesses of
24 course is permitted by those participants in the case.

25 The ANC, as I have noted, is automatically a party in

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1 all cases before this Board.

2 The record would be closed at the
3 conclusion of the hearing on this case. That may take
4 several days. It may be finished in one day. Once
5 the hearing is ended however no other information is
6 accepted into the record except for that which is
7 specifically requested by this Board. We will be very
8 specific as to what is to be submitted and when it is
9 to be received into the Office of Zoning. After that
10 material is received, of course, the record would then
11 be closed, meaning no other information is accepted
12 into the record.

13 The Sunshine Act requires that this Board
14 conduct hearings on each case in the open and before
15 the public. Our rules and procedure and the Sunshine
16 Act however allow this Board to enter executive
17 session during or after a hearing on a case. That is
18 for the purposes of reviewing the record and
19 deliberating on a case. The decision of this Board in
20 contested cases must be based exclusively on the
21 record that is formed which is the importance of
22 saying everything you need to into the microphone and
23 also submitting that material into the record.

24 We will not deliberate or decide on
25 anything else that is not in the record. In addition,

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1 we ask that you not engage any Board Members in
2 conversation that is off the record where it may give
3 the appearance that we are receiving information that
4 has not become part of the record. We will make every
5 effort to conclude this afternoon session by 6:00 p.m.

6 I will update you as we go forward on what we are
7 going to be able to accomplish today as the time moves
8 along.

9 I would also ask as part of establishing
10 the record, of course, it's important that when we're
11 hearing testimony or evidence that the Board be able
12 to focus on who is speaking in front of us, so I would
13 ask everyone to refrain from any disruptive noises or
14 actions in the hearing room as the proceeding
15 continues. That being said, I believe we should call
16 the first case in the afternoon and then get to any
17 preliminary matters which are attendant to that case.

18 Preliminary matters are those which relate
19 to whether a case will or should be heard today such
20 as request for a postponement, continuance, or
21 withdrawal or whether proper and adequate notice has
22 been given. With that, I'm going to turn it over to
23 Ms. Bailey to call the first case in the afternoon.

24 However, if you have preliminary matters that
25 need to be brought to the attention of the Board, I

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1 would ask you to indicate that by having a seat and we
2 will get to you shortly. Ms. Bailey, let me also say
3 a very good afternoon to our Office of Zoning staff,
4 Ms. Bailey and also Mr. Moy. Mr. Nyarku is also in
5 and out ably assisting the Board. That's all I have.

6 MS. BAILEY: Mr. Chairman, good afternoon
7 and also to everyone. The case this afternoon, Mr.
8 Chairman, as you indicated is an appeal. The number
9 is 17054 of Henry P. Sailer, et al, pursuant to 11
10 DCMR 3100 and 3101, from the administrative decision
11 of the Zoning Administrator in the issuance of
12 Building Permit Number B448548, to Brian Logan dated
13 January 29, 2003, for the construction of a new single
14 family detached dwelling.

15 Appellant alleges that the Zoning
16 Administrator erred by issuing the building permit
17 without applying the applicable provisions (subsection
18 1567, Lot Occupancy and Ground Coverage Restrictions,
19 subsection 1568, Tree Removal Restrictions, et cetera)
20 of the Chain Bridge Road/University Terrace Overlay
21 (CBUT). The CBUT/R-1-A zoned subject premises is
22 located at 3101 Chain Bridge Road, N.W., Square 1427,
23 Lot 870. All those wishing to testify, would you
24 please stand to take the oath? Please raise your
25 right hands.

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1 WHEREUPON,

2 HENRY SAILER, STEVEN S. WOLF, JUDITH LANIUS,
3 FRIDO VAN KESTEREN, EDWARD P. MILHOUS, JOHN EPTING,
4 ALMA GATES, ASHLEIGH HORNE, LAURA GISOLFI GILBERT,
5 ALAN AICHES, DAVID MURPHY, LEON PAUL, and
6 JEANNINE RUSTAD ZIGNER

7 were called as witnesses and, having been first duly
8 sworn, assumed the witness stand, was examined and
9 testified as follows:

10 MS. BAILEY: Thank you.

11 CHAIRPERSON GRIFFIS: Very well. Who was
12 first at the table? No, we're not going to start the
13 arguing right now. Let me start on my left. If you
14 wouldn't mind just give me your name and your address
15 and then what I'm going to do is I'm going to ask you
16 what your preliminary matter is without getting into
17 any substance so that I can gage what I'm looking at
18 here. Can you just turn your microphone on? You just
19 need to touch the button on the base and the red light
20 will turn on. Thank you.

21 MR. SAILER: Thank you. I apologize for
22 my voice today. I will try to be as clear as I can.
23 My name is Henry P. Sailer. I am appearing pro se and
24 on behalf of the other applicants. At one time, I was
25 a lawyer. I have been retired for almost ten years.

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1 I never heard of Zoning Regulations or a zoning
2 hearing in my life. I'm a pure layman as to that. So
3 I regard myself as a layman for whatever that it's
4 worth.

5 I have a preliminary matter which is a
6 motion to dismiss the motion to dismiss filed by the
7 intervenor as untimely and improper and as they in our
8 opinion filed a rebuttal or reply totally improperly.

9 I haven't gotten it yet. They apparently put it in
10 the mail on Friday which I regard as sharp practice,
11 and I don't have it yet.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. SAILER: That would be the nature of
14 my motion.

15 CHAIRPERSON GRIFFIS: Excellent. As we go
16 along, I will set up some rules that the Board
17 follows. It's going to be most expeditious in any
18 appeal that we keep a lot of anecdotal
19 characterizations of actions off the record. Let's
20 stick right to the facts and all of the actions.
21 That's what we're really paying attention to. That's
22 what we deliberate on. So that being said, we have a
23 motion to dismiss the motion to dismiss. I want
24 clarification. You said that there was a submission
25 into the record which you have not received. It was a

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1 rebuttal to what?

2 MR. SAILER: Apparently I was told last
3 night after I had gone to bed I guess that a reply
4 brief in support of the intervenor's motion to dismiss
5 had just been received by whoever told me. I have
6 never received it.

7 CHAIRPERSON GRIFFIS: Okay. We'll look
8 for that. Yes?

9 MS. GILBERT: Yes, Laura Gisolfi Gilbert
10 from the Department of Consumer and Regulatory Affairs
11 representing the Department of Consumer and Regulatory
12 Affairs. We are prepared to go forward with arguments
13 on the two motions to dismiss which are pending. If
14 the Board denies the intervenor's motion to dismiss
15 and wants to proceed with the hearing in this case, we
16 would like to move for a continuance of the hearing
17 date.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. EPTING: I am John Epting with Shaw
20 Pittman, Potts and Trowbridge. Ashleigh Horne is with
21 me also. We did file a motion to dismiss as untimely.

22 There's no time period in the regs for us filing that
23 time period. We are an automatic party. We did
24 receive a response to our motion which was mailed on
25 October 14. We did reply to that as soon as we got

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1 it. Both of those were sent by mail; Appellant's
2 response to us and our response back to them. So I
3 apologize if there is any confusion by that. As soon
4 as we got their response, we did file a timely
5 response back. I do have maybe 30 minutes of argument
6 about our motion.

7 MR. SAILER: Excuse me, Mr. Chairman.

8 CHAIRPERSON GRIFFIS: Yes.

9 MR. SAILER: I'm sorry to say I'm unclear.
10 Am I supposed to have already argued my motion, or am
11 I merely stating my motion?

12 CHAIRPERSON GRIFFIS: No, you are just
13 stating it right now.

14 MR. SAILER: Thank you very much.

15 CHAIRPERSON GRIFFIS: Let me return to
16 you, Mr. Sailer. You received the original motion.

17 MR. SAILER: I received the original
18 motion by mail.

19 CHAIRPERSON GRIFFIS: Then the subsequent
20 submission, Mr. Epting, when was that done?

21 MR. SAILER: Are you asking me?

22 CHAIRPERSON GRIFFIS: No, Mr. Epting.

23 MR. EPTING: It was prepared and mailed on
24 the 17th.

25 CHAIRPERSON GRIFFIS: Of?

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1 MR. EPTING: Of October. Their response,
2 they said it was mailed to us on October 14. If it's
3 more convenient, I'm perfectly willing to drop that
4 response because I can address it. Basically I think
5 he mischaracterized some of the cases for what it's
6 worth.

7 CHAIRPERSON GRIFFIS: Right. It's Exhibit
8 27 in the record. Do you have an additional copy of
9 that?

10 MR. EPTING: We will find one.

11 CHAIRPERSON GRIFFIS: Okay. Is there
12 anything else preliminary matter-wise? In which case,
13 as I look at this, first of all, Mr. Sailer, I think
14 it would be advantageous if we pick up the first
15 motion and then have brief argument on the motion to
16 dismiss based on timeliness. Clearly your motion to
17 dismiss the motion to dismiss can be addressed either
18 in your response or we can allow you a separate time
19 to make that argument. It's more expeditious if we do
20 it all together. You are obviously arguing against a
21 motion to dismiss.

22 MR. SAILER: I'm not all together clear
23 that I understand. You were directing that counsel
24 for the intervenor make his argument and I then or at
25 some point reply to it, is that right?

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1 CHAIRPERSON GRIFFIS: That's correct.

2 MR. SAILER: May I respond to that very
3 briefly?

4 CHAIRPERSON GRIFFIS: Sure.

5 MR. SAILER: I say again I have not
6 received a copy of the motion to dismiss as of now.

7 CHAIRPERSON GRIFFIS: You received the
8 original motion to dismiss.

9 MR. SAILER: Yes, the original. I mean
10 the reply. I beg your pardon.

11 CHAIRPERSON GRIFFIS: Right. What he
12 stated is that he will cover it. I'll be frank with
13 you. I was delivered his reply today. I have been in
14 hearing since 8:00 a.m. I reviewed it briefly and
15 will review it again as he is going on. Mr. Epting
16 has just stated that he is going to make oral argument
17 that covers that and could in fact if you object
18 strongly remove this from the record. So my point is
19 we'll address all the substance that's in that reply.

20 MR. SAILER: Well, I don't know how
21 strongly I object. I object. I suggest that if he is
22 to cover it in his oral argument, although we should
23 be covering what's in his original brief, that he take
24 it out of the record.

25 MR. EPTING: Mr. Chair, I was responding

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1 to a motion which he filed.

2 CHAIRPERSON GRIFFIS: Indeed. We're not
3 going to take a lot of time on this. You are going to
4 be delivered a copy. What I'm going to do is this.
5 You are going to have it. It's hard to take something
6 out of the record that the Board has already been able
7 to review. What I am going to do is I can give you a
8 moment.

9 We can take a brief pause, and you can
10 review that before Mr. Epting gets into his argument.

11 You will have been able to read this and we can
12 address it. If additional time is needed at the end
13 of all of that argument, you can address the Board in
14 that fashion. We can either have written submission.

15 We can continue this Christmas Day or whenever we
16 want to hear additional information on it.

17 MR. SAILER: One more word, Your Honor.

18 CHAIRPERSON GRIFFIS: Sure, and I'm just
19 the Chair.

20 MR. SAILER: I didn't mean Your Honor.
21 I'm sorry.

22 CHAIRPERSON GRIFFIS: No, I appreciate it.
23 (Laughter.)

24 MR. SAILER: I tried to indicate, whether
25 successfully or not, when I described my motion as

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1 going beyond this. I am moving to dismiss the entire
2 motion on limitations.

3 CHAIRPERSON GRIFFIS: Time limits.

4 MR. SAILER: I will --

5 CHAIRPERSON GRIFFIS: I fully understand
6 that. That's why I say it's best as the originator of
7 the motion to dismiss on timeliness state their case
8 and reiterate some of the written stuff. He will
9 state his case. I will give you an opportunity to
10 rebut his case and in that also present your case of
11 why it is timely. It's all in the same species, so we
12 can argue it all together.

13 MR. SAILER: All right.

14 CHAIRPERSON GRIFFIS: As far I understand,
15 and correct me if you have other opinions, we have one
16 issue of preliminary motion which we can combine in
17 addressing. The second is a motion for continuance.
18 That is from DCRA. So what I would like to do is just
19 get a brief indication of what the basis of that
20 motion for a continuance is. I think the Board can
21 act deliberately on that motion. Ms. Gilbert?

22 MS. GILBERT: Yes, that would not be
23 asking to continue the argument.

24 CHAIRPERSON GRIFFIS: I understand where
25 you want to continue. Why would you want to continue

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1 it after the timeliness of argument?

2 MS. GILBERT: Essentially, Your Honor, the
3 Department is - I can only say - not as prepared as it
4 should be in terms of going forward on this case
5 today. Several things intervened. The Appellant
6 served the Acting Zoning Administrator, who is now
7 Denzil Noble, with the Appellant's pre-hearing
8 statement that was mailed on October 7 according to
9 their certificate of service. Their supplemental pre-
10 hearing statement was mailed on October 14.

11 I'm not suggesting that they didn't mail
12 it. I'm not suggesting that the department did not
13 receive it. I can only say that Mr. Noble had not
14 received it in his hands and that I just went down to
15 the BZA yesterday and reviewed the entire record
16 yesterday. I had not received either of these
17 documents. Now, admittedly I did not file an entry of
18 my appearance. Some of the documents were served on
19 Charlotte Parker in the Office of Corporation Counsel.

20 We have a process whereby if Appellant is
21 not represented by counsel generally these appeals are
22 defended by agency counsel. Whereas if the Appellant
23 is represented by counsel, then the Corporation
24 Counsel handles the appeal. So through a combination
25 of factors, I did not affirmatively enter my

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1 appearance so that none of these documents were served
2 on me directly and did not realize that this case was
3 slated for October 21 for hearing.

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. GILBERT: There was a second point
6 that I was going to make in terms of a continuance.
7 The additional factors are that, as you are aware, Mr.
8 Noble has been acting as Administrator, Deputy
9 Administrator, and Zoning Administrator over the past
10 six months or whatever. Once I realized Friday where
11 we were, I have not been able to really consult with
12 anybody. I have Mr. Leon Paul here today with me if
13 we are forced to go forward who did do one of the site
14 inspections.

15 However, we have not had a full agency
16 review of the claims by the Appellant in this case.
17 One of the things that the Appellant referred to was a
18 difficulty in reviewing the plans because the
19 department had moved some of the plans related to this
20 case to another location while there was renovation
21 going on in the basement. Mr. Paul has not yet had an
22 opportunity to review the plans to review his
23 calculations that were made defending the case.
24 That's my motion.

25 CHAIRPERSON GRIFFIS: Very well. As you

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1 stated in the beginning, you are able and prepared to
2 talk about the timeliness and to deal with this motion
3 that's before us now.

4 MS. GILBERT: Yes.

5 CHAIRPERSON GRIFFIS: Very well. Board
6 Members, we do have a motion for a continuance. I'm
7 going to have the participants speak to that very
8 briefly. I think it is advantageous obviously to have
9 full participation of DCRA in this if this appeal was
10 to move beyond the initial motions. More importantly
11 however, this may continue on its own.

12 I am anticipating that this afternoon we
13 will get through preliminary matters and if those are
14 resolved that we start into the merits of an appeal
15 that will be set for another date. If it doesn't,
16 then obviously another date wouldn't be needed. So to
17 restate, I think we will get through hearing arguments
18 on the timeliness of this today which would coincide
19 to the motion of DCRA. Mr. Sailer, do you have
20 support or opposition to the motion for a continuance
21 after the deliberation and arguments are heard on the
22 initial motions?

23 MR. SAILER: Mr. Chairman, I find this in
24 an odd position. The intervenor has never filed a
25 pre-trial statement. I don't know whether they intend

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1 to file one or not or whether they are going to ask
2 for a continuance. As far as we are concerned, we are
3 ready to go forward, but we don't want to go forward
4 ourselves and then have them wait a week and come back
5 at us.

6 CHAIRPERSON GRIFFIS: All right. We won't
7 do that. So if I am understanding your position, you
8 are ready to go today.

9 MR. SAILER: Yes, sir.

10 CHAIRPERSON GRIFFIS: Mr. Epting?

11 MR. EPTING: I would support the motion.
12 In fact, as part of my motion on timeliness, I was
13 going to ask you to split the hearing and deal with
14 the merits later and basically try to get a decision
15 on whether it was timely or not before you get to the
16 merits.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. EPTING: Just one clarification, only
19 Appellants have to file 14 days in advance. I think
20 we're clear about that. So we had no filing
21 requirement. That's why we haven't made one other
22 than our motion to intervene. I just want to make
23 that clear.

24 CHAIRPERSON GRIFFIS: I think Mr. Sailer's
25 point was he didn't want to get caught, have to

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1 present, and then a motion for continuance because you
2 are not ready to go either.

3 MR. EPTING: We're completely ready to go.

4 CHAIRPERSON GRIFFIS: I'm clear on that.
5 Board Members? Can I hear opposition to the motion
6 for continuance? Not noting any opposition, I think
7 we could grant the motion by consensus of the Board
8 for a continuance from DCRA after we hear the initial
9 preliminary motions. I will be clear on what we'll
10 take up after we get through the preliminaries today.

11 The other important piece of this is in
12 timeliness. We have an awful lot of issues that are
13 going through. The timeliness is going to shake out a
14 lot of those which will actually form the basis of the
15 substance of an appeal that we hear, meaning there may
16 be elements that were brought initially that don't
17 stand to timeliness and therefore will be removed from
18 being heard from an appeal.

19 I think doing it in this fashion will help
20 everyone in participating in the case in terms of
21 addressing specific issues that would actually be
22 within the jurisdiction of the Board. So with that,
23 unless there are any further questions or
24 clarifications at this time, we could probably begin
25 the fun or the hearing. Anything? Everyone clear on

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1 what we're doing?

2 MR. SAILER: Well, I have a preliminary
3 motion to discuss. No, I beg your pardon. You told
4 me what to do with that.

5 CHAIRPERSON GRIFFIS: So we're all set.
6 Mr. Sailer, did you want to take a minute? We can
7 take a three minute recess so you can read the reply
8 motion and address that.

9 MR. SAILER: I understood the reply had
10 been withdrawn.

11 CHAIRPERSON GRIFFIS: No, it hasn't. I
12 can give you a couple of minutes right now to read it.

13 MR. SAILER: I don't think a couple of
14 minutes will do me any good. Thank you.

15 CHAIRPERSON GRIFFIS: Are you sure? It's
16 only four pages.

17 MR. SAILER: Well, I'm a slow read at my
18 age.

19 CHAIRPERSON GRIFFIS: I'm not sure what
20 that means. I'm a slow read at my age.

21 (Laughter.)

22 CHAIRPERSON GRIFFIS: Okay. In which
23 case, let's proceed.

24 MR. EPTING: Thank you very much. Good
25 afternoon. I am John Epting from Shaw Pittman. We

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1 have filed a motion to dismiss this appeal as untimely
2 on behalf of the property owner, which is Brian Logan,
3 an automatic party to this appeal.

4 CHAIRPERSON GRIFFIS: Good. I'm glad you
5 just stated that. That's another quick clarification
6 we want to do for essentially semantics on this.
7 There was obviously some question about whether we had
8 an agency firm or whatever it was. It's the owner
9 that's actually a participant in this.

10 MR. EPTING: Appellant's appeal is clear
11 on the hearing which is this January 29, 2003 building
12 permit which is the main building permit for this
13 single family dwelling. The building permit says
14 single family dwelling as per plans. All of the
15 issues that they are raising --

16 CHAIRPERSON GRIFFIS: The permit number on
17 January is B448548, is that correct?

18 MR. EPTING: That's correct. All of the
19 issues that they are raising in the appeal relate back
20 to and are within the scope of that permit. After we
21 filed our motion to dismiss, Appellant sought to
22 bolster their case by arguing that they are were
23 really appealing the last permit which is June 13
24 which is a driveway permit. That was issued 4.5
25 months after the initial permit.

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1 I want to make it clear that all of the
2 subsequent permits were ancillary to the main building
3 permits. They were excavation, sheeting-type permits,
4 a pool permit, and then a driveway permit. All of the
5 issues are solely within what was encompassed by the
6 main building permit. So the main building permit is
7 out there, and these are just derivative from that.

8 It's not like a system where you had
9 piecemeal cumulative permits where you really couldn't
10 tell what was going on. The Board concluded that the
11 Appellant did not know from the first permit what was
12 being sought. That's not the case here. The first
13 permit is clearly for the main building, a house with
14 pool, accessory structure, garage, and all the
15 landscaping.

16 Appellant certainly had knowledge as of
17 February 8, 2003 when the existing structure was
18 raised. They admit this in their pre-hearing
19 statement in the Levi affidavit and page two of their
20 summary statement where Appellants admit they had
21 notice of the demolition and construction. They all
22 live adjacent to the property.

23 The Board has carefully ruled that
24 Appellants cannot use subsequent matters or ancillary
25 permits to push back the required fine date. Issuance

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1 and the permit are actual knowledge. The Board and
2 its regulations are clear that the tiniest provisions
3 were designed not to let Appellants "aimlessly extend
4 the period" citing your recent Lehrman case.

5 So again, the action being challenged here
6 is the main building permit. Which was issued January
7 29. The Zoning Commission has recently adopted
8 changes to the regulations adopting a 60 day date on
9 which the person filing the appeal either knew or
10 should have known. Here Appellant's themselves have
11 established that date is February 8.

12 Appellants did not actually file their
13 appeal until July 2, 2003, a month after they filed
14 what was labeled "notice of intent to appeal" and
15 almost five months after Lehrman demolished the
16 structure and five months after DCRA issued the
17 permit. This is just too long. They knew about the
18 case. They live near the property. We request that
19 you dismiss under the order and applicable case law.

20 I'll just try to summarize. The building
21 permit on its face says as per plans all the work
22 except for the ancillary permits, which I talked
23 about, was included on that main building permit. So
24 they had actual knowledge as of February 8. The March
25 2003 issue of the Palisades News featured an article

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1 on the demolition. It clearly stated the address of
2 the property and that construction was being
3 performed.

4 It describes in detail the demolition of
5 the existing structure and the removal of the tree.
6 On the same page, the newspaper lists the property
7 owner having a residential zoning construction order
8 stated that applications for or building permits have
9 been issued by the city for the following properties;
10 3101 Chain Bridge Road, new home, \$1.25 million, Brian
11 Logan.

12 Appellants filed a letter to Mr. Logan on
13 May 21, 112 days, well over four months after DCRA
14 issued a permit and 102 days, well over three months
15 after the existing building was demolished. Yet they
16 waited until July 2, 2003, five months after the
17 permit was issued, to file their appeal. Their appeal
18 form, as I noted before, goes back to the January 29
19 building permit. That's the main building permit, so
20 over five months after that permit was issued.

21 I have already indicated that 3112.2
22 Zoning Regulations says an Appellant must file within
23 60 days that it knew or had notice of the decision.
24 The operations began February 8. All the Appellants
25 live within sight of the property and clearly saw it

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1 and omitted this. There was a detailed article
2 describing the demolition.

3 Prior to adopting that regulation, 3112.2,
4 there was basically a reasonless standard. What was
5 reasonable time in which to file? That was adopted in
6 the waste management case that you are all familiar
7 with. Absolute exceptional circumstances, the limited
8 time is reasonableness. A reasonable time period is
9 calculated to allow the grieved party time to evaluate
10 the feasibility of filing an appeal and to obtain
11 counsel "not to allow the grieved party to wait until
12 it's convenient to file the appeal. This concept of
13 reasonableness in the standard does not count on a
14 delay in taking an appeal when it is merely convenient
15 for an Appellant to afford making that decision."

16 The Appellant has said now with the series
17 of ancillary permits we were talking about System (PH)
18 and this is not the case of System (PH). In System (PH)
19 they rule that because of the cumulative piecemeal
20 nature of the applications, the Appellant was
21 circumvented from discerning the cumulative impact of
22 what was being controlled. That's not true in this
23 case. The main building controls.

24 Actually the mere fact that Appellant does
25 not know the permits have been issued is not

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1 sufficient to constitute exceptional circumstances
2 under the Georgetown Residence Alliance case where
3 knowledge from an ANC meeting on the proposal was
4 enough for the court to hold that Appellants had
5 knowledge and should have begun the appeal period.
6 The term they used was chargeable with notice.

7 The Board of Zoning Adjustment has
8 recently applied these principals in two similar
9 appeals: Appeal 16849 of Robert Lehrman and Appeal
10 16982 of J. Brendan Herron, Jr. In Lehrman, the Board
11 found that an appeal filed 99 days after the Zoning
12 Administrator's decision in the form of a letter was
13 untimely even though the Appellant had pursued other
14 remedies such as seeking to obtain reversal from the
15 Zoning Administrator. In Herron, the Board used the
16 day the permit was issued to determine an appeal filed
17 six months after the permits were issued was untimely
18 despite Appellant's argument that subsequent letters
19 from DCRA extended the time period.

20 Under the Mendelssohn (PH) case,
21 Appellants are chargeable with notice on the date of
22 issuance of the permit. The permit together with the
23 permit application and plans indicated the full extent
24 of the work to be performed different than Sysen (PH).

25 If you apply the 60 day time limit, and I think this

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1 is important, based upon your regulations, the time
2 for filing would be March 30. If you use a different
3 standard, let's say two months from raise, that would
4 be April 9 in order to file a permit. That's 60 days
5 after the existing structure was demolished.

6 The Appellants did nothing. At the very
7 latest, the Appellants had notice of the permits when
8 construction began on the property March 24, 2003.
9 The reason construction had not begun before that is
10 there was a stop work order issued which we had to get
11 lifted. As soon it was lifted, we started work again.

12 So March 24 they started work again. From this date
13 the time for filing an appeal expired on May 23.

14 I believe under the case law, the Board's
15 rules, and the Board's recent decisions this doesn't
16 constitute filing timely and as required. Filing on
17 July 2 is five months after the permit had been issued
18 and almost five months after the structure had been
19 raised. There are no existing circumstances here.
20 Appellants admit that they saw the raise. Unlike
21 Sysen (PH), the full scope of the project was detailed
22 in the building permit and plans. All of the
23 subsequent permits were ancillary and directly related
24 to the project.

25 In Sysen (PH), the permits were found to

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1 be piecemeal. The Board held that the first permit
2 did not provide notice of all work to be done. That's
3 not the case here. The full extent of construction to
4 be performed on the property was clearly depicted on
5 the approved plans. So I would like to conclude with
6 a statement that a timely filing and appeal is
7 mandatory and jurisdictional. Accordingly, we request
8 that the Board of Zoning Adjustment dismiss this
9 appeal with prejudice as untimely filed. I appreciate
10 your time.

11 CHAIRPERSON GRIFFIS: Good. Thank you
12 very much.

13 MS. HORNE: Excuse me. I'm Ashleigh Horne
14 for the record from Shaw Pittman for Brian Logan. I
15 just wanted to note that attached as Exhibit T to our
16 motion to dismiss is a timeline stating the dates just
17 for your convenience.

18 CHAIRPERSON GRIFFIS: Exhibit T you say.

19 MS. HORNE: Yes.

20 CHAIRPERSON GRIFFIS: Excellent. Any
21 Board questions at this time? Mr. Etherly?

22 MEMBER ETHERLY: I will defer to my
23 colleague Ms. Miller.

24 MEMBER MILLER: Mr. Epting, did I hear you
25 correctly that March 24 could be a date at which the

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1 Appellants were chargeable with notice?

2 MR. EPTING: Well, that's one in a series
3 of dates that we picked out, yes.

4 MEMBER MILLER: Thank you.

5 MEMBER ZAIDAIN: Mr. Epting, I have a
6 question of clarification. You are stating that the
7 January 29 permit was all encompassing in terms of
8 that being the main permit and all of the other
9 permits were ancillary to it. I guess I'm trying to
10 get a handle on that because when you have projects
11 such as this there are so many issues. Let's take for
12 example the sheeting and showing permit. Let me refer
13 to the timeline here.

14 MS. HORNE: Excuse me. We also have all
15 permits attached.

16 MEMBER ZAIDAIN: Right, they are in the
17 exhibits. I had my thumb on it. The date is not
18 important to that issue.

19 CHAIRPERSON GRIFFIS: March 4, 2003.

20 MEMBER ZAIDAIN: Okay. My question is are
21 there issues in the sheeting and showing permit for
22 example that were not covered on the January 29
23 permit? Are you saying that the January 29 permit
24 covered every action that was going to be undertaken
25 on the property? Do you follow my question?

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1 MR. EPTING: Yes, all the zoning issues
2 were covered in that May building permit. As you get
3 out in the field, there comes a time when you have to
4 do the construction and other building code-type
5 permits are required in order to do the work.

6 MEMBER ZAIDAIN: Right. For example, in
7 the January 29 permit, it refers to the plans as
8 submitted, et cetera. But did that reflect the
9 removal of the trees for example?

10 MR. EPTING: The tree permits had already
11 been issued over two years before.

12 MEMBER ZAIDAIN: Two years before, okay.

13 MR. EPTING: They had been renewed. I
14 didn't want to get into it, but that was the subject
15 of the stop work order that we dealt with.

16 MEMBER ZAIDAIN: That's correct, okay.
17 That's my confusion. Thank you.

18 MR. EPTING: I think the other part about
19 these ancillary permits is if you look at any of them
20 on their face including the June 13 permit, it's just
21 a driveway permit so it has none of the zoning issues
22 that they are talking about. It's the same with the
23 sheeting and showing and the pool permits.

24 CHAIRPERSON GRIFFIS: I think a critical
25 piece that Mr. Epting just stated is the fact that the

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1 sheeting and showing permit -- Well, you say that the
2 base building permit would have illustrated all the
3 zoning issues.

4 MR. EPTING: That's correct. It showed
5 the complete house. It showed the pool. It showed
6 the landscaping. It showed the driveway.

7 CHAIRPERSON GRIFFIS: Would the permits
8 with the sheeting and showing have evidence of any
9 zoning pertinent issues?

10 MR. EPTING: No, I think of it almost as a
11 foundation permit. It's a wall permit that allows you
12 to dig in that location.

13 CHAIRPERSON GRIFFIS: Correct. Mr.
14 Etherly?

15 MEMBER ETHERLY: Thank you very much, Mr.
16 Chair. So under your interpretation, Mr. Epting, is
17 it your contention that none of the "ancillary
18 permits" would have been appealable on their own?

19 MR. EPTING: That's absolutely correct.

20 MEMBER ETHERLY: So if you wanted to get
21 at any of the issues that were raised in the ancillary
22 permits, it should have been back to the permit that
23 was issued in January.

24 MR. EPTING: On the single family house,
25 yes.

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1 MEMBER ETHERLY: Okay. Hypothetically
2 speaking, what I'm trying to get a sense of is in
3 terms of working through the two month requirement or
4 working through the reasonableness standard, what
5 types of changes or nuances would have had to appear
6 in any of those ancillary permits in order for any of
7 them to be appealable? What I'm struggling with here
8 is if January is your key date and, as I think you are
9 contenting, you are going to have issues that will
10 arise during the course of project work that will give
11 rise to the need for additional permits down at DCRA,
12 what types of changes in those ancillary permits would
13 create or give rise to a new right of appeal?

14 MR. EPTING: And I think that's clearly
15 what Sysen (PH) is. Sysen (PH) started - and I may
16 have the order wrong - with a garage permit. He built
17 the garage and it was too big. He got another garage
18 permit. He applied for permit to do a roof over the
19 porch. He did things not within the scope of the
20 original permit. They all relate to zoning issues.

21 MEMBER ETHERLY: Okay.

22 MR. EPTING: That's the difference. And I
23 actually agree with Sysen (PH). So if we had filed to
24 make the house larger or something like that which
25 gets into zoning, I think that would be chargeable as

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1 notice. I wouldn't let him do it, but that would be
2 that type of thing.

3 For instance, every house at some point in
4 time has to get a curb and driveway permit. I think
5 everybody agrees that doesn't trigger a new appeal
6 period. The whole point in my mind and the reason you
7 have the appeal period is so that you know at some
8 point in time that you waited long enough so you can
9 proceed.

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

12 CHAIRPERSON GRIFFIS: Ms. Miller?

13 MEMBER MILLER: I just want to follow up
14 on your previous question with respect to that March
15 24 date. Could you articulate what you think they
16 would have notice of? Obviously there was
17 construction that date, but what notice would that
18 trigger, a notice of the building permit or a notice
19 of something else?

20 MS. HORNE: Ms. Miller, if I may answer.
21 Basically the operative date that we would like you to
22 really focus on is February 8 when they tore down the
23 house. We think it was clear as of that date that
24 there was no house there and something was going to be
25 constructed and that they should have learned that

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1 there was no house there. However, even if March 24
2 is the operative date, they should have seen equipment
3 on the property, workers --

4 MR. EPTING: The construction was started.

5 MS. HORNE: Materials, mud and dirt, those
6 sorts of things that indicate that construction had
7 started. This is not something where you go to bed
8 and you wake up and there's a new house next door.
9 The permit was issued on January 29. We got the raise
10 permit on February 5, just a few days later. We tore
11 down the house on February 8, just a few days later.
12 It was pretty clear that a process had begun by that
13 point and that they should have known that something
14 was happening.

15 MEMBER MILLER: That's my question. Is
16 that what you mean by notice that something was
17 happening or notice that there was this building
18 permit that they needed to check out?

19 MR. EPTING: I think it's either. It can
20 be both. It could be notice just of the building
21 permit, or a different standard, if you go to waste
22 management, is actual notice of when something
23 happened. What I was saying is actually they met
24 February 8. They knew the demolition started. It
25 started with a permit and was under construction.

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1 Then even the March date, during a stop work
2 order, all of the equipment has to sit there. It
3 can't move. Nothing can happen. So once that's
4 lifted, that equipment starts moving again, so it
5 shows you that something has happened to start
6 construction again.

7 MS. HORNE: Also in the March issue of the
8 Palisades News, the building permit was clearly
9 listed, the number of the permit, the price of the
10 construction, the name of the owner, and the address.

11 So I think as in Georgetown Residence Alliance, the
12 community was well aware of what was going on at this
13 site.

14 CHAIRPERSON GRIFFIS: Anything else?

15 MEMBER MILLER: I have one more question.
16 Do you have an opinion with respect to whether the
17 stop work order has an effect on whether they should
18 have had notice? For instance, if the work was
19 stopped, does that delay their having notice that
20 there might be a problem with construction?

21 MR. EPTING: Well, again, I don't. In
22 fact, by that time, the house is down. The trees are
23 down. So something had already happened. One person,
24 not these Appellants, actually got that stop work
25 order. These Appellants didn't even do that. So I

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1 don't think that has anything to do with it. It's
2 almost like a tolling-type argument. It's not there.
3 It's certainly not there once they release that stop
4 work order.

5 MS. HORNE: But then it's all academic
6 because it would be untimely even on March 24.

7 MR. EPTING: Just one more thing. Waste
8 management was also very clear and the Lehrman case
9 was very clear too that just because you are doing
10 other types of things, getting stop work orders and
11 maybe relying upon a stop work order, which would be
12 your argument, that doesn't relieve you of the burden
13 of filing a timely appeal.

14 MEMBER MILLER: It's not an argument I'm
15 making. I just wanted to explore that.

16 MR. EPTING: Right.

17 CHAIRPERSON GRIFFIS: Mr. Parsons?

18 COMMISSIONER PARSONS: I am trying to
19 determine whether this permit for the inground pool,
20 which was attained on May 20, was that not within the
21 original proposal or the original building permit that
22 you mentioned earlier?

23 MR. EPTING: The plans for the pool were
24 shown.

25 COMMISSIONER PARSONS: So the outlines --

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1 MR. EPTING: We counted it within the
2 surface area. It was all counted. The plans will
3 show that. You always have to dance around whether
4 you get into the merits or not, but the plans for the
5 building permit show the pool in all pervious and
6 impervious areas.

7 COMMISSIONER PARSONS: So why then was the
8 pool permit issued six months later? It obviously
9 wasn't part of the original permit.

10 MR. EPTING: It was a construction-type
11 permit. What Mr. Logan is telling me is that it was a
12 different contractor for the pool.

13 COMMISSIONER PARSONS: There's no change
14 from the drawings of January with a different
15 contractor.

16 MR. EPTING: No, and there are times when
17 you do wish to go and dig deeper or the gradings have
18 changed when you have to do a different permit that
19 still are in the scope of the original plans.

20 COMMISSIONER PARSONS: So you believe the
21 permit was authorized in the original permit.

22 MR. EPTING: Yes.

23 COMMISSIONER PARSONS: Thank you.

24 CHAIRPERSON GRIFFIS: What exhibit is the
25 pool permit in for your submission? It's B451476.

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1 MS. HORNE: That would be Exhibit N.

2 CHAIRPERSON GRIFFIS: Exhibit N. It's the
3 one behind sheeting and showing, 451576 construction
4 of inground pool cleared for EIS. Separate electrical
5 plumbing installation permits are required. Are you
6 telling me that this was required because of a change
7 of contractor?

8 MR. EPTING: That's what Mr. Logan is
9 telling me. We can give you the permit plans to show
10 you that the pool was --

11 CHAIRPERSON GRIFFIS: Was in the
12 submission documents.

13 MR. EPTING: Right.

14 CHAIRPERSON GRIFFIS: Was it permitted is
15 Mr. Parson's question.

16 MR. EPTING: Yes.

17 CHAIRPERSON GRIFFIS: Was it permitted
18 under January 29?

19 MR. EPTING: The permit issued on January
20 29 says single family dwelling as per plans, so
21 anything included in that plan, and approval was
22 included, was permitted.

23 CHAIRPERSON GRIFFIS: So why would you go
24 through the hassle of getting another permit?

25 MR. EPTING: That I can't answer.

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1 CHAIRPERSON GRIFFIS: We need that answer.

2 (Pause.)

3 MR. EPTING: All right. My understanding
4 is much like a retaining wall pools have specific
5 requirements, hydraulics and stuff. You have to
6 submit even after its permitted specifications on
7 hydraulics on the relationships of the pool by the
8 pool contractor itself. It's a building code issue.
9 With pools you also have to have special fences.
10 There's a certain width limitation so kids can't get
11 through.

12 CHAIRPERSON GRIFFIS: Okay. If I have
13 this right, you pull a base building permit which
14 gives you a parameters of what's happening there.
15 Just like in any base building, you are going to have
16 to pull a structural and electrical and mechanical
17 permit. You are saying that the pool itself is of a
18 subcontractor permit, is that correct?

19 MR. EPTING: That's correct.

20 CHAIRPERSON GRIFFIS: So you need a
21 separate permit for that type of construction that
22 comes under the base building permit, is that correct?

23 MR. EPTING: That's correct.

24 CHAIRPERSON GRIFFIS: Ms. Gilbert, is that
25 your understanding of processing a permit at DCRA?

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1 MS. GILBERT: I just consulted with Mr.
2 Paul here. It is my understanding that it could
3 probably be done either way, but assuming the original
4 plans indicate that there is a pool as part of those
5 original plans then the zoning issues would have been
6 part of that original permit.

7 CHAIRPERSON GRIFFIS: Addressed in the
8 base building.

9 MS. GILBERT: Right, but very often there
10 is a different contractor. There may be separate
11 mechanical work or mechanical requirements that would
12 be done as a separate contract.

13 CHAIRPERSON GRIFFIS: Understood. Is the
14 Board clear on that?

15 MEMBER ZAIDAIN: Yes, so no zoning issues
16 were put in the March 24 permit.

17 CHAIRPERSON GRIFFIS: In the March 24
18 permit, the pool permit?

19 MEMBER ZAIDAIN: I'm 0 for 5 on dates
20 today.

21 CHAIRPERSON GRIFFIS: The permit for what?

22 MEMBER ZAIDAIN: May 20 permit.

23 CHAIRPERSON GRIFFIS: Right.

24 MEMBER ZAIDAIN: Excuse me. I apologize.

25 CHAIRPERSON GRIFFIS: The pool permit,

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1 right. What Ms. Gilbert is stating and Mr. Epting is
2 stating is that the pool permit is actually thought of
3 more as a subcontract on the base building.

4 MEMBER ZAIDAIN: Right.

5 CHAIRPERSON GRIFFIS: The base building
6 would have been reviewed for all of the zoning issues.

7 MEMBER ZAIDAIN: Okay.

8 CHAIRPERSON GRIFFIS: Were there drawings
9 attendant to the submission of this permit?

10 MR. EPTING: I'm sure there were hydraulic
11 and construction-type things. Again, we're not
12 talking about the building code here. The building
13 code has specific requirements for pools under a
14 special section.

15 CHAIRPERSON GRIFFIS: Okay. I understand
16 that.

17 COMMISSIONER PARSONS: Mr. Chairman, I
18 just wanted to follow up. This permit of May 20 is
19 issued to Mr. Logan, not to a separate contractor.

20 MR. EPTING: But the permits can be issued
21 under the building code either to the owner or an
22 agent. I mean the permit could be issued to me when I
23 process permits. So that's allowed under the building
24 code.

25 COMMISSIONER PARSONS: Because you applied

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1 for it I assume.

2 MR. EPTING: Right, I served as agent.

3 CHAIRPERSON GRIFFIS: He paid for it is
4 more like it.

5 COMMISSIONER PARSONS: As long as you are
6 not doing a case of Ace Pool Company going down and
7 getting a permit on behalf of Mr. Logan.

8 MR. EPTING: It could be either way.

9 COMMISSIONER PARSONS: I understand.

10 MR. EPTING: The owner could file and Ace
11 would process it for him. It would be issued in the
12 name of Mr. Logan. Or Ace could file it under a
13 separate line and say agent for Mr. Logan and it would
14 be issued under Ace.

15 COMMISSIONER PARSONS: Thank you.

16 CHAIRPERSON GRIFFIS: Further questions?

17 MR. EPTING: That's my complete knowledge
18 of pools now.

19 CHAIRPERSON GRIFFIS: Anything else from
20 the Board?

21 MEMBER ETHERLY: Mr. Chair, I want to move
22 this forward. Let me follow up with a quick line of
23 questioning. Part of Appellant's contention is that
24 when you look at the ancillary permits you are looking
25 at efforts to continually in a piecemeal fashion bring

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1 the project into increased compliance with Zoning
2 Regs.

3 I'm trying to think of how to best phrase
4 the question. I think what I'm getting at is
5 hypothetically speaking if a subsequent permit is
6 issued in an effort to come into compliance with a
7 zoning requirement after a first permit has been
8 issued, would that scenario in your mind change the
9 starting point for the appeal timeline?

10 MR. EPTING: Yes, if it wasn't shown
11 within the scope of the original permit.

12 MEMBER ETHERLY: If the original permit
13 shows everything but let's say at some subsequent
14 point of review a zoning compliance issue is somehow
15 raised, whether it's within the scope of DCRA review
16 or during the course of some other look at the project
17 and you have to come back and get a subsequent permit,
18 does that subsequent permit change your argument or
19 change your position? It still would be your
20 contention under that scenario if it's all shown in
21 the original permit that's your starting point.

22 MR. EPTING: That's correct and if you had
23 notice of whatever the starting date was, yes.

24 MEMBER ETHERLY: So if you are dealing
25 with any zoning compliance issues in subsequent

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1 permits, that nevertheless doesn't change the fact
2 that you still had the starting permit at some prior
3 point.

4 MR. EPTING: That's correct.

5 MS. HORNE: And you certainly couldn't
6 bring in new issues. You couldn't boot strap the old
7 permit issues into whatever new issues come into the
8 new permit.

9 MEMBER ETHERLY: Okay.

10 MR. EPTING: Hypothetically as long as we
11 are dealing here with a pool and landscaping and
12 driveways and accessory structures, as long as we were
13 dealing with that, I agree with that. If it's like
14 Sysen (PH) where you start introducing new elements
15 that were never contemplated originally, then I think
16 that does go to your time limit.

17 MEMBER ETHERLY: Okay.

18 MR. EPTING: But here everything was shown
19 on the original plans.

20 MEMBER ETHERLY: Okay. Thank you. Thank
21 you, Mr. Chair.

22 MEMBER MILLER: I just have one more
23 question for clarification on these permits. The June
24 13 permit I think is characterized as a revision.
25 Would that not be an ancillary permit in the same

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1 category as all of the other permits that followed the
2 January 29 permit?

3 MR. EPTING: DCRA often just calls permits
4 revision when you are following plans. That's their
5 terminology.

6 MEMBER MILLER: Okay. I just wanted to
7 know --

8 MR. EPTING: But again, the driveway --

9 CHAIRPERSON GRIFFIS: Let's be clear
10 what's being asked here. There's a difference between
11 a revision to the base building permit and a separate
12 pool, sheeting or showing raise permit, is that your
13 testimony?

14 MR. EPTING: Right. That is. No, I'm not
15 testifying. We're just talking.

16 CHAIRPERSON GRIFFIS: That's your
17 position.

18 MR. EPTING: Yes.

19 CHAIRPERSON GRIFFIS: Indeed. Anything
20 else? Mr. Parsons?

21 COMMISSIONER PARSONS: I am looking at
22 Exhibit 11 which is called "copy of plans" plural in
23 our record. It's one page. Are these the plans that
24 you referred to that accompany the permit?

25 MS. HORNE: No, they are not.

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1 COMMISSIONER PARSONS: Are those in our
2 record?

3 MS. HORNE: Not from us. I don't know if
4 the District has filed those plans.

5 MR. EPTING: We have copies of the plans
6 today once we get to the merits, or we could submit
7 them now.

8 COMMISSIONER PARSONS: In that we are
9 relying on your statements that everything was on the
10 drawings in those plans that accompanied the permit,
11 it might be helpful if we had those because the only
12 thing we have is this exhibit here. (Indicating.)

13 MS. HORNE: We would like to offer the
14 plans. I will get you the copies.

15 COMMISSIONER PARSONS: I'll have to wait
16 for my Chairman here.

17 CHAIRPERSON GRIFFIS: Sorry, Mr. Parsons,
18 continue.

19 COMMISSIONER PARSONS: Apparently the
20 plans that we have are not the plans that accompany
21 the permit. They have them with them.

22 MR. EPTING: Let me explain. I now have
23 this exhibit. At some point in time because I guess
24 Appellants weren't able to get the permits from DCRA,
25 they called us and asked us to send a set of plans.

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1 So we did some reduced plans and sent those over to
2 the Appellants. That's what these are.

3 COMMISSIONER PARSONS: This? (Indicating.)

4 MR. EPTING: Yes.

5 COMMISSIONER PARSONS: I just want to make
6 sure it's singular.

7 MR. EPTING: Well, we sent them a set of
8 plans. They are using certain of those plans as
9 exhibits.

10 CHAIRPERSON GRIFFIS: They have a full set
11 of the approved permit submission plans.

12 MR. EPTING: We sent them more simplified
13 plans, more graphic oriented. We didn't give them the
14 HVAC plans, the plumbing plans, the riser plans.

15 CHAIRPERSON GRIFFIS: I see. I
16 understand.

17 MR. EPTING: We gave them the zoning
18 plans.

19 CHAIRPERSON GRIFFIS: Let's be very
20 specific. You gave them the architectural drawings
21 that were submitted and approved by DCRA.

22 MR. EPTING: They asked for the
23 elevations. That's what we gave them. It was the
24 elevations from the building permit plans, yes.

25 CHAIRPERSON GRIFFIS: So portions of the

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1 documents that were approved by DCRA.

2 MR. EPTING: Right.

3 COMMISSIONER PARSONS: This is what I'm
4 trying to get because a lot of the testimony or
5 statements we have had so far are based on the
6 drawings that accompanied the permit. We don't have
7 those in the record.

8 CHAIRPERSON GRIFFIS: Not yet.

9 COMMISSIONER PARSONS: So they are willing
10 to give them to us. I wasn't going to accept those on
11 behalf of the Board until we focused on this issue.

12 CHAIRPERSON GRIFFIS: Right. There will
13 come a pertinent point at which we will have to see
14 drawings or there may come a pertinent point. I don't
15 think we're there yet.

16 MR. EPTING: But you can also go to
17 Exhibit 10. That shows the subplot that was included
18 as part of our permit applications.

19 CHAIRPERSON GRIFFIS: Right.

20 MR. EPTING: I just want to know where the
21 line is here between getting into the merits and
22 talking about contracts.

23 CHAIRPERSON GRIFFIS: That's why it's
24 premature to have the full permit drawings in front of
25 us.

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1 MR. EPTING: But if the building permit of
2 January 29 says single family dwelling as per plans,
3 Exhibit 10 does represent the plan. It shows the
4 pool. It shows all the improvements that were being
5 made there.

6 COMMISSIONER PARSONS: All right. I'll
7 look for that.

8 CHAIRPERSON GRIFFIS: Exhibit 10.

9 COMMISSIONER PARSONS: A very similar
10 drawing. Thank you.

11 CHAIRPERSON GRIFFIS: Okay. Are there any
12 other questions from the Board at this time? We can
13 certainly bring them up if we have others that
14 develop. Mr. Sailer, are you prepared?

15 MR. SAILER: Yes, as prepared as I'll ever
16 be. We'll see. Can you hear me?

17 CHAIRPERSON GRIFFIS: Yes.

18 MR. SAILER: I'm sorry about my voice.

19 CHAIRPERSON GRIFFIS: No, I'm fine. I was
20 wondering if you needed a glass of water just to keep
21 up.

22 MR. SAILER: What I would really like is
23 about a five minute recess.

24 CHAIRPERSON GRIFFIS: Five minutes, me
25 too.

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1 MR. SAILER: Thank you.

2 CHAIRPERSON GRIFFIS: Let's be back in
3 five minutes with Mr. Sailer. Then Ms. Gilbert we'll
4 have you address also.

5 (Whereupon, the foregoing matter went off
6 the record at 2:34 p.m. and went back on
7 the record at 2:50 p.m.)

8 CHAIRPERSON GRIFFIS: Very well. Let's
9 resume. Mr. Sailer, when you are ready.

10 MR. SAILER: We have two experts here who
11 we are paying vast sums of money to.

12 CHAIRPERSON GRIFFIS: I understand.

13 MR. SAILER: If you already ruled on the
14 continuance, I would like to release them if I may.

15 CHAIRPERSON GRIFFIS: Absolutely. They
16 don't go towards the timeliness.

17 MR. SAILER: No.

18 CHAIRPERSON GRIFFIS: Absolutely. I don't
19 see any difficulty in that. We won't be hearing the
20 merits of an appeal today.

21 MR. SAILER: I think I'm going to be very
22 brief. By the time I'm finished, I represent that I
23 will tell you ever single thing I know.

24 CHAIRPERSON GRIFFIS: How could that be
25 brief, Mr. Sailer?

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1 MR. SAILER: The first thing relates to
2 the June 13 permit which intervenors have made light
3 out of. It really wasn't anything and so forth. I
4 would like to say a few things about that. We have
5 eight issues in our pre-hearing statement. The June
6 13 permit relates directly to pre-hearing statement
7 which makes it sound pretty important to me. I will
8 explain why I say this.

9 They all say driveway. I'm aware of that.
10 There's a history here. Mr. Logan, the developer,
11 had built a building with no driveway that he called a
12 garage. When we raised our eyebrows a bit, he decided
13 that he would move it, make it higher, and add a
14 driveway.

15 CHAIRPERSON GRIFFIS: So is this getting
16 to the timeliness?

17 MR. SAILER: This is a permit for that
18 driveway.

19 CHAIRPERSON GRIFFIS: Okay.

20 MR. SAILER: That's one. We are
21 challenging that building which is served by the new
22 driveway, by the June 13 driveway.

23 CHAIRPERSON GRIFFIS: Right.

24 MR. SAILER: The second is that he I think
25 denominates somewhere the driveway as a pervious

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1 driveway. In fact, as we read the plans, the driveway
2 has two impervious strips running down the middle from
3 beginning to end. I think because Mr. Logan is trying
4 to avoid the 50 percent rule. So a violation and a
5 new violation are caused by the June 13 permit. The
6 very thing it permitted in our opinion for the reasons
7 I have just stated was unlawful.

8 The third point relates to the driveway
9 that starts at the street and runs into the property.

10 Mr. Logan's plan and I believe his actuality so far
11 has been to have an eight foot driveway. Sorry, I
12 can't remember the section but I will represent it as
13 a fact. Our papers show that with the new driveway,
14 so the driveway and the street serving two different
15 garages and two different structures, the required
16 width of the driveway went up to 14 feet. He still
17 shows on the slightest signs of making it 14 feet.

18 CHAIRPERSON GRIFFIS: Right. Okay. Let's
19 stay a lot of the facts or merits of the case.

20 MR. SAILER: I'm sorry. It's very hard to
21 argue this without though.

22 CHAIRPERSON GRIFFIS: It is very
23 difficult.

24 MR. SAILER: I'll try. I beg your pardon.

25 CHAIRPERSON GRIFFIS: Let me clarify your

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1 position. Your position is that the June 13 revision
2 permit is appealable based on those three issues.

3 MR. SAILER: Three issues.

4 MEMBER ZAIDAIN: Just to help on where the
5 Chair is going, I'm looking at your pre-hearing
6 statement. You have your list of issues. The way I
7 am understanding what you are saying is you think that
8 the permit in which you are discussing only relates to
9 the issues that deal with the driveway, for example,
10 point number three, four, five, and six.

11 MR. SAILER: Number two deals with the
12 garage. This is our pre-hearing statement. Three to
13 eight deal with other matters, and one deals with
14 another matter. But three and six deal with the other
15 two issues I raised about the pervious/impervious
16 driveway.

17 MEMBER ZAIDAIN: All of these issues you
18 just stated were reflected for the first time on the
19 June 13 permit.

20 MR. SAILER: So far as I know. He didn't
21 have a driveway there before. That was precisely the
22 problem with his building which he calls a garage.

23 MEMBER ZAIDAIN: Well, you just cited
24 point number two in your pre-hearing statement. As
25 far as I read that, that does not relate to a

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1 driveway.

2 MR. SAILER: The argument there is
3 driveway or no driveway that is not a garage.

4 MEMBER ZAIDAIN: But was the first time
5 that you were aware of that structure was when it was
6 part of the June 13 permit?

7 MR. SAILER: I don't remember the precise
8 date, but it was around there because he didn't decide
9 until then to build a driveway to the structure.

10 MEMBER ZAIDAIN: Well, this may take some
11 follow up.

12 MR. SAILER: Am I talking too loud? I
13 can't hear myself.

14 CHAIRPERSON GRIFFIS: No, absolutely fine.

15 MR. SAILER: Are we ready? Ms. Miller
16 raised a question that I would like to deal with as
17 succinctly as I can. This is the stop work order.
18 I'm just going to lay out the facts and not even argue
19 it. The stop work order was issued on February 10.
20 From that time on, mostly DCRA I believe was
21 interrogated by letter and orally after a time had
22 elapsed. Is the stop work order still in effect?
23 Over and over again.

24 The reason is that I did not understand
25 then and do not understand now. We could not get an

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1 answer. We finally learned. We properly assumed the
2 status quo that the last we knew the stop work order
3 had been issued and they wouldn't tell us it was
4 different. In the latter half of June, we were given
5 a pile of papers. In the pile of papers, there was a
6 little document from the DCRA dated March 21 I believe
7 to the intervenor saying that the stop work order
8 would be lifted on March 24.

9 I will represent to the Board that we did
10 not know that. I don't see how we could have
11 discovered it by any questions because we asked all
12 the questions. Therefore, and I'm not going to pursue
13 this, our position is that the stop work order tolled
14 the statute of limitations until we found in late June
15 that it was lifted, from February 10 to late June. If
16 there are any questions, I'll answer that question.

17 Those are really the two things I wanted to say.

18 I have another question for the Chairman. I'm sorry.

19 I gather that you have accepted the reply brief from
20 intervenors in the issue we have been dealing with.

21 CHAIRPERSON GRIFFIS: You mean accepted
22 the reply brief into the record.

23 MR. SAILER: I mean you are accepting it I
24 believe.

25 CHAIRPERSON GRIFFIS: That's correct.

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1 MR. SAILER: I respectfully would urgently
2 request that we be given until Friday to serve by hand
3 on everybody you designate a response to that document
4 which as I say I still have never seen except insofar
5 as the Chairman put it in front of me.

6 CHAIRPERSON GRIFFIS: I don't have any
7 difficulty in that. We can keep the record open for a
8 reply to the reply.

9 MR. SAILER: Thank you very much. I think
10 that's it.

11 CHAIRPERSON GRIFFIS: So if I understand,
12 your position on this point is you have two milestone
13 dates of which toll the timeliness on this. One is
14 the stop work. One is the revised permit of June 13.

15 MR. SAILER: Well, let me confess. I have
16 been avoiding it so far. This is an issue that I have
17 not been able to get my hands around because I didn't
18 expect it to be filed. Suddenly it was there one day
19 when I was trying to prepare for it. So I will deal
20 with that question if I may in a statement where I sit
21 down with a book.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. SAILER: Is that agreeable?

24 CHAIRPERSON GRIFFIS: I think so, but I
25 want to afford you the most opportunity as we may not

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1 have oral testimony.

2 MR. SAILER: I very much appreciate that.

3 CHAIRPERSON GRIFFIS: That should be clear
4 then. Let me lay it out then. Mr. Epting covered it.

5 I thought that perhaps everyone had the same
6 understanding. Our regulations from the Zoning
7 Commission were amended to set the timeliness of
8 filing appeals. Mr. Epting has cited quite a few
9 cases that went to the rendering of that decision,
10 waste management being one of the largest.

11 It is critical that you review that and
12 understand then what we are actually trying to decide.

13 There is a parameter of 60 day window. Previously
14 the courts had told us that it had to be within a
15 reasonable time. Through the iteration of appeals and
16 the hearings of this Board, a reasonableness was
17 established. It came to be roughly around 60 days.
18 It is much more defined now.

19 Let me say this as simplified as I can.
20 Timeliness is based on 60 days from when one should
21 have known of a problem. Now, the basis of which this
22 Board starts with is the issuance of a permit.
23 There's an official administrative decision that's
24 appealable to this Board in our jurisdiction. That's
25 the first milestone of which timeliness starts.

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1 Now, there is, as our regulations so
2 beautifully do, an area of undefinedness. That
3 undefinedness is then when someone should have known,
4 should have had notice of a problem. That's
5 essentially what we're trying to figure out with this
6 now with the submissions. So what I'm hearing you
7 state today is really you are holding to two dates.

8 MR. SAILER: Well, they are rather
9 separate dates. One is what I would call a
10 conventional limitations argument such as I learned,
11 the stop work order. The other doesn't rely on the
12 same facts exactly at all. It relies on its own
13 facts. It is on the last date before our filing there
14 was a new permit, far from being an insignificant
15 moment, which had three major consequences.

16 CHAIRPERSON GRIFFIS: Right. I understand
17 that. It's a revised permit to the base building
18 permit, not a new permit, but I understand your point.
19 Talk to me about why you think a stop work order
20 would be an appealable action to this Board.

21 MR. SAILER: Why I think it is?

22 CHAIRPERSON GRIFFIS: Or what did you
23 think was coming out of the stop work order that would
24 have impacted your actions before this Board?

25 MR. SAILER: Well, if I understand you,

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1 and please correct me if I don't --

2 CHAIRPERSON GRIFFIS: I will.

3 MR. SAILER: The only point I am making in
4 the stop work order is if there is a stop work order
5 where nobody can do anything on the property the
6 statute of limitations doesn't run. That's my sole
7 point. I'm asking you not to order anything about the
8 stop work order but to decide whether I'm right about
9 the statute of limitations.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. SAILER: Thank you.

12 MEMBER MILLER: Mr. Sailer, do you have
13 any authority on the statute of limitations being
14 tolled by a stop work order?

15 MR. SAILER: I don't know is the answer to
16 that. I will say freely and frankly in our Friday
17 submission either that we have found something or that
18 we have not found anything. If we haven't found
19 anything, I will try to give you analogies if they
20 serve my purpose.

21 MEMBER MILLER: That would be great. With
22 respect to the March 24 date, it's my understanding
23 that was the date that the stop work order lifted but
24 you didn't have any notice of that order from DCRA.

25 MR. SAILER: No, I'm sitting here a lot

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1 more strongly than that. We did not only have any
2 notice. We continually sought notice orally and by
3 writing for reasons I say I still don't understand.

4 MEMBER MILLER: My question then is
5 according to Mr. Epting there was construction that
6 began again on March 24. Were you aware of the
7 construction?

8 MR. SAILER: The construction began a
9 little after that I think. We were aware of the
10 construction, and we asked does that mean the stop
11 work order has been lifted. No answer. We assumed
12 the legal status quo obtained until we were told
13 otherwise if we asked all the time and only if we ask
14 all the time, and we did ask all the time.

15 MEMBER MILLER: Were there any other
16 documents that you were waiting for that you didn't
17 get until June?

18 MR. SAILER: I don't think. We have a
19 team of people, laymen, all trying to work on this
20 thing. But I certainly had no document that I
21 couldn't get. There were some plans that were
22 apparently in the cellar that nobody could get hold
23 of. We got hold of them only actually through the
24 kindness of Mr. Logan. We don't claim any prejudice
25 from that. It worked out. I don't think anybody was

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1 being benevolent. I think they were in the cellar and
2 the cellar was being reconstituted or redone. Is that
3 responsive to your question?

4 MEMBER MILLER: Yes, when did you get the
5 plans?

6 MR. SAILER: September 17 or something
7 like that.

8 MEMBER MILLER: But you weren't waiting
9 for those. You are saying you weren't waiting for
10 those.

11 MR. SAILER: Well, we were doing the best
12 we could. You undoubtedly know the little things.
13 There's a lot of measurement in our case for
14 impervious surfaces and things like that. We felt we
15 had to have something big so we didn't make a stupid
16 mistake. We never did get them from whoever it was,
17 the zoning people.

18 CHAIRPERSON GRIFFIS: Mr. Zaidain?

19 MEMBER ZAIDAIN: I have a question for the
20 intervenors, Mr. Epting or Ms. Horne. The June 13,
21 2003 permit, was that submitted in your motion?
22 Exhibit N.

23 MS. HORNE: I think that is the pool
24 permit.

25 CHAIRPERSON GRIFFIS: It's Exhibit A.

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1 MS. HORNE: Yes, it's part of Exhibit A,
2 the second permit in Exhibit A.

3 CHAIRPERSON GRIFFIS: It's in the middle
4 of it. It's the third page from the back.

5 MEMBER ZAIDAIN: You heard Mr. Sailer's
6 comments about this permit and the driveway. Does
7 this permit reflect things that were not shown in
8 previous permits or revised elements of previous
9 permits? What exactly does this permit do?

10 MR. EPTING: Previously and under the
11 building permit plans which we now have --

12 MEMBER ZAIDAIN: Under which plans?

13 MR. EPTING: The permit plans show a
14 garage, accessory structure in the back on the
15 building.

16 MEMBER ZAIDAIN: Right.

17 MR. EPTING: It wasn't clear under those
18 plans how you would get there. You get there by
19 pervious surface. We modified the permit to make it
20 clear on how you would get into that garage. There
21 are some grade issues and other things back there.
22 That's what we did. So we made the plans clearer on
23 how you get into the garage. We are transferring one
24 pervious surface to another.

25 MEMBER ZAIDAIN: Okay. That's the only

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1 question I have for now.

2 MR. SAILER: I have one more comment if
3 permitted.

4 CHAIRPERSON GRIFFIS: Take Ms. Miller's
5 question first.

6 MR. SAILER: Sure. I didn't know you had
7 a question.

8 MEMBER MILLER: What exactly triggered the
9 filing of the appeal? Why did you file the appeal
10 when you filed it?

11 MR. SAILER: Why?

12 MEMBER MILLER: Why did you file it July
13 2?

14 MR. SAILER: My answer is after we got the
15 September 17 statements we moved as rapidly as we
16 could.

17 MEMBER MILLER: The September 17 document
18 was what?

19 MR. SAILER: Wait a minute.

20 (Pause.)

21 MR. SAILER: I'm sorry. Are you talking
22 about the original suit? Of course you are. I'm
23 getting tired and I made a stupid answer. The thing
24 that triggered us was as follows. There was in the
25 bottom of the property a building which was going to

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1 be a two story building and I think which was labeled
2 on the plans or otherwise which told us to be a
3 garage.

4 It had to be a garage to be two stories
5 high. That's the law. There was no driveway that
6 went anywhere near it. I happen to disagree with Mr.
7 Epting's characterization about making things clear.
8 There was no driveway anywhere near it. We had a
9 meeting with Mr. Logan --

10 MEMBER MILLER: When did you learn there
11 was no driveway?

12 MR. SAILER: April or May.

13 MEMBER MILLER: I'm sorry. I didn't mean
14 to interrupt you but we wanted to know that.

15 MR. SAILER: Yes, April or May.

16 MEMBER MILLER: How did you learn there
17 was no driveway in April or May?

18 MR. SAILER: I think from the plans that
19 we got in late April. One of the Appellants who now
20 lives in France strangely enough was home or something
21 and got hold -- I don't even know where it came from.

22 MEMBER MILLER: So you got some plans in
23 April or May that showed there was no driveway.

24 MR. SAILER: I think it was late April.

25 MEMBER MILLER: Would you say that's the

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1 time that you learned there was a problem that you
2 wanted to file an appeal on?

3 MR. SAILER: The first legal problem that
4 we wanted to attack - we lacked both the information
5 and sophistication - was something they called a
6 garage and therefore only being able to be two stories
7 high right in our sight lines when there wasn't any
8 driveway. There's something seriously wrong here.

9 MEMBER MILLER: What about in February
10 when there was a stop work order?

11 MR. SAILER: On February 8, if I
12 understand the facts correctly, I awoke from a deep
13 sleep to hear a bulldozer knocking down the house next
14 door to me. I think that same day a large tree which
15 is discussed in my papers was -- Well, they first
16 tried as I understand to saw it and it wouldn't saw so
17 it was bulldozed down. That's the first time we knew
18 that life was going to be different.

19 CHAIRPERSON GRIFFIS: That was February.

20 MR. SAILER: That was February 8. The
21 stop work order was sought not by us but by Mrs.
22 Judith Lanius who has been very helpful. That was
23 issued on February 10. As I say again, the first we
24 knew that it had been taken away was in late June.

25 MEMBER MILLER: But you knew there was

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1 construction in March.

2 MR. SAILER: Yes, but we asked about it.
3 We were told nothing.

4 MEMBER MILLER: I'm sorry. What did you
5 just say? You asked about it. There was construction
6 and you asked about it. What happened?

7 MR. SAILER: We went to DCRA as I recall
8 and asked and asked and asked. We were told nothing.
9 I didn't do the asking. I represent that in my
10 judgement we did every possible thing to find out the
11 answer to that question. We filed a FOIA request and
12 got one document which didn't have much to do with
13 anything.

14 CHAIRPERSON GRIFFIS: When was the FOIA
15 put in?

16 MR. SAILER: April I think. If I don't
17 answer you satisfactorily, I will make a point of
18 answering that question in my brief which is due
19 Friday.

20 CHAIRPERSON GRIFFIS: Let's try and figure
21 it out now. Mr. Parsons, you have questions.

22 COMMISSIONER PARSONS: I wanted to follow
23 up on this issue of your relationship with DCRA. This
24 pile of papers as you characterized it that you
25 received on June 3, what prompted --

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1 MR. SAILER: I don't think it was June 3.
2 Excuse me. I beg your pardon. June 27 is the date
3 I'm told. I simply meant that it was not subject
4 matter in order. It was just a bunch of papers.

5 COMMISSIONER PARSONS: Well, pile or
6 bunch, it makes no difference. Neatly assembled
7 materials were received on June 27.

8 MR. SAILER: I'm so told.

9 COMMISSIONER PARSONS: Was this in further
10 response to the Freedom of Information Act request?

11 MR. SAILER: No, it was not. At the
12 meeting, which took place several days before, called
13 by DRCA, they had said -- Wait a minute. I'm sorry.
14 That's right. We don't all have the facts.

15 (Pause.)

16 MR. SAILER: I'm told by a gentleman who
17 was at the meeting, unlike me, that they said at the
18 meeting that they were going to give us some documents
19 within a week.

20 COMMISSIONER PARSONS: The meeting
21 occurred on June 3. The material came forward on June
22 27.

23 MR. SAILER: We have a disagreement here
24 about the day of the meeting. It's the last half of
25 June anyway.

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1 COMMISSIONER PARSONS: All right. I guess
2 I have gotten us into too much detail here. Still
3 with that submission to you of June 27, you did not
4 have a set of plans from the District of Columbia.

5 MR. SAILER: Those documents?

6 COMMISSIONER PARSONS: No, the plans for
7 the building, for the property.

8 MR. SAILER: No.

9 COMMISSIONER PARSONS: You still didn't
10 get them.

11 MR. SAILER: What we were looking for was
12 those great big plans, that size.

13 COMMISSIONER PARSONS: Yes.

14 MR. SAILER: I'm not blaming anybody. I'm
15 just saying we couldn't get them because they were
16 fixing up the basement.

17 CHAIRPERSON GRIFFIS: Okay.

18 COMMISSIONER PARSONS: So you didn't get
19 those on June 27.

20 MR. SAILER: We didn't get them until
21 September.

22 COMMISSIONER PARSONS: You still do not
23 have a set of plans.

24 MR. SAILER: We did get them from Mr.
25 Logan.

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1 COMMISSIONER PARSONS: Not from the
2 District of Columbia.

3 MR. SAILER: We asked him for them and he
4 gave them to us.

5 COMMISSIONER PARSONS: But not from the
6 District of Columbia.

7 MR. SAILER: Never.

8 COMMISSIONER PARSONS: Their excuse was
9 the basement is being fixed up.

10 MR. SAILER: Well, their explanation was
11 that. I will not call it an excuse. They said that
12 there was construction activity going on in the
13 basement and they couldn't find them or they couldn't
14 get to them.

15 COMMISSIONER PARSONS: Thank you.

16 CHAIRPERSON GRIFFIS: Any other questions
17 at this time?

18 MEMBER MILLER: I just want to get these
19 dates straight because we're dealing with timeliness.

20 MR. SAILER: Sure.

21 MEMBER MILLER: I thought I had in my
22 notes that you got plans in late April or May.

23 MR. SAILER: I'm sorry.

24 MEMBER MILLER: I thought that you had
25 said earlier you got some plans in late April or May.

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1 Are those different plans?

2 MR. SAILER: We got a little plan.

3 DR. WOLF: May I clarify that issue?

4 MR. SAILER: Go ahead.

5 DR. WOLF: My name is Steve Wolf. I am
6 one of the Appellants. We received in late April a
7 very small plat for subdivision, a document that is
8 approximately this large that contains about an eight
9 by ten drawing. (Indicating.)

10 CHAIRPERSON GRIFFIS: Right. We know. So
11 it's the subdivision plat --

12 DR. WOLF: With things identified in
13 handwritten form on it and very small markings --

14 CHAIRPERSON GRIFFIS: That's how they do
15 it.

16 DR. WOLF: Which is a primitive document
17 on which we based our initial assessments.

18 CHAIRPERSON GRIFFIS: But it was the
19 approved subdivision plat. You had the approved
20 subdivision plat.

21 DR. WOLF: Yes.

22 CHAIRPERSON GRIFFIS: So that's the way
23 they do it. You wouldn't have received anything other
24 than the hand drawn piece. But that's what you looked
25 at. Did it have any of the building footprint on it?

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1 DR. WOLF: Yes, it did.

2 CHAIRPERSON GRIFFIS: Just the building
3 footprint?

4 DR. WOLF: No, it had the footprint. It
5 had the pool house, the accessory building, no
6 driveway to the accessory building, terraces around
7 the accessory building.

8 CHAIRPERSON GRIFFIS: Did you submit that
9 into the record?

10 MR. EPTING: This is in our documents, in
11 our exhibits.

12 CHAIRPERSON GRIFFIS: Where? That doesn't
13 sound like a subdivision plat to me.

14 MR. EPTING: Exhibit 10 to our pre-hearing
15 statement.

16 CHAIRPERSON GRIFFIS: I'm sorry. I may
17 have misunderstood what you said. This is not a
18 subdivision plat.

19 DR. WOLF: This is all we had.

20 CHAIRPERSON GRIFFIS: Okay. This is one
21 of the permit documents. Is this one of the permit
22 documents, Mr. Epting?

23 MR. EPTING: This is the official building
24 plat.

25 CHAIRPERSON GRIFFIS: Okay. I understand.

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1 So it's the plat but not the subdivision which is
2 another issue in this case.

3 MEMBER ZAIDAIN: When was this originally
4 filed? This is the same thing as this, am I correct?
5 (Indicating.)

6 MR. EPTING: Yes, I think so.

7 MEMBER ZAIDAIN: This came out in a
8 question raised by Mr. Parsons. What exactly is this?

9 MR. EPTING: Whenever you file a building
10 permit, you have to file a D.C. approved building
11 permit plat showing the dimensions in which you are
12 proposing, basically everything above ground that you
13 are proposing so that they can calculate the zoning
14 requirements.

15 MEMBER ZAIDAIN: Okay. That's what this
16 is.

17 MR. EPTING: That's right.

18 MEMBER ZAIDAIN: This was filed for the
19 January permit.

20 MR. EPTING: Yes, and it's actually
21 referenced on the January permit.

22 CHAIRPERSON GRIFFIS: Right. Okay. I'm
23 sorry.

24 MEMBER ZAIDAIN: I apologize to keep
25 reiterating dates. We're buried in paper up here.

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1 CHAIRPERSON GRIFFIS: Good. So where were
2 we?

3 MEMBER MILLER: I asked this before, but I
4 really don't have a clear understanding of what your
5 answer is. I want to know what you were waiting for
6 to file your appeal. Why did you file your appeal
7 when you did?

8 MR. SAILER: Well, we had met as neighbors
9 do and said what are we going to do. Then the little
10 plan that was just referred to was produced. We all
11 looked at it and thought about how much it would cost
12 and things like that. Then as I said at that time we
13 were focusing on the issue of whether that was a
14 garage or not without a driveway. That clearly is
15 what focused us to begin litigation by filing as
16 required the notice of appeal.

17 MEMBER MILLER: What led you to get the
18 plans in April or May?

19 MR. SAILER: We had a neighbor who now
20 lives in Paris.

21 MEMBER MILLER: That's right.

22 MR. SAILER: He came to visit in
23 Washington. He appeared with the plan. At least for
24 my part, it didn't even seem worth asking where it
25 came from. There is was.

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1 MEMBER MILLER: What is his name?

2 MR. SAILER: Arthur Levi. He is
3 testifying by affidavit rather briefly and I think
4 only on other issues.

5 MEMBER MILLER: Okay.

6 MR. SAILER: Quite seriously if you would
7 like to know how Mr. Levi got it --

8 CHAIRPERSON GRIFFIS: Can I go to Paris?

9 (Laughter.)

10 MR. SAILER: I will fly to Paris
11 personally and get you the answer.

12 DR. WOLF: I have the answer.

13 MR. SAILER: Mr. Wolf says he knows the
14 answer.

15 DR. WOLF: I spoke with Mr. Levi in Paris
16 quite some time ago to inquire about that very
17 question and learned that when he was home in April he
18 asked the Chairman of our local Chain Bridge
19 Road/University Terrace Committee if she had a copy of
20 this plat for construction and she did. She gave him
21 a copy and he distributed it.

22 CHAIRPERSON GRIFFIS: Okay. Mr. Parsons?

23 COMMISSIONER PARSONS: I want to make sure
24 that this Exhibit 10 that we're looking at is what Mr.
25 Epting has because this says "paved drive, pervious

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1 drive court, pervious drive to lower drive court."

2 MR. SAILER: Yes.

3 COMMISSIONER PARSONS: What you are
4 stating is that there is no indication of any driveway
5 on this plan and there is on the one in our Exhibit
6 10.

7 MR. SAILER: Will you wait a second?

8 COMMISSIONER PARSONS: Sure.

9 (Pause.)

10 DR. WOLF: The problem is it's Exhibit 9.

11 MR. SAILER: Are you speaking to Exhibit
12 10? You have the right to speak to any exhibit you
13 please.

14 COMMISSIONER PARSONS: Exhibit 9 is good.
15 I have that now. See at the back of the house where
16 it says "paved drive" written under the word
17 "plantings?"

18 MR. SAILER: I'm sorry. Mr. Wolf is our
19 plans expert so I will just sit here fat, dumb, and
20 happy and wait for him.

21 DR. WOLF: I'm sorry. What is your
22 question?

23 COMMISSIONER PARSONS: It's been
24 represented there's no indication of any driveway on
25 this drawing.

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1 DR. WOLF: The representation is that
2 there is no driveway from the main driveway leading
3 down to the lower building, what is labeled "new two
4 story accessory building garage/studio." In Exhibit
5 9, there is no driveway. Those are all terraces which
6 you would have to drive down with a vehicle.

7 MR. SAILER: Our point about the drive
8 court, at least as it metamorphisized, is that it is
9 listed as pervious when in fact there is no way to get
10 by car to the street to the garage to the main house
11 without going over it, and therefore under the law it
12 must be impervious. That's our point.

13 COMMISSIONER PARSONS: Well, it's your
14 point the lines running along side the house, which I
15 guess have elevations on them, are not a driveway with
16 a --

17 DR. WOLF: I'm sorry. Your question?

18 COMMISSIONER PARSONS: That this is not a
19 driveway running along side the house.

20 DR. WOLF: Running along side the main
21 structure is a driveway.

22 COMMISSIONER PARSONS: All right. Then we
23 come to paved drive.

24 DR. WOLF: Yes.

25 COMMISSIONER PARSONS: Pervious drive

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1 court.

2 DR. WOLF: Right.

3 MR. SAILER: It's just pervious drive
4 court we're talking about. You can talk about
5 anything obviously.

6 DR. WOLF: Actually I can elaborate. This
7 pervious drive court allows access to the main garage
8 in the main building. It does not allow any access in
9 that original drawing to the lower accessory
10 structure. Everything you see on the lower half of
11 that drawing is terraces and steps.

12 COMMISSIONER PARSONS: So he would have to
13 drive down the stairs.

14 DR. WOLF: You would have to drive down
15 the stairs, yes, and it's raised suspicions in our
16 mind about the nature of this so-called garage.

17 COMMISSIONER PARSONS: Thank you. Now I
18 understand.

19 DR. WOLF: And we needed the final plans
20 to make further evaluations.

21 COMMISSIONER PARSONS: Which you still
22 don't have.

23 MR. SAILER: We got them from Mr. Logan.

24 COMMISSIONER PARSONS: I understand that,
25 but you don't have them from the District of Columbia.

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1 MR. SAILER: That's correct.

2 CHAIRPERSON GRIFFIS: Anything else?

3 MR. SAILER: I think Ms. Miller is coming
4 after me again.

5 MEMBER MILLER: I just want to be clear
6 about this Exhibit 9. Exhibit 9 wasn't seen until
7 April, is that correct?

8 DR. WOLF: Late April.

9 MEMBER MILLER: But did Exhibit 9 exist in
10 connection with the building permit before April, Mr.
11 Epting?

12 MR. EPTING: Since November 2001 it's been
13 on file.

14 MEMBER ZAIDAIN: I have one question to
15 make sure I'm clear. The June 13 permit, did it
16 revise any elements of this?

17 MR. SAILER: June 13?

18 MEMBER ZAIDAIN: Yes, that's the question
19 for Mr. Epting.

20 MR. SAILER: I beg your pardon.

21 MEMBER ZAIDAIN: That's okay.

22 DR. WOLF: Is that Exhibit 10?

23 MEMBER ZAIDAIN: I'm looking at their
24 Exhibit 9 which is also the same as their Exhibit 11
25 and then the same as our Exhibit 11. I think it's all

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1 one and the same there.

2 DR. WOLF: Exhibit 9?

3 MEMBER ZAIDAIN: Their Exhibit 9.

4 DR. WOLF: We do have a blow up of the
5 area in question.

6 MEMBER ZAIDAIN: Hang on. Let him answer
7 this question.

8 MR. EPTING: Just give me one second.

9 MEMBER ZAIDAIN: Sure. Take your time.

10 (Pause.)

11 MR. EPTING: Exhibit 9 is the original
12 permit plan.

13 MEMBER ZAIDAIN: I understand.

14 MR. EPTING: Exhibit 11 is a plan that we
15 gave them showing the landscape planning as revised
16 after the June 13 permit.

17 MEMBER ZAIDAIN: Which exhibit is that?

18 MR. EPTING: That's 11.

19 MEMBER ZAIDAIN: Whose Exhibit 11? Let's
20 make sure we're clear.

21 MR. EPTING: Their Exhibit 11 to the pre-
22 hearing statement. As far as I know, those are our
23 plans.

24 MEMBER ZAIDAIN: So this plan is a result
25 of the June revised permit. Can you see that?

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1 CHAIRPERSON GRIFFIS: Yes, that's just
2 what you said.

3 MR. EPTING: Okay. Exhibit 10 is the
4 revised plat that went with the June 13 permit.

5 CHAIRPERSON GRIFFIS: No, their Exhibit 11
6 is the revised landscape plan.

7 MR. EPTING: Right.

8 CHAIRPERSON GRIFFIS: You are saying the
9 Exhibit 10.

10 MR. EPTING: Right. That's the revised
11 plat.

12 CHAIRPERSON GRIFFIS: What's revised on
13 this plan?

14 MR. EPTING: The revision to the accessory
15 drive showing the pervious surface.

16 CHAIRPERSON GRIFFIS: There's a note
17 change, is that right?

18 MR. EPTING: Yes.

19 CHAIRPERSON GRIFFIS: The drawing didn't
20 change, but the notes changed.

21 MR. EPTING: No.

22 CHAIRPERSON GRIFFIS: In fact, there was
23 an addition of a note on the subsequent submission.

24 MR. EPTING: Like I said before, we made
25 it clearer how from pervious surface you get to the

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1 driveway. That's what we changed.

2 CHAIRPERSON GRIFFIS: Do you understand
3 that?

4 MEMBER ZAIDAIN: No, I don't. Can you
5 point to me the note change?

6 CHAIRPERSON GRIFFIS: Yes, it may help if
7 you disassemble these or hold them. These are the
8 exact same drawing although they are oriented
9 differently and different scale. They are not to
10 scale but they are a different blow up. If you follow
11 where Mr. Parson was going having been walked down the
12 plat starting at the side of the building where there
13 is the drive aisle, at the original Exhibit 9, there
14 is no note that now reads on Exhibit 10, which is the
15 change, "pervious drive to lower drive court." In the
16 original submission, there's pervious drive court.
17 Underneath that now reads "pervious drive to lower
18 drive court."

19 MEMBER ZAIDAIN: Okay. I see that.

20 CHAIRPERSON GRIFFIS: But the position Mr.
21 Epting is taking on this is that there is no
22 substantive change in the drawings. In fact, they are
23 identical except for an addition of a note.

24 COMMISSIONER PARSONS: I find Exhibit 11
25 the most telling in this sequence because the

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1 accessory building is now termed a garage. The stairs
2 have been eliminated so as to gain access to the
3 garage whereas the garage is open on the one side to
4 the pool with swinging doors. It's very curious. But
5 what is Exhibit 11, Mr. Epting? It says "for permit
6 only."

7 MR. EPTING: It's the revised landscape
8 plan.

9 COMMISSIONER PARSONS: Was a permit sought
10 for that?

11 MR. EPTING: Give me a second.

12 (Pause.)

13 MR. EPTING: It's basically just an
14 illustration plan showing from that Exhibit 10 what
15 the materials are going to be. We did not get a
16 permit for that.

17 COMMISSIONER PARSONS: You did not get a
18 permit for the Exhibit 11.

19 MR. EPTING: No.

20 COMMISSIONER PARSONS: That would explain
21 my next question which would be the date above the
22 "for permit only."

23 MR. EPTING: We did this to simplify for
24 Appellants to show them how the landscape plan worked.
25 We didn't feel it was clear on the building permit

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1 plans. If anything, we were trying to be helpful. If
2 it's not helpful --

3 CHAIRPERSON GRIFFIS: Are the stairs the
4 same as they were on the submitted permit plan?

5 MR. EPTING: Again, remember we changed
6 those plans to reflect what's on Exhibit 10.

7 CHAIRPERSON GRIFFIS: Right. I understand
8 that.

9 MR. EPTING: So the permit plans reflect
10 Exhibit 10. I'm not going to get into the merits, but
11 we do have a difference of opinion. We believe you
12 can have pervious surface back to the accessory
13 garage. That's why we did it that way.

14 CHAIRPERSON GRIFFIS: I understand that.
15 How many parking spaces are you required on this?

16 MR. EPTING: One parking space.

17 CHAIRPERSON GRIFFIS: Ms. Miller?

18 MEMBER MILLER: Mr. Epting, can you just
19 tell me when you gave the Appellant Exhibits 9, 10 and
20 11?

21 MR. EPTING: Just one second. They asked
22 us a while ago. We got back to them within two days
23 once we had the permit. It was right around September
24 10. Mr. Wolf called Mr. Lehrman's office. We copied
25 them and sent them over to him.

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1 COMMISSIONER PARSONS: That couldn't have
2 been true of Exhibit 11 which is dated March 7.

3 MR. EPTING: Let me ask about that too.

4 (Pause.)

5 MR. EPTING: Actually that date is 8/7.

6 COMMISSIONER PARSONS: Oh.

7 CHAIRPERSON GRIFFIS: Do you have more,
8 Mr. Parsons?

9 COMMISSIONER PARSONS: Not right now.

10 CHAIRPERSON GRIFFIS: Indeed. Any final
11 questions? Mr. Sailer, based on your position today,
12 do you find that the permits, as you have asserted,
13 that violate the tree removal limitations are actually
14 before us timely for an appeal?

15 MR. SAILER: I guess that's the reason
16 we're here, isn't it?

17 CHAIRPERSON GRIFFIS: I'm asking
18 specifically on the tree removal of which was one of
19 the aspects of what you were trying to bring.

20 MR. SAILER: I see.

21 CHAIRPERSON GRIFFIS: Is that timely
22 before us?

23 MR. SAILER: May I unfairly ask that I be
24 permitted to put that in the Friday brief? I really
25 am an ignoramus on this subject.

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1 CHAIRPERSON GRIFFIS: Okay. The proposed
2 structure that violates the applicable eight foot side
3 yard?

4 MR. SAILER: I beg your pardon.

5 CHAIRPERSON GRIFFIS: Proposed structure,
6 your item number seven.

7 MR. SAILER: Yes?

8 CHAIRPERSON GRIFFIS: Is that timely
9 before us?

10 DR. WOLF: What was the question?

11 CHAIRPERSON GRIFFIS: The eight foot side
12 yard requirement.

13 MR. SAILER: We will do the same thing.
14 Thank you.

15 CHAIRPERSON GRIFFIS: Okay. Ms. Gilbert?

16 MS. GILBERT: Yes, I will really try to be
17 brief.

18 CHAIRPERSON GRIFFIS: Why? We have all
19 day.

20 (Laughter.)

21 MS. GILBERT: Let me begin by stating that
22 I concur with Mr. Epting that the regulations require
23 that an appeal be filed within 60 days, that the
24 requirement is mandatory and jurisdictional under the
25 regulations. With respect to this case, I would like

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1 to say that all of the zoning issues were covered in
2 the permit that was issued on January 29, 2003.
3 There's been no change in the zoning calculations
4 since that time.

5 The Sysen (PH) case talks about cumulative
6 and piecemeal nature of permitting. In this case, the
7 other permits that were talked about in the
8 Appellant's opposition to the intervenor's motion to
9 intervene and to dismiss, they refer on page 5 to a
10 number of items; the raise permit, the tree removal
11 permit that was renewed in February, the building
12 permit for sheeting and showing. Sheeting and showing
13 permits are sometimes applied for as part of the
14 general permit, sometimes separately. They don't
15 affect the zoning in this case at all.

16 The subdivision plat was issued on March
17 31, the record single lot, as a matter of practice
18 whether it's absolutely in accordance with the
19 regulations or not. What DCRA has been doing is if
20 the single record plat has been applied for, we do
21 proceed with the processing of the permit. That may
22 or may not be in complete accordance with 11 DCMR
23 3202.3. However, in this case, even if you were to
24 use the March 31 date, the Appellants didn't file
25 until July 2. I believe they filed a notice of intent

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1 to file an appeal on May 31.

2 What else was I going to say? Referring
3 to the stop work order, that was lifted on March 24.
4 So again, if you were going to give credence to the
5 stop work order as tolling the statute of limitations,
6 still the appeal was not filed until July 2. I think
7 we talked about the pool permit. I am advised by DCRA
8 staff who is here that as far as he is aware Mr.
9 Arthur Levi did have some plans back in mid-March
10 apparently from DCRA because he had copies of zoning's
11 comments on the job.

12 So I believe that the Appellants were -- I
13 can't testify to this. I don't have my people ready
14 to testify to this. But apparently they were privy to
15 at least some of the plans and some of the comments on
16 the plans some time ago. I am also advised that the
17 lack of access because of the problems with the
18 basement or whatever is going on as far as renovation
19 is concerned didn't become a problem until July. So I
20 don't know what to make of that except to say that the
21 revision permit as far as we are concerned did not
22 impact the zoning.

23 But the main thing that I want to say in
24 addition to saying that we should abide by the 60 day
25 rule is that there does need to be some kind of point

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1 at which you determine to cut off appeals. Apparently
2 this is a group of people who were pretty much aware
3 of what was going on and making a point of being in
4 touch with the department and so on. Apart from that,
5 what I want to say is that however you rule in this
6 specific case I would just like to caution that we
7 would not like any kind of general ruling that says
8 whenever there's a revision permit you can use the
9 date of the revision permit.

10 I think that whatever you rule in this
11 case has to be very specific to the facts of this
12 case. That's my biggest concern here, that we don't
13 have the lack of the single record lot or the fact
14 that the department issues a revision permit be
15 generally a basis for moving the appeal date. So
16 that's essentially what I have to say.

17 CHAIRPERSON GRIFFIS: Thank you.

18 Questions?

19 MEMBER MILLER: I heard you say something
20 about a March 31 date. What was that?

21 MS. GILBERT: March 31 was the date that
22 the single record law was issued by the surveyor's
23 office. It's an attachment to something.

24 MEMBER MILLER: What's the significance of
25 that?

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1 MS. GILBERT: Well, one of the complaints
2 by the Appellants was that DCRA had issued the permit
3 without a single record law having been issued by the
4 surveyor's office. They cited section 3202.3 of the
5 Zoning Regulations which says "a building permit shall
6 not be issued for the proposed erection, construction,
7 or conversion of any principal structure or for any
8 addition unless the land for the proposed erection,
9 construction, or conversion has been divided so that
10 each structure will be on a separate lot of record."

11 As I said, the department as a matter of
12 practice will not issue a permit until there has been
13 at least an application made to the surveyor's office.

14 Sometimes I'm informed we do act on permits before we
15 receive the final surveyor's office subdivision.

16 MEMBER MILLER: Well, with respect to the
17 question of timeliness, does that affect the date that
18 the time would start running from as opposed to
19 January 29?

20 MS. GILBERT: I don't believe it does.
21 I'm just trying to respond to some of the arguments
22 that the Appellant made in their opposition.

23 MEMBER MILLER: Can you answer whether in
24 fact DCRA was not responding to inquiries with respect
25 to the stop work order until June?

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1 MS. GILBERT: I am not in a position to
2 respond to that.

3 MEMBER MILLER: I heard what you said
4 about the 60 day rule. There is case law that talks
5 about extenuating circumstances beyond the control of
6 the Appellant.

7 MS. GILBERT: Right.

8 MEMBER MILLER: Would you say that DCRA's
9 failure to provide necessary documents would fall into
10 that category?

11 MS. GILBERT: Well, I'm sorry to be at
12 such a disadvantage here. I can't say that DCRA
13 failed to provide documents. As I said, I just spoke
14 with Mr. Paul who indicates that the Appellant's did
15 have a number of plans before them in middle to late
16 March that came from the department because they
17 included departmental comments. Now, whether that was
18 a full set of documents and how Mr. Arthur Levi
19 obtained those documents, I have no idea.

20 MR. SAILER: Excuse me, Mr. Chairman. It
21 does seem to me at some point inappropriate to say Mr.
22 Paul said that they had the documents and that kind of
23 testifying.

24 CHAIRPERSON GRIFFIS: Mr. Sailer, do you
25 have them or not? Did you receive documents in March?

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1 DR. WOLF: No, the answer is no.

2 MR. SAILER: What's the question?

3 DR. WOLF: He said did we receive
4 documents in March.

5 CHAIRPERSON GRIFFIS: So you didn't
6 receive anything from DCRA. Did you receive any of
7 the zoning permit comments?

8 DR. WOLF: No, we received a plat from Mr.
9 Arthur Levi. At the time, we were not Appellants of
10 course. He had obtained it he told me from Judith
11 Lanius. He had correspondence around that time,
12 probably in April with Mr. Paul at DCRA.

13 CHAIRPERSON GRIFFIS: What kind of
14 comments?

15 DR. WOLF: He gave that information to the
16 other Appellants to review in late April.

17 CHAIRPERSON GRIFFIS: So you are saying
18 that Mr. Levi knew about it but he kept it from you
19 guys.

20 MR. SAILER: What I think we believe is he
21 was in France and they don't have permits in France.

22 CHAIRPERSON GRIFFIS: We blame a lot on
23 the French. I don't know if we can pull them into
24 this one.

25 (Laughter.)

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1 CHAIRPERSON GRIFFIS: Is Mr. Paul here?

2 MR. PAUL: Yes.

3 CHAIRPERSON GRIFFIS: Can you come up for
4 a second? Please give me your name.

5 MR. PAUL: My name is Leon Paul with DCRA.

6 CHAIRPERSON GRIFFIS: And your address.

7 MR. PAUL: Home address?

8 CHAIRPERSON GRIFFIS: Give me whatever you
9 want.

10 MR. PAUL: 941 North Capitol Street.

11 CHAIRPERSON GRIFFIS: Okay. Just one very
12 quick question. You indicated to Ms. Gilbert that
13 there was information provided in mid-March. Do you
14 recall what that information was?

15 MR. PAUL: Yes, sir.

16 CHAIRPERSON GRIFFIS: What was that
17 information?

18 MR. PAUL: I received emails from Mr. Levi
19 where he had with attachments given me back copies of
20 my comments regarding the job because I was the
21 reviewer and also the plats.

22 CHAIRPERSON GRIFFIS: So you gave him the
23 plats that you reviewed.

24 MR. PAUL: No, he sent them to me with
25 comments that he had made regarding the situation.

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1 CHAIRPERSON GRIFFIS: So he already had
2 your comments on the plat.

3 MR. PAUL: He already had them.

4 CHAIRPERSON GRIFFIS: That's when he first
5 contacted you.

6 MR. PAUL: Yes, sir.

7 CHAIRPERSON GRIFFIS: He first contacted
8 you when?

9 MR. PAUL: I want to say late March, but I
10 know definitely before April. I still have all of the
11 emails.

12 CHAIRPERSON GRIFFIS: So in March at some
13 point you received comments of which he had already
14 reviewed that you had done.

15 MR. PAUL: Yes, sir.

16 CHAIRPERSON GRIFFIS: What else did you
17 review in addition to the plat?

18 MR. PAUL: I actually reviewed and
19 approved the job.

20 CHAIRPERSON GRIFFIS: So you reviewed
21 what?

22 MR. PAUL: The full set of plans that were
23 submitted for the initial permit as well as the
24 revision.

25 CHAIRPERSON GRIFFIS: And your comments

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1 would have been based on those, correct?

2 MR. PAUL: The comments that he spoke to
3 were based on the original permit, yes, sir.

4 CHAIRPERSON GRIFFIS: Your comments, were
5 there indications of the drawings that cited your
6 comments? For instance, did you say A-1 140 story
7 building is not permissible in the District of
8 Columbia?

9 MR. PAUL: Well, the comments that he sent
10 back were actually in my handwriting.

11 CHAIRPERSON GRIFFIS: I understand that.
12 Did your comments go specifically to sheets in the
13 documents?

14 MR. PAUL: Yes, sir.

15 CHAIRPERSON GRIFFIS: Mr. Sailer, that's
16 the information that you received, those
17 correspondence some time in April.

18 MR. SAILER: From Mr. Levi.

19 CHAIRPERSON GRIFFIS: I don't care where
20 you got them.

21 MR. SAILER: That's a matter of best
22 memory I guess. There's no leger or anything like
23 that. That's my understanding. Perhaps Mr. Wolf can
24 say more than I can. I was involved in family matters
25 at that time.

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1 CHAIRPERSON GRIFFIS: It's a quick
2 question. Yes or no, that was April.

3 DR. WOLF: It was April 17 when he was
4 returning to the United States from Paris. He dropped
5 by our house and the other neighbors with a copy of
6 this small plat.

7 CHAIRPERSON GRIFFIS: So there was a lot
8 of reliance on Mr. Levi and his lay-work even though
9 he was to and from on the Concord.

10 DR. WOLF: He was the immediate neighbor
11 to this whole thing.

12 CHAIRPERSON GRIFFIS: Mr. Parsons?

13 COMMISSIONER PARSONS: Mr. Paul, I'm still
14 trying to understand. Mr. Levi sent to you a drawing.
15 You did not send him a drawing.

16 MR. PAUL: No, sir, he sent me the
17 drawing.

18 COMMISSIONER PARSONS: It's still a
19 mystery as to how he got into the basement and copied
20 it or something.

21 CHAIRPERSON GRIFFIS: No, let's clarify.
22 My understanding of what they just said from DCRA is
23 the basement renovation started in July.

24 COMMISSIONER PARSONS: I understand. I
25 shouldn't jest.

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1 CHAIRPERSON GRIFFIS: We're way back in
2 March. So somehow Mr. Levi could have conceivably
3 gone down to DCRA and has someone make a copy of that,
4 is that correct?

5 MR. PAUL: Once the permit was approved in
6 February, it became public record. So the file with
7 the application and permits would still be upstairs.

8 CHAIRPERSON GRIFFIS: So he could have
9 gone up there, put on the Xerox machine, and left with
10 it.

11 MR. PAUL: Yes, sir.

12 CHAIRPERSON GRIFFIS: He wouldn't have
13 needed anybody to send it to him. He could have done
14 it himself.

15 MR. PAUL: No, it becomes public record as
16 soon as it's approved.

17 CHAIRPERSON GRIFFIS: Okay.

18 COMMISSIONER PARSONS: So the confusion to
19 me, Mr. Sailer, is why you had difficulty getting
20 these plans from DCRA if Mr. Levi was able to go down
21 and apparently grab the file and make copies.

22 MR. SAILER: You will have to ask DCRA.
23 All I know is the fact that several efforts were made
24 with no luck.

25 CHAIRPERSON GRIFFIS: Did you ever go down

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1 to 901?

2 MR. SAILER: Did I?

3 CHAIRPERSON GRIFFIS: Yes.

4 MR. SAILER: No.

5 CHAIRPERSON GRIFFIS: Did anyone in your
6 assemblage go down?

7 MR. SAILER: I'm sorry.

8 CHAIRPERSON GRIFFIS: Did anyone in your
9 assemblage go down to 901?

10 MR. SAILER: How do you define my
11 assemblage?

12 CHAIRPERSON GRIFFIS: Whoever is on your
13 appeal; Mr. Kelly, Mr. Wolf, Mr. Levi, Steinwhald,
14 LaGrange, any of these folks.

15 MR. SAILER: I can't answer that question.

16 CHAIRPERSON GRIFFIS: Can anyone?

17 DR. WOLF: I can. I went down to DCRA.

18 CHAIRPERSON GRIFFIS: When?

19 DR. WOLF: I went down to DCRA after
20 multiple attempts to get the --

21 MR. SAILER: When?

22 DR. WOLF: It would have been in early
23 September I believe or late August. I cannot tell you
24 the precise date.

25 CHAIRPERSON GRIFFIS: Okay. Let's just

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1 say August or September you physically went down.
2 That's the first time you went down to DCRA. Prior to
3 that, you were writing them letters asking them to
4 package it up and mail it to you.

5 DR. WOLF: The Chain Bridge
6 Road/University Terrace Association, of which we are
7 not a part but whom we support, had made numerous
8 requests including filings of Freedom of Information
9 Act in April for all files and documents relating to
10 this case.

11 CHAIRPERSON GRIFFIS: Did they go down and
12 try and just make copies of public record?

13 DR. WOLF: They went down in person. They
14 made numerous phone calls. It got so desperate I
15 accosted Mr. Clark himself, the head of DCRA, at a
16 public town hall meeting at Tenleytown Citizen
17 Association to request a direct meeting between the
18 Chain Bridge Association and the concerned neighbors
19 with him and his officials because we had so little
20 opportunity to see anything from them. All we had was
21 this tiny little plat and correspondence.

22 COMMISSIONER PARSONS: So you mean whoever
23 went to the office, there was no file available to
24 look at, is that correct? It was just not made
25 available.

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1 CHAIRPERSON GRIFFIS: Not by August and
2 September.

3 MR. SAILER: I think the most striking
4 fact is that the Freedom of Information Act effort was
5 made, and they came back with one document which had
6 nothing to do with what we were asking for.

7 CHAIRPERSON GRIFFIS: Yes, and did we get
8 the date on when the FOIA request was put in?

9 DR. WOLF: Early April .

10 CHAIRPERSON GRIFFIS: Do you have a copy
11 of that?

12 DR. WOLF: We do not at this time.

13 MR. SAILER: I'll supply it if we have it
14 with our brief on Friday.

15 CHAIRPERSON GRIFFIS: I can't imagine you
16 don't have it.

17 MR. SAILER: Well, I don't have it. I
18 will do my best to produce it.

19 CHAIRPERSON GRIFFIS: I would be shocked
20 if we don't receive it.

21 MS. GILBERT: I'm also prepared to follow
22 up and see if I can get a copy of the FOIA that was
23 filed. I can see if I can find out whether the
24 department responded and how they responded.

25 CHAIRPERSON GRIFFIS: Well, there's only

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1 so far we're going to take it. It's not germane to us
2 nor do we have the jurisdiction to go into the FOIA
3 and whether it was responded to or not responded to.
4 The critical aspect of the FOIA request goes again to
5 the timeliness. What actions were taken to try and
6 establish when one knew or should have known that
7 there was or may have been a zoning violation? That's
8 all I want to know is the date.

9 MS. GILBERT: I understand.

10 CHAIRPERSON GRIFFIS: It seems to be an
11 easy thing to find out.

12 MR. EPTING: Mr. Chair, can I have a brief
13 rebuttal whenever you are ready?

14 CHAIRPERSON GRIFFIS: Yes, hold on.

15 MEMBER MILLER: I have a question for Mr.
16 Paul. I think you said that Mr. Levi contacted you in
17 late March or early April, something like that. Did
18 he say what prompted his contacting you at that time?

19 MR. PAUL: He had questions as to how the
20 architect responded to the comments that I made on the
21 job and why I approved it. He wanted clarity as to
22 what was changed on the plans so that it would be
23 approved.

24 MEMBER MILLER: What had changed on the
25 plans?

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1 MR. PAUL: Well, I had made comments that
2 certain things were not in compliance with zoning.
3 Then the architect had to correct the drawings and
4 resubmit them, and I had to review them again. After
5 he corrected the comments, I approved it. He didn't
6 feel as though the architect properly responded to my
7 comments for me to approve the drawings.

8 MEMBER MILLER: He didn't say why he was
9 calling at that time though.

10 MR. PAUL: You mean as to what
11 specifically on the drawings he didn't agree with.

12 MEMBER MILLER: No, why he was doing that
13 in March, what prompted him to call in March or April.

14 MR. PAUL: No, just the comments.

15 MEMBER MILLER: Okay.

16 CHAIRPERSON GRIFFIS: Mr. Parsons?

17 COMMISSIONER PARSONS: Mr. Chairman, I
18 wonder if Mr. Paul can help us with Exhibits 9, 10 and
19 11 as to what his understanding is of the permit
20 drawing. It's probably pretty difficult without dates
21 on them and so forth.

22 CHAIRPERSON GRIFFIS: You mean the stamp
23 on the exhibit that says "for permit only."

24 COMMISSIONER PARSONS: No, what Mr. Epting
25 has shown us, he has the plans with him today but we

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1 haven't accepted them yet, that this is the permit
2 drawing that was issued in January. I'm just
3 wondering if Mr. Paul could say yes this is the
4 document I reviewed and issued a permit on.

5 MR. PAUL: Yes, Exhibit 9 is the first set
6 of plans that I reviewed with the building permit
7 plans. This is the plat that I used to approve for
8 the construction of the house. Then Exhibit 10 is the
9 revision of that plat to show that pervious drive
10 court.

11 COMMISSIONER PARSONS: Which resulted in
12 the permit in May.

13 MR. PAUL: The permit in June.

14 COMMISSIONER PARSONS: June, excuse me.
15 Exhibit 11?

16 MR. PAUL: Exhibit 11 is a site plan more
17 or less of the entire area. I don't remember this
18 exactly.

19 COMMISSIONER PARSONS: So this was a
20 drawing for another purpose. It's not something you
21 used in issuing a permit.

22 MR. PAUL: In zoning, we can only use the
23 official plat to do any issuance of permits.

24 CHAIRPERSON GRIFFIS: Do you ever use
25 landscape plans as part of zoning?

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1 MR. PAUL: No, this is for information
2 only.

3 MEMBER ZAIDAIN: It was Mr. Epting's
4 testimony earlier that it wasn't submitted. It was
5 just forwarded for clarification to the Appellants, is
6 that correct, Mr. Epting?

7 MR. PAUL: Right.

8 MR. EPTING: That's correct. He's right.
9 The landscaping doesn't count in zoning so he
10 wouldn't look at it anyway.

11 COMMISSIONER PARSONS: Exhibit 10 and 11,
12 is that the extent of the drawings that were submitted
13 to you?

14 MR. PAUL: No, sir.

15 COMMISSIONER PARSONS: You certainly used
16 more than this drawing to evaluate this case.

17 MR. PAUL: To approve it, I had to look at
18 the entire set of drawings including the elevations
19 and the floor layouts as well.

20 COMMISSIONER PARSONS: Sure. Was it your
21 understanding that this accessory building was just
22 that, an accessory building when you issued this
23 permit or was it a garage?

24 CHAIRPERSON GRIFFIS: Actually that's
25 going a bit far into the substance of this, is it not,

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1 Mr. Parsons? How does that relate to the timing?

2 COMMISSIONER PARSONS: I guess you are
3 right. I am just having trouble with this change in
4 use at the same time as change in driveway and
5 impervious surface. To me, there's a change in use to
6 this building that occurred and isn't documented
7 except in the cartoon that follows on number 11.

8 CHAIRPERSON GRIFFIS: Okay. That may go
9 to the merits.

10 COMMISSIONER PARSONS: I guess so.

11 CHAIRPERSON GRIFFIS: Anything else?
12 Questions from the Board?

13 MEMBER MILLER: Well, doesn't it go to
14 timeliness if there's something new in it? I think
15 that's why Mr. Parsons was looking at it.

16 CHAIRPERSON GRIFFIS: No, we're not going
17 to decide that there is a basis of information that
18 actually is the substance of a winnable appeal or
19 loseable appeal but rather that there was an action
20 that there was appealable. So no, the substance makes
21 no difference.

22 MR. EPTING: Exhibit 9, the original plat
23 shows it as a garage accessory structure.

24 CHAIRPERSON GRIFFIS: Right.

25 COMMISSIONER PARSONS: Maybe I can't read.

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1 "New two story accessory building garage/studio." Is
2 that what that word is?

3 CHAIRPERSON GRIFFIS: On the bottom.

4 COMMISSIONER PARSONS: I'm sorry. I did
5 not understand that word. Thank you.

6 MR. EPTING: It's the same language on
7 Exhibit 10.

8 CHAIRPERSON GRIFFIS: Anything else?
9 Good. We have one more round. We're going to do
10 rebuttal straight through. We're going to start with
11 Mr. Epting on this side first. Then we'll give Mr.
12 Sailer and team an opportunity to rebut or however you
13 want to couch it. You can take it as summations for
14 today, however we want to do it. Then Ms. Gilbert.

15 So we have a choice. You can take five minutes
16 now, or we can jump right into it. I'll get the
17 answer to that question in a moment. Then when that
18 is done, we will reorganize. I will lay out what the
19 schedule is next, what submissions are due, when they
20 are due, and when we will see you next.

21 MR. SAILER: Will the public witnesses not
22 testify today?

23 CHAIRPERSON GRIFFIS: Do you have
24 witnesses that go to timeliness?

25 MR. SAILER: They are not my witnesses. I

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1 understand there are people here to testify for the
2 public. I was asking. They have been here all
3 afternoon.

4 CHAIRPERSON GRIFFIS: You mean persons to
5 give testimony.

6 MEMBER ZAIDAIN: ANC.

7 MR. SAILER: Testimony or statements, the
8 ANC representative for example. I am simply raising
9 it in case you don't know it.

10 CHAIRPERSON GRIFFIS: Who is representing
11 the ANC today? I'm sorry. Do you have a position on
12 the motion of timeliness?

13 MS. GATES: No, I don't.

14 CHAIRPERSON GRIFFIS: The ANC doesn't have
15 -- Do you have a position on the motions, either the
16 motion to dismiss or the motion to --

17 MS. GATES: No, we do not.

18 CHAIRPERSON GRIFFIS: In that sense then,
19 what I had laid out previously is that we would get
20 through the preliminary matters. The preliminaries
21 have come into this motion of which is the timeliness.
22 We need to afford you time to speak to this if you
23 have anything.

24 MS. GATES: Okay.

25 CHAIRPERSON GRIFFIS: Again, it's the same

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1 direction of what you just heard of laying out all of
2 these. We are not going into the merits or the
3 substance of submissions but rather whether you
4 believe that this appeal is timely before the Board or
5 not. No, you don't get that.

6 MS. GATES: I honestly don't.

7 CHAIRPERSON GRIFFIS: Did the ANC take a -
8 -

9 MS. GATES: Yes.

10 CHAIRPERSON GRIFFIS: Really? Then we're
11 done.

12 (Laughter.)

13 CHAIRPERSON GRIFFIS: Did the ANC take an
14 official position on this motion of timeliness?

15 MS. GATES: No.

16 CHAIRPERSON GRIFFIS: In which case, that
17 is what we'll get to today. So we will certainly look
18 for your participation following this unless there is
19 something I'm missing that you want to bring to my
20 attention.

21 MS. GATES: No.

22 CHAIRPERSON GRIFFIS: Good. Thank you.
23 So Mr. Sailer, do you want a five minute break?

24 MR. SAILER: I always want a five minute
25 break. Thank you.

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1 CHAIRPERSON GRIFFIS: I'm with you. Let's
2 do that. Again, we're going to come back. It's going
3 to be short rebuttals of what we have just heard.

4 (Whereupon, the foregoing matter went off
5 the record at 4:07 p.m. and went back on
6 the record at 4:25 p.m.)

7 CHAIRPERSON GRIFFIS: Very well. Let's
8 resume. Mr. Epting?

9 MR. EPTING: Thank you very much. I am
10 going to be really brief. The simple answer is
11 Appellants waited. The trees clearly were moved on
12 February 8 and demolition and construction started.
13 They didn't file a protective appeal in any manner
14 until July 2. The cases and the BZA rules require
15 filing after either a permit or actual notice.

16 It's not when they later determine a
17 zoning violation. It's permit or actual notice. The
18 Georgetown case which I talked about before is clear
19 that even when they don't have knowledge of the permit
20 if they have general knowledge of what is being
21 proposed they are charged with notice at that point in
22 time. That was either January 29 or February 8.

23 Our builder was visited by Mr. Levi during
24 the time of the stop work order where he did review
25 the plans and subsequently called Mr. Paul out to the

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1 site. So some time prior to March 24, Mr. Levi had
2 knowledge of the plans and didn't begin his efforts
3 with the Zoning Administrator, with the Zoning
4 Inspecting Branch.

5 I also don't believe that Appellants can
6 blame not filing this appeal on DCRA. My paralegal
7 went down and got the permit applications and plans
8 because I wanted to see what was on file. You can't
9 just keep writing letters to DCRA and then point the
10 finger at them and say they didn't give me the plans
11 so therefore that automatically ruins my time period.

12 That's not equitable under the regs, and it's not
13 equitable to the property owner.

14 On Marcy 24, which is the date when the
15 stop work order was lifted, piling work and drilling
16 work did begin. So it was loud, actual construction
17 noise that started. Construction work started again
18 on the 24th again providing actual notice of
19 construction activities.

20 In terms of the stop work order, I just
21 fundamentally disagree with the principle that we are
22 trying to rely upon other people who get a stop work
23 order and say that because they have done it I can sit
24 back on my heels and not have to do anything. That's
25 not what waste management says. Waste management says

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1 you have to go out and do it yourself. Particularly
2 when the stop work order was issued wrongly, that
3 should give no basis for tolling. After they removed
4 the materials, it was lifted.

5 Finally, the June 13 permit. First, that
6 was issued four and a half months after the original
7 permit was issued. At some point in time, the owner
8 must know that it can proceed to do its plans or
9 change its plans or keep it moving. The plans have
10 always shown the garage as an accessory structure.
11 That was approved on January 29. I think that's all I
12 have. I appreciate the opportunity to be here today.

13 Thank you.

14 CHAIRPERSON GRIFFIS: Thank you. Mr.
15 Sailer?

16 MR. SAILER: I'll be shorter still. He
17 made reference to Mr. Levi knowing lots of things in
18 March. Our understanding is that Mr. Levi was in
19 Paris in March and came to the United States in April.

20 That will be checked. That's my understanding. The
21 other point is a reiteration. I just want to
22 reiterate as strongly as I can that I think our side
23 did absolutely everything that anybody could have done
24 to attempt to find out the answer to the stop work
25 order in question.

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1 I know it was asked about as early as
2 March 24. I know that the FOIA finding was in early
3 April. I know there were a lot of other attempts
4 during that period. I don't like to speak on my own
5 behalf, but I would defy anybody to find anything else
6 we could have done to attempt to find the answer to
7 this question. That's all I have. Mr. Wolf would
8 like to say a couple of sentences if that's agreeable
9 to the Chairman.

10 CHAIRPERSON GRIFFIS: Why didn't you file
11 an appeal in April?

12 MR. SAILER: You mean FOIA appeal.

13 CHAIRPERSON GRIFFIS: No, an appeal to
14 this Board.

15 MR. SAILER: This is going to strike you
16 as an idiotic answer but I didn't know you filed the
17 FOIA appeal with the Board.

18 CHAIRPERSON GRIFFIS: Not the FOIA.

19 MR. SAILER: Two things. We were a group
20 of lay people trying to get organized and find out
21 what was going on. We had a meeting finally with Mr.
22 Logan. When Mr. Logan's meeting with us went sour, we
23 filed within a matter of days as I recall.

24 DR. WOLF: Can I amend that?

25 MR. SAILER: No.

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1 DR. WOLF: I need to explain that, Henry.
2 Can I clarify that very briefly? The attempts to get
3 the FOIA were not done by us but by the Chain Bridge
4 Road/University Terrace Committee, a separate group
5 which we support. I want to make that very clear. We
6 were very supportive of their efforts, but we were not
7 directly involved in that.

8 However, we were concerned about the
9 document that we obtained from Mr. Levi in April as he
10 was a very primitive plat for building permit which is
11 Exhibit 11 I believe. It took us quite some time to
12 scrutinize this one and only small document which was
13 the only document that we had to begin to raise
14 concerns about what was going on with this property.
15 That is a separate issue. Those are issues that we
16 ourselves, the local Appellants, raised.

17 We then began to make inquiries with Mr.
18 Logan. When Mr. Logan met with us, he basically said
19 he would not change his plans in response to our
20 request to make them abide by the regulations. We
21 subsequently immediately put in very rapidly after
22 that a notice of appeal, and an appeal went in on July
23 2.

24 CHAIRPERSON GRIFFIS: So if I understand
25 you correctly, you wanted to exhaust having Mr. Logan

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1 change the plans how you wanted to accommodate it.
2 Then as that was not coming to fruition, then you took
3 another step which was filing an appeal to this Board.

4 DR. WOLF: We made a very rapid appeal
5 after we began to raise suspicions about a document
6 which was distributed to the neighbors, a single small
7 plat, not large construction documents, nothing else.

8 It was not just the accessory building. That was
9 simply the most blatant. It was a number of
10 observations like pervious surface coverages, things
11 that are instrumental to our own overlay regulations
12 which are extremely strict on this issue but could not
13 be adequately addressed from this small document.
14 Henceforth after that we immediately filed this notice
15 of appeal and began our efforts to obtain the large
16 construction documents that might show us exactly what
17 was on this property.

18 CHAIRPERSON GRIFFIS: So this small
19 document did evidence problems as you saw with the
20 overlay.

21 DR. WOLF: Yes.

22 CHAIRPERSON GRIFFIS: That was the
23 document that was received by Mr. Levi prior to mid-
24 March.

25 DR. WOLF: No, we don't know exactly when

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1 he received it.

2 CHAIRPERSON GRIFFIS: Well, he definitely
3 had it before that because he corresponded with a DCRA
4 staff member.

5 DR. WOLF: I would like to see the dates
6 of that. I think we all would probably about that
7 correspondence. But he did not share it with us from
8 Paris. He brought it to us in April.

9 CHAIRPERSON GRIFFIS: Why didn't the Chain
10 Bridge Road/University Terrace Preservation Committee
11 bring an appeal?

12 DR. WOLF: I would have to leave the
13 answer to that open in the record because I do not
14 know the answer.

15 COMMISSIONER PARSONS: Mr. Chairman, I
16 want to ask DR. WOLF a question. Do you yet have a
17 set of plans for the full project?

18 DR. WOLF: Yes.

19 COMMISSIONER PARSONS: You got those after
20 you filed the appeal.

21 DR. WOLF: When we went down this summer
22 to DCRA after we filed the appeal July 2, we finally
23 decided to go down. I went down in person. I'm a
24 physician. I took time out from my schedule to go
25 there in person because we were so desperate and ask

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1 for those documents. At which time, I was told they
2 were unavailable.

3 It was some time in mid-July or something
4 like that. Shortly after we filed our appeal they
5 were unavailable. We thought about how else we might
6 be able to obtain these. Ultimately, although we did
7 not think we would get these documents, we asked for
8 them from the developer himself.

9 COMMISSIONER PARSONS: So the District of
10 Columbia still has not provided you with a set.

11 DR. WOLF: I believe on Monday of this
12 week attorney Pat Brown, who has assisted us, received
13 a copy of these documents at our request finally.

14 COMMISSIONER PARSONS: Thank you.

15 CHAIRPERSON GRIFFIS: Anything else?

16 DR. WOLF: No.

17 CHAIRPERSON GRIFFIS: Ms. Miller?

18 MEMBER MILLER: Did you make a request for
19 the documents from DCRA before you filed your appeal?

20 DR. WOLF: We had believed at that time
21 that we had all available documents. We met with
22 David Clark on June 25. They said they would release
23 all files on this case to us. They released them
24 within a week. I believed we were in possession as
25 did all other Appellants of everything they had.

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1 We noted that there was some mention of
2 topographic site plans which we thought would be very
3 important. But when we asked about those, of course,
4 we learned about the problem downstairs in their
5 basement. We were also told by Denzil Noble that we
6 might be able to get them from the Department of
7 Health, some soil erosion division. When I contacted
8 them, they said I would need to file a separate
9 Freedom of Information Act to obtain all of that
10 information. By this time, I believe this was now in
11 August. We then went to Mr. Logan in September and
12 asked him for these documents.

13 MEMBER MILLER: Did you ask for documents
14 before June 25?

15 DR. WOLF: From Mr. Logan?

16 MEMBER MILLER: No, from DCRA.

17 DR. WOLF: I do not recall. I would have
18 to check.

19 MEMBER MILLER: Was there something that
20 happened in April that prompted Mr. Levi to share that
21 document with you?

22 DR. WOLF: Mr. Levi at that time was not
23 entirely sure if there were violations or not. He was
24 concerned as the immediate neighbor to this operation
25 about what was going on. He was very concerned. His

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1 driveway had already been uprooted by a tree that
2 fell. He had a number of concerns. A retaining wall
3 of his was knocked down during that operation.

4 He was angry and upset. He made inquiries
5 to DCRA. He thought other neighbors might be
6 concerned about what was going on and then began to
7 share this information with us. We all received this
8 information approximately April 17 or April 19 and
9 looked over it for probably a week or two before we
10 asked for a meeting with Mr. Logan to discuss
11 concerns.

12 CHAIRPERSON GRIFFIS: But certainly his
13 concerns came up when the construction on the site
14 started which was February 8.

15 DR. WOLF: Right, but we assumed that was
16 all legal. The only thing we had any knowledge of was
17 that the Chain Bridge Road Association was fighting an
18 issue over a tree on that property.

19 MEMBER MILLER: So you are saying you
20 assumed everything was legal until April when you saw
21 that document.

22 DR. WOLF: We had no reason to believe
23 that they were engaging in illegal activities. We
24 assume people are engaging in legal activities until
25 proven otherwise.

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1 CHAIRPERSON GRIFFIS: But something
2 motivated you to put an appeal in. Mr. Epting, were
3 the permits posted on the property?

4 MR. EPTING: Yes, they were. They have to
5 be, yes.

6 CHAIRPERSON GRIFFIS: That's true. Where
7 were they posted, physically a description?

8 MR. EPTING: There's actually a built box
9 in front of the property that they are attached to.

10 CHAIRPERSON GRIFFIS: In the front of the
11 property visible to the street.

12 MR. EPTING: Yes.

13 DR. WOLF: May I comment on that? We
14 actually in our meeting on the property site with Mr.
15 Logan asked him where were the permits because they
16 were not there. He said he would arrange to have them
17 put there.

18 CHAIRPERSON GRIFFIS: When was that?

19 DR. WOLF: That was on May 21 because he
20 met the day before on the property with Mr. Leon Paul
21 I believe.

22 MR. EPTING: Apparently they were there.
23 They were taken out by somebody else, and we put them
24 back. They have been there.

25 CHAIRPERSON GRIFFIS: Okay. Anything

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1 else, Mr. Sailer?

2 DR. WOLF: May I also comment that after
3 the stop work order they were never there? We found
4 nothing there.

5 CHAIRPERSON GRIFFIS: You mean they were
6 there before the stop work order.

7 DR. WOLF: At the time of the stop work
8 order, they were never there. They were not there.
9 That is not my personal knowledge. That is from other
10 members of the Chain Bridge Road/University Terrace
11 Committee.

12 MS. HORNE: If I may address the Board.

13 CHAIRPERSON GRIFFIS: Yes.

14 MS. HORNE: It seems like we're getting a
15 little off track here.

16 CHAIRPERSON GRIFFIS: That's a good
17 observation.

18 MS. HORNE: The standard is - let me read
19 it - "an appeal shall be filed within 60 days from the
20 date the person appealing the administrative decision
21 had notice or knowledge of the decision complained of
22 or reasonable should have had notice or knowledge of
23 the decision complained of."

24 CHAIRPERSON GRIFFIS: Wouldn't you think
25 notice or knowledge of the administrative decision

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1 would be a posting of the permits?

2 MS. HORNE: No, not necessarily. Anything
3 that would bring to mind that a permit has been issued
4 --

5 CHAIRPERSON GRIFFIS: Would be a posting
6 on the property, wouldn't it?

7 MS. HORNE: What I'm saying is we had a
8 lot of discussions about whether or not they knew that
9 a violation had occurred.

10 CHAIRPERSON GRIFFIS: I understand that.

11 MS. HORNE: They had testified that they
12 knew that construction was ongoing on this property.

13 CHAIRPERSON GRIFFIS: Your point is it's
14 not when you know of the violation but when you know
15 of the action.

16 MS. HORNE: Right, it's when you know of
17 the permit.

18 CHAIRPERSON GRIFFIS: The permit itself.

19 MS. HORNE: Yes.

20 CHAIRPERSON GRIFFIS: That's an excellent
21 point to clarify. So it's not the basis of when you
22 would be able to actually put together the substance
23 of appeal but that you knew that there was something
24 to appeal in the administrative action.

25 MS. HORNE: Yes, that was what I was

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1 trying to say.

2 CHAIRPERSON GRIFFIS: So certainly you
3 saying that's off track didn't go to whether there was
4 a posting of the permits of the property or not.

5 MS. HORNE: No, I'm sorry. Excuse me.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. EPTING: Our builder could verify -- I
8 don't know what we want to get into.

9 CHAIRPERSON GRIFFIS: We don't. I have
10 enough.

11 MR. EPTING: Okay. That's fine with me.

12 CHAIRPERSON GRIFFIS: Anything else? Mr.
13 Sailer, did you or your team have anything additional?

14 MR. SAILER: I beg your pardon.

15 CHAIRPERSON GRIFFIS: Additional rebuttal?

16 MR. SAILER: Well, I guess one sentence
17 about the young lady's argument about if you knew
18 about the permit. It seemed and seems to me
19 unreasonable that when I believed that the intervenor
20 was enjoying from proceeding and in the normal course
21 will be enjoying from seven years from building on
22 that property that it would be somewhat -- for me to
23 be bringing up lawsuits. He was frozen in place by
24 the whole separate order. When that situation
25 changed, we had an obligation to act when we had

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1 knowledge it changed.

2 CHAIRPERSON GRIFFIS: Let's get some brief
3 clarification about what you just said. Do tell me.

4 MR. SAILER: Of what I just said?

5 CHAIRPERSON GRIFFIS: Yes.

6 MR. SAILER: I'll do the best I can.

7 CHAIRPERSON GRIFFIS: What is the seven
8 years that you are now bringing up?

9 MR. SAILER: There is a provision. I
10 don't know why I brought that up except it's relevant.

11 In the Chain Bridge/University Terrace overlay,
12 there's a provision that if you violate the
13 prerogations that the - I can't remember who - can
14 forbid you to act further with respect to the property
15 for up to seven years or seven years unless he or she
16 --

17 CHAIRPERSON GRIFFIS: So it's your basis
18 that you knew that they violated the tree so there was
19 no action needed by you because construction or
20 anything wasn't going to happen on this property for
21 seven years.

22 MR. SAILER: They wouldn't concede for a
23 moment today that they violated anything. They had a
24 letter from an arborist.

25 CHAIRPERSON GRIFFIS: Did you have

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1 reliance that there wasn't going to be construction on
2 this property for seven years?

3 MR. SAILER: We had reliance on the fact
4 that as long as the stop work order was in place we
5 were not being injured. They were not building. They
6 could not move a finger. That's what the stop work
7 order provides. That's what we were relying on.

8 CHAIRPERSON GRIFFIS: It's not your
9 understanding that a stop work order would be issued
10 by DCRA for noncompliance with the permit that was
11 issued.

12 MR. SAILER: I guess what happened was
13 that on February 8 somebody in the DCRA or somebody
14 else said maybe they are acting illegally or they are
15 acting illegally and issued the stop order. Then they
16 come back and said no we're not acting illegally and
17 the DCRA agrees and therefore lifts the stop work
18 order.

19 CHAIRPERSON GRIFFIS: So you had a
20 reliance on the stop work order that said you didn't
21 need to put an appeal in to this Board.

22 MR. SAILER: Absolutely, yes, that's
23 precisely correct.

24 CHAIRPERSON GRIFFIS: I caution you that
25 this Board has found otherwise previously. Anything

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1 else?

2 MR. SAILER: I can make one argument. We
3 have a basic argument about the Sysen (PH) case and my
4 statements about the June 13 permit and its
5 significance. Otherwise I'm through. Thank you very
6 much.

7 CHAIRPERSON GRIFFIS: Thank you. Ms.
8 Gilbert?

9 MS. GILBERT: I just want to say that I
10 believe, unless I'm reading something wrong, the seven
11 years that Mr. Sailer is talking about has no
12 relevance. It's only as far as the trees that were
13 cut down before 1999.

14 CHAIRPERSON GRIFFIS: That's okay. Stick
15 to your points. We're not arguing that.

16 MS. GILBERT: I just want to reiterate
17 that the permit was issued January 29, 2003, that all
18 of the zoning issues which have been raised here
19 relate to that original permit, that the Appellants
20 either had knowledge of that permit or they should
21 have had knowledge of that permit, and that these
22 other dates that we're looking at, the other things
23 that they talked about here, are all general and
24 really do not change anything. We have a permit
25 issued in January. This is July that they applied.

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1 I think they had ample opportunity to apply well
2 before July. Even if we were to give some credence to
3 the concerns about the stop work order or the single
4 lot or the one other issue that they raised, it would
5 still mean that they would have had to appeal by late
6 May. They didn't appeal until July. So I think any
7 way you cut it, the appeal is not timely.

8 CHAIRPERSON GRIFFIS: Thank you. Let's
9 hear from the ANC first.

10 MR. EPTING: Mr. Chairman, could we file
11 the cases that we cited for the record with you?

12 CHAIRPERSON GRIFFIS: Yes, absolutely.

13 MS. GATES: I would like to make a point
14 of clarification please. I did not mean to infer in
15 any way that the ANC felt that the Chain Bridge Road
16 Committee representatives were being untimely. The
17 ANC was never informed of this particular issue.

18 CHAIRPERSON GRIFFIS: Right. I understand
19 that.

20 MS. GATES: Thank you.

21 CHAIRPERSON GRIFFIS: I think it's very
22 clear to the Board, but it's good that you restated
23 it. The point is that the ANC didn't take official
24 position on this motion. Therefore, you can't come
25 before us and give us a position because that would

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1 not be the official ANC position.

2 MS. GATES: Thank you.

3 CHAIRPERSON GRIFFIS: Now, what we are
4 going to do is set this for a decision. We're
5 deciding this motion on November 4 as part of our
6 public meeting. I'm sorry. You wanted to address the
7 Board.

8 MS. ZIGNER: Yes.

9 CHAIRPERSON GRIFFIS: Can we give her a
10 microphone?

11 MS. ZIGNER: Actually if we could have
12 two.

13 CHAIRPERSON GRIFFIS: Two?

14 MS. ZIGNER: Good afternoon, Mr. Chairman,
15 my name is Jeannine Rustad Zigner from Robins, Kaplan,
16 Miller and Ciresi here as counsel for the Chain Bridge
17 Road/University Terrace Preservation Committee.

18 CHAIRPERSON GRIFFIS: Yes.

19 MS. ZIGNER: I have been informed of some
20 of the proceedings. As you are aware, they have been
21 involved with this property as well as the overlay.

22 CHAIRPERSON GRIFFIS: How are they
23 involved in this appeal though?

24 MS. ZIGNER: They are not involved with
25 the appeal, but some of their work does go to the

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1 timeliness issue.

2 CHAIRPERSON GRIFFIS: Yes, but how do we
3 even entertain that?

4 MS. ZIGNER: Well, you asked if there was
5 anyone who wanted to comment on the timeliness issue.

6 CHAIRPERSON GRIFFIS: No, I didn't. I
7 asked for the participants.

8 MS. ZIGNER: I was going to be a witness
9 in this case.

10 CHAIRPERSON GRIFFIS: For who?

11 MS. ZIGNER: For the Chain Bridge
12 Road/University Terrace Preservation Commission.

13 CHAIRPERSON GRIFFIS: But they are not a
14 participant in the appeal.

15 MS. ZIGNER: No, we are not.

16 CHAIRPERSON GRIFFIS: How can you be a
17 witness for someone who is not participating?

18 MS. ZIGNER: During the community comment
19 period. They do have an interest in this. Because of
20 financial resources they haven't intervened, but they
21 do have an interest in seeing that this is correctly
22 handled.

23 CHAIRPERSON GRIFFIS: I think we all have
24 that interest.

25 MS. ZIGNER: Yes.

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1 CHAIRPERSON GRIFFIS: My hands are tied
2 unless you can tell me how I can actually have them
3 participate.

4 MS. ZIGNER: Well if --

5 CHAIRPERSON GRIFFIS: You could be called
6 as a witness to the group that's brought the appeal.
7 I would suggest you go coordinate.

8 MS. LANIUS: Forgive me. I had the
9 impression that when you called Ms. Alma Gates that
10 you were calling everyone.

11 CHAIRPERSON GRIFFIS: Absolutely not. The
12 ANC is a party in all of our cases automatically. It
13 was only my oversight that I didn't have them sitting
14 at the table for the entire portion of this motion.

15 MS. LANIUS: Well, could I coordinate with
16 Mr. Sailer?

17 CHAIRPERSON GRIFFIS: Absolutely.

18 MEMBER ZAIDAIN: Mr. Chair, it's my
19 understanding we're still dealing with a preliminary
20 matter.

21 CHAIRPERSON GRIFFIS: Right. We're not
22 even into the appeal yet.

23 MS. LANIUS: I know.

24 MEMBER ZAIDAIN: I'm a little confused as
25 to what's going on.

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1 MS. LANIUS: I just --

2 DR. WOLF: Excuse me. We are going to ask
3 with your permission, Mr. Chairman, that we call the
4 Chain Bridge Road/University Terrace Committee as a
5 witness.

6 CHAIRPERSON GRIFFIS: During your case.

7 DR. WOLF: Specifically to the timeliness
8 issue.

9 MEMBER ZAIDAIN: I guess my question is I
10 noticed the individuals sitting in the crowd since
11 this hearing was called at 1:00 p.m. Why is she being
12 called now?

13 CHAIRPERSON GRIFFIS: After the
14 presentation and the rebuttal.

15 MEMBER ZAIDAIN: Yes.

16 DR. WOLF: We feel that after this long
17 discussion that some issues which only they are
18 experts on could really most answer in great detail.
19 You must remember that we have only been served with
20 this issue of untimeliness.

21 MEMBER ZAIDAIN: That wasn't my question.
22 She's been here the whole time.

23 DR. WOLF: Right.

24 MS. ZIGNER: I was just contacted at 4:15
25 p.m. and informed how it was going and asked advice at

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1 that point and tried to come down as quickly as
2 possible. I had not been aware. I have been in
3 meetings during the afternoon. If we can have two or
4 three minutes.

5 CHAIRPERSON GRIFFIS: You don't get our
6 sympathy for that.

7 MS. ZIGNER: I know.

8 CHAIRPERSON GRIFFIS: You can keep talking
9 about it.

10 MS. ZIGNER: If we can just have two or
11 three minutes of your time. This is an important
12 issue, if I may intervene on this point, of how DCRA
13 acts not just to this case but in several other cases
14 that are going to be coming before this Board and the
15 troubles that there are with community individuals
16 trying to get responses.

17 MS. LANIUS: And I think I can clarify the
18 issue of Mr. Levi and also why the Chain Bridge
19 Road/University Terrace Preservation Committee did not
20 bring an appeal.

21 CHAIRPERSON GRIFFIS: Right. I
22 understand. Hold on a moment. Mr. Sailer, do you
23 have any witnesses to call?

24 MR. SAILER: On the issue of timeliness?

25 CHAIRPERSON GRIFFIS: Yes.

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1 MR. SAILER: No, not a one.

2 (Laughter.)

3 CHAIRPERSON GRIFFIS: Are you sure?

4 MS. LANIUS: Henry.

5 MR. SAILER: Oh, I beg your pardon.

6 CHAIRPERSON GRIFFIS: We have three
7 minutes. Now, you were sworn in at the beginning.

8 MS. LANIUS: Yes, I stood up.

9 CHAIRPERSON GRIFFIS: Very well. We're
10 going to have three minutes of your presentation of
11 your witness. I would suggest you obviously instruct
12 your witness as you want. Of course, she's flanked by
13 all sorts of people that will now probably instruct
14 her. You have three minutes. Then we will have cross
15 examination. Then we will conclude for today. I'm
16 going to set out submissions. I'm going to set out
17 decision-making. Then we are going to hold a date so
18 that we have something to deal with later. Let's go.

19 MS. LANIUS: I am Judith Lanus, former
20 chair of the Chain Bridge Road/University Terrace
21 Preservation Committee. We have filed a statement of
22 testimony with you. I would like to clarify some
23 points with you. Following the issuance of the stop
24 work order, the Committee made persistent efforts to
25 meet with DCRA management to discuss follow up

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1 actions.

2 A meeting finally occurred with Mr. Kelly
3 on March 11. Mr. Kelly, who was the Zoning
4 Administrator at that time, acknowledged that the stop
5 work order was still in effect and indicated that the
6 property owner would need to seek relief before he
7 could proceed with construction. Mr. Kelly also
8 indicated that he was corresponding in writing with
9 the property owner but refused to share such
10 correspondence with the Committee.

11 Mr. Kelly resigned in mid-March 2003.
12 Despite the lack of any notice that the stop work
13 order had been lifted, construction recommenced at the
14 property in early April. Needless to say, the
15 Committee was surprised and dismayed by this
16 development. Inquiries to Mr. Noble and Ms. Lewis at
17 DCRA to explain the resumption of construction went
18 unanswered.

19 Subsequently we filed an FOIA request with
20 DCRA seeking all correspondence and documentation
21 relating to the release of the stop work order. After
22 two weeks, all that was produced was a permit center
23 stop work and property hold notice printout, a copy of
24 which is attached in the testimony that we provided to
25 you, which provided no information about the property.

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1 I'm getting a little thirsty, so I'm having a little
2 trouble here. Through circumstance, our council
3 learned from a permit reviewer and Mr. Noble that the
4 stop work order was orally released, but the date of
5 this release was uncertain and the justification
6 undocumented.

7 In the absence of satisfactory answers
8 from DCRA, the Committee's council wrote to Mr. Clark,
9 Ms. Lewis, and Mr. Noble on March 17, 2003 - and you
10 have a copy of that letter - seeking (1) a meeting to
11 be attended by the addressees regarding the property
12 as well as enforcement of the overlay by DCRA in
13 general (2) written clarification of whether the stop
14 work order for the property had been released and if
15 so how and when it was released and if such release
16 was in accordance with the rules and regulations
17 governing DCRA and (3) immediate action to enforce the
18 stop work order if it was not lawfully released. This
19 meeting was finally held with DCRA on June 25, 2003
20 with the Chain Bridge Road/University Terrace
21 Preservation Committee.

22 At that meeting, DCRA agreed to turn over
23 its entire file on the property. A copy of the file
24 was prepared that very day for release to the
25 community. It was only at that point that we learned

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1 that the stop work order had been lifted as of March
2 21 in response to a request from Mr. Logan's counsel.

3 This was at roughly the same time that we were being
4 reassured by Mr. Kelly that Mr. Logan would be
5 pursuing his remedies with BZA.

6 Thus in reality, DCRA had been
7 surreptitiously negotiating with Mr. Logan while
8 allowing the community to believe that the stop work
9 order would remain in effect. Remarkably while Mr.
10 Logan's counsel has challenged that the appeal is
11 untimely, Appellants in effect filed their notice of
12 appeal as of June 1 before DCRA informed the Committee
13 of its decision not to enforce the stop work order.

14 Between the filing of their notice of
15 appeal and the filing of the issues to be decided,
16 Appellants worked closely with the Committee in
17 tracking down the necessary information to complete
18 the appeal. DCRA was unresponsive to requests to make
19 available full sized construction plans, which you
20 have heard a lot about, for the property that might
21 help Appellants develop their case.

22 However, in September 2003, and you have
23 heard about this, Appellants were able to obtain a set
24 of these documents from Logan directly that allowed a
25 more accurate calculation and assessment of impervious

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1 surface coverage clearly demonstrating a significant
2 violation of this overlay regulation. Upon review of
3 the drawings on September 15, 2003, the Appellants
4 promptly amended their statement of issues as
5 appropriate and necessary from the construction
6 documents. That the property owner has gone to great
7 lengths to conceal the true nature of his development
8 and the extent of his violations --

9 CHAIRPERSON GRIFFIS: Let me interrupt
10 you.

11 MS. LANIUS: Okay.

12 CHAIRPERSON GRIFFIS: We have all of this
13 in your submission.

14 MS. LANIUS: Yes, right, and I just wanted
15 to make it know because I don't think it was being
16 stated here today and make the distinction between the
17 Chain Bridge Road/University Terrace Preservation
18 Committee's involvement in this case and our
19 persistent involvement.

20 CHAIRPERSON GRIFFIS: When did your
21 organization know of violations in Zoning Regulations?

22 MS. LANIUS: We obtained the stop work
23 order. We contacted DCRA on February 10.

24 CHAIRPERSON GRIFFIS: February 10 you knew
25 that there were Zoning Regulation violations.

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1 MS. LANIUS: And we obtained the stop work
2 order on February 11.

3 CHAIRPERSON GRIFFIS: Why didn't you file
4 an appeal on February 11?

5 MS. LANIUS: Why did we not file? Because
6 we expected the stop work order to remain in place
7 because an enormous protected tree was leveled with a
8 bulldozer.

9 CHAIRPERSON GRIFFIS: Right. You had
10 correspondence with those that are now bringing the
11 appeal.

12 MS. LANIUS: We did not have
13 correspondence with them.

14 CHAIRPERSON GRIFFIS: Ever?

15 MS. LANIUS: No.

16 CHAIRPERSON GRIFFIS: You have never
17 talked to these folks. They just called you as a
18 witness.

19 MS. LANIUS: Written correspondence?

20 CHAIRPERSON GRIFFIS: Talking, walking
21 down, meeting when you have your dog walks, whatever
22 it is. Did you ever talk about this with these folks?

23 MS. LANIUS: Sure.

24 CHAIRPERSON GRIFFIS: When?

25 MS. LANIUS: When?

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1 CHAIRPERSON GRIFFIS: Sometime around
2 February 10?

3 MS. LANIUS: No, June, when they first
4 became interested in filing.

5 CHAIRPERSON GRIFFIS: You waited several
6 months to talk to the neighbors.

7 MS. LANIUS: Yes.

8 CHAIRPERSON GRIFFIS: Are they part of
9 your organization?

10 MS. LANIUS: They are part of the
11 households in the neighborhood.

12 CHAIRPERSON GRIFFIS: Do you have regular
13 meetings?

14 MS. LANIUS: No, we don't have regular
15 meetings.

16 CHAIRPERSON GRIFFIS: When was your last
17 meeting? How many people are involved in your
18 organization?

19 MS. LANIUS: Seventy households.

20 CHAIRPERSON GRIFFIS: Are they members or
21 it's just by residence?

22 MS. LANIUS: It's by residence.

23 CHAIRPERSON GRIFFIS: Your last meeting
24 was?

25 MS. LANIUS: I would have to look it up.

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1 I would say it was probably --

2 CHAIRPERSON GRIFFIS: Years ago?

3 MS. LANIUS: No, not years ago.

4 CHAIRPERSON GRIFFIS: Was it this month?

5 MS. LANIUS: No, maybe March.

6 CHAIRPERSON GRIFFIS: Did this issue come
7 up in your March meeting?

8 MS. LANIUS: The issue of the stop work
9 order came up.

10 CHAIRPERSON GRIFFIS: So the issue of the
11 zoning violations on this property came up in your
12 March meeting.

13 MS. LANIUS: Not the Appellants, no.

14 CHAIRPERSON GRIFFIS: What do you mean
15 "not the Appellants?"

16 MS. LANIUS: Not the issue of the
17 Appellants bringing a case.

18 CHAIRPERSON GRIFFIS: Did the zoning
19 violations come up in your March meeting?

20 MS. LANIUS: The issue of the stop work
21 order. Perhaps it did. I would have to look.

22 CHAIRPERSON GRIFFIS: Why don't we have
23 your minutes from that meeting and the attendees?

24 MS. LANIUS: Yes.

25 MEMBER ZAIDAIN: Mr. Chair, I have a

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1 question.

2 CHAIRPERSON GRIFFIS: Yes.

3 MEMBER ZAIDAIN: According to the timeline
4 I'm looking at here, the stop work order was lifted
5 March 21. Then March 24 construction commences. How
6 come your organization didn't file an appeal after
7 that?

8 MS. LANIUS: Excuse me. I should clarify
9 that none of the Appellants were at the meeting.

10 CHAIRPERSON GRIFFIS: Were they invited?

11 MS. LANIUS: No, they are not --

12 CHAIRPERSON GRIFFIS: They are members,
13 aren't they?

14 MS. LANIUS: We have an executive
15 committee.

16 MEMBER ZAIDAIN: No, they are not members.
17 He has said that a couple of times.

18 MS. LANIUS: It's not a membership
19 organization. We have an executive committee, and
20 they are not members of the executive committee.

21 CHAIRPERSON GRIFFIS: You said there were
22 70 members.

23 MS. LANIUS: No, I said there are 70
24 households.

25 CHAIRPERSON GRIFFIS: That are somehow

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1 affiliated with the Terrace Preservation Committee.

2 MS. LANIUS: And that it's not a
3 membership organization.

4 CHAIRPERSON GRIFFIS: Do you represent
5 them?

6 MS. LANIUS: We don't have dues.

7 CHAIRPERSON GRIFFIS: Do you represent
8 these 70 households?

9 MS. LANIUS: Yes, we do, but it's not a
10 membership organization. People support it by paying,
11 not dues, but they support it by paying for us to
12 bring cases like this. We didn't bring this case
13 because we have such a deficit right now because we
14 have so many violations before the BZA.

15 CHAIRPERSON GRIFFIS: Okay.

16 MS. LANIUS: That's the answer to why we
17 didn't bring this case.

18 MEMBER ZAIDAIN: There's my answer.

19 MEMBER ETHERLY: Mr. Lanius, could you
20 clarify to your recollection when the FOIA request was
21 made?

22 MS. LANIUS: I'm sorry. Could you repeat
23 that?

24 MEMBER ETHERLY: Do you have recollection
25 of the rough time or month in which the FOIA request

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1 was made to DCRA?

2 MS. LANIUS: Yes, early April.

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

5 MEMBER MILLER: Could you address how it
6 is that you wouldn't know or at least suspect that the
7 stop work order had been lifted if construction is
8 going on at the site?

9 MS. LANIUS: I didn't say I didn't suspect
10 it wasn't lifted.

11 MEMBER MILLER: Let's just go through your
12 testimony that you were waiting for DCRA to give you a
13 summation as to why it had been lifted.

14 MS. LANIUS: We tried to find out. We
15 never received any answer from DCRA. We kept trying
16 to find out why it had been lifted. We kept trying to
17 find out. After Bob Kelly resigned, the communication
18 went dead with DCRA. It took from the time of his
19 resignation until June 25 for us to have any answers.

20 MEMBER MILLER: What were you trying to
21 find an answer to?

22 MS. LANIUS: Why they had lifted it
23 because we thought there was no basis for the lifting
24 of the stop work order.

25 CHAIRPERSON GRIFFIS: But you thought

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1 there was basis for the stop work order.

2 MS. LANIUS: Exactly.

3 CHAIRPERSON GRIFFIS: You knew that on or
4 about February 10.

5 MS. LANIUS: Well, I'm sorry. I don't
6 understand the question.

7 CHAIRPERSON GRIFFIS: That's okay. You
8 already testified to that. Mr. Zaidain?

9 MEMBER ZAIDAIN: Nothing.

10 CHAIRPERSON GRIFFIS: Any other questions?
11 Mr. Epting, cross examination?

12 MS. LANIUS: And we weren't even sure that
13 the stop work order had been lifted.

14 CHAIRPERSON GRIFFIS: Yes, we're talking
15 way too much about the stop work order. Let's move on
16 from that. Does the ANC have any cross examination?

17 MS. GATES: I am going to cover this in my
18 testimony, but I will do it in direct. Ms. Lanius, do
19 you recall placing a phone call to me in early March?

20 MS. LANIUS: Yes.

21 MS. GATES: Can you describe for the Board
22 what that was about?

23 MS. LANIUS: I was sitting in Dick
24 England's office, and he asked me to call you.

25 MS. GATES: Regarding?

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1 CHAIRPERSON GRIFFIS: Get to the heart of
2 the conversation quickly, shall we? What was the
3 conversation about? What did you say? Why did you
4 call her?

5 MS. GATES: Why did you call me?

6 MS. LANIUS: He asked me to call you
7 because he said Alma Lewis should look into what's
8 happening at the site at 3101 Chain Bridge Road.

9 MS. GATES: Had a tree had been cut down?

10 MS. LANIUS: Yes.

11 MS. GATES: Had you had difficulty at that
12 point with DCRA?

13 MS. LANIUS: Yes.

14 MS. GATES: Did you ask me to contact DCRA
15 on your behalf to try to set up a meeting with Denzil
16 Noble?

17 MS. LANIUS: Yes.

18 MS. GATES: Were we successful?

19 MS. LANIUS: No.

20 MS. GATES: That's all.

21 CHAIRPERSON GRIFFIS: Whose office were
22 you in?

23 MS. LANIUS: I was --

24 MS. GATES: Richard England who was a
25 neighbor on Chain Bridge Road.

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1 CHAIRPERSON GRIFFIS: So in March, you
2 knew that there was something wrong, okay.

3 MS. LANIUS: I knew that we weren't able
4 to get with DCRA.

5 CHAIRPERSON GRIFFIS: DCRA have any cross
6 examination questions? None, okay. Thank you very
7 much. We do have your written submission. We are
8 going to take this in, Mr. Sailer, as your witness's
9 statements and evidence presented to that, is that
10 correct?

11 MR. SAILER: I'm sorry. I didn't hear
12 that.

13 CHAIRPERSON GRIFFIS: Just say yes. It
14 will make it easier.

15 MR. SAILER: Sure.

16 CHAIRPERSON GRIFFIS: Actually turn on
17 your microphone. In all seriousness --

18 MR. SAILER: I would like to say something
19 about the continuance if I may.

20 CHAIRPERSON GRIFFIS: Okay, but hold on
21 just a moment. I want to clarify this for you because
22 you just presented a witness. We are accepting into
23 the record which we had not done previously her
24 statement and her tabbed evidence attached to that, is
25 that correct?

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1 MR. SAILER: Are you referring to Ms.
2 Lanius?

3 CHAIRPERSON GRIFFIS: That's correct.

4 MR. SAILER: Yes.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. SAILER: May I be heard for just a
7 moment on the question of continuance?

8 CHAIRPERSON GRIFFIS: The one that we
9 granted.

10 MR. SAILER: Well, I mean there's timing.

11 CHAIRPERSON GRIFFIS: Go ahead.

12 MR. SAILER: We feel extremely eukered by
13 this situation. We got our statement on time that we
14 waited for theirs to come --

15 CHAIRPERSON GRIFFIS: So far my
16 understanding of the record is according to our rules
17 and procedures, so there's no issue there.

18 MR. SAILER: All right. It's not an
19 issue. I want to make a few remarks. I would request
20 two things; either that the continuance go to a nearby
21 date as possible or if it doesn't that the intervenor
22 be put specifically on notice that if he builds up a
23 storm between now and then and then claims that his
24 father and mother are dead but he is an orphan he not
25 be sympathetically received. Third and last and then

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1 you will have seen the last of me for a while, we
2 would like a decent time to respond to their
3 statement.

4 CHAIRPERSON GRIFFIS: Which one, the reply
5 statement?

6 MR. SAILER: The reply. I don't know how
7 many weeks they will have had by this time, and I
8 would like two weeks.

9 CHAIRPERSON GRIFFIS: Two weeks to reply
10 to their reply.

11 MR. SAILER: To their answer, yes. We
12 filed. They are going to file. Then I want two weeks
13 to respond to them.

14 CHAIRPERSON GRIFFIS: No, they filed
15 already.

16 MR. SAILER: They have not filed, to the
17 best of my knowledge, and I have never seen a
18 preliminary statement by them, anything.

19 CHAIRPERSON GRIFFIS: Have you seen their
20 filings to date?

21 MR. SAILER: Today?

22 CHAIRPERSON GRIFFIS: To date, the filings
23 in the record, their motion for leave to intervene and
24 dismiss.

25 MR. SAILER: Yes, I have seen that. I

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1 have not seen the reply to that.

2 CHAIRPERSON GRIFFIS: I'm not requesting
3 anything else of filing from them so there's nothing
4 to reply to. We kept the record open for you to
5 submit a reply to their --

6 MR. SAILER: Let me put it another way.
7 Give me a week or two after your notice of the
8 continuance date to lie down and try to recover before
9 I have to come to that. Is my request clear?

10 CHAIRPERSON GRIFFIS: Perhaps.

11 MR. SAILER: I would like you to let me
12 know --

13 CHAIRPERSON GRIFFIS: What I'm going to do
14 is this. This is not new territory to us. It may be
15 for others. These are three logical things that we
16 always have requests of for every appeal. Let me lay
17 it out to what we're going to do. If there's problems
18 with that, we'll assess it at that point.

19 MR. SAILER: Fine.

20 CHAIRPERSON GRIFFIS: First of all, in
21 terms of notification of continuing construction, by
22 filing the appeal, the owner/builder/whoever is on
23 notice that they are building at their own risk. I
24 don't think anyone comes into this happy, but no one
25 comes under the false belief that if they get it built

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1 that will remedy the appeal. That being said, first
2 of all, we are going to set a decision-making on the
3 motion of timeliness.

4 We are going to set that for our first
5 meeting in November which is the 4th if I'm correct.
6 It will be in the morning. That is a public meeting.

7 A public meeting is where the Board deliberates on
8 the record which has been established. The record we
9 are looking at is only that which went to the
10 timeliness and the arguments of timeliness. There is
11 no additional testimony. There is no public
12 participation. You are absolutely welcome to be here
13 and watch us and listen to us, but that's what will be
14 happening. It's just a bunch of us talking.

15 MR. SAILER: I apologize for not hearing
16 the date.

17 CHAIRPERSON GRIFFIS: November 4. Don't
18 worry. If you miss something, I'm going to run
19 through this very quickly. Then it will be said
20 probably three or four more times by the time you get
21 out of here.

22 MR. SAILER: Thank you.

23 CHAIRPERSON GRIFFIS: So that being said,
24 we'll set that for decision-making. Now, submissions
25 to fill the record for that. First of all, we have

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1 the request for FOIA which is to be put into the
2 record. We also have the case submissions of which we
3 are accepting.

4 I'm going to keep the record open if the
5 ANC can in a timely manner with their meetings and
6 schedule create a position on the motion and any
7 attendant information that they want to submit
8 regarding the timeliness motion. Quite frankly, in
9 the expeditious nature of that, we're going to accept
10 it unless there is great objection. We won't have
11 responses to that. So we're just going to take it as
12 it is. I guess what I would say is if you want to
13 affect that go to the public meeting with the ANC.

14 MS. BAILEY: Mr. Chairman, there was some
15 discussion of the minutes of the March 2003 meeting of
16 the Chain Bridge Road/University Terrace Preservation
17 Committee.

18 CHAIRPERSON GRIFFIS: Thank you very much,
19 Ms. Bailey. That's exactly correct. That's what I
20 had in my notes. Do you have others?

21 MS. BAILEY: No, sir, that was it.

22 CHAIRPERSON GRIFFIS: Additionally first
23 of all, there have been several communications that
24 have been discussed here regarding communications with
25 DCRA. A critical one will be Mr. Levi's

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1 communication. I would also ask if you have the
2 records - and I would hope you would - that any other
3 requests for information that were put in and any
4 responses to that can be submitted in.

5 Now, of course, an important aspect of
6 anything submitted into the record as you are all
7 participants means you need to serve everyone else.
8 So the copies come into the Office of Zoning, and you
9 are to also serve DCRA and the owner. They likewise
10 will serve you. So before you guys leave, you still
11 have to talk to each other. Mr. Sailer, this is very
12 important. You need to let DCRA and also Mr. Epting
13 know what is the best way to serve you and where. Is
14 that clear?

15 MR. SAILER: Sure.

16 CHAIRPERSON GRIFFIS: Unless that's
17 already known in which case I'm being redundant.
18 Anything else? What else do we have on the
19 submissions for the decision-making on the 4th?

20 MS. GILBERT: How about a deadline for
21 submissions? I think that's what Mr. Sailer was
22 trying to get to.

23 CHAIRPERSON GRIFFIS: Indeed.

24 MS. GILBERT: I think what he was really
25 saying, as I understood was his concern, was that if -

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CHAIRPERSON GRIFFIS: I understand. Submissions for that information, which doesn't seem that cumbersome at this point, is going to be the last week. It is a week from today, is that correct?

MS. BAILEY: Mr. Chairman, we are looking for a submission date.

CHAIRPERSON GRIFFIS: Yes.

MS. BAILEY: To get the maximum amount of time, Wednesday the 29th.

CHAIRPERSON GRIFFIS: Close of business, 5:00 p.m.

MS. BAILEY: 3:00 p.m.

CHAIRPERSON GRIFFIS: 3:00 p.m. Is that clear? Submissions are due the 29th. That's Wednesday by 3:00 p.m.

MR. SAILER: I'm sorry. I didn't hear.

DR. WOLF: We got it. Thank you.

CHAIRPERSON GRIFFIS: Wednesday at 3:00 p.m. Now, I will be absolutely clear. That's just not a false deadline. If that's not in to this office by then, the Board doesn't see it. We don't work here. We have jobs outside. We're volunteers. It's these hard-working folks down here that have to put packages together to get it to us. If it's not here

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1 and they don't put it in the package, we don't see it.

2 If we don't see it, we don't deliberate on it, is
3 that clear? It's due Wednesday at 3:00 p.m.

4 MS. BAILEY: Mr. Chairman, were you going
5 to set a date for --

6 CHAIRPERSON GRIFFIS: Yes, thank you. If
7 needed after our deliberation on the motion we need to
8 then get into the merits of the appeal, we are setting
9 aside a scheduled calendar date so that we can all put
10 that down. It probably won't be until '06 I think.
11 Actually what do you have, Ms. Bailey?

12 MS. BAILEY: You are correct, Mr.
13 Chairman, January 2004. The next full afternoon in
14 January will be the 27th. There are mornings
15 available, but the full afternoon will be January 27.

16 (Pause.)

17 CHAIRPERSON GRIFFIS: There it is, January
18 27.

19 MS. GATES: May I request that the ANC be
20 served on all documents as well please?

21 CHAIRPERSON GRIFFIS: No request needed.
22 It's required.

23 MS. GATES: Thank you. I'm not sure
24 everyone knows that.

25 CHAIRPERSON GRIFFIS: Indeed. Actually I

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1 was passed a note to mention that, so I was going to
2 get to it but I appreciate you bringing it to my
3 attention. Of course, the ANC is a participant in
4 this and therefore needs to be served also in any
5 information. From the top, we're going to meet again
6 November 4 to decide the motion on timeliness.
7 Submissions should be known.

8 If there are questions before Wednesday at
9 3:00 p.m. when all of this is due, you should call the
10 Office of Zoning. Don't be frivolous with that. They
11 have a lot of work to do. But clarifications
12 obviously the staff at Office of Zoning will assist
13 you and ably so. After that motion is decided, it
14 will be clear and definitive of what the appeal and
15 the basis of the appeal is or isn't. Then we will
16 meet again to call the appeal on January 27, '04.
17 Questions?

18 MR. SAILER: I'm sorry to be thick. Are
19 we supposed to be there, should we be there on
20 November 4 or it doesn't make any difference?

21 CHAIRPERSON GRIFFIS: That's an
22 interesting question. You are not required. There is
23 no participation from you. If you want to hear how
24 the Board derives its deliberation and decision, it's
25 very important.

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1 MR. SAILER: All right.

2 CHAIRPERSON GRIFFIS: Clearly there will
3 be an order issued based on the motion. You will hear
4 our arguments and debate and all of that.

5 MR. SAILER: The second would be I promise
6 that I will wear a hearing aid next time. There was a
7 date before November 4 where something happened. I
8 missed it.

9 CHAIRPERSON GRIFFIS: Okay. That's next
10 Wednesday which is when the submissions are due by
11 3:00 p.m.

12 MR. SAILER: Submissions of?

13 CHAIRPERSON GRIFFIS: That's the FOIA
14 request, the case summaries, the ANC position if there
15 is any, your submission that is the reply to the reply
16 of the submission.

17 MR. SAILER: I was hoping you would say
18 that.

19 CHAIRPERSON GRIFFIS: Yes, and I think
20 that's it. Everyone clear?

21 MS. GILBERT: I think I have one question.

22 CHAIRPERSON GRIFFIS: Ms. Gilbert?

23 MS. GILBERT: No, that's okay. It does
24 not matter. I realized it does not matter.

25 CHAIRPERSON GRIFFIS: All right. Everyone

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1 else clear? Thank you very much. We can adjourn the
2 afternoon session of 21 October 2003.

3 (Whereupon, the above-entitled matter
4 concluded at 5:21 p.m.)

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