

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY,

FEBRUARY 3, 2004

+ + + + +

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 Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice Chairperson
CURTIS L. ETHERLY, JR.	Board Member
DAVID A. ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

JOHN PARSONS	Commissioner
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Acting Secretary
BEVERLY BAILEY	Office of Zoning
JOHN NYARKU	Office of Zoning

D.C. OFFICE OF CORPORATION COUNSEL:

MARY NAGELHOUT, ESQ.
JANICE SKIPPER, ESQ.

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

9:46 a.m.

CHAIR GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the 3rd of February 2004 Public Hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis. I am Chairperson. Joining me today is Vice Chair Ms. Miller and Board Member Mr. Etherly. Representing the National Capital Planning Commission with us today is Mr. Zaidain and representing the Zoning Commission is Mr. Parsons. I also say a very good morning to Ms. Bailey from the Office of Zoning and Mr. Moy, also with the Office of Zoning.

Copies of today's agenda are available to you. I believe they are located on the wall where you entered into the hearing room. Unfortunately, they may not be of much use as we have juggled our schedule to accommodate quite a bit. First, let me just make the announcement that we will be calling the continued appeal, first, in the morning. As many of you may be aware, our decisions are scheduled for first in the morning on the first Tuesday of the month.

We will be moving our decision making, our Public Meeting to the afternoon in order to accommodate Case No. 17054. We have one other. Well,

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1 there it is. We'll pick that up in the afternoon.
2 Also, please, be advised that there are several
3 things. First of all, all Public Hearings and
4 Meetings before the Board of Zoning Adjustment are
5 recorded. They are now recorded in two fashions.
6 One, and most importantly is the recorder, who is
7 sitting to my right, which will create the transcript
8 and part of the record.

9 I ask several things of people. First of
10 all, when coming forward to fill out two witness
11 cards. Witness cards are located at the table where
12 you entered into, also the table in front of us. If
13 you are anticipating or will be presenting to the
14 Board, you will need to have those filled out and
15 given to the recorder prior to coming forward to speak
16 to the Board.

17 Additionally, we are now being broadcast
18 live all our sessions on the Office of Zoning's
19 website, and so attendant to creating an orderly and
20 civil process, we ask that people refrain from making
21 any noises or actions that might be disruptive in the
22 hearing room. Of course, it should also be known that
23 any comments made off a microphone will not be part of
24 the record, which goes to a very important point.
25 When coming forward to speak to the Board, you will

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1 need to, first, and only the first time, state your
2 name and your address for the record.

3 You will also need to speak into a
4 microphone. That microphone must be on. We ask that
5 people turn off the microphone when they are finished
6 speaking, so that we don't have any feedback that
7 might be disruptive or we might, in fact, miss
8 something of great import as it should be put into the
9 record.

10 The order of procedure for the appeal,
11 which we will be calling first in the morning, will be
12 first of all, the statement of witnesses for the
13 appellant. Second would be, of course, the Government
14 or the Zoning Administrator's case presentation.
15 Third would be the case of the owner/lessee or any
16 intervenor or party in the appeal. Fourth would be
17 the ANC and their presentation in case. Fifth would
18 be any other intervenor or party in the appeal as has
19 been established by the Board. And finally, we would
20 have rebuttal and closing statement by the appellant.

21 It is important to note that the appellant
22 is afforded that opportunity for rebuttal and closing.

23 Others should conclude their cases during their time
24 and their presentation. Pursuant to 3117.4, and I
25 believe 3117.5, the Board has full authority to set

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1 time limits on cases. We have and I will reiterate
2 now set time limits on Case No. 17054. It is 30
3 minutes for each case presentation. I will go through
4 more specifics as needed. Of course, individuals that
5 would be testifying that may not be directly a part of
6 the morning's case, but, of course, individuals would
7 be allowed three minutes.

8 The record will be closed at the
9 conclusion of each case, except for any material that
10 the Board specifically requests. We will be very
11 specific on what is to be submitted and when it is to
12 be submitted into the Office of Zoning. Once that is
13 received, of course, the record would then be closed
14 and no other information would be accepted into the
15 record. The Sunshine Act requires that this Board
16 conduct all its procedures in the open and before the
17 public. This Board may, however, consistent with the
18 Sunshine Act and its rules and procedures enter into
19 Executive Session.

20 Executive Session is for the purposes of
21 reviewing the record or deliberating on a case. The
22 decision of this Board in all cases must be based
23 exclusively on the record, which is why it is so
24 important if you want something on the record to say
25 it into a microphone and put it in the record.

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1 Additionally, though, we ask that people present today
2 not engage Board Members in any type of conversation,
3 so that we do not give the appearance of receiving
4 information that is not officially within the record.

5 I believe we can, at this point, take up
6 any preliminary matters. Preliminary matters are
7 those which relate to whether a case will or should be
8 heard today, such as requests for postponements,
9 continuances or withdrawals or whether proper and
10 adequate notice of a case has been provided. If you
11 believe the Board should not hear any cases on its
12 agenda today or you believe that we should not for
13 some reason go forward, I would ask that you come
14 forward, have a seat at the table as an indication of
15 having a preliminary matter.

16 Let me first go to Ms. Bailey from the
17 Office of Zoning and see if she has any preliminary
18 matters that she is aware of for the Board.

19 MS. BAILEY: Mr. Chairman, and to
20 everyone, good morning. There is a preliminary matter
21 associated with Appeal No. 17054. There is a request
22 for continuance from the Department of Consumer and
23 Regulatory Affairs.

24 CHAIR GRIFFIS: Okay. I say we take that
25 up after we call the case. Yes? Can you turn that

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1 microphone on?

2 MR. SHER: For the record, my name is
3 Steven E. Sher, the director of Zoning Services with
4 Holland and Knight. I just wanted to clarify, you
5 will not be taking any cases for decision until 1:00?

6 CHAIR GRIFFIS: After 1:00, yes.

7 MR. SHER: Okay. I just wanted to make
8 sure.

9 CHAIR GRIFFIS: Okay. Good. Any other
10 preliminary matters at this time? If not, I don't see
11 any indication, why don't we call the first case of
12 the morning then?

13 MS. BAILEY: Appeal No. 17054 of Henry P.
14 Sailer and others, pursuant to 11 DCMR 3100 and 3101,
15 from the administrative decision of the Zoning
16 Administrator in the issuance of Building Permit No.
17 B448548 to Brian Logan dated January 29, 2003, for the
18 construction of a new single-family detached dwelling.

19 Appellant alleges that the Zoning
20 Administrator erred by issuing the building permit
21 without applying the applicable provisions (subsection
22 1567, Lot Occupancy and Ground Coverage Restrictions,
23 subsection 1568, Tree Removal Restrictions, etcetera)
24 of the Chain Bridge Road/University Terrace Overlay.
25 The Chain Bridge Road/University Terrace Overlay, R-1-

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1 A Zone property, is located at 3101 Chain Bridge Road,
2 N.W., also known as Square 1427, Lot 870.

3 Mr. Chairman, the witnesses were sworn in
4 previously, so there is no need to do so, unless there
5 is someone here testifying who has not been sworn
6 previously who needs to be sworn in. The case is
7 ready, sir.

8 CHAIR GRIFFIS: Good. Thank you very
9 much. Just to be clear, has anyone not been sworn in
10 that will be giving testimony?

11 UNIDENTIFIED SPEAKER: Yes.

12 CHAIR GRIFFIS: Okay. If you wouldn't
13 mind, if you would just stand and give your attention
14 to Ms. Bailey, even if you are anticipating possibly
15 giving testimony, we just need to swear you in. As
16 Ms. Bailey said, those who were sworn in previously,
17 it does carry over, rain, shine, snow, whatever it is.
18 Okay.

19 (The witnesses were sworn)

20 MS. BAILEY: Thank you.

21 CHAIR GRIFFIS: Very well. Let's go. Is
22 the appellant ready? There I am.

23 MR. ZIMMITTI: Mr. Chairman, there is a
24 preliminary matter.

25 CHAIR GRIFFIS: I believe there is. Let's

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1 bring it up. That's right. Stay comfortable, because
2 you're going to have to respond.

3 MR. ZIMMITTI: Sure.

4 MS. BELL: Good morning. My name is Lisa
5 Bell. I am the senior counsel at DCRA in the Office
6 of the General Counsel. Laurie Gilbert, who was
7 originally assigned this particular case, will not be
8 present today. She had another conflict. She filed a
9 motion for a continuance in this case, which I think
10 the Board Members have before them, as well as a
11 supplement to her motion for a continuance.

12 CHAIR GRIFFIS: Right. Now, the
13 supplement, if I'm clear, indicated that because the
14 appellant now has a high powered attorney, not their
15 words of course, that you needed more time to prepare?

16 MS. BELL: I think her issue is, generally
17 speaking, when they are represented by counsel, OCC
18 provides representation for DCRA.

19 CHAIR GRIFFIS: I see.

20 MS. BELL: But she is familiar with the
21 case and I, in an attempt to pinchhit for her today,
22 have reviewed the case.

23 CHAIR GRIFFIS: Okay. So you're ready to
24 go?

25 MS. BELL: As I said, if the Board

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1 believes a continuance is appropriate, I understand
2 that Mr. Logan's counsel takes no position with regard
3 to the continuance. If Ms. Gilbert's presence and her
4 expertise in the case is needed, then we are prepared
5 to --

6 CHAIR GRIFFIS: Okay. Good. Yes.

7 MR. ZIMMITTI: Mr. Chairman, my name is
8 Andrew Zimmitti of the Law Firm of Patton Boggs, LLP.

9 CHAIR GRIFFIS: How do you spell the last
10 name?

11 MR. ZIMMITTI: Z-I-M-M-I-T-T-I.

12 CHAIR GRIFFIS: Zimmitti, T-T-I. Is that
13 correct?

14 MR. ZIMMITTI: Yes, sir.

15 CHAIR GRIFFIS: Okay. Good.

16 MR. ZIMMITTI: Patton Boggs, LLP, 2550 M
17 Street, N.W., Washington, D.C. 20037. The phone
18 number is (202) 457-6000. Of course, representing the
19 appellants. The appellants' position on the motion
20 for continuance is that we consent to it. Yesterday,
21 my partner, Mr. Chew, had a conversation with Ms.
22 Gilbert and agreed essentially to her motion on its
23 grounds.

24 CHAIR GRIFFIS: Are you ready to go today?

25 MR. ZIMMITTI: We are otherwise ready to

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1 go.

2 CHAIR GRIFFIS: But you don't have any
3 objection to another continuance?

4 MR. ZIMMITTI: No, we do not.

5 CHAIR GRIFFIS: Mr. Epting?

6 MR. EPTING: John Epting, Shaw Pittman. I
7 feel a little bit of a bind, because we're ready to go
8 again. We were ready last week. But I feel like I
9 need to defer. I mean, I requested to go ahead last
10 week and you wanted to wait for DCRA. I feel a little
11 bit sort of practical reality that if you want de jure
12 on this, I guess, I feel like I'm in a bind.

13 CHAIR GRIFFIS: Okay.

14 MR. EPTING: But we're ready to go.

15 CHAIR GRIFFIS: Understood. Board Members
16 questions?

17 VICE CHAIR MILLER: Mr. Epting, is there a
18 prejudice for delaying this to the appellant? To you,
19 to the intervenor, to your client?

20 MR. EPTING: Other than just it's still
21 hanging out there for three or four months and we have
22 been ready a number of times to go, I don't think
23 there is any actual injury, other than the fact that
24 we keep getting prepared.

25 CHAIR GRIFFIS: Right.

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1 MR. EPTING: My client will probably kill
2 me for saying that, but I think that's true.

3 CHAIR GRIFFIS: Right. Others?
4 Questions, clarifications? I'm inclined not to grant
5 the motion for continuance. I think it is well said
6 that we have actually gone through several of these.
7 It was called in October. I think we delayed last
8 week to this week in order to have representation by
9 the Government. Clearly, the fact of the matter is,
10 everyone's schedule doesn't always fit, and we have
11 juggled, first of all, Board Members's schedules in
12 order to accommodate this.

13 We've redone our entire agenda for today.

14 And we lost an entire afternoon last week in order to
15 accommodate this. I don't see any harm coming if we
16 move ahead today, I think we can do that
17 expeditiously. Unless others have objection or
18 additional comments on that?

19 UNIDENTIFIED SPEAKER: No objection.

20 CHAIR GRIFFIS: Very well. Then I'll take
21 is as a consensus of the Board to deny the motion for
22 continuance and the case has been called. So let's
23 move ahead. Good. When you are ready.

24 MR. ZIMMITTI: Good morning, Mr. Chairman,
25 Members of the Board. The reasons for this appeal are

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1 as follows: First, the June 13, 2003 revised permit,
2 which has a pervious surface driveway from the
3 intervenor's accessory building to the main driveway
4 and that is as depicted on Exhibit F to the
5 intervenor's January 22nd opposition brief, was issued
6 in error by the appellee, DCRA, because we maintain
7 pursuant to applicable Zoning Regulations,
8 specifically section 2117.4, a driveway to a required
9 parking space must be impervious.

10 We respectfully submit to the Board that
11 intervenor's interpretation of Chapter 21 of the
12 Zoning Regulations, which is that an impervious
13 surface driveway to an accessory building is not
14 required, see, intervenor's opposition brief at page
15 9, is plainly wrong. To the contrary, the impervious
16 driveway requirement of section 2117.4 applies to
17 intervenor's accessory parking space for the following
18 two reasons: One, because the accessory building is
19 greater than 600 feet square, it falls under the "all
20 other uses" category in the table set forth in section
21 2101.1, and therefore requires a parking space.

22 And, two, even assuming for the sake of
23 argument that the accessory building does not require
24 a parking space pursuant to the table in section
25 2101.1, which appellants will dispute, the provisions

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1 of section 2117.4 also apply to accessory parking
2 spaces pursuant to the Rules of Interpretation section
3 2118.9. Section 2118.9 generally requires that all
4 accessory parking spaces comply with the provisions of
5 Chapter 21. And that would include section 2117.4.

6 In support of the appellants' position, we
7 offer the expert opinion letter of Mr. Edgar Nunley,
8 the former chief of the Zoning Review Branch of the
9 DCRA, a position that Mr. Nunley held for 17 years.
10 We submit to the Board that based upon Mr. Nunley's
11 extensive experience interpreting and applying the
12 D.C. Zoning Regulations as chief of the Zoning Review
13 Branch for the DCRA, it qualifies him as an expert to
14 testify in matters of interpretation concerning the
15 Zoning Regulations at issue in this appeal.

16 Mr. Nunley has reviewed the relevant
17 findings in this appeal, intervenor's application for
18 the June 13, 2003 revised permit, relevant
19 correspondence from the DCRA and, particularly, the
20 intervenor's explanation set forth in his opposition
21 brief at page 9.

22 CHAIR GRIFFIS: Let me interrupt you
23 quickly.

24 MR. ZIMMITTI: Yes, Judge.

25 CHAIR GRIFFIS: Are you calling Mr. Nunley

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1 as a witness?

2 MR. ZIMMITTI: No, sir. We have a written
3 statement from Mr. Nunley.

4 CHAIR GRIFFIS: You're just issuing a
5 written statement.

6 MR. ZIMMITTI: Which we would submit.

7 CHAIR GRIFFIS: And you are wanting us to
8 establish him as an expert witness, though, in order
9 to look at his letter as such?

10 MR. ZIMMITTI: And his letter, which is a
11 declaration, contains an explanation of his background
12 education.

13 CHAIR GRIFFIS: Right.

14 MR. ZIMMITTI: And experience with DCRA.
15 If you would like, we can submit that to the Board?

16 CHAIR GRIFFIS: Yes, that would be good.
17 I don't think we have ever entertained establishing a
18 letter as an expert witness.

19 MR. ZIMMITTI: Mr. Nunley was unable to
20 appear today.

21 CHAIR GRIFFIS: I understand.

22 MR. ZIMMITTI: So we're doing what we can.

23 CHAIR GRIFFIS: Okay. And do we have --
24 thank you very much.

25 MR. EPTING: Mr. Chair, again, we would

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1 make -- John Epting. I would object to the
2 submission. Mr. Nunley is not going to have the
3 opportunity to listen to either Mr. Paul or our expert
4 witness, Mr. Lourenco about their interpretation of
5 the Zoning Regulations. I mean, that could be taken
6 for face value, I think, but I also can't cross
7 examine Mr. Nunley. So I would object to its
8 submission.

9 MR. ZIMMITTI: Our response to that, Mr.
10 Chairman, is that intervenor in his last submission
11 has also submitted new evidence in the form of
12 statements from witnesses that we don't have the
13 opportunity to cross examine ourselves.

14 CHAIR GRIFFIS: Yes, we're not going to
15 battle who did what. Let's stick to the issue at
16 hand.

17 MR. ZIMMITTI: So here's what --

18 CHAIR GRIFFIS: I mean, it brings up an
19 important piece which is not unfamiliar to the Board
20 and the fact if there is a submission or written
21 statement, especially if it's being asked to hold some
22 sort of higher standard of expert witness submission.

23 How is it to be cross examined? I think the Board
24 has always looked to the fact that submissions are
25 appropriate to be written in that, as appropriate, to

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1 fill out the record as we are not able to have Mr.
2 Nunley here exactly or in person.

3 What has been appropriate before is that
4 it is adopted and affirmed as the testimony by one of
5 your witnesses, in which case it would be open to
6 cross examination. By that, I think the Board is
7 capable enough of weighing each side with the
8 information that we receive, so if we do, in fact,
9 receive contrary testimony, I think we can weigh that.

10 Let me hear from DCRA on the submission of Mr.
11 Nunley's letter.

12 MS. BELL: Sir, that's actually the
13 Government's position. The Government would object to
14 the declaration and actually ask that it be stricken,
15 removed from the record, because I note here that Mr.
16 Nunley in addition to calling himself an expert and
17 several different points in the declaration takes
18 issue with the DCRA's Government witness and refers to
19 his expertise.

20 What his testimony, I assume, will be,
21 since Mr. Nunley is not here to hear his testimony,
22 and it denies us not only the opportunity to cross
23 examine him with regard to his opinions, but cross
24 examine him with regard to his experience at DCRA, as
25 well as his performance in his role there when he

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1 worked there. So we would not only ask that it not be
2 admitted, but that it would also be withdrawn
3 completely.

4 CHAIR GRIFFIS: What portion were you
5 talking about where he was --

6 MS. BELL: In section 4 and section 5 he
7 goes on to discuss what he perceives to be the skill
8 level of the Government's witness, which I believe is
9 inappropriate for this type of forum.

10 CHAIR GRIFFIS: All right.

11 MR. ZIMMITTI: Mr. Chairman, we would
12 submit that it is essentially a statement of fact as
13 to the Government witness' status within DCRA and
14 that's essentially what that statement in paragraph 5
15 of the declaration sets forth. Furthermore, we agree
16 with the Board's position that the Board is fully
17 capable of weighing the value of this testimony in
18 written form, absent cross examination, and we ask
19 that the Board admit it, but that the Board grant it
20 the weight that the Board feels fit based on
21 circumstances.

22 CHAIR GRIFFIS: Oh, gosh. Yes, I agree, I
23 think. And let me hear from other Board Members. We
24 have heard from each side. Additional?

25 BOARD MEMBER ZAIDAIN: Mr. Chair?

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1 CHAIR GRIFFIS: Yes.

2 BOARD MEMBER ZAIDAIN: I agree. First of
3 all, I think if this declaration is going to have any
4 sort of legal binding, doesn't it, correct me if I'm
5 wrong, have to be certified?

6 CHAIR GRIFFIS: By a notary?

7 BOARD MEMBER ZAIDAIN: You know, that's a
8 general question, but, you know, I mean, this is a
9 submission of somebody's, you know, of a witness'
10 position and I think we can take it as such. I don't
11 see us granting it any sort of great weight, although
12 I still struggle on what exactly great weight can mean
13 sometimes.

14 CHAIR GRIFFIS: Okay.

15 BOARD MEMBER ZAIDAIN: I agree with the
16 appellant in that I think we should accept it and take
17 it for what it is.

18 MR. EPTING: John Epting. The only thing
19 I would say about that is that there are facts in
20 here, but he also states in the last paragraph that
21 "It is my opinion that Mr. Paul is not qualified."

22 CHAIR GRIFFIS: That's correct. Okay.

23 MR. EPTING: And that is not a statement
24 of fact.

25 CHAIR GRIFFIS: Indeed. Others on the

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1 Board? Any concern about accepting this into the
2 record? Mr. Parsons?

3 MS. BELL: Well, I would also like to add
4 his --

5 CHAIR GRIFFIS: Actually, I need to hear
6 from Mr. Parsons first.

7 COMMISSIONER PARSONS: I'm troubled by
8 this. I don't ever recall this kind of a declaration
9 being admitted into a record of a case without the
10 opportunity for the Board and others to cross examine
11 the witness. I think it's a dangerous precedent.

12 CHAIR GRIFFIS: Okay.

13 COMMISSIONER PARSONS: Unless others say
14 oh, we do this all the time, I've certainly never seen
15 it before.

16 CHAIR GRIFFIS: So it's the format that
17 takes on a greater emphasis for you, Mr. Parsons? I
18 mean, we certainly take in written statements.

19 COMMISSIONER PARSONS: But usually the
20 witness is here to explain.

21 VICE CHAIR MILLER: Sometimes.

22 CHAIR GRIFFIS: Yes.

23 COMMISSIONER PARSONS: Sometimes?

24 CHAIR GRIFFIS: Well, for instance, we
25 have a case, I don't know, maybe it is on today, I

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1 think we have close to 100 submissions. They are not
2 all going to testify.

3 COMMISSIONER PARSONS: Oh, certainly. You
4 know, letters from the neighbors and so forth.

5 CHAIR GRIFFIS: Right.

6 COMMISSIONER PARSONS: But here is a
7 pretty key opinion that the issuing of the permit
8 makes no sense.

9 CHAIR GRIFFIS: Okay.

10 COMMISSIONER PARSONS: If we're going to
11 listen to that or read it or comprehend it, I don't
12 understand that.

13 CHAIR GRIFFIS: Okay.

14 COMMISSIONER PARSONS: How can we accept
15 it? You know, the appellant should have said they are
16 not ready to go if this is the case, in my view. They
17 should have said their key witness isn't here today.

18 CHAIR GRIFFIS: Okay. So, in your
19 opinion, it should not be accepted into the record?

20 COMMISSIONER PARSONS: Right.

21 CHAIR GRIFFIS: Others? Mr. Etherly?

22 BOARD MEMBER ETHERLY: Thank you, Mr.
23 Chair. It would be my opinion to accept this into the
24 record. I think there are two questions. One,
25 whether or not it is accorded some measure or expert

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1 designation. And then secondly, should it come in? I
2 believe we deal with the second piece first. I think
3 it can come in and I think that the intervenor and
4 DCRA, of course, could speak to any factual issues or
5 opinion issues fairly directly and perhaps decisively.

6 I'm not too troubled by anything that I see here.

7 As Mr. Zaidain said, you can handle -- you
8 can take this as it stands with a grain of salt or
9 what. The expert status designation, while perhaps I
10 might be a little troubled by the method, I would not
11 be, in that vein, overly concerned with according it
12 that status as well. We are, of course, I think,
13 familiar with Mr. Nunley, having dealt with him on
14 other cases and there is a recitation, of course, in
15 Clause 1 of the document, which does relate Mr.
16 Nunley's qualifications. So I would be inclined to
17 allow it in with expert designation, but would be very
18 open to significant latitude regarding responses to
19 any of the opinions or alleged facts that are stated
20 with.

21 CHAIR GRIFFIS: Excellent. Thank you.
22 Two diverging opinions.

23 MR. EPTING: Could I also make one more
24 comment?

25 CHAIR GRIFFIS: Yes.

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1 MR. EPTING: And I'm not beating the bush.

2 CHAIR GRIFFIS: Well, actually, let me,
3 because I interrupted the Government, let me go back.

4 BOARD MEMBER ETHERLY: There is a 14 day
5 requirement for appellants to file submissions. We
6 have talked about that last week, so it would have
7 been useful for us to have been able to review this
8 ahead of time and we could have responded. And that
9 way, it sort of would have taken the place of being
10 cross examined.

11 CHAIR GRIFFIS: Indeed. Okay.

12 BOARD MEMBER ETHERLY: And that's a --

13 CHAIR GRIFFIS: Well, I think, Mr.
14 Etherly, if we go in the direction of accepting, Mr.
15 Etherly has hit on an excellent point and that would
16 be we grant to some great latitude in terms of
17 responses to this within reason, of course, if we ever
18 show that. Ms. Miller?

19 VICE CHAIR MILLER: Well, basically, I
20 would concur with Mr. Etherly. I think in the past we
21 have sometimes taken in reports or statements without
22 a witness present and parties have said that they
23 didn't have an opportunity to cross and we provided an
24 opportunity for them to respond in writing.

25 CHAIR GRIFFIS: All right.

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1 VICE CHAIR MILLER: So I would recommend
2 we do the same thing in this case.

3 CHAIR GRIFFIS: Okay. Mr. Zaidain, you're
4 holding to acceptance?

5 BOARD MEMBER ZAIDAIN: I guess I'm a
6 little confused. We are now -- what is being proposed
7 is that we accept this as expert testimony?

8 CHAIR GRIFFIS: No.

9 BOARD MEMBER ZAIDAIN: Okay.

10 CHAIR GRIFFIS: If there were --

11 BOARD MEMBER ZAIDAIN: I thought I heard
12 you say that.

13 CHAIR GRIFFIS: One hurdle first. Do we
14 accept it in?

15 BOARD MEMBER ZAIDAIN: Yes, I have no
16 problem accepting it in.

17 CHAIR GRIFFIS: Okay.

18 BOARD MEMBER ZAIDAIN: I mean, what would
19 we have done if this would have been mailed in?

20 CHAIR GRIFFIS: Right.

21 BOARD MEMBER ZAIDAIN: We would accept it.
22 I mean, we'll take it for what it is.

23 CHAIR GRIFFIS: Right. And we can always
24 strike it.

25 BOARD MEMBER ZAIDAIN: Right. I mean,

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1 see, I don't view this as a legal affidavit. I mean,
2 it's Mr. Nunley's opinion.

3 CHAIR GRIFFIS: Okay.

4 BOARD MEMBER ZAIDAIN: It's a statement.
5 And if the intervenors and the Government want to
6 respond in writing, at some other point, then let them
7 do it.

8 CHAIR GRIFFIS: Yes.

9 MR. ZIMMITTI: Mr. Chairman?

10 CHAIR GRIFFIS: Yes?

11 MR. ZIMMITTI: Pardon me. But in response
12 to Board Member Zaidain's original concern, we would
13 be happy following the hearing to submit the statement
14 with a certification, if you will, a notary block if
15 that was a concern.

16 CHAIR GRIFFIS: Right.

17 MR. ZIMMITTI: Just for that purpose.

18 CHAIR GRIFFIS: Okay. This is what I
19 understand from the Board in hearing their opinions.
20 Of course, we do have a diversion of opinion, which I
21 would like all Board Members to weigh, but this is
22 what I would propose we do. First of all, I have
23 great trouble with the form. Why this is a
24 declaration. Why this would need to be certified.
25 Really, I don't find, unless legal counsel would tell

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1 us differently, I see no reason for that. It seems to
2 be a lot more fluff than anything else.

3 So I do not have difficulty accepting it
4 into the record. I think we can, I think, as I have
5 said and probably too many times, if we do make an
6 error, we make the error of accepting more information
7 than we need. I do think that the shortness of this
8 and the amount of information it will be able to be
9 addressed, if not, Mr. Nunley directly cross examined
10 in the case presentation. So what I would like to do
11 is proceed forward with this.

12 And my last statement is in paragraph 5, I
13 find it to be outrageously inappropriate for any type
14 of submission. It seems to be on the level of some of
15 the battles that we see in person. Of course, we
16 always try and move away from those and get into
17 actual substance and fact, because that's all we
18 absolutely care about. But be that as it may, we are
19 able to take that under consideration as we review the
20 record and deliberate on it. And we are very capable
21 of doing that.

22 In which case then, unless there are other
23 major objections, I would suggest that we take it into
24 the record. Noting Mr. Parsons' position of not being
25 in favor of that. Any consenting opinions to that

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1 direction? Very well. Then let's proceed and take
2 this in as a written statement.

3 MS. BELL: Could I just interrupt for a
4 moment? I'm a little confused. Do I understand that
5 the Board feels its a subjective -- it's a declaration
6 of a subjective opinion and not that of an expert that
7 shouldn't be given any more weight than a neighbor's
8 personal statement about the qualifications of a
9 Government witness and a Government employee?

10 CHAIR GRIFFIS: Right.

11 MS. BELL: Because the way we sort of view
12 this is Mr. Nunley's purpose in providing this
13 declaration under penalty of perjury is to basically
14 defame the qualifications and subsequently the opinion
15 of the Government witness that we're providing to
16 support our opinion.

17 CHAIR GRIFFIS: I understand that.

18 MS. BELL: So --

19 CHAIR GRIFFIS: I think we're going to be
20 looking at this as a statement of a witness that was
21 not able to be in attendance. So it's a written
22 statement submission. I think it is up to you to
23 address limitedly some of the aspects that you are
24 bringing up. I think, if I wasn't clear, the Board is
25 interested in the facts that are addressed that go

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1 directly to this case, you know, impugning witnesses
2 and all that, I find fairly inappropriate, unless it
3 is attacking the actual substance of their case
4 presentation.

5 And I'll say again, when we have it all in
6 front of us and the record is complete, the Board will
7 be looking at the facts and not people's opinions of
8 agencies, personnel or processes.

9 MS. BELL: So when the Board deliberates
10 it is not going to take into context his comments
11 about whether or not someone has the appropriate
12 education or skill level?

13 CHAIR GRIFFIS: That's correct.

14 MS. BELL: Okay.

15 CHAIR GRIFFIS: Ms. Miller?

16 VICE CHAIR MILLER: I don't know if there
17 is still a question hanging out with respect to
18 whether we're conferring expert status on this
19 witness, but I would recommend that we not do that,
20 because normally when we do that there is an
21 opportunity to cross the witness.

22 CHAIR GRIFFIS: Thank you.

23 VICE CHAIR MILLER: With respect to that.

24 CHAIR GRIFFIS: Indeed. I don't think
25 there should be any question. I am not offering that,

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1 and I don't think we would establish expert status on
2 Mr. Nunley. Okay. Is everyone clear? I take that as
3 a definitive decision then. We'll accept it into the
4 record. We'll start the clock again and turn it back
5 over to you.

6 MR. ZIMMITTI: Thank you, Mr. Chairman.
7 And we would agree with the Board's assessment of the
8 declaration. However, we just do take issue strongly
9 with any suggestion that there is anything in this
10 statement that constitutes defamation. That is
11 patently untrue. It merely is a statement as to Mr.
12 Nunley's opinion of the qualifications of the
13 Government witness.

14 Essentially, the purpose for this
15 declaration was to point out to the Board that a
16 gentleman who has 17 years of experience in a senior
17 position with the DCRA finds no basis in the
18 explanation for the revised permit that was issued.
19 There is no such thing as a pervious surface driveway
20 anywhere in the Zoning Regulations. It is a fiction
21 and it suggests that the reasoning that was applied by
22 the DCRA in issuing that permit was just false, was
23 flawed. And that was the thrust of that letter.

24 To the extent that there are any questions
25 concerning Mr. Paul's qualifications as a zoning

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1 specialist, I certainly can handle that on cross
2 examination. Appellants also submit that intervenor's
3 violations of applicable Zoning Regulations are not
4 cured, and I'm going back to the violation with
5 respect to 2117.4, merely by adding an impervious
6 surface to the accessory building driveway.

7 The reason for this is that if the
8 intervenor were to designate his accessory building
9 driveway as impervious using his own calculations,
10 which are set forth in Exhibit H to the intervenor's
11 opposition brief, he will have covered more than 50
12 percent of the entire surface area of his lot with
13 impervious surfaces, which would constitute a
14 violation of section 1567.2 of the Chain Bridge
15 Road/University Terrace Overlay.

16 A further consequential violation of the
17 June 13, 2003 revised permit is that pursuant to
18 section 2117.8, subsection C2, the width of the
19 intervenor's main driveway, which apparently is only 7
20 feet wide, see, intervenor's opposition brief at page
21 8, is too narrow for the number of parking spaces
22 provided on the lot, including the parking space in
23 the accessory building garage.

24 Section 2117.8, subsection C2, requires
25 that a driveway serving more than one parking space

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1 must be at least 12 feet wide for one-way circulation
2 and at least 14 feet wide for two-way circulation.
3 However, regardless whether the main driveway is
4 intended for one-way or for two-way circulation, and
5 we submit that it is for two-way circulation, because
6 it is the only avenue of ingress or egress into both
7 of the parking spaces, the main driveway at which, as
8 originally planned, is only 7 feet wide, is a
9 violation of section 2117.8, subsection C2.

10 With these violations stemming from the
11 June 13, 2003 revised permit underscore, is that the
12 structures intervenor planned for and erected at 3101
13 Chain Bridge Road simply are too large for the space
14 provided on the lot. Therefore, because intervenor,
15 one, already has covered at least 50 percent of the
16 surface area by his own admission with impervious
17 surfaces and, two, left himself no room to widen the
18 main driveway to comply with section 2117.8,
19 subsection C2, the only viable alternative to bring
20 intervenor's construction into compliance with the
21 applicable Zoning Regulations is to raise the top
22 story off of his two-story accessory building, thereby
23 eliminating the garage parking space he is required to
24 have for a two-story accessory building, pursuant to
25 section 2500.5 of the regulations. And by eliminating

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1 the second story off of the accessory building, there
2 also would be no need for an impervious driveway
3 leading to the accessory building, pursuant to section
4 2117.4.

5 The second purpose of this appeal is to
6 bring to the Board's attention that as a consequence
7 of intervenor's construction activities, intervenor
8 also has cut down or fatally damaged without a permit
9 approximately 70 percent of the total circumference of
10 all trees on the lot regulated by the Chain Bridge
11 Road/University Tree and Slope Overlay. Of the total
12 15 regulated trees that intervenor recorded on his
13 preconstruction topographic survey of the property,
14 three regulated trees were removed by permit.

15 And we are not disputing the permit for
16 the removal of those three trees. We understand that
17 that is an issue that was precluded by virtue of the
18 Board's ruling back in November. However, at least
19 four regulated trees that appellants know of were
20 unlawfully cut down and an additional six trees were
21 fatally damaged by intervenor's construction
22 activities in violation of the Chain Bridge
23 Road/University Terrace Tree and Slope Overlay section
24 1568.1, and in violation of the General Tree Removal
25 Limitations in Zoning Regulation section 1514.1.

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1 CHAIR GRIFFIS: Let me see if I follow you
2 here.

3 MR. ZIMMITTI: Yes, sir.

4 CHAIR GRIFFIS: You indicated that 70
5 percent of the regulated trees have been affected,
6 right?

7 MR. ZIMMITTI: That's correct.

8 CHAIR GRIFFIS: 70 percent is the 15 trees
9 on the site, four of which, you say, have been damaged
10 beyond repair and 10 -- four have been removed and six
11 have been damaged.

12 MR. ZIMMITTI: 70 percent.

13 CHAIR GRIFFIS: So 10 is 70 percent of 15?

14 MR. ZIMMITTI: No, sir. The 10 that we
15 are talking about are -- were removed or fatally
16 damaged without a permit. We're not including in the
17 70 percent the three that were -- the additional three
18 up to 13.

19 CHAIR GRIFFIS: Okay. So 13 would be 70
20 percent of 15?

21 MR. ZIMMITTI: 13 total trees were
22 removed. Correct, sir.

23 CHAIR GRIFFIS: Gotcha. So 70 percent was
24 for emphasis. Okay. I understand.

25 MR. ZIMMITTI: 70 percent constitutes the

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1 four that were removed without the permit.

2 CHAIR GRIFFIS: Right.

3 MR. ZIMMITTI: And the six that were
4 fatally damaged.

5 CHAIR GRIFFIS: Regulated. Okay.

6 BOARD MEMBER ZAIDAIN: Mr. Chair, just to
7 make sure I'm clear, is this an issue above and beyond
8 the revised permits or is this another issue or it
9 seems to be?

10 MR. ZIMMITTI: This is an issue that
11 intervenor's -- excuse me, that appellants are
12 bringing to the Board's attention. It was addressed
13 in the appellants' supplemental prehearing statement
14 in October, and it constitutes violations of the Tree
15 and Slope Overlay.

16 CHAIR GRIFFIS: Right. I think Mr.
17 Zaidain's direct question is is this an appealable
18 issue right now? Isn't it a compliance issue? And
19 what --

20 BOARD MEMBER ZAIDAIN: Now, when you say
21 you are bringing it to the Board's attention, what
22 exactly does that mean?

23 MR. ZIMMITTI: Yes, I appreciate your
24 question. The issue is this. In November, the
25 appellants served a request for a stop-work order on

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1 the DCRA with respect to these trees. And it has been
2 about two months. The DCRA has not acted on it and
3 time is moving on and appellants are very mindful of
4 the Board's admonition during the last hearing that
5 the appellants should not wait around for the DCRA to
6 act, because their right to appeal very well may be
7 stale.

8 So in an abundance of caution, we are
9 bringing these issues now before the Board, because we
10 believe that DCRA's inaction has caused us to do that.

11 And we really have no other avenue of recourse at
12 this point in time.

13 BOARD MEMBER ZAIDAIN: Well, no, sure. I
14 agree with that. I mean, it's like you could appeal
15 the DCRA's decision to not issue a stop-work order
16 almost, you know, I mean.

17 CHAIR GRIFFIS: To remove the stop-work or
18 yes. To be in compliance, there has to be an action
19 of which would be appealable.

20 BOARD MEMBER ZAIDAIN: Right.

21 CHAIR GRIFFIS: Bringing it to our
22 attention doesn't secure your place for an appeal of
23 the issue.

24 MR. EPTING: Mr. Chair?

25 CHAIR GRIFFIS: Yes?

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1 MR. EPTING: John Epting with Shaw
2 Pittman. I would object to any testimony about trees.

3 I mean, I thought that was beyond the scope of this
4 hearing, as decided in November. The trees came down
5 in February 2003. It's the one thing that we agree on
6 that everybody had notice about. And my understanding
7 on the November ruling was that things related to the
8 main permit and the February actions were untimely.
9 They could have appealed. Another group actually
10 filed a stop-work order that was lifted. This group
11 waited until July 2nd to appeal. And the trees have,
12 in my mind, nothing to do with the revised pool permit
13 and nothing to do with the revised driveway permit,
14 which, I think, are the only issues before us today.

15 CHAIR GRIFFIS: Okay.

16 MR. EPTING: So I'm at least confused.

17 CHAIR GRIFFIS: Right. Okay.

18 MR. ZIMMITTI: Mr. Chairman, may I
19 respond?

20 CHAIR GRIFFIS: Hold on. Let me just hear
21 from everybody.

22 MS. BELL: DCRA is also confused. We
23 don't understand the appellants' argument. Now, DCRA
24 is at fault for failing to file a stop-work order that
25 they wanted.

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1 CHAIR GRIFFIS: For some sort of action in
2 compliance. Right.

3 MR. SIMPSON: That they thought we needed.

4 CHAIR GRIFFIS: Understood.

5 MS. BELL: All right.

6 CHAIR GRIFFIS: Your confusion is
7 understood. Yes?

8 MR. ZIMMITTI: Mr. Chairman, I have a
9 response to Mr. Epting's remarks in that appellants
10 really did not know anything about the removal of
11 these trees or the fatal damage to these trees until
12 well after the construction activities began. And
13 precisely because these actions were taken by the
14 intervenor without a permit, there was no notice of
15 the destruction to these trees or the fatal damage to
16 these trees. And further, we would state that it
17 wasn't even until October that the appellants were --
18 obtained from the intervenor a copy of the original
19 topographic survey of the property preconstruction
20 topographic survey providing an inventory of all the
21 trees on the property that were protected under the
22 Tree and Slope Overlay.

23 CHAIR GRIFFIS: I'm sorry. You received a
24 topo when?

25 MR. ZIMMITTI: The topographic survey of

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1 the property? We have actually -- would you go ahead
2 and pass it up? The appellants obtained a copy of
3 that topographic survey, which is --

4 CHAIR GRIFFIS: I don't want to see it.
5 When did you receive it?

6 MR. ZIMMITTI: In October. And shortly
7 after obtaining that topographic survey, the
8 intervenors -- excuse me, the appellants prepared
9 their supplemental prehearing statement and also
10 obtained the expert opinion of an arborist, Mr. Edward
11 Milhous, who is here today to testify as to the fatal
12 damage to the trees. So in so far as timeliness is
13 concerned, we do not feel that it is an issue here.

14 CHAIR GRIFFIS: It may not be. But I
15 don't think that we can even get to timeliness,
16 because I'm not sure what the element of appeal is.

17 MS. BELL: Right.

18 CHAIR GRIFFIS: What is the action that
19 you are being asked to judge, whether there was an
20 error or not?

21 DR. WOLF: We feel we have a default
22 decision from DCRA by virtue of inaction on a request
23 for a stop-work order. This is basically a repeat
24 performance of what started this process in the first
25 place in February of 2003 when we requested a stop-

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1 work order. It was put into effect. It was removed
2 without our notice and we spent three months,
3 including a Freedom of Information Act request to
4 DCRA, determining, trying to find out what happened.
5 We did not. By the time we put in our appeal, we were
6 found to be untimely on that particular tree removal
7 permit.

8 And I would like, if I could for just a
9 moment, to quote from your own discussion of this
10 issue: Board Member Miller, this is at the November
11 25th Public Meeting, "I don't think that we can hold
12 that the statute of limitations has told until DCRA
13 issues a decision, because even in this case, we asked
14 DCRA for submissions and they failed to provide
15 submissions. The city could come to a halt waiting
16 for DCRA to act."

17 Vice Chairman Etherly: "As soon as you
18 think you have something to worry about, get in the
19 door. I don't think getting in the door with your
20 appeal requires crystal clear specificity. I think we
21 have the ability as an appellate body once an appeal
22 has been filed, if there is need for additional issues
23 to be raised, I think, we have the ability here in
24 this body to deal with that eventuality."

25 Mr. Chairman, Members of the Board, we ask

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1 you to deal today with that eventuality.

2 CHAIR GRIFFIS: Yes, and I understand
3 that, and I think the Board Members' opinions that
4 were just stated may well be correct. However, we
5 don't write the regulations. We are just abiding by
6 them. And so I still don't see bringing this up.

7 MR. EPTING: Can I interject one more
8 thing?

9 CHAIR GRIFFIS: There is a way to deal
10 with this, but I'm not hearing it.

11 DR. WOLF: We have tried that way and we
12 have waited almost three months now.

13 CHAIR GRIFFIS: You're waiting for an
14 action from DCRA. And I understand that you are
15 frustrated by an inaction.

16 DR. WOLF: So we have a default decision.

17 CHAIR GRIFFIS: I'm not sure a default
18 decision is appealable.

19 MS. BELL: That's correct. And quite
20 frankly, no action, what they are asking for is the
21 court to take an appeal for the omission of an action
22 or for the Board to take an appeal action.

23 CHAIR GRIFFIS: Right.

24 MS. BELL: It's sort of a double negative.

25 CHAIR GRIFFIS: Right.

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1 MS. BELL: DCRA, as the regulatory agency,
2 is supposed to implement the regulations. Citizens
3 aren't supposed to regulate.

4 CHAIR GRIFFIS: That's right.

5 MS. BELL: And so that's the problem here,
6 I think. DCRA has decided not to act. In fact, they
7 have been out to the site recently. They have been
8 out to the site within the last two or three months
9 and has made a determination that a stop-work order is
10 not appropriate. So there is nothing for this Board
11 to review, because no action has been taken.

12 MR. EPTING: John Epting, one more time,
13 and I won't beat a dead horse. Anticipating this
14 argument, we did file a report, which has been
15 referred to by Care of Trees, it should be given at
16 least a worth, the evidentiary worth that Mr. Nunley's
17 report was, that states that no trees have come down
18 since February 8th, which is when the raze and
19 demolition started.

20 CHAIR GRIFFIS: Right. You said in your
21 recent submission?

22 MR. EPTING: Yes.

23 CHAIR GRIFFIS: Attached?

24 MR. EPTING: Yes.

25 CHAIR GRIFFIS: Do you want to just cite

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1 it for the record? Is it Exhibit B of your --

2 MR. ZIMMITTI: I'm ready for everything
3 but that. But that's correct, Mr. Chairman.

4 MR. EPTING: Exhibit B, yes, sir.

5 CHAIR GRIFFIS: Okay.

6 MR. EPTING: And so I just wanted to take
7 the trees off the table, and that's why I put that in
8 there to show that no additional trees have come down
9 since that one date.

10 MR. ZIMMITTI: Mr. Chairman, I would say
11 by putting it on the table, by putting it in his
12 brief, it is precisely on the table. And now that it
13 is in the brief, we want an opportunity to respond to
14 that one paragraph letter from the Care of Trees dated
15 January 22nd. We have our expert here today who is
16 prepared to respond to that letter having taken a
17 recent inspection of the lot. For that reason, we
18 should be able to go forward.

19 In addition, Your Honor, excuse me, I
20 might be doing that from time to time. You'll have to
21 excuse me in the courtroom.

22 CHAIR GRIFFIS: That's okay.

23 MR. ZIMMITTI: Mr. Chairman, we also
24 suggest that there are strong equities in this matter
25 which warrant that the Board at least hear the issue.

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1 Essentially, by the DCRA's reasoning, they could just
2 sit on the request for a stop-work order and never act
3 on it, and it will never be ripe for the Board's
4 consideration. We submit that that is inequitable and
5 that there has to be some point at which the Board
6 steps in before further damage occurs.

7 CHAIR GRIFFIS: Okay. And I understand
8 that issue and believe me I fully understand that
9 issue and I don't think we actually have the authority
10 to do that type of maneuver. That's my concern. I
11 mean, getting into it and whether I want to do it or
12 not, has no bearing. It's just whether we actually
13 have the jurisdiction to do it. Ms. Miller is going
14 to tell me whether I do or not. Yes?

15 VICE CHAIR MILLER: Well, a couple
16 questions and a comment, I guess. Are you making a
17 distinction between, as I hear it you are, trees that
18 were cut down, as authorized by a permit of which we
19 ruled that you had notice way back in March, and then
20 those that were cut down or damaged where there was no
21 permit, so you had no notice of that until you got the
22 topographical survey, which was in October? Is that
23 correct?

24 MR. ZIMMITTI: Yes, we would agree with
25 that and we would further state that we do not know

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1 that the trees at issue, the 10 that we are talking
2 about, the four that were cut down or the six that
3 were fatally damaged, were, in fact, effected around
4 the February time frame. That very well could have
5 occurred well after even the appeal was filed by the
6 appellants, so as far as timeliness is concerned, we
7 don't see that there is an issue. But, yes, your
8 characterization is correct.

9 VICE CHAIR MILLER: All right. From my
10 notes from the appeal, one of the allegations was that
11 all of the building permits should have been reviewed
12 for compliance with the CBUT Tree Removal
13 Restrictions, which would carry into these permits.
14 Is there some authority for that that you want to
15 argue about? That was a statement that was made. And
16 if that is true, then I would say that we do have
17 authority to consider these trees, since we didn't
18 rule them out, because they weren't covered by the
19 permit, the notice of the permit.

20 MR. ZIMMITTI: I would agree with that
21 characterization. I don't have any authority at hand
22 to point to, but we certainly can provide that to the
23 Board after the hearing.

24 CHAIR GRIFFIS: What statement are you
25 referring to?

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1 VICE CHAIR MILLER: Well, there is a
2 statement that they made in their appeal that all
3 building permits should have been reviewed for
4 compliance with the Tree Removal Restrictions. If
5 that is true, then I would say that these tree issues
6 with respect to those that weren't authorized by
7 permit to be cut down would still be at issue in this
8 case.

9 CHAIR GRIFFIS: But so what you're saying
10 is --

11 VICE CHAIR MILLER: If that is not true,
12 then they are not covered by the permits that we're
13 considering.

14 CHAIR GRIFFIS: Right. So the revisions
15 to the base building permit would have to somehow
16 connect with the trees that are in question. Because
17 if not, then they would hold, they would ride with the
18 base building permit, which was rendered untimely.

19 VICE CHAIR MILLER: Right. Right.

20 CHAIR GRIFFIS: For it's appeal.

21 MR. ZIMMITTI: We respectfully suggest
22 that, in fact, they are all inextricably linked.

23 CHAIR GRIFFIS: To the revisions?

24 MR. ZIMMITTI: That's correct.

25 CHAIR GRIFFIS: Mr. Parsons?

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1 COMMISSIONER PARSONS: Without calling
2 your expert witness, these trees that are fatally
3 damaged, those are your terms, do they still stand?

4 MR. ZIMMITTI: They stand and that's
5 correct, they are in the process of dying. Some of
6 them are in the process of falling over, which Mr.
7 Milhous will testify to.

8 COMMISSIONER PARSONS: Okay. So Exhibit B
9 says no trees have been removed. Is that true?

10 MR. ZIMMITTI: Exhibit B, which is in the
11 intervenor's opposition brief.

12 COMMISSIONER PARSONS: It seems to me we
13 are debating. All right. We're getting into an area
14 here of no, these trees have not been removed. Your
15 judgment is they are dead, I guess, fatally damaged
16 must mean pretty close to death. Is that what this is
17 about? Is to say during the construction period, the
18 contractor damaged trees that were not authorized to
19 be removed. Therefore, what?

20 MR. ZIMMITTI: Therefore, there is a
21 violation of the Tree and Slope Overlay that is
22 pertinent with the building permits that were issued.

23 COMMISSIONER PARSONS: Okay.

24 MR. ZIMMITTI: The problem is this. When
25 the intervenor submitted his applications for relevant

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1 permits, he did not include his topographic survey of
2 the property indicating where the trees were located,
3 and I'm talking about the June revised permit. The
4 DCRA, essentially, had no way of knowing where those
5 trees were located with respect to the various
6 structures represented on the plans. And in the
7 process of then going forward and getting the permits,
8 the intervenor has actually taken down trees that
9 appellants didn't even know existed until only after
10 the appellants obtained the very document that was not
11 submitted to the DCRA along with the revised
12 application for the revised permit. So we feel in
13 that respect that they are relevant and tied to the
14 permits.

15 DR. WOLF: If I can add to that, what we
16 are saying is that the topographic and boundary survey
17 that was submitted with the initial request for
18 removal of trees contained the existing improvements
19 on the property not the proposed improvements. There
20 was no way that a DCRA reviewer examining those
21 documents could have looked at those trees in
22 relationship to what was proposed for the property.
23 Therefore, they could not make a fair assessment, DCRA
24 could not, of whether those trees would be damaged by
25 new construction.

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1 This permit was presented as if these
2 trees were being removed in isolation without the
3 context of the new construction proposed for that
4 property. Therefore, it was only after the fact that
5 we were able to determine when we superimposed those
6 construction plans with the tree removal plans that
7 those trees had actually, you know, and would damage
8 the surrounding -- that the construction would damage
9 the surrounding trees.

10 COMMISSIONER PARSONS: But, as I
11 understand it, if DCRA had the topographic survey,
12 they also had the plans laid upon it that they were
13 asked to approve, if they did, they would have known
14 that these trees would have been killed. Is that your
15 point?

16 DR. WOLF: If they were --

17 COMMISSIONER PARSONS: I mean, it appears
18 as though the applicant tried to save these trees.

19 DR. WOLF: No. If those trees --

20 COMMISSIONER PARSONS: They did not go in
21 and cut them down.

22 DR. WOLF: If those trees -- if that tree
23 permit, which was submitted, it was the very first
24 permit submitted, and, in fact, it was not submitted
25 with reference, for example, to the impervious

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1 coverage that was -- the permit application asks for
2 the impervious coverage of the property.

3 COMMISSIONER PARSONS: Correct.

4 CHAIR GRIFFIS: Is that correct?

5 DR. WOLF: It doesn't specifically say.

6 CHAIR GRIFFIS: Is it a requirement that
7 you would have had to include proposed work for the
8 first permit to remove trees?

9 DR. WOLF: I cannot answer that question.

10 But my reading of that application permit would be
11 that if you are removing trees that are being removed
12 in relation to new construction that is going to be
13 done, and that was the only reason these trees were
14 being removed, they would want to know, as part of
15 this permit, what the impervious coverage of the
16 property was, because the only reason for asking that
17 question is it is part of a Tree and Slope
18 application, which has specific impervious coverage
19 requirements.

20 CHAIR GRIFFIS: Okay.

21 DR. WOLF: There would be no other reason
22 to ask that question.

23 CHAIR GRIFFIS: Okay. I think Mr. Parsons
24 is hitting on an excellent point that we need to
25 probably explore further, but, in addition to that,

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1 unless it can be brought to the Board that that is a
2 requirement, therefore, an error was made, it may be a
3 great idea, you may be absolutely correct that that
4 should be the process, but if it isn't the required
5 process, we can't do anything about it.

6 MR. EPTING: Could I also note that, I
7 mean, we put in our statement, the initial plat and
8 the revised plat, and there is virtually no change
9 between those two plats. So in terms of a Zoning
10 reviewer looking at where the trees are, there is
11 virtually no change. The second thing is, I mean,
12 it's obvious to me that DCRA has been called a number
13 of times for a stop-work order out there, and the
14 appellants just haven't gotten the answer they want.

15 And it seems like they can reappeal this
16 issue, but to bring it up in the course of this
17 hearing when it's not related to a pool permit and
18 it's not related to the revisions of the driveway
19 permit, is just beyond the scope.

20 CHAIR GRIFFIS: Okay. I think I'm clear
21 on everything, what I'm hearing from the Board. Mr.
22 Parsons brings up an excellent point, and if I could
23 expand on it a little bit, and combined with what Ms.
24 Miller is also stating, I think, if it can be brought
25 to our attention of how in the revised permit that

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1 these trees are related, that we will hear it. And
2 I'm going to be fairly aggressive in paring down some
3 of the testimony.

4 What I'm concerned about getting into is
5 what Mr. Parsons has touched upon is hours and hours
6 of arguments. Is the tree dead? Is it not dead? Was
7 it meant to be taken down? Was it, you know, an
8 accident? You know, what's the remedy of all that?
9 Our jurisdiction will go quickly out the window in
10 dealing with a lot of that. And so I don't want to
11 get too embroiled in the speculative nature of what is
12 happening or what the intention was. So is that clear
13 to everybody?

14 MR. EPTING: Yes, Mr. Chairman.

15 CHAIR GRIFFIS: Okay. Then let's proceed.
16 We left off at section 1568.1, 70 percent, 4 and 6.
17 Yes, you wanted to say something else?

18 MR. ZIMMITTI: Yes, that's correct. We
19 concluded that we represent that the Tree and Slope
20 Overlay has been violated, section 1568.1 and the
21 General Tree Removal Limitations at 1514.1. At this
22 time, Mr. Chairman, we would like to offer the
23 testimony of appellant, Dr. Steven Wolf, who will
24 provide a little bit of background and second our
25 expert arborist, Mr. Edward Milhous, who is here today

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1 to testify as to the health or the fatal damage to the
2 six trees that I indicated earlier at issue.

3 MR. EPTING: I apologize. John Epting
4 again. I just don't see anything under 1568.2 which
5 would allow the Board to retroactively question the
6 arbor support or the arbor's decision that was made
7 over a year ago. It seems to me the Zoning
8 Administrator is entitled to rely upon the arborist
9 certification, much like it does structural
10 certifications and other certifications. And if the
11 requirements of that section are met, they can be
12 appealed, but you can't go back and try to question
13 the underlying assumptions that were presented to the
14 Zoning Administrator.

15 CHAIR GRIFFIS: Comments? Mr. Zaidain?

16 BOARD MEMBER ZAIDAIN: Yes, I'm a little
17 concerned at all this. I mean, we hashed this out
18 back in November and, at least, I was anticipating a
19 very focused hearing on the specific issues with the
20 revised permits. I still -- when we look at the tree
21 analysis that we're talking about here, it always goes
22 back to the original base permits, which we ruled as
23 untimely. And that is kind of my short term view here
24 is that we're now dealing with almost an amended
25 appeal or they're trying to bring in more information

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1 now and that concerns me.

2 Now, I do have a long term view of what is
3 going on here and that is whether or not there may be
4 recourse for the appellant at some later date on this
5 issue. In my mind, a decision to not issue a stop-
6 work order by DCRA is, in fact, just that a decision
7 which, to me, would be appealable to this Board,
8 especially given the great latitude this Board has
9 given to appeals in the past, opinion letters and what
10 not.

11 So it seems like we have narrowed this
12 down and we should stay focused on what the permits
13 are and the revised permits and what they cover. And
14 the tree issue to me is tied to the base building
15 permit, because that's when the arborist report was
16 issued and that's what we ruled on back in November.
17 But it seems to me there still may be recourse for the
18 appellants on this issue at a later date.

19 CHAIR GRIFFIS: Okay. Ms. Miller?

20 VICE CHAIR MILLER: Well, I think
21 appellant would need to make a showing as to how the
22 arborist testimony is going to relate to the two
23 permits that are before us. It's just not apparent.

24 CHAIR GRIFFIS: That's exactly correct.
25 Otherwise, I think, Mr. Zaidain has stated it fairly

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1 plainly.

2 MR. ZIMMITTI: I'll be happy to respond to
3 that in two parts, Mr. Chairman. First, we believe
4 the issue is in play as to whether the overall health
5 of the trees and whether or not trees have been cut
6 down. In fact, the intervenor has put that in play by
7 adding the Care of Trees letter of January 22nd into
8 his opposition brief. So clearly they believe that
9 the issue is ripe to be heard.

10 BOARD MEMBER ETHERLY: If I may, Mr.
11 Zimmitti, I think it is a very focused question that
12 we're putting to you. How does that relate? Because
13 you are still speaking very generally and very
14 broadly. How does that relate to the two permits that
15 are at issue now?

16 CHAIR GRIFFIS: Right.

17 BOARD MEMBER ETHERLY: So make that
18 connection.

19 MR. ZIMMITTI: I appreciate that. It
20 relates in this way. The revised permit that was
21 issued on the 13th of June concerns the driveway to the
22 accessory building. The driveway to the accessory
23 building is planned as pervious. There is no such
24 provision in the code for a pervious driveway. In
25 fact, as we have argued, it has to be impervious. By

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1 virtue of the fact that it was to be impervious, we
2 are now over the 50 percent impervious surface
3 requirements imposed in the overlay.

4 That has a direct impact on the trees that
5 are on the lot and it is inextricably linked to
6 whatever plans were submitted by, in that sense, the
7 intervenor to the DCRA for his building.

8 CHAIR GRIFFIS: So you're asking us to
9 accept the argument that you are making that by not
10 providing the required impervious surface, the trees
11 are going to die?

12 MR. ZIMMITTI: We're making the argument
13 that because the permit was issued, and was issued in
14 error, the intervenor was allowed to go forward
15 without taking into account the overall impact of the
16 impervious surface requirements, and essentially to
17 further work on the property to remove trees and
18 fatally damage them by continuing to work on his
19 original plans. We view it as a whole.

20 We view it as inextricably linked in the
21 sense that the June 13th revised permit cannot be
22 separated from the January permit, because a violation
23 or an error in the issuance of the June 13th revised
24 permit automatically brings into play the January 29th
25 original permit, which should have taken into

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1 consideration originally the trees that are on the
2 property and the number of trees.

3 CHAIR GRIFFIS: Yes, but that's rearguing
4 an old issue.

5 MR. ZIMMITTI: It's not rearguing it,
6 because the June 13th permit put all of this back into
7 play, Mr. Chairman.

8 CHAIR GRIFFIS: Well, not according to the
9 Board's decision it didn't.

10 BOARD MEMBER ETHERLY: I mean, how do you
11 reconcile that argument with the timeliness issue that
12 we resolve?

13 CHAIR GRIFFIS: And that's a critical
14 question that I don't need an answer for, because
15 we've been through it.

16 VICE CHAIR MILLER: I have an answer.

17 CHAIR GRIFFIS: It's well said.

18 MR. ZIMMITTI: Well, if I may respond to
19 that? Board Member Etherly, we respond to the
20 timeliness issue in that the appellants didn't know
21 about the existence of those trees.

22 CHAIR GRIFFIS: Yes, yes.

23 MR. ZIMMITTI: Until they obtained a
24 topographic survey in October.

25 CHAIR GRIFFIS: Let me say it again.

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1 We've been through this and Mr. Etherly, I think,
2 absolutely stated it well. So we're back. Trees. I
3 think, Ms. Miller, we go back to the initial set,
4 you've got to set a foundation for us to hear it,
5 otherwise, we cannot be open to hearing it.

6 DR. WOLF: Let me just add one more thing,
7 Mr. Chairman. Again, we submitted this information
8 about the trees in the form of our supplemental
9 prehearing statement in October, anticipating that we
10 would probably get no response from DCRA as in the
11 last case. We, after that, submitted a request for a
12 stop-work order. We haven't gotten it. It is going
13 on three months now.

14 CHAIR GRIFFIS: Have you gotten any
15 correspondence from DCRA?

16 DR. WOLF: We have no recourse -- what's
17 that?

18 CHAIR GRIFFIS: When you send in a request
19 for a stop-work order investigation, do you get any
20 written response back?

21 DR. WOLF: I got an initial request --
22 statement saying they were in receipt of my
23 information, that they were going to be passing it on
24 and keeping in touch.

25 CHAIR GRIFFIS: Okay. Do you ever get a

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1 letter that says we've been out. We've seen this.
2 We're not issuing a stop-work order?

3 DR. WOLF: I did more than that. I
4 actually went down there and met in person.

5 BOARD MEMBER ZAIDAIN: Did you get a
6 letter from DCRA saying that they would not issue a
7 stop-work order?

8 DR. WOLF: No. I got no letters. I met
9 with Faye Ogunaye, chief of Zoning Review, in person
10 and the Zoning Inspector Yvonne Rocket who told me
11 they would go out that week.

12 CHAIR GRIFFIS: Okay.

13 DR. WOLF: And take a look at the
14 property. We have had no subsequent response. I have
15 emailed. I have left messages. No response. We feel
16 that we have already put our foot in the door, as was
17 suggested by this Board, by getting in the door with
18 an appeal.

19 CHAIR GRIFFIS: Right.

20 DR. WOLF: And we feel that we have no
21 decision.

22 CHAIR GRIFFIS: Let me be clear, because I
23 don't want you to go away with a misunderstanding.
24 Board Members can make statements.

25 DR. WOLF: Yes.

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1 CHAIR GRIFFIS: That does not mean that
2 that's the correct process.

3 DR. WOLF: Oh.

4 CHAIR GRIFFIS: You have not insured
5 yourself a timely appeal just by coming in and saying
6 you know what, there is an issue out there and we
7 think we ought to appeal it. And the Board may give
8 their opinion and say you know what, it's great you
9 know that now and I think it's wonderful your foot is
10 in the door, that's not the process. My and Mr.
11 Zaidain was pushing on the point, you need a letter.
12 You need some affirmative action that can be appealed
13 from DCRA.

14 And I would suggest, and this is the last
15 time we're going to go about coaching somebody how to
16 bring an appeal, but the issue is after your meeting
17 with the Zoning Administrator, it would be well
18 appropriate for you to ask and request them to put
19 their statements in writing, and that way we have
20 something that can be brought. At this point though,
21 going back and hashing out how much is there or, you
22 know, what was done, I don't see is appropriate.

23 DR. WOLF: Could I make one last comment
24 then?

25 CHAIR GRIFFIS: Yes.

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1 DR. WOLF: We have a verbal statement
2 today from DCRA counsel that they have made a
3 decision. I'm learning for the first time now that
4 they have been out to the site and have decided that a
5 stop-work order is not indicated.

6 CHAIR GRIFFIS: Have them put it in
7 writing.

8 DR. WOLF: Okay. We cannot accept it.
9 Therefore, as a verbal statement and the add that into
10 our appeal, because it has already basically been
11 admitted as a supplemental attachment in October?

12 CHAIR GRIFFIS: It certainly wouldn't be
13 my opinion that they could. Others? It would be very
14 hard to hear an appeal or an element of appeal in this
15 case.

16 DR. WOLF: Okay. Well, we will fully
17 expect then from DCRA to get that in writing very
18 promptly, since we are learning about it for the first
19 time today and we will be back here with an appeal on
20 that issue.

21 CHAIR GRIFFIS: I look forward to it.

22 MS. BELL: Procedurally, as I said, I do
23 think agency action is actually defined in the code as
24 well as the DCMR and we will be glad to take a look at
25 it. But I don't believe that a Government's inaction

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1 can be considered an agency action for the purposes of
2 an appeal.

3 CHAIR GRIFFIS: Right.

4 MS. BELL: Which I assume the appellant is
5 aware of and their counsel is aware of.

6 CHAIR GRIFFIS: And I think that's --

7 MS. BELL: So while it might be --

8 CHAIR GRIFFIS: -- the Board's lectern to
9 be absolutely clear.

10 MS. BELL: -- sort of a novel thing to
11 bootstrap.

12 CHAIR GRIFFIS: The Board's concern is to
13 have an actual action that, frankly, will make it a
14 more substantive appeal. Okay. What else? Whew.
15 All right. So I'm going to continue this. Let's run
16 the clock. Let's continue.

17 MR. ZIMMITTI: What we would like to do at
18 this time, Mr. Chairman, is call our expert arborist
19 to come forward to respond to the letter that was
20 submitted by the intervenor as Exhibit B to his
21 opposition brief, and at least provide some rebuttal
22 to that letter, which we feel we are entitled to do,
23 because it is in the record.

24 CHAIR GRIFFIS: Rebuttal to Exhibit B,
25 Care of Trees, January 22, '04?

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1 MR. ZIMMITTI: That is correct.

2 CHAIR GRIFFIS: Okay. We'll take limited
3 testimony.

4 MR. ZIMMITTI: Mr. Chairman, Mr. Edward
5 Milhous is a consulting arborist certified by the
6 American Society of Consulting Arborists and is an
7 international society of arborculture.

8 CHAIR GRIFFIS: Are you offering him as an
9 expert witness? Is that what you're getting to?

10 MR. ZIMMITTI: Yes. Yes, we are.

11 CHAIR GRIFFIS: Do you have any written
12 submission on his background?

13 MR. ZIMMITTI: We have Mr. Milhous'
14 curriculum vitae, which I was going to offer to the
15 Board, in addition to a letter.

16 CHAIR GRIFFIS: Can you pass it around?

17 MR. ZIMMITTI: Mr. Chairman, Mr. Milhous
18 is a consulting arborist certified by the American
19 Society of Consulting Arborists and is an
20 international society of arborculture certified
21 arborist. Among Mr. Milhous' many other credentials,
22 he possesses a BS and MS in horticulture from Virginia
23 Tech, in addition to a BS in business administration
24 from Virginia Tech.

25 CHAIR GRIFFIS: Okay. It's all in front

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1 of us.

2 MR. ZIMMITTI: Oh, okay.

3 CHAIR GRIFFIS: Mr. Milhous, have you ever
4 presented before the Board?

5 MR. MILHOUS: Yes, I have. Yes, I have.

6 CHAIR GRIFFIS: And have you been
7 qualified as an expert witness before?

8 MR. MILHOUS: Yes, sir.

9 CHAIR GRIFFIS: Indeed. Objections here
10 from any Board Members?

11 BOARD MEMBER ETHERLY: No objection, Mr.
12 Chair.

13 CHAIR GRIFFIS: Any objections? It has
14 come to my attention that Mr. Milhous has, in fact,
15 been established as an expert witness in prior
16 applications for the same scope of arborists, so I
17 have no objection to it. Let's continue.

18 MR. ZIMMITTI: Thank you, Mr. Chairman.
19 Mr. Milhous, are you familiar with the subject
20 property at 3101 Chambers Road, N.W.?

21 MR. MILHOUS: Yes, I am.

22 MR. ZIMMITTI: And how are you familiar
23 with that property?

24 MR. MILHOUS: I visited the site three or
25 four times in the last six months.

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1 MR. ZIMMITTI: When was the last time you
2 visited the property?

3 MR. MILHOUS: This past week.

4 MR. ZIMMITTI: Did you have an opportunity
5 to inspect the condition of various trees on that
6 property, at that time?

7 MR. MILHOUS: Yes, I did.

8 MR. ZIMMITTI: Did you also have an
9 opportunity to review the letter from the Care of
10 Trees dated January 22, 2004, which is attached to the
11 intervenor's opposition brief as Exhibit B?

12 MR. MILHOUS: Yes, I did.

13 MR. ZIMMITTI: Given your inspection of
14 the trees on the lot and your understanding of their
15 condition, do you have an opinion about the one
16 paragraph letter from the Care of Trees?

17 MR. MILHOUS: Yes, I do.

18 MR. ZIMMITTI: And what is that opinion?

19 MR. MILHOUS: Most of the letter is
20 prefaced by, to the best of my knowledge, so to me
21 that says I don't really know. He does say, Mr.
22 Lawler says, that the Care of Trees has performed the
23 following work on the trees to be preserved: Root
24 pruning prior to excavation. I can't tell whether
25 they did or not on that. Crown clean pruning, looking

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1 at those trees, I am really surprised they would want
2 to claim credit for the work that was done on them, as
3 far as pruning goes.

4 CHAIR GRIFFIS: Well, let's stick to the
5 substance and the facts.

6 MR. MILHOUS: It's terrible.

7 CHAIR GRIFFIS: So it was a bad job?

8 MR. MILHOUS: It amounts to butchery.

9 CHAIR GRIFFIS: Okay.

10 MR. MILHOUS: I can't comment on the
11 fertilization of the trees. There is no way to know
12 whether they did or not, but certainly the pruning was
13 terrible.

14 CHAIR GRIFFIS: Okay. So it's your
15 statement, just based on this one paragraph letter,
16 that there may well have been quite a bit of work that
17 was done that is not available for your viewing?

18 MR. MILHOUS: Without going on the site, I
19 can't say.

20 CHAIR GRIFFIS: Right. What else?

21 MR. ZIMMITTI: Thank you. That concludes
22 our testimony.

23 CHAIR GRIFFIS: Anything else?

24 MR. ZIMMITTI: I have some concluding
25 remarks.

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1 CHAIR GRIFFIS: Don't go anywhere. Board
2 questions?

3 BOARD MEMBER ETHERLY: Mr. Chairman, I'm
4 still struggling with kind of the relevancy, because I
5 know we're in a sensitive area here, but perhaps let
6 me ask a question that is just kind of in my head
7 here. Mr. Milhous, have you had an opportunity to
8 review the appellants' supplemental prehearing
9 statement? It's Exhibit 23 submitted to the Board on
10 October 14th. And that is the exhibit that has the
11 topo survey that was referenced by counsel, and then
12 also what is referred to as Exhibit B, which is a
13 fairly detailed survey, if you will, of a number of
14 trees on the subject property.

15 MR. MILHOUS: I saw the topo survey and
16 the inventory of trees, yes.

17 BOARD MEMBER ETHERLY: Okay. Was the
18 inventory of trees at Exhibit B, was that prepared by
19 you or your firm?

20 MR. ZIMMITTI: I can respond to that, Mr.
21 Etherly. It was prepared by Dr. Wolf, the appellant.

22 BOARD MEMBER ETHERLY: Okay.

23 MR. ZIMMITTI: And it was prepared based
24 on the information derived from the topographic survey
25 that was provided by intervenor.

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1 BOARD MEMBER ETHERLY: Okay. Mr. Milhous,
2 are you in a position to speak to specific trees on
3 the property as they relate to -- you've heard some
4 discussion, I'm sure, about the part we had hoped
5 would be a very specific inquiry today regarding two
6 permits, pool and driveway. Can you speak with any
7 specificity to impacts of those two aspects of the
8 subject property on trees?

9 CHAIR GRIFFIS: I think we ought to
10 actually limit his testimony to response as he was
11 been offered to rebuttal of the letter in Exhibit B.

12 BOARD MEMBER ETHERLY: Okay.

13 CHAIR GRIFFIS: I'm not sure we want to
14 push them to expand the scope.

15 BOARD MEMBER ETHERLY: I mean, the only
16 reason I'm exploring that is with all due respect, I
17 mean, I appreciate the testimony, but I find it's not,
18 you know, helping me move my inquiry further. So I'll
19 withdraw the question. Thank you, Mr. Chair.

20 CHAIR GRIFFIS: I mean, I think -- all
21 right. Any other questions from the Board? Oh, yes,
22 Mr. Parsons? John?

23 COMMISSIONER PARSONS: As I understand it,
24 as far as your testimony you did not go on the site,
25 adjacent properties or the street?

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1 MR. MILHOUS: That's correct.

2 COMMISSIONER PARSONS: Thank you.

3 MR. ZIMMITTI: If I may add to Mr.
4 Parsons' question in responding, the property that Mr.
5 Milhous was on in viewing the subject trees on 3101
6 Chain Bridge Road is immediately adjacent to the
7 trees. The trees are but a step away from the
8 property boundary, so the full scope of the trees
9 themselves, since they are mostly on the edges of the
10 lot itself, were all fully viewable by our expert at
11 the time that he inspected them. He could not take
12 soil samples. He could not actually physically walk
13 on the lot, but he did see the construction activities
14 that had caused damage to the trees.

15 COMMISSIONER PARSONS: Is there anything
16 in particular he would like to say about the tree that
17 is in the vicinity of the impervious court, impervious
18 driveway, those areas?

19 MR. MILHOUS: One of the trees is next to
20 the accessory building and certainly soil has been
21 piled several inches deep around it, soil and gravel,
22 and it has had limbs hacked off of it, so it has been
23 affected detrimentally certainly.

24 CHAIR GRIFFIS: And how do you assess
25 that? What basis is that statement on that it has

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1 been detrimentally impacted?

2 MR. MILHOUS: You can kill a tree simply
3 by piling three inches of soil around the base of the
4 tree.

5 CHAIR GRIFFIS: For how long?

6 MR. MILHOUS: A few months.

7 CHAIR GRIFFIS: Okay. And how long has
8 that pile been on that tree?

9 MR. MILHOUS: The pile was there when I
10 visited the site in August and it is still there
11 today.

12 CHAIR GRIFFIS: Okay.

13 MR. MILHOUS: It still was there last
14 week.

15 CHAIR GRIFFIS: So based on that piling
16 up, there is a potential that it could kill the tree?

17 MR. MILHOUS: Certainly.

18 CHAIR GRIFFIS: Okay. Is the tree dead
19 now?

20 MR. MILHOUS: Without going on the site, I
21 couldn't tell you.

22 CHAIR GRIFFIS: Okay. Follow-up, Mr.
23 Parsons?

24 COMMISSIONER PARSONS: No, thank you.

25 CHAIR GRIFFIS: Anything else, Board?

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1 Let's go to cross.

2 MR. EPTING: None, thank you.

3 CHAIR GRIFFIS: No cross. Does the
4 Government have any cross?

5 MS. BELL: No.

6 CHAIR GRIFFIS: Wow, that's easy. I
7 thought you were gearing up for a rough one. Okay.
8 Very well. Let's move on.

9 MR. ZIMMITTI: Mr. Chairman, we would
10 conclude our presentation by stating that the
11 deleterious impact of the intervenor's excessive over
12 building on the lot has been both stark and dramatic,
13 both on the Chain Bridge Road neighborhood as a whole
14 and most directly on Mr. Logan's immediate neighbors.

15 The appellants, particularly those who once had an
16 unobstructed view from their backyard of the sweeping
17 and undeveloped vistas of Battery Kimball Park now
18 must stare at a solitary grotesquely oversized and out
19 of place 15,000 square foot mansion, the large
20 concrete pool and three level accessory building.

21 The intervenor's structures are completely
22 out of place with the rest of the neighborhood.

23 CHAIR GRIFFIS: How is that pertinent to
24 an appeal?

25 MR. ZIMMITTI: It's pertinent to the

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1 appeal in that this all stems from the June 13th
2 revised permit. It takes into account the fact that
3 the June 13th revised permit was issued in error,
4 because the developer, the builder, Mr. Logan, did
5 not, because he could not, designate the driveway to
6 the accessory building.

7 CHAIR GRIFFIS: I know that.

8 MR. ZIMMITTI: It's impervious.

9 CHAIR GRIFFIS: You're making statements
10 as if you're coming in against a special exception or
11 a variance, not an appeal. How is it an error that
12 your clients find it an inappropriate scale or out of
13 character?

14 MR. ZIMMITTI: We're trying to add color
15 to the straightforward argument.

16 CHAIR GRIFFIS: Indeed. Yes, yes.

17 MR. ZIMMITTI: That we have provided to
18 the Board.

19 CHAIR GRIFFIS: We want to add lunch to
20 our day.

21 MR. ZIMMITTI: Very well taken, sir.
22 Well, then we'll conclude by respectfully requesting
23 that the Board void the June 13, 2003 revised permit
24 and order the intervenor to comply with the applicable
25 zoning and overlay regulations, including, but not

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1 limited to as necessary requiring the intervenor to
2 raise the top story off of his accessory building,
3 particularly to comply with the impervious surface
4 requirements of the lot and with section 2117.4,
5 impervious surface driveway to an accessory parking
6 space.

7 In the alternative, the appellants request
8 that the Board require intervenor to restore
9 sufficient mature trees and other greenery to the lot
10 pursuant to the recommendation of a qualified
11 landscaping designer and arborist, so that the
12 intervenor's structures are hidden from view to the
13 maximum extent that is feasible. And I believe
14 appellant, Dr. Wolf, also has a supplemental statement
15 he would like to make.

16 DR. WOLF: I would like to add that while
17 this may seem perhaps a small matter, a trivial thing
18 about percentages of impervious coverage, I might
19 point out that the intervenor going into the
20 discussion today was right at, by his own admissions,
21 50 percent impervious coverage of his property. This
22 is a percentage which has a great meaning to the
23 citizens of our neighborhood. Going over that would
24 be an absolute maximum, going over that at all, we
25 consider a major infraction of the Chain Bridge

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1 Road/University Terrace Tree and Slope District, which
2 we worked very hard to create.

3 If this Board finds that by building a
4 pervious driveway to this accessory building, which is
5 the subject of that June permit, is okay, what they
6 are saying, in effect, is setting a new precedent in
7 the Zoning Regulations of the District of Columbia.
8 I, fortunately, had the opportunity to review the
9 website, which you all have posted for everyone to
10 read, I reviewed the BZA Orders going back to 1970 to
11 the present time. And in every instance in which
12 accessory parking has been added, and special
13 exceptions were requested from this Board, they were
14 added only with the caveat that they must be supplied
15 and accessed by impervious coverage.

16 The impervious coverage which Mr. Logan is
17 required to add will put him, by his own calculations,
18 in excess of what is required by the regulation. It
19 is very simple. You can go back and check those BZA
20 Orders yourself. We don't need an expert witness. I
21 don't have much more to say, except that this would
22 establish a new precedent and I think there would be a
23 lot of people who would like to come here and build
24 accessory buildings that are two-story and service
25 them with driveways that are made of anything they

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1 want from jello to grass. And you will be required --
2 they won't even get here. The Zoning Administrator
3 will approve them, because there will be a new
4 interpretation of the regulations. That's all I have
5 to say. Thank you.

6 CHAIR GRIFFIS: Good. Thank you very
7 much. First of all, I think, you have brought up an
8 interesting -- well, let me address your comment.
9 First of all, we don't find it a small issue. I mean,
10 we are here and we're dedicated to listening to it, so
11 none of this is small. Of course, we need to be
12 focused on exactly what we can and can't do. That
13 being said, it seems like you have evidenced, both in
14 all the submissions and just now in your statement,
15 that there may well be a conflict at some point
16 between our regulations and that being the overlay and
17 that of the required parking in the chapters, and
18 whether that creates an error in this case, I'm making
19 a larger point to look back on maybe there needs to be
20 come coordination, maybe not.

21 But specifically, the question is you
22 indicated that the owner had made a statement on the
23 50 percent coverage.

24 DR. WOLF: Exhibit H.

25 CHAIR GRIFFIS: Okay. I just wanted to

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1 make sure that you cite what that goes to. And that
2 is, in fact, the color calculations that is showing.

3 DR. WOLF: Not just Exhibit H, but in
4 their own construction document submitted to DCRA, the
5 cover page of those documents.

6 CHAIR GRIFFIS: Okay.

7 DR. WOLF: Has all those calculations.

8 CHAIR GRIFFIS: And you are disputing the
9 square footage calculations or if I follow you
10 correctly, what you are saying is they are not allowed
11 to have the impervious portion of the driveway. Is
12 that correct?

13 DR. WOLF: What we are disputing is that
14 the area they show in green on Exhibit H, which leads
15 down to that accessory building, should, in fact, be
16 in black or, I'm color blind, but what color is that?

17 MR. ZIMMITTI: Orange.

18 DR. WOLF: Orange. And that if you added
19 that additional orange that leads down to that lower
20 black building, which is the accessory building, they
21 are immediately over 50 percent.

22 CHAIR GRIFFIS: Yes, right.

23 DR. WOLF: Whatever number you want to
24 calculate, they are over it. I calculated at around 5
25 or 6 percent. But it doesn't matter. They needed to

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1 be before this Board requesting a special exception
2 and I can guarantee you that would have offered us an
3 opportunity beforehand to fight this case before it
4 was a done deal.

5 CHAIR GRIFFIS: Okay. Mr. Zaidain?

6 BOARD MEMBER ZAIDAIN: I think you were
7 going somewhere with that that I was going to push,
8 and that was just to kind of boil this down, because
9 we've had a lot of ancillary discussions. And
10 basically what the argument is is this area is out of
11 compliance with 2117.4, which is the impervious
12 surface requirement. And if they come into compliance
13 with that impervious surface requirements, under your
14 argument, that would then push them out of compliance
15 with the Chain Bridge Road Overlay. That's
16 essentially your argument in a nutshell?

17 DR. WOLF: Correct.

18 BOARD MEMBER ZAIDAIN: Okay. Thank you.

19 DR. WOLF: And it would also -- well, yes,
20 that is correct.

21 BOARD MEMBER ZAIDAIN: Okay. And no other
22 issues are being raised in regard to the permits, the
23 revised permits?

24 DR. WOLF: Basically, if he wants to make
25 that a two-story accessory building down there, it has

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1 to be serviced by, like all other accessory parking
2 spaces, an impervious driveway.

3 CHAIR GRIFFIS: All right.

4 DR. WOLF: There has never been any other
5 interpretation of the regulations.

6 BOARD MEMBER ZAIDAIN: All right. That
7 doesn't change my summary.

8 DR. WOLF: Right.

9 BOARD MEMBER ZAIDAIN: I just want to make
10 sure that we're clear.

11 DR. WOLF: Right.

12 BOARD MEMBER ZAIDAIN: Okay. Thank you.

13 CHAIR GRIFFIS: Ms. Miller?

14 VICE CHAIR MILLER: I just wanted to ask,
15 in order for the intervenor to be in compliance with
16 both overlay and 2117.4, would that mean that they
17 couldn't have two stories? That they would just be
18 able to have one story?

19 DR. WOLF: If he wants to have a building
20 down there and be in compliance with the overlay
21 regulations, he would have to stop calling it a two-
22 story garage accessory in domestic quarters, take one
23 story off and remove that excessive impervious -- what
24 should be impervious coverage and return it to some
25 form of pervious coverage, like grass or terraces and

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1 so forth, as shown on his original drawings.

2 MR. ZIMMITTI: If I may add as well to
3 help color this?

4 CHAIR GRIFFIS: Can you turn your mike on?
5 Your microphone is off.

6 MR. ZIMMITTI: If I may add section 2500.5
7 contains the only exception for a two-story accessory
8 building on a residential use lot like this and that
9 is for the top level being servant's quarters and for
10 the bottom level being a garage, and with an accessory
11 parking space in the garage, you're now bringing into
12 play the regulations in 2117.4, which is for
13 impervious surfaces, two accessory parking spaces and
14 as well it calls into question the entire impervious
15 surface requirements for the entire lot, because now
16 once you classify that accessory building driveway as
17 impervious, you now exceeded, by intervenor's own
18 admissions, the maximum 50 percent of impervious
19 surface coverage that he has already occupied on the
20 lot.

21 DR. WOLF: May I add that these
22 regulations have always been interpreted that
23 accessory parking is treated the same as required
24 parking in terms of access requirements.

25 COMMISSIONER PARSONS: But it's also your

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1 point that there is no definition of pervious surface
2 in our regulations.

3 DR. WOLF: There is no reference anywhere
4 in the regulations to pervious driveway, pervious
5 drive courts.

6 COMMISSIONER PARSONS: So theoretically,
7 if this term pervious became practice, you could apply
8 for a permit to put pervious pavement over the entire
9 lot, couldn't you?

10 DR. WOLF: This is correct. And when I
11 asked James Fahey, who is the Zoning Administrator, at
12 the time when these regulations were put into effect
13 in 1958 on this issue, what the intent of these
14 regulations were. He said exactly that. He said that
15 the intent of these regulations that relate to parking
16 were to make sure that accessory parking had the same
17 requirements as required parking.

18 BOARD MEMBER ZAIDAIN: It seems like we're
19 under the regs when there is a meaning in dispute
20 where we're asked to look at, I believe, Webster's.
21 Is that correct? It seems like that is something that
22 we are going to have to do. I have my own idea in my
23 mind about what Webster's is going to say, but I think
24 there is an area where we can make a determination on
25 pervious.

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1 CHAIR GRIFFIS: Okay. But did that answer
2 your question, Mr. Parsons?

3 COMMISSIONER PARSONS: Yes.

4 CHAIR GRIFFIS: Okay.

5 COMMISSIONER PARSONS: That's the most
6 troubling aspect of this case to me.

7 CHAIR GRIFFIS: Right. And how is that
8 detrimental to the intent of the overlay if you were
9 creating some sort of surface that could, in fact, be
10 pervious, but driveable?

11 DR. WOLF: The point here is that you
12 could over build your property and instead of leaving
13 appropriate green space, which is what the intent
14 was --

15 CHAIR GRIFFIS: But isn't pervious green
16 space, conceivably?

17 DR. WOLF: No.

18 CHAIR GRIFFIS: And drainage?

19 DR. WOLF: Well, first of all, the reason
20 for impervious coverage of driveways, for example, is
21 to make sure that things like oil and runoff go into
22 appropriate, you know, drainage and not into the
23 ground of that area. It is a standard regulation in
24 the District of Columbia. I can imagine there are
25 other reasons as well. For example, fire rescue being

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1 able to go down grass driveways to reach these
2 accessory buildings. The whole point is that these
3 should be used for vehicular access. It's just common
4 sense.

5 But I would point out that again if the
6 Board reinterprets the intent of these regulations to
7 mean, by their decision today, that anybody can build
8 a pervious driveway of whatever they want, there is no
9 specification. It really would just set a precedent.

10 It really would. I have looked at all the BZA Orders
11 that relate to this kind of case, and I could not find
12 one after looking at 60 of them between 1970 and the
13 present that allowed an individual when dealing with
14 accessory parking spaces, which is what we're talking
15 about to build pervious driveways to them.

16 CHAIR GRIFFIS: Right.

17 DR. WOLF: They specifically specified
18 they must be impervious.

19 CHAIR GRIFFIS: Understood.

20 DR. WOLF: And the subsequent regulations,
21 I would add, in the 1980s became more specific about
22 the Department of Transportation standards for what
23 constitutes impervious. Grass, pave or ramps
24 criteria, which is what they show in some of their
25 latest revisions.

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1 CHAIR GRIFFIS: Okay. Anything else? Any
2 Board questions? Cross? No cross examination? Does
3 the Government have any cross? Is the ANC represented
4 today?

5 DR. WOLF: I was informed by telephone
6 that she was stuck in her driveway, because of ice,
7 and was going to try to fax in a statement in support
8 of our case.

9 CHAIR GRIFFIS: Is it an impervious
10 driveway?

11 DR. WOLF: Yes, it is.

12 CHAIR GRIFFIS: Okay. Ms. Miller?

13 VICE CHAIR MILLER: I just wanted to ask
14 Mr. Wolf, what standards were you referring to with
15 respect to what constitutes pervious?

16 DR. WOLF: There is, I think, in 2117
17 point --

18 CHAIR GRIFFIS: 4.

19 DR. WOLF: -- 4 and also in 2117.10,
20 maybe.

21 VICE CHAIR MILLER: I thought you also
22 were referring to the Department of Transportation or
23 something?

24 DR. WOLF: It was -- well, DOT standards.
25 This issue had come up, apparently, in the past,

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1 according to Mr. Fahey, and when these were revised
2 they wanted to make it more clear cut, so that people
3 didn't try to get around this, what exactly
4 constituted impervious. Because this was a problem
5 even going back to 1958.

6 VICE CHAIR MILLER: But what DOT standards
7 were you referring to?

8 DR. WOLF: DOT standards, let's see if I
9 can show you an example.

10 CHAIR GRIFFIS: It's 2117.4, I think, is
11 what you're going to, isn't it?

12 DR. WOLF: Oh, yes. It's in 199.1
13 definitions impervious surface.

14 CHAIR GRIFFIS: Okay.

15 DR. WOLF: I don't know if those are DOT
16 standards, but basically an area that impedes the
17 percolation of water into the subsoil and impedes
18 plant growth.

19 CHAIR GRIFFIS: Okay.

20 DR. WOLF: The other I would refer you to
21 is 2117.10, where they talk about very specifically
22 DOT as structurally equivalent or better that form in
23 all weather an impervious surface at least 4 inches in
24 thickness and consisting of materials such as
25 bituminous, concrete or brick materials or

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1 combinations of these materials or other materials
2 approved by DOT.

3 BOARD MEMBER ZAIDAIN: What is the
4 citation on that?

5 DR. WOLF: That is 2117.10.

6 CHAIR GRIFFIS: Okay. Anything else? Mr.
7 Zaidain?

8 BOARD MEMBER ZAIDAIN: I think I'm working
9 from an -- okay. It is the D.C. Department of
10 Transportation that you are referring to. Okay.

11 DR. WOLF: Yes.

12 BOARD MEMBER ZAIDAIN: Okay. But I think
13 the standards that you were citing earlier were those
14 U.S. Department of Transportation standards or
15 whatever? Because that is what causes confusion.

16 DR. WOLF: The original --

17 BOARD MEMBER ZAIDAIN: I mean, you cited
18 something that may or may not give us direction on how
19 to determine what pervious is and now we're struggling
20 to figure out what you were talking about.

21 DR. WOLF: The original standards, I
22 think, in 1958 were just vague enough that they were
23 revised. I don't have the exact date. Mr. Fahey's
24 recollection, who is the former Zoning Administrator,
25 was that it was in the 1980s, to reference D.C. DOT

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1 standards.

2 MR. EPTING: Mr. Chair, could I just
3 object to the hearsay about Mr. Fahey?

4 CHAIR GRIFFIS: Yes.

5 BOARD MEMBER ZAIDAIN: I was just asking
6 him to clarify his earlier statement, that's all.

7 CHAIR GRIFFIS: Right.

8 MR. EPTING: That's fine.

9 CHAIR GRIFFIS: So in response to Mr.
10 Zaidain's question, you don't recall exactly the cite
11 that he was looking for that you were mentioning?

12 DR. WOLF: No.

13 CHAIR GRIFFIS: Okay. Very well.
14 Anything else from the Board? Clarifications? No
15 cross for this witness? Any other witnesses?

16 MR. ZIMMITTI: No, Mr. Chairman.

17 CHAIR GRIFFIS: Okay. So you are finished
18 with the presentation of your case?

19 MR. ZIMMITTI: That's correct.

20 CHAIR GRIFFIS: Excellent. Let's take
21 five minutes. We're going to come back and the
22 Government should be prepared to go to their case.

23 (Whereupon, at 11:18 a.m. a recess until
24 11:32 a.m.)

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1 CHAIR GRIFFIS: Okay. Let's reconvene.
2 We're ready for the Government's case.

3 MR. ZIMMITTI: Mr. Chairman, Andrew
4 Zimmitti, for the appellants, again. I was not aware
5 earlier, we actually do have an additional party who
6 would like to testify on behalf of the appellants, Mr.
7 David Murphy of the U.S. Park Service. He was under
8 the impression that there would be a public statement
9 period after our presentation.

10 CHAIR GRIFFIS: So you're calling him as a
11 witness?

12 MR. ZIMMITTI: Well, he would like -- we
13 understand from Mr. Moy that if he is going to present
14 any testimony, it would be now, and he has a statement
15 to make.

16 CHAIR GRIFFIS: As a witness?

17 MR. ZIMMITTI: In that respect, yes.

18 CHAIR GRIFFIS: Let's go. Don't go too
19 far. They are calling one last witness. Objections?

20 MS. BELL: Yes. And you know, I'm a
21 litigator, so I apologize if I call you Judge one too
22 many times.

23 CHAIR GRIFFIS: No need to apologize.

24 MS. BELL: You know, I think, we're
25 supposed to be the party that is unprepared in

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1 providing last minute evidence. We do object to the
2 submission of another witness. This is the second
3 one, if we count the statement, that we haven't had an
4 opportunity to review.

5 CHAIR GRIFFIS: Okay.

6 MS. BELL: And obviously, we can't
7 adequately prepare for cross examination. I do want
8 to point out that I also learned in the break since it
9 seems to be appropriate to go back to old issues, the
10 Ed Nunley declaration, once again, we have learned
11 that Mr. Nunley misrepresented his experience at DCRA.

12 CHAIR GRIFFIS: Okay. Bring it up in your
13 case and you can make a statement on that, but let's
14 keep to the specific issue. First of all, this
15 witness is going to be addressing what issue in the
16 appeal?

17 MR. ZIMMITTI: The witness will be
18 addressing the issue of the setback, which would be
19 the second permit at issue.

20 CHAIR GRIFFIS: The rear yard setback?

21 MR. ZIMMITTI: The May 20th permit.

22 CHAIR GRIFFIS: Okay.

23 MR. EPTING: I guess I would also like to
24 object to Mr. Murphy. I was also not aware that he
25 was going to be testifying. Maybe if I knew more

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1 about exactly what he was going to testify to, but it
2 seems like he is just being put into their spot,
3 because he didn't fit in any other spot.

4 CHAIR GRIFFIS: Right.

5 MR. EPTING: And usually in appeals you
6 have the appellant, the ANC, the Government agency and
7 I thought that was the D.C. Government agency, and the
8 owner or intervenor and that's it.

9 CHAIR GRIFFIS: Right. In appeals, there
10 is no section as in the variances, special exceptions
11 for testimony or persons to testify either in support
12 or in opposition to the application. Let's learn from
13 this and not take up everybody's time and let's put
14 this under provision that it is your witness, and
15 we're going to run through pretty quickly and we'll
16 take the information for what it is.

17 MR. ZIMMITTI: Thank you, Mr. Chairman.

18 MR. MURPHY: Thank you, Mr. Chairman. My
19 name is David Murphy and I'm speaking for the National
20 Park Service. As you know, the adjoining property --

21 CHAIR GRIFFIS: I'm sorry. You are
22 officially speaking for the National Park Service?

23 MR. MURPHY: National Park Service of Rock
24 Creek Park, because the --

25 CHAIR GRIFFIS: You are here representing

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1 the National Park Service?

2 MR. MURPHY: Yes, I am, sir.

3 MR. ZIMMITTI: He is here to testify on
4 behalf of the appellants. He also is employed by the
5 National Park Service. I think that's what Mr. Murphy
6 is saying.

7 MR. MURPHY: Fair enough.

8 CHAIR GRIFFIS: Well, that's a huge
9 difference.

10 VICE CHAIR MILLER: Huge. That's a huge
11 one.

12 CHAIR GRIFFIS: Are you giving a statement
13 from the National Park Service now?

14 MR. MURPHY: I can revise my position as I
15 am an employee of the National Park Service. I am
16 familiar with the site. And my observations on the
17 site as to rear lot setback may be of import to your
18 consideration.

19 CHAIR GRIFFIS: I understand. But how
20 does the National Park Service fit into this, other
21 than it is your employer?

22 MR. MURPHY: The National Park Service is
23 the adjoining property owner at the rear lot line.

24 CHAIR GRIFFIS: I know. But how does that
25 fit into your statement that you are about to give?

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1 MR. MURPHY: We are --

2 CHAIR GRIFFIS: Perhaps --

3 MR. MURPHY: Mr. Chair, we had understood
4 and apparently it was in error, as Mr. Moy pointed
5 out, that there would be an opportunity for the
6 National Park Service, as an adjoining owner, to make
7 a comment. We had understood at the time of the ANC.
8 Now, if that is not correct--

9 CHAIR GRIFFIS: So you do, you have a
10 designated testimony from the National Park Service as
11 the adjoining neighbor, as the adjoining property?

12 MR. MURPHY: We are prepared to testify if
13 that opportunity avails. It appears that it does not.

14 CHAIR GRIFFIS: Well, this is --

15 MR. ZIMMITTI: Mr. Chairman, we've adopted
16 Mr. Murphy, essentially, as a witness to give him an
17 opportunity to testify.

18 CHAIR GRIFFIS: Yes, but it's a whole
19 different thing if he is coming and making a statement
20 that he is presenting a testimony and statement from
21 the National Park Service, then it's somebody of
22 concern that you're calling as a witness to give some
23 factual evidence for the appeal.

24 MR. ZIMMITTI: Well, we do have a common
25 interest in this appeal.

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1 CHAIR GRIFFIS: I don't dispute that. I
2 just want to know what I'm actually about to hear.

3 MR. ZIMMITTI: Yes. Well, we could
4 offer --

5 MS. BELL: If I can interrupt? I'm a
6 little confused. Is this sanctioned testimony or
7 sanctioned information by the National Park Service
8 and is your job at the National Park Service one that
9 would include your duties and responsibilities would
10 include that you provide testimony in administrative
11 hearings such as this on behalf of the Park Service as
12 a neighboring property?

13 MR. MURPHY: The answer to that is yes.
14 My position is adjacent development liaison and I am a
15 frequent commentator and reviewer on adjoining
16 development.

17 CHAIR GRIFFIS: And this is a sanction
18 statement?

19 MR. EPTING: But, Mr. Chair, I mean, there
20 are --

21 CHAIR GRIFFIS: Let him answer that.

22 MR. MURPHY: I'm sorry?

23 MR. EPTING: I'm sorry.

24 CHAIR GRIFFIS: The beginning of the
25 question was this is a sanctioned statement that you

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1 are about to provide?

2 MR. MURPHY: Yes, I am confident that I am
3 speaking for the interests of the Park Service as an
4 authorized representative of same.

5 CHAIR GRIFFIS: I understand you are
6 confident.

7 VICE CHAIR MILLER: Yes.

8 CHAIR GRIFFIS: Did this go through -- I
9 don't know what kind of channeling you would have.
10 Was your statement approved by the National Park
11 Service and they give you this great stamp and seal
12 and say all right go downtown and present it to the
13 BZA or is this something that you generated in your
14 capacity of your employment?

15 MR. MURPHY: I have generated this in the
16 capacity of my appointment and it has been reviewed
17 verbally with the superintendent of Rock Creek Park,
18 so therefore I am representing Rock Creek Park.

19 CHAIR GRIFFIS: Okay. Further comments?
20 Mr. Epting?

21 MR. EPTING: Well, he is not -- he didn't
22 file as an intervenor and he is not, at least, a
23 Government DC agency, so I just don't see where you
24 slide him. It seems like he could have filed as a
25 party 14 days in advance.

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1 CHAIR GRIFFIS: I tend to agree. Okay.
2 Ms. Miller?

3 VICE CHAIR MILLER: Well, why wouldn't he
4 be a witness in support of the application?

5 MR. EPTING: Well, typically, on an appeal
6 you have the appellant, you have the ANC, the DC
7 agency and you have the intervenor or the owner and
8 that's it.

9 CHAIR GRIFFIS: But is there anything that
10 precludes them from calling him as a witness?

11 MR. EPTING: I'm not sure I could point to
12 anything. It seems irregular to call a different
13 federal agency as a witness, particularly when we
14 didn't know that it was occurring.

15 CHAIR GRIFFIS: Understood.

16 MR. EPTING: I certainly can't point to
17 anything.

18 CHAIR GRIFFIS: Yes, understood.

19 MS. BELL: And this property isn't in Rock
20 Creek Park.

21 MR. MURPHY: Mr. Chair, the term Rock
22 Creek Park is under the superintendent of Rock Creek
23 Park, who has responsibility and stewardship for
24 almost, if not all, the National Park lands and
25 reservations within northwest Washington. Certainly

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1 from Rock Creek over to Canal Road is within in that.

2 CHAIR GRIFFIS: Is adjacent to what park?

3 MR. MURPHY: Excuse me, sir?

4 CHAIR GRIFFIS: What park is adjacent to
5 this property?

6 MR. MURPHY: This is adjoining to Battery
7 Kimball Park. Mr. Chair, I would point out that
8 Battery Kimball Park was a major subject of the reason
9 for the Tree and Slope Overlay.

10 CHAIR GRIFFIS: Understood. It's also a
11 good sledding hill.

12 MR. MURPHY: Certainly.

13 CHAIR GRIFFIS: Maybe I shouldn't say
14 that.

15 BOARD MEMBER ETHERLY: I don't have any
16 objection, Mr. Chair. Mr. Epting, I think, raises a
17 point, but I believe as part of the appellants'
18 presentation, they could, of course, I think, bring a
19 witness in for testimony. I think perhaps the more
20 critical issue, I mean, it has been asked and answered
21 and Mr. Murphy has spoken to it, there is no doubt the
22 questions that you heard regarding authorization of
23 Mr. Murphy were critical and, of course, are not
24 alleging any doubt in terms of your veracity.

25 But the testimony takes on a different

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1 nature if it's being offered on the part of the
2 National Park Service as opposed to just as an
3 individual who has familiarity with the subject
4 property and any adjacent property. So I think that
5 was an important point for me, but it has been asked
6 whether or not you are providing testimony on behalf
7 of the National Park Service and it is your testimony
8 that you are, indeed, doing so.

9 Could you perhaps just to get a little
10 more clarity in that regard, what is your title with
11 the National Park Service? You noted adjacent
12 development liaison. I just wanted to be sure I had
13 that clear. What is your title and role, if you
14 would, with the National Park Service?

15 MR. MURPHY: I am a, by classification,
16 Park Ranger in the National Park Service. I work in
17 the Office of Land Resources and Planning, that is at
18 the regional level. We provide support and assistance
19 to the parks. And my title and specialty is adjacent
20 land liaison and my role is to provide point of
21 contact for the Park Service, for adjacent development
22 and also point of commentary as necessary on adjoining
23 developments and their impacts on Park land and
24 observations for potential remediation or mitigation
25 as apply.

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1 BOARD MEMBER ETHERLY: Okay. Excellent.
2 And just one final question. How long have you served
3 in that capacity?

4 MR. MURPHY: I have been in that capacity
5 for the last 12 years. I have been a professional
6 Park Ranger in the National Park Service in the
7 Washington area for the last 28 years.

8 BOARD MEMBER ETHERLY: Okay. Thank you.
9 Thank you, sir. Thank you, Mr. Chair.

10 CHAIR GRIFFIS: Any other comments from
11 the Board?

12 BOARD MEMBER ZAIDAIN: Well, just very
13 quickly, Mr. Chair. I mean, I agree with Mr. Etherly,
14 where Mr. Etherly was going. Unfortunately, the
15 National Park Service is not organized like a
16 commission, like an ANC or, you know, a planning
17 commission where there could be a vote on whether or
18 not he is authorized. I think we have asked him the
19 appropriate questions on whether or not he can be here
20 and represent the Park Service and he has answered
21 that. If the intervenor and anybody else wants to
22 challenge that in their cross or whatever, that's
23 their burden to bear. But I think that we've asked
24 all that we can of Mr. Murphy.

25 CHAIR GRIFFIS: Good.

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1 BOARD MEMBER ZAIDAIN: And I am a little
2 concerned at the timing. It seems like this is kind
3 of ad hoc witness calling, but I think it would be
4 appropriate to let his testimony into the record.

5 CHAIR GRIFFIS: Okay. Let's go ahead.
6 Mr. Murphy?

7 MR. MURPHY: In response to Mr. Zaidain's
8 comment, I do want to apologize for the timeliness,
9 but again we were at the -- at a point of
10 misunderstanding of the actual timing of our
11 testimony. I'll be very brief. The National Park
12 Service, Battery Kimball Park, is immediately
13 adjoining this property. It is the rear lot property,
14 adjacent property owner. We, in the last five years,
15 have worked with the community and this Board and the
16 District of Columbia to afford some level of
17 protection on this natural island of natural and
18 cultural resources.

19 The community has gone far beyond what we
20 would have expected to band together and pursue a Tree
21 and Slope Overlay with very specific applicability to
22 the preservation of the park and its natural and
23 cultural resources. We have watched this development.

24 We have had difficulty reviewing a number of the
25 drawings. We are concerned that the development may

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1 not be as finite and as absolute as some of the
2 drawings would imply.

3 I took the trouble of visiting the site on
4 October 30, 2003 and photographed the site, and I want
5 to share those photographs with you, just to show the
6 status and the proximity of this building as it is
7 built, not finished, not at the current conditions,
8 but it does antidotally point out the reason for our
9 concern and very specific need to follow both the rear
10 lot setback and also getting to if there is a decision
11 on the replacement of trees, how those trees will be
12 placed and for what function, as well as how the
13 National Park Service will have to respond to the tree
14 and slope development. So I have these photographs.

15 CHAIR GRIFFIS: Do you have copies to
16 provide everybody?

17 MR. MURPHY: Yes, yes, Mr. Chair, I have
18 15 copies.

19 CHAIR GRIFFIS: Before you go too far.

20 MR. EPTING: Mr. Chair, John Epting with
21 Shaw Pittman, and I apologize again for interrupting.

22 My understanding of rear yard setback was shown on
23 the main building permit, and that wouldn't be timely.

24 The revised driveway permit made no changes to that.

25 And I don't want to delay things, either. I mean, we

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1 can deal with it if we have to. But I think we have a
2 simple answer. But it just strikes me is that the
3 Board has already ruled on that.

4 MR. ZIMMITTI: In response to that, Mr.
5 Chairman, I would just point out that the May 20th
6 permit relating to the pool does concern the
7 structures at the very rear of the property line that
8 are within 25 feet of the rear property line and
9 therefore are at issue and it is not something that
10 has been waived, at any time, due to this.

11 CHAIR GRIFFIS: Okay. And I'm sorry, you
12 indicated the pool permit? Is that what you said?

13 MR. ZIMMITTI: Right.

14 CHAIR GRIFFIS: Right.

15 MR. ZIMMITTI: We're pointing out the pool
16 permit, which is what ties them.

17 CHAIR GRIFFIS: Okay. Indeed. Mr.
18 Murphy, what are these supposed to show us?

19 MR. MURPHY: Okay. The first photograph
20 shows the building on October 30, 2003 and it shows
21 the foundation of the ancillary building and the pool.

22 The pool is actually -- this is a low wall and is the
23 overflow pond. We want to point out that the
24 staircase and platform upon which the ancillary
25 building rests is, according to the drawings as we

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1 understand it, 25 feet from the rear lot setback. So
2 we do not believe that there is a reason to argue
3 that.

4 However, the entry that you see at the
5 base of that, at the ground level has a drop
6 staircase. And in normal practice, there will need to
7 be a structure to keep that staircase dry, i.e., roof.

8 And we would argue that that's within the 25 foot
9 setback.

10 CHAIR GRIFFIS: Have you seen
11 documentation on that?

12 MR. MURPHY: No, we do not. We have not.

13 CHAIR GRIFFIS: Okay.

14 MR. MURPHY: We are projecting that as
15 normal development. Now, it may be that the applicant
16 can argue and present that it will never have a roof,
17 and that is the sort of specificity that we need. The
18 other issue is the second photograph, and you'll
19 notice I had an assistant, my 10 year-old daughter, I
20 took with me to take these photographs. And at the
21 point that I took the picture on the first page, she
22 said, which is an interesting thing because she is not
23 trained to this, she said am I trespassing?

24 CHAIR GRIFFIS: Okay.

25 MR. MURPHY: So I said, I reassured her --

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1 CHAIR GRIFFIS: What are the photographs
2 supposed to show?

3 MR. MURPHY: The problem is that this
4 child, 10 years-old, understands and feels that she is
5 encroaching onto private land.

6 CHAIR GRIFFIS: Okay.

7 MR. MURPHY: She is more than 30 feet from
8 the building.

9 CHAIR GRIFFIS: I got to stop you there,
10 because there is nothing I can do with that.

11 MR. MURPHY: Okay.

12 CHAIR GRIFFIS: Impressions are one thing.
13 I want to know what this is showing us factually that
14 goes directly to the appeal.

15 MR. MURPHY: All right. If you rule on
16 the owner's behalf --

17 CHAIR GRIFFIS: No, don't tell me how.

18 MR. MURPHY: All right. We would suggest
19 that any landscape replacement of trees would be
20 within that 25 foot setback.

21 CHAIR GRIFFIS: Okay. Also, I'm not going
22 to condition an appeal.

23 MR. MURPHY: All right.

24 CHAIR GRIFFIS: We're either going to find
25 that an error happened or it didn't.

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1 MR. MURPHY: All right. I would say that
2 the structure itself indicates to -- from our
3 experience that there will be a process of additional
4 development within the rear lot setback, which will
5 then preclude its being used as a screening or
6 mitigation to the site, and that is a concern and I
7 believe that is on the mark of the 25 foot setback.

8 CHAIR GRIFFIS: Okay.

9 MR. MURPHY: Thank you very much.

10 CHAIR GRIFFIS: Questions from the Board?
11 Any other questions? Cross? No cross. Government,
12 have any cross?

13 MS. BELL: I just have one question and
14 I'm a little confused. The sum total of your
15 testimony is that the National Park Service, based on
16 your experience, anticipates additional development
17 which will probably occur within the 25 foot space?

18 MR. MURPHY: Since much of this discussion
19 has been on timeliness, we find ourselves needing to
20 point out that the final decision may not be the final
21 product, and we have to anticipate future actions on
22 the site. And we want to make sure that that does not
23 occur. This is a very sensitive area. We are very
24 constrained in our ability to create and maintain a
25 park next to a development. We thought that with the

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1 Tree and Slope Overlay there was a substantial level
2 of protection. We are now sensing there may not be.

3 MS. BELL: So I am correct in my
4 understanding that you are assuming that it will
5 occur? That's your testimony, right?

6 MR. MURPHY: It is a reasonable projection
7 that it will occur.

8 MS. BELL: Okay. That's it.

9 CHAIR GRIFFIS: Anything else?

10 MS. BELL: No.

11 CHAIR GRIFFIS: Nothing. Thank you very
12 much, Mr. Murphy.

13 MR. MURPHY: Thank you, sir.

14 BOARD MEMBER ZAIDAIN: Can I ask a really
15 quick question?

16 CHAIR GRIFFIS: Yes, sure. Mr. Zaidain?

17 BOARD MEMBER ZAIDAIN: A really quick
18 question. I just want to make sure I understand the
19 photos that we are looking at here. What we're seeing
20 in the, and I'm looking at the second page, although
21 they both -- well, the second one is more -- with more
22 detail. It's more of a tighter angle on that
23 structure. This is the concrete wall that is at the
24 base of the pool and is that the overflow wall that is
25 part of this infinite pool?

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1 MR. MURPHY: The lower wall, the one that
2 basically is about half the doorway height, as we
3 understand it, is the overflow.

4 BOARD MEMBER ZAIDAIN: Okay. And then
5 there is like a catch-base type of thing below that or
6 is that the catch-base?

7 MR. MURPHY: No. As I understand, that is
8 the catch-base.

9 BOARD MEMBER ZAIDAIN: That is the catch-
10 base. Okay. And then this entrance to the left,
11 that's your understanding that that is an entrance to
12 the accessory structure?

13 MR. MURPHY: As shown on the drawings,
14 that is what it appears to be. There is also on the
15 drawings a staircase leading down to that entry.

16 BOARD MEMBER ZAIDAIN: And that's -- okay.
17 That staircase you cannot see, because of the steel
18 fence?

19 MR. MURPHY: That's because of the steel
20 fence. The steel fence is approximately the boundary
21 between the private ownership and the Park land.

22 BOARD MEMBER ZAIDAIN: Yes. Okay. And
23 then, obviously, this is the whole entire accessory
24 structure that we see in the background. Okay.

25 MR. MURPHY: As of October 30, 2003.

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1 BOARD MEMBER ZAIDAIN: Okay. Okay. Thank
2 you.

3 CHAIR GRIFFIS: Anything else?

4 MR. ZIMMITTI: Nothing further, Mr.
5 Chairman, from the appellants.

6 CHAIR GRIFFIS: Good. Let's move ahead
7 then.

8 MS. BELL: Actually, to move the hearing
9 along, I will be very brief and then I'll have Mr.
10 Paul give his testimony. As we sort of indicated
11 earlier, he is the person who initially reviewed the
12 plats and also initially took a look at the permits.
13 I do want to add one comment with regard to the Nunley
14 declaration. It has come to our attention that Mr.
15 Nunley actually had not worked at DCRA at the time
16 that he had indicated.

17 My only point in mentioning that is when
18 you take a look at a statement given by an individual,
19 who isn't physically here, who makes a number of
20 comments, both personal and professional, that calls
21 into question not only the Government operation, but
22 Government employees, it really creates an
23 unreasonable burden on the Government to defend its
24 position, and that's the awkward place that we're in
25 right now.

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1 Mr. Paul will provide some information
2 about both site visits, as well as the two issues that
3 we believe that are currently alive and that has to do
4 with the parking and the driveway with regard to the
5 garage and the stairwell and the width of as well as
6 the escalation. We believe that the tree issue is not
7 alive for the Board, because that is something that
8 had been ruled on with regard to timeliness and we
9 don't believe it is connected to the revised permit.
10 We don't believe that the appellant was able to show a
11 connection between either additional trees or trees
12 that he believes have been subsequently damaged after
13 the original base permit was issued.

14 And the last thing that Mr. Paul will talk
15 about is the issue of impervious driveways and the 50
16 percent threshold. We do take issue with a number of
17 the interpretations the appellant has with regard to
18 the Zoning Regulations, and Mr. Paul will talk about
19 that, particularly, with regard to the number of
20 parking spaces that are required for the detached
21 garage.

22 And the last thing I want to mention is as
23 the Board is aware a stop-work order was issued by
24 DCRA back on February 10th. It gave us an opportunity
25 to take a look at the site and review it as well as

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1 inspect it. It was lifted in March of last year on
2 the 21st. So actually, as I said, the two issues that
3 we believe are alive are the two permits, 1576 with
4 regard to the ground pool and 452193 which was with
5 regard to the accessory garage. That would be both
6 the May 20th permit and the June 13th permit. And that
7 would be the scope of the appeal that we're here about
8 today. Correct? I see quizzical faces.

9 CHAIR GRIFFIS: Well, maybe I don't mean
10 it. Go ahead.

11 MS. BELL: All right. Okay. Sure.

12 MR. PAUL: Again, my name is Leon Paul.
13 I'm a zoning technician with the Office of Zoning
14 Administrative Building and Regulation Administration.

15 One of the first things I want to speak to was, as
16 she said, the site visits. I was in correspondence
17 with Arthur Levy, also one of the, I believe,
18 appellants, who questioned how comments I made on the
19 original review of the application for the building
20 permit were corrected and how the permit was granted
21 if they were constructing within the limitations of
22 the permit.

23 After corresponding with him a number of
24 times on email, I went out on a site visit with Allen
25 James, a zoning inspector. At the time we went out

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1 there, ground was broken and foundations were being
2 laid for the construction of the house and the
3 accessory structure and grading was being done to
4 probably have the grades as they were stated in the
5 permit. At the time we went out, we saw nothing that
6 was inconsistent with the plans, as I reviewed them.

7 And so I gave that result back to Mr. Levy
8 and they continued on with their work. That was the
9 only site visit I have been party to. Ms. Ogunaye,
10 the chief of Zoning Review, was the person who went
11 out with another inspector regarding the trees, which
12 is, as we said, an issue that we're --

13 CHAIR GRIFFIS: Okay. And these are all
14 prior to the revised permit issuance?

15 MR. PAUL: These are prior to the revised
16 permit issuance.

17 CHAIR GRIFFIS: Okay. So let's catch up.

18 MR. PAUL: Okay. Now, in regards to the
19 driveway issue with regards to pervious, impervious
20 and how -- whether or not there needs to be an
21 impervious driveway leading to the accessory garage,
22 one of the things that was stated was accessory versus
23 required. When this case -- the accessory parking is
24 what is required. It's the accessory to the home.
25 And the regulations speak and the section they stated

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1 is 2117.4, each required space ought to be accessible
2 at times directly from approved streets or alleys.

3 In the plans as the house is constructed,
4 there is parking within the house. There is garage
5 space within the house that the impervious driveway
6 leads to in the original plat. So the required
7 parking, the parking requirements were filled with the
8 parking within the home, so there is an impervious
9 driveway that leads to the required parking.

10 The section that was stated, I have in
11 front of me the original --

12 MS. BELL: If you have the plat in front
13 of you.

14 MR. PAUL: -- plat. I have the original
15 plat that shows impervious driveway leading from the
16 entrance from Chain Bridge Road directly to the paved
17 drive court that leads to the parking within the house
18 itself. From there, also another section that was
19 stated in arguing the impervious surface was section
20 2118.9, which states "Except where otherwise
21 indicated, whenever the word all is followed by the
22 words parking spaces in the same sentence, the parking
23 requirements, as specified, shall apply to all parking
24 spaces whether or not the spaces are required by the
25 chapter. The requirement shall also apply to both

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1 accessory parking spaces and parking spaces that are
2 constructed as a principal use unless otherwise
3 specified."

4 So unless the statement is made all
5 parking spaces, all the requirements stated refer to
6 required parking spaces. And the required parking was
7 fulfilled within the garage of the house, the inside
8 of the house. So this parking in the accessory garage
9 is not actually required parking, but, in this sense,
10 extra parking spaces, not part of the requirement.
11 So, therefore, there is nothing that states that an
12 impervious driveway needs to be constructed, extra
13 parking that does not fulfill the requirement. It's
14 not part of the required parking.

15 CHAIR GRIFFIS: So your point is the
16 regulations regulate that which is required?

17 MR. PAUL: Right.

18 CHAIR GRIFFIS: And above that?

19 MR. PAUL: Above that there is no
20 statement of impervious surface.

21 CHAIR GRIFFIS: They are not. Okay. Ms.
22 Miller, did you have a quick question?

23 VICE CHAIR MILLER: I just want to clarify
24 what regulation you were referring to when you were
25 talking about defining all other than 2117.4 of the

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1 statement?

2 MR. PAUL: It was 2118.

3 VICE CHAIR MILLER: 2118.9.

4 MR. PAUL: 2118.9. It was actually
5 mentioned in the beginning of the testimony by the
6 appellant.

7 VICE CHAIR MILLER: Thank you.

8 MR. PAUL: I think another issue that was
9 in question was the stairwell at the rear of the
10 accessory garage, in terms of how it fits into the
11 rear yard. Rear yard, the rear yard dimension is
12 actually measured from the building line of the
13 principal structure on the property, which would be
14 that single-family house. So the pool and the
15 accessory structure are found within the rear yard.
16 So they don't affect the rear yard dimension, because
17 they are found within the rear yard. And, I believe,
18 I think that's it.

19 I believe one other issue was the setback
20 of the actual pool itself. And I believe the base in
21 that is built into the pool for any spillage. Pool
22 setbacks are not zoning requirements. There is no
23 zoning requirement as to the distance from the rear
24 yard, the rear lot line to the pool. That is actually
25 not found in the Zoning Codes, so we wouldn't be able

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1 to speak as to how to regulate that as a Zoning issue.

2 I believe that covers all the details that we would
3 like to cover. Will there be any questions?

4 CHAIR GRIFFIS: You indicated that the
5 setback for pools is not within the Zoning
6 Regulations. Is that correct?

7 MR. PAUL: Yes, sir.

8 CHAIR GRIFFIS: Can a pool be a structure?

9 MR. PAUL: A pool can be an accessory
10 structure to a single-family dwelling. It can be a
11 principal structure, but in this case an accessory
12 structure to a single-family dwelling.

13 CHAIR GRIFFIS: And accessory structures
14 are not regulated in terms of setback, open space
15 requirements?

16 MR. PAUL: No, sir, not in terms of rear
17 yard. Only -- excuse me rear lot line. Only rear lot
18 line dimension that is given is for a garage that
19 abuts an alley where there is a distance of 12 feet
20 from sitting on the alley for proper turn ratio, but
21 nothing in terms of a rear lot line on a property by
22 an alley that is not a garage, a structure, I mean.

23 CHAIR GRIFFIS: Okay. Questions from the
24 Board?

25 VICE CHAIR MILLER: Yes.

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1 CHAIR GRIFFIS: Ms. Miller?

2 VICE CHAIR MILLER: So part of your job is
3 reviewing building permits. Is that correct?

4 MR. PAUL: Yes, ma'am.

5 VICE CHAIR MILLER: Do you review building
6 permits for compliance with the CBUT Tree Removal
7 Restrictions?

8 MR. PAUL: Yes, I do.

9 VICE CHAIR MILLER: Are all building
10 permits required to be reviewed for compliance with
11 those restrictions?

12 MR. PAUL: All building permits?

13 VICE CHAIR MILLER: All building permits.

14 MR. PAUL: No, ma'am.

15 CHAIR GRIFFIS: Only in the overlay.

16 MR. PAUL: Only properties that fall
17 within the overlay.

18 VICE CHAIR MILLER: Oh, within the
19 overlay.

20 MR. PAUL: Within the overlay, yes.

21 VICE CHAIR MILLER: So okay. I'm sorry.

22 MR. PAUL: Yes.

23 VICE CHAIR MILLER: So within the overlay,
24 within this case.

25 MR. PAUL: Yes, yes.

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1 VICE CHAIR MILLER: Did you review the two
2 permits that are under consideration right now, the
3 June 13th revised permit and then the May pool permit
4 for compliance with the CBUT Tree Removal Restriction?

5 MR. PAUL: I reviewed the original and the
6 June 13th revision. The pool permit that we speak of
7 was dated May of 2000. I believe that pool permit --
8 see, the original pool and all the dimensions of the
9 pool were actually included in the original building
10 permit. I believe the permit that was issued in May
11 is only for the installation of what was already
12 approved zoning-wise in the original permit. So there
13 was no zoning issues in terms of the location setback
14 of the pool in any way in the May permit. So I didn't
15 review that further.

16 VICE CHAIR MILLER: So with respect to the
17 June 13th permit, how did you review it for compliance
18 with the Tree Removal Restrictions?

19 MR. PAUL: Well, I have the original plat.
20 We received a new plat that showed a pervious
21 driveway to the accessory garage. And what had to
22 take place was a recalculation of the entire
23 impervious surface and pervious surface to make sure
24 that the change was still going to be in it. But in
25 actuality, there is no change in -- or there was very

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1 slight change from pervious to impervious from one
2 permit to the next one, one plat to the next.

3 VICE CHAIR MILLER: Thank you.

4 CHAIR GRIFFIS: Mr. Parsons?

5 COMMISSIONER PARSONS: Mr. Paul, in
6 getting to those two plats.

7 MR. PAUL: Yes, sir?

8 COMMISSIONER PARSONS: What, in your view,
9 was the reason to change the plat from December 12th to
10 June 5th?

11 MR. PAUL: To June 5th. I believe a lot of
12 speculation came up as to the use of the accessory
13 structure, whether or not it fulfilled a garage and I
14 think it was more to appeal to the complaints that
15 were being placed on it. Because it was -- it is laid
16 out as a garage in the plans. It has a parking space
17 on the lower level, but there was a lot of question as
18 to how it was going to be accessed as parking if there
19 was no way to access it. When, in fact, there is
20 nothing in the code that stipulates that this extra
21 parking requires access. But in terms -- I guess to
22 smooth over the whole construction and alleviate some
23 of the complaints, this driveway was put in in
24 addition to what was already there to alleviate that
25 problem.

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1 COMMISSIONER PARSONS: So in your original
2 issuance of this permit, the original plat.

3 MR. PAUL: Yes.

4 COMMISSIONER PARSONS: There is no
5 requirement for a garage structure, this kind, to have
6 access to it by vehicles? It can be just called a
7 garage and you can access it from the stairway?

8 MR. PAUL: Yes, because there is no
9 provision for access to the extra parking. Everything
10 speaks only to the required parking.

11 COMMISSIONER PARSONS: I understand. So
12 did you get into the issue of pervious/impervious and
13 square footage of both during your evaluation?

14 MR. PAUL: Yes. In terms of the --

15 COMMISSIONER PARSONS: The 50 percent.

16 MR. PAUL: Right. Yes, I did.

17 COMMISSIONER PARSONS: So the first permit
18 you issued, you believed was under the 50 percent?

19 MR. PAUL: Yes, it was. I believe it was.
20 Through my calculations, I believe it was.

21 COMMISSIONER PARSONS: But have you seen
22 Exhibit H now that talks about that?

23 MR. PAUL: Exhibit H by the intervenor?

24 COMMISSIONER PARSONS: Yes.

25 MR. PAUL: I've seen the coloring, yes.

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1 Yes, the color coordinated plat.

2 COMMISSIONER PARSONS: Right.

3 MR. PAUL: Yes, I have.

4 COMMISSIONER PARSONS: So what is your
5 view on that? Are they currently at the 50 percent?

6 MR. PAUL: I reviewed it. I believe that
7 through my calculations it would still be slightly
8 under it, because the change from the -- to the
9 pervious drive court -- I mean, excuse me, driveway
10 that leads to the accessory garage, there is no change
11 in surface, because before there was terrace, there
12 was planting there, and there was nothing that graded
13 down towards that accessory garage. What they
14 provided was a driveway with pervious surface, at
15 least to the garage. There was no change in surface
16 from plat to plat.

17 COMMISSIONER PARSONS: I understand. Now,
18 to the question that the appellant brought up about
19 the term pervious.

20 MR. PAUL: Yes.

21 COMMISSIONER PARSONS: Which apparently is
22 not in the regulations. Could you describe how you
23 apply the term pervious?

24 MR. PAUL: Well, the definition for
25 impervious surfaces is in section 199.1, so just apply

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1 the opposite.

2 COMMISSIONER PARSONS: And it says?

3 MR. PAUL: Oh.

4 COMMISSIONER PARSONS: Or you could
5 paraphrase.

6 MR. PAUL: Impervious surface, any area
7 that impedes the percolation of water into subsoil and
8 impedes plant growth. Pervious surfaces include the
9 footprints of principal and accessory buildings,
10 footprints of patios, driveways, other paved areas,
11 tennis courts and driving pools and any path or
12 walkway that is covered by impervious material.

13 COMMISSIONER PARSONS: So how about the
14 term impervious?

15 COMMISSIONER PARSONS: Well, that was the
16 definition for impervious.

17 MS. BELL: Yes. I think that the
18 Government sort of takes an issue with the appellants'
19 contention that it's not properly defined, because in
20 the DCMR not only is impervious surface defined, but
21 impervious surface coverage is defined. His argument
22 was that there was no definition at all.

23 COMMISSIONER PARSONS: I think his
24 argument was there was no definition of pervious, if I
25 caught the point.

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1 MR. PAUL: I'm not sure.

2 COMMISSIONER PARSONS: There is a
3 definition of impervious.

4 MS. BELL: Yes.

5 COMMISSIONER PARSONS: Let's call it
6 asphalt to get on with it or slate or concrete.

7 MR. PAUL: Well, actually, I'm looking at
8 the definition.

9 MS. BELL: Okay. I'm a little confused.

10 MR. PAUL: I'm also.

11 COMMISSIONER PARSONS: Maybe my question
12 was improperly phrased. But anyway, I'm trying to get
13 the definitions of both terms.

14 MR. PAUL: Okay.

15 COMMISSIONER PARSONS: We now have
16 impervious.

17 MS. BELL: Yes.

18 COMMISSIONER PARSONS: Water can't get
19 through it.

20 MR. PAUL: Right.

21 COMMISSIONER PARSONS: So now we have a
22 term used for a driveway.

23 MR. PAUL: Yes.

24 COMMISSIONER PARSONS: That is pervious.

25 MR. PAUL: Yes.

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1 COMMISSIONER PARSONS: And what is the
2 meaning of that?

3 MR. PAUL: What is the meaning of a
4 pervious driveway or the meaning of pervious surface?

5 COMMISSIONER PARSONS: Well, pervious
6 surface in your experience.

7 MR. PAUL: Okay. I took the meaning to be
8 an area that allows for the percolation of water.
9 Just the opposite of what impervious meant.

10 COMMISSIONER PARSONS: Right.

11 MR. PAUL: That's what I took the
12 definition to be. Okay.

13 COMMISSIONER PARSONS: So it could be
14 gravel. It could be sand. It could be grass.

15 MR. PAUL: Yes.

16 COMMISSIONER PARSONS: But it's not your
17 place to evaluate that as to whether it is pervious or
18 not.

19 MR. PAUL: No.

20 COMMISSIONER PARSONS: There is nothing in
21 the code?

22 MR. PAUL: As to the material, from the
23 interpreted material?

24 COMMISSIONER PARSONS: Right. Correct. I
25 mean, it could become pacted with a roller as long as

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1 it is not asphaltic. Is that it or concrete?

2 MR. PAUL: I took it as -- in terms of
3 this review, I took it as the applicant had to
4 identify what was impervious or pervious and I would
5 take that as how they are going to provide the
6 material and then when they go to the soil and road
7 materials person, they would then regulate whether or
8 not the material they were going to use was as they
9 stated on the plat pervious and impervious. I didn't
10 look to --

11 COMMISSIONER PARSONS: That's a separate
12 permitting requirement then?

13 MR. PAUL: No, it's within the same
14 review. But I took it as only the zoning
15 implications, what I was looking for. I didn't go
16 into the actual material. I left that for the soil
17 and road materials person to do.

18 COMMISSIONER PARSONS: Do you think they
19 rendered a judgment on this?

20 MR. PAUL: I do believe they saw the plat
21 and they did look at it and saw that impervious or
22 pervious was stated and what materials must be used.

23 COMMISSIONER PARSONS: But there is
24 nothing in the permit that conditions what pervious
25 material is?

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1 MR. PAUL: When you say nothing in the
2 permit?

3 COMMISSIONER PARSONS: Well, is there
4 something in the permit that says what this plat isn't
5 telling us what it is.

6 MR. PAUL: What material they were going
7 to use? Okay. Just for clarity, are you asking if
8 there is anything in the permit that specifies what
9 material they were going to use as pervious or
10 impervious?

11 COMMISSIONER PARSONS: Correct.

12 MR. PAUL: I would say there is something
13 in the drawings in the package, but I don't think it
14 is stated on the building permit what was to be used.

15 It wouldn't be stated on the building permit itself.
16 The actual building permit is posted. But within the
17 package, the drawings as stated, as they were
18 presented, I would believe that that would be
19 impervious to pervious, the material would be listed.

20 COMMISSIONER PARSONS: All right.

21 MS. BELL: And as I understand your
22 question, are you asking is there a requirement that
23 an applicant identify what materials they intend to
24 use?

25 COMMISSIONER PARSONS: Yes.

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1 MS. BELL: That they are --

2 COMMISSIONER PARSONS: I think we've got a
3 hole in our process here.

4 MS. BELL: Okay.

5 COMMISSIONER PARSONS: And it's very
6 important, as I grasp it, this is a main factor in
7 this case.

8 MS. BELL: Yes.

9 COMMISSIONER PARSONS: And that is if we
10 have a Tree and Slope Overlay that deals with the term
11 impervious --

12 MS. BELL: Yes.

13 MR. PAUL: Yes.

14 COMMISSIONER PARSONS: And gives a 50
15 percent capacity for that, that's the limit.

16 MS. BELL: Yes.

17 COMMISSIONER PARSONS: Then if we start to
18 use the term pervious, we can create all kinds of
19 vandalism here. The entire rest of the site could be
20 treated with some pervious material that, one, isn't
21 defined and apparently, two, is not in the building
22 code. So the entire site could no longer be natural
23 in quality, which was the purpose for this overlay.
24 And that's what I'm trying to grasp here is where is
25 this term pervious coming from? What does the code

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1 say about it?

2 MS. BELL: Okay.

3 COMMISSIONER PARSONS: And if it doesn't,
4 I understand that. But it seems to me we've got a
5 hole in our regulations.

6 MS. BELL: Okay.

7 COMMISSIONER PARSONS: If people can
8 perviate their site and demolish it.

9 MS. BELL: Okay. Would it be helpful then
10 for the Board if we took a look at that and provided
11 something, a supplement?

12 COMMISSIONER PARSONS: Yes.

13 MS. BELL: Would that be helpful for your
14 analysis?

15 COMMISSIONER PARSONS: It certainly would
16 be to me.

17 MS. BELL: Okay.

18 COMMISSIONER PARSONS: Yes. So I'm trying
19 to figure out if we need to amend this overlay.

20 MS. BELL: Okay.

21 COMMISSIONER PARSONS: To prevent this
22 from happening. Thank you.

23 CHAIR GRIFFIS: Of course, we wouldn't be
24 doing that in this proceeding.

25 COMMISSIONER PARSONS: No, I wouldn't.

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1 CHAIR GRIFFIS: It certainly is something
2 to take back to the Commission.

3 COMMISSIONER PARSONS: I want to -- that's
4 correct. I certainly didn't mean to give you that --
5 us that authority.

6 CHAIR GRIFFIS: Exactly. Okay. So what
7 we are requesting is a definition of pervious.

8 MS. BELL: Of pervious as opposed to
9 impervious. Okay.

10 CHAIR GRIFFIS: How it was established to
11 define in terms of the review of this.

12 MS. BELL: Okay.

13 CHAIR GRIFFIS: Okay. Any other questions
14 from the Board? Very well. Cross? Any cross
15 examination questions? None? Okay. None. Thank you
16 very much, Mr. Paul.

17 MR. PAUL: Thank you. Thank you.

18 MR. EPTING: Actually, good afternoon now.
19 We've moved on. John Epting with Shaw Pittman.
20 Ashleigh Horne is also with me today. We represent
21 the property of Brian Logan. I'm going to be very,
22 very brief and Armando is going to be brief, too, and
23 if you have questions, maybe just ask it.

24 The appellant has the burden of proof
25 pursuant to 3119.2 to reverse the Zoning

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1 Administrator's decision approving the issuance of a
2 building permit. The appellant must show by a
3 preponderance of evidence that the building permit was
4 issued in error, because it violated the Zoning
5 Regulations. We've submitted a statement showing the
6 pool permit and the revised driveway permit. We've
7 submitted the plats. We've described, I think, as
8 clearly as we could the differences between the main
9 permit and those revised permits and what Zoning
10 issues there are.

11 So with that, I would like to submit Mr.
12 Lourenco's resume as an expert. He has been qualified
13 here before submitting as an expert in Zoning. And
14 with that, after you consider that, he is ready to go.

15 CHAIR GRIFFIS: Thanks. Any questions
16 from the Board? No objection from the appellant?
17 Does DCRA have any objection? I think they have left
18 the room. No questions? Any objections to granting
19 expert status to Mr. Lourenco? Not hearing any, I'll
20 take it as a consensus of the Board. I think it is
21 correct, in fact, that we have conferred expert status
22 on Mr. Lourenco before. Let's proceed.

23 MR. EPTING: Thank you.

24 CHAIR GRIFFIS: And I'm sorry, just to
25 qualify, because we always get back into this. Mr.

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1 Lourenco is being qualified as an expert witness in
2 Zoning.

3 MR. EPTING: That's correct.

4 CHAIR GRIFFIS: And Zoning Regulations.

5 MR. EPTING: That's correct.

6 CHAIR GRIFFIS: Okay.

7 MR. LOURENCO: Chairman Griffis, Members
8 of the Board, good afternoon. Thank you for the
9 opportunity to address this Board on the matter of the
10 two permits being appealed. It is always a pleasure
11 to be here before this Board and, particularly, I
12 always enjoy the beautiful setting that you have with
13 all those trees behind you.

14 CHAIR GRIFFIS: We cut the color off from
15 them, so we have to cut it out from you, too.

16 MR. LOURENCO: As you know, I was the BLRA
17 administrator for a period of over two years and the
18 acting Zoning Administrator for a portion of that
19 period. As such, I supervised directly the zoning
20 plans, reviewed functions of the Zoning Division for
21 over one year, and I had indirect oversight for
22 another year thereafter.

23 The permits under appeal before the Board,
24 they are Building Permit B451476, a permit to
25 construct a private outdoor in-ground pool, which

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1 we'll call the pool permit, and Building Permit
2 B452193, which we'll call the revision permit, a
3 revision permit to amend certain project features
4 previously approved under another permit to build a
5 new single-family dwelling and other ancillary
6 improvements at 3101 Chain Bridge Road, N.W. The
7 project is located in an R-1-A Zoning District.
8 Therefore, it is subject to special district, Chain
9 Bridge Road/University Terrace Overlay District.

10 The appellants are contesting these two
11 permits, invoking violations of the Zoning Regulations
12 that allegedly would taint the approval of the
13 permits. Several of the arguments used by the
14 appellants, such as those related to the removal of
15 trees, are not properly before the Board since they
16 relate to issues that are not part of the permits
17 under appeal. This has been established here before
18 today.

19 Some of the appellants' other arguments,
20 however, may be relevant to the permits and their
21 appeal and among those, I specifically want to
22 identify that: (A) The appellants allege that the
23 driveway would not meet the 14 foot width requirement
24 of 2117.8; (B) The impervious surface of the lot would
25 be below the 50 percent requirement of section 1576.2;

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1 (C) Drive courts to the rear of the main structure
2 would not have impervious surfaces required for
3 driveways by 2117.4 and 2117.10; (D) The proposed
4 pervious driveway at the front of the main building
5 would violate 2117.4 and would not meet the criteria
6 for pervious, thereby failing to meet the requirements
7 of 1567.2; (E) The Stairways connecting the upper
8 drive court to the lower drive court behind the main
9 building would encroach into the required side yard
10 and violate section 405.9, since they fail to meet the
11 exemptions of 2503.4; (F) The pool would encroach into
12 the 25 foot rear yard required by 404.1, since it
13 would fail to meet the exemptions at 2503.2.

14 I will try to take them briefly, and I'll
15 start with the last one. The pool does not encroach
16 into the rear yard. The last of appellants'
17 arguments, Item F, is the only one that would affect
18 the pool permit. It should be noted that the pool
19 permit does not change the placement of the structures
20 on the lot. In fact, the plat used for the pool
21 permit is the same plat that had been approved with
22 the main building permit, which is not under appeal.

23 Both plats show that the rear wall of the
24 pool defines the rear most line of structures on the
25 lot. The rear yard is, therefore, by definition, the

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1 portion of the lot behind the rear wall of the pool,
2 also known in the regulations as the rear building
3 line. The rear lot line is skewed in relation to the
4 side lot lines and the rear pool wall. Therefore, by
5 definition, the depth of the rear yard is the mean
6 distance between the rear building line and the rear
7 lot line.

8 Both plats show this distance to be 25.3
9 feet. Therefore, in compliance with section 404.1.
10 The pool has an appended overflow tank that is not
11 more than 4 feet above ground, which encroaches into
12 the rear yard. This is an appropriate encroachment,
13 specifically allowed by section 2503.2, which
14 disregards encroachments by structures that are less
15 than 4 feet above grade. Consequently, the
16 appellants' argument relating to encroachment of the
17 pool into the rear yard is baseless. Since no other
18 zoning aspect of the pool permit are being appealed,
19 the appeal should be denied.

20 I will go into the items that affect the
21 revision permit. Before I get into that, I should
22 note that I am a little bit at a loss with this issue
23 of the pervious being or not being defined. I can't
24 even figure out where it comes up, because the
25 regulations regulate impervious surface coverage.

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1 1567.2 says the maximum impervious surface coverage is
2 so-and-so, and then the definitions define impervious
3 surface and impervious surface coverage. So there is
4 really nothing that is regulated that is not defined
5 in the regulations.

6 But I would also argue that the definition
7 of impervious surface has two qualities that must be
8 met concurrently, because they are, and I quote from
9 here, stated as "An impervious surface is an area
10 that: (A) Impedes the percolation of water into the
11 subsoil and impedes plant growth." So if somebody
12 wants to figure out what pervious is, but I don't
13 think we need to, because the regulations address the
14 amount of impervious surface. I guess it would be the
15 negative of this conjunction, which is obviously an
16 alternative. Anything that allows percolation of
17 water is pervious. Anything that does not, a surface
18 that does not, impede plant growth is also pervious.

19 Going back to my analysis of the arguments
20 of the appellants. The issue of the driveway. The
21 Zoning Regulations require the owner of a one-family
22 dwelling to provide one off-street parking space,
23 pursuant to 2101.1, to the table. Furthermore, 2116.2
24 allows this off-street requirement to be met in one of
25 three ways. In the case of the applicant, the

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1 applicant has the option of meeting the requirement on
2 an open area of the lot within the side yard, as
3 allowed by 2116.2(b)(2), which is what the applicant
4 did. There are no other parking spaces in the lot.

5 The section cited by appellant, section
6 2117.8, establishes standards that apply to, and I
7 quote, "A Driveway which provides access to required
8 parking spaces." Furthermore, it specifically states
9 in section 2117.8(b) that, and I quote, "A driveway
10 serving a one-family dwelling shall not be less than 7
11 feet in width." 7 feet wide is the requirement for
12 the driveway that connects the public right of way
13 with the required parking space on the side yard.

14 The revised plat filed with the revision
15 permit shows a 7 foot driveway leading to a 9 foot
16 wide parking space on an 11.3 foot wide side yard and
17 that meets the Zoning Regulations. Based on the
18 actual text of the regulations, the invoked 14 foot
19 width requirement of 2117.8(c)(2) applies only to
20 certain driveways serving, and I quote, "Any use other
21 than a one-family dwelling."

22 Consequently, the appellants' argument for
23 a 14 foot driveway width requirement is inapplicable
24 and should be dismissed. It's very clear for anyone
25 that examines that section of the Zoning Regulations

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1 that there is a genuine concern of the regulator to
2 regulate in great detail parking spaces and access to
3 parking spaces that are construed in a commercial
4 setting and not, it would be in my opinion, an abuse
5 of the intent of the regulations to try to extrapolate
6 and stretch those kinds of requirements to a condition
7 such as a one-family dwelling. The control that the
8 one-family in the premises has over cars and the
9 circulation of cars and so on is what allows a 7 foot
10 driveway to be adequate, even if somebody decides to
11 stack two cars on the side yard of the property.

12 Another issue was the issue of the
13 exceeding 50 percent impervious surface coverage. The
14 revised plans, and I should stress out here that right
15 now, the construction that's going on in this property
16 is regulated until this Board makes a decision.
17 Otherwise, it is regulated by three permits, the
18 original permit, the revision permit, which changes
19 some of those features, and the pool permit, which
20 adds details to what goes on in the pool area. So the
21 revised plans are currently what is the building
22 permit setting for this development.

23 The revisions to the structures and
24 surfaces to the rear of the main building prompted, I
25 guess, by the Zoning Division of BLRA, resulted in a

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1 rearrangement of landscaping of those spaces. The
2 elimination of both areas and steps on grade and the
3 creation of a new pervious ramp leading to a pervious
4 drive, and I figure I can use the word now, a pervious
5 drive court adjacent to the garage building 10 foot
6 door, those are actually the things that were revised
7 from one permit to the other. And if the Board needs
8 to take a stance on whether or not that permit was
9 properly issued, those are the issues that are
10 properly before the Board, in my opinion.

11 I reviewed the computations prepared by
12 the architect. I believe he is finding that the
13 impervious surface coverage is 10 square foot short of
14 the maximum allowed. It is based on conservative
15 assumptions. There are areas that are shown as being
16 impervious that are really not required to be
17 impervious. The driveway that leads from public space
18 to the required parking space is kind of pie shaped
19 and, in reality, it needed only be 7 foot wide with
20 the two sides parallel.

21 Consequently, the appellants' argument on
22 this point is not based on fact and should be
23 dismissed. In order to determine compliance with the
24 50 percent maximum impervious surface coverage, it's
25 the current condition of the revised permit that needs

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1 to be reviewed and assessed.

2 A lot has been said here about the --
3 well, another argument that the appellant had is that
4 the drive courts would be required to be impervious.
5 There is no such requirement in the regulations. The
6 provisions of 2117.4 and 2117.10 apply to other
7 features of the development and do not apply to those
8 courts, because those courts: (A) Are not designated
9 parking spaces; (B) Are not accessed drives to those
10 designated parking spaces.

11 So the use of surfaces that don't fall
12 into the definition of impervious surface are
13 perfectly acceptable and the architect's zoning
14 calculations are dated 1/14/04, I think it's Exhibit
15 H, I think it is, is an acceptable way of dealing with
16 this.

17 It's not very clear from the submission of
18 the appellant, but it could be construed that the
19 appellant was also questioning the fact that the front
20 driveway, the U-shaped driveway in the front, wasn't
21 impervious. It is not required to be impervious other
22 than for the 7 foot wide stretch that leads to the
23 required parking space.

24 The gentleman from BLRA that spoke before
25 me pointed out that in the Rules of Interpretation of

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1 the section on parking and access to parking and so
2 on, it is very clear that unless the word all is in
3 front of parking spaces, the requirement does not
4 apply to all parking spaces. The sections, 2117.4 and
5 2117.10, actually have parking spaces qualified as
6 required in one case and, please, bear with me. Yes,
7 required in one case and open in another.

8 One would be hard pressed to say that a
9 parking space site, an accessory garage, is an open
10 parking space. In fact, I conferred with someone,
11 whose opinion I respect a lot, and his response was
12 absolutely not. It's a covered parking space.
13 2117.4, which is the one that requires the access
14 driveway to the required parking space to be an
15 impervious surface, applies only to the required
16 parking space. The required parking space, in my
17 opinion, looking at the documents, is clearly the
18 first parking space that you encounter when you get
19 into the side yard of the house. Consequently, I
20 believe this argument is baseless and should be
21 dismissed by the Board.

22 The only other issue that remains is
23 whether or not there are unacceptable intrusions into
24 the open space of required yards. I already addressed
25 the issue of the rear yard. I think there isn't. On

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1 the side yards, I examined the plans carefully. On
2 the south side there is a retaining wall to provide
3 access to the lower level from the outside of the
4 house. Retaining walls are perfectly allowable in
5 required yards. There is a section that specifically
6 states that.

7 There is another stairway, a set of steps
8 and a stoop, coming up to the rear courts, which,
9 because of the way the slope, the grade developed in
10 that area and the fact that the steps are coming up
11 the slope --

12 CHAIR GRIFFIS: You have one minute.

13 MR. LOURENCO: Pardon?

14 CHAIR GRIFFIS: You have one minute left.

15 BOARD MEMBER ZAIDAIN: One minute.

16 MR. LOURENCO: Yes. Our point would be
17 that they are at every point or when it's complete, it
18 will be at every point less than 4 feet above grade.

19 I conferred with the architect on this point and he
20 confirmed that. And on the other side, which is the
21 side where most of the revisions occurred, you have a
22 ramp that is built on grade.

23 There is a retaining wall between the ramp
24 and the steps to the side, which is still within the 8
25 foot required side yard, which again is a retaining

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1 wall, which is allowed to be on a side yard, and the
2 steps to the side don't even go 4 feet above the
3 bottom of the steps.

4 Again, I'm not sure if that was clear, but
5 the parking space that exists within the garage
6 building is an accessory parking space. Therefore,
7 there is no requirement in the regulations for a
8 driveway leading to that space to be an impervious
9 surface.

10 CHAIR GRIFFIS: Good. Thank you very
11 much. Questions from the Board?

12 VICE CHAIR MILLER: Mr. Lourenco, how
13 would you review the revised permit for compliance
14 with the CBUT Tree Removal Restrictions?

15 MR. LOURENCO: The scope of a revision
16 permit -- every permit needs to be reviewed based on
17 the scope of the work that it addresses. So
18 basically, what you have before, and I have reviewed
19 dozens and dozens of permits in my life and not just
20 zoning, the scope of the revision starts from the fact
21 that there is an issued building permit and here is
22 the applicant trying to change some of the features of
23 what is previously approved.

24 So if I were in the position of making
25 that review, I would start from the fact that there

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1 was a valid permit, and I would look at the features
2 that would change. In the particular case of what was
3 before me, I had basically no change in the plat from
4 the original condition to the revised condition that
5 would affect any tree.

6 Of course, I would have to take into
7 account the percentage of impervious surface. I would
8 have to look at every aspect of the overlay district,
9 as well as every aspect of Zoning District R-1-A to
10 see if any of the things that were being proposed
11 would have to be changed, but that would be how I
12 would address it. And once I am changing steps and
13 stoops and so on to grassy ramps, that wouldn't -- my
14 decision would certainly have been that that would not
15 affect -- the proposed revision would not be in
16 violation of the overlay district.

17 CHAIR GRIFFIS: Any other questions? Mr.
18 Parsons?

19 COMMISSIONER PARSONS: I wanted to deal
20 with this issue of pervious and impervious again. Did
21 you participate in this diagram? Are you familiar
22 with it?

23 MR. LOURENCO: I'm familiar with it, but I
24 didn't participate in the preparation.

25 COMMISSIONER PARSONS: Okay. Everything

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1 shown in green here on this diagram is pervious.

2 MR. LOURENCO: Not impervious.

3 COMMISSIONER PARSONS: Okay. And are you
4 aware of any building code or anything in the District
5 of Columbia that would define what this is? In other
6 words, some of these are, presumably, a different kind
7 of paving in the back of a terraced area than it would
8 be where people are driving in front, one being --

9 MR. LOURENCO: I guess it's a matter of
10 design. If I had to design that, thank God I don't,
11 but I would obviously design the drive to sustain a
12 load different from just an area where people would
13 probably just walk around.

14 COMMISSIONER PARSONS: Right. But you
15 don't have any knowledge as to one, what this diagram
16 means about the term pervious nor are there any things
17 in our regulations or the building code that would
18 define that?

19 MR. LOURENCO: The Zoning Regulations
20 define impervious surface.

21 COMMISSIONER PARSONS: Impervious, yes.

22 MR. LOURENCO: Impervious surface. As a
23 regulator, if I had to be in that position, I would
24 have to consider everything else that is declared as
25 not being part of impervious surface as what makes the

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1 other 50 percent. It's really --

2 COMMISSIONER PARSONS: Would you?

3 MR. LOURENCO: In other words, I think
4 it's appropriate, at the time of field inspection, to
5 make sure that the areas that are shown in green there
6 are not constructed in a way that prevents water from
7 percolating into the subsoil and prevents plant
8 growth. That is something that is appropriate, for
9 the regulatory agency to go out and enforce, because
10 that is a Zoning Regulation.

11 COMMISSIONER PARSONS: But in reviewing
12 this, in your experience, wouldn't those kinds of
13 details be on the drawing to show what these materials
14 were to get a building permit?

15 MR. LOURENCO: Okay. There is -- the
16 criteria for what is an acceptable construction
17 document varies from commercial construction to
18 single-families and the like. If you were building a
19 building downtown in an area where landscaping on the
20 sidewalk is very tightly regulated, obviously, you are
21 expected to provide landscaping plans that are much
22 more detailed and professionally prepared than what is
23 expected normally from a single-family dwelling.

24 But regardless of the details shown, and a
25 lot of these things are developed as, almost designed,

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1 built as things evolve, regardless of how it is shown,
2 the final product shall pass mustard on a field
3 inspection. So if I have a drive of dirt with course
4 gravel on top, to me that's an acceptable surface that
5 does not fall into the category of impervious surface.

6 But if I have asphalt, obviously, it falls into the
7 category of impervious surface.

8 At that point, it's very simple to go
9 there and measure and come up with an area. Divide
10 the area by an area of impervious surface. Divide the
11 area by the area of the lot and that's what you have.

12 It can't pass the maximum of 50 percent unless you
13 got to come here to get permission for that.

14 CHAIR GRIFFIS: Follow-up, Mr. Parsons?

15 COMMISSIONER PARSONS: No, thanks. Thank
16 you.

17 CHAIR GRIFFIS: Any other questions from
18 the Board? Cross? No cross? Government have any
19 cross? Has the ANC come in yet? I know they are
20 stuck in traffic, but it got a little warmer out
21 there, so I figured they might be -- okay. That's it
22 then. We were going to call the ANC for their
23 presentation. Obviously, they are not here
24 represented. Let's go to closing or do you have
25 rebuttal witnesses you're calling?

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1 MR. ZIMMITTI: We do not have any rebuttal
2 witnesses.

3 CHAIR GRIFFIS: Okay.

4 MR. ZIMMITTI: But we do have some
5 closing.

6 CHAIR GRIFFIS: Closing. Let's do it.

7 MR. ZIMMITTI: Thank you.

8 CHAIR GRIFFIS: Oh, one thing I'm going to
9 require, Mr. Lourenco, your statement to be put in in
10 writing, so if you can put that together. Obviously,
11 you are not adding to it, but just what was stated.
12 You don't have copies of that today, do you?

13 MR. LOURENCO: No, I don't.

14 CHAIR GRIFFIS: Okay. Fine. It's going
15 to come into the record and, obviously, it will be
16 served on everybody. Okay. Go ahead.

17 MR. ZIMMITTI: Thank you, Mr. Chairman.
18 Again, Mr. Chairman, we submit that the June 13, 2003
19 revised permit was issued by DCRA in error.
20 Essentially, what we have here is a permit that was
21 issued based on a fictitious, nonexistent definition
22 of a pervious surface driveway. DCRA is really
23 creating a new category of driveways, if you will, of
24 surfaces without going through the required and
25 necessary administrative processes here. Essentially,

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1 that driveway could be anything.

2 But more importantly, it ignored the fact
3 that you do, in fact, need an impervious surface to
4 the accessory building, because the accessory building
5 is a required parking space. I would like to again
6 walk you through our reasoning on that, which we feel,
7 based on the plain language of these rules, is the
8 correct one.

9 First, section 2500.5 is the only
10 exception to which a two-story accessory building
11 could be built. You need to have a garage on the
12 lower level and, basically, domestic servant's
13 quarters on top. So there is a garage requirement
14 with a parking space provision. The definition of a
15 private garage is that it also contains a parking
16 space, so that is required under the definitions in
17 199.1.

18 If you go to the table next in section
19 2101.1, it is true that there is a required parking
20 space for the main residential structure on the
21 property. However, there is also an accessory
22 building on that property that is larger than 600 feet
23 square and we submit that under the last category,
24 which is, essentially, a catch-all category of all
25 other uses, that that provision applies requiring a

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1 parking space in the accessory building garage.

2 CHAIR GRIFFIS: What section are you
3 looking at now?

4 MR. ZIMMITTI: We're looking at all other
5 uses category of the table in 2101.1.

6 CHAIR GRIFFIS: All right.

7 MR. ZIMMITTI: It is the last category.
8 It's at the very end of that table.

9 CHAIR GRIFFIS: I see.

10 MR. ZIMMITTI: We submit that that is the
11 category that applies and should apply to require a
12 parking space in the accessory building garage. It
13 really makes sense.

14 CHAIR GRIFFIS: So you're taking -- I'm
15 sorry, because I'm not following you.

16 MR. ZIMMITTI: Yes.

17 CHAIR GRIFFIS: 2100 is the table that
18 requires parking. You're saying that based on the
19 fact that this is an accessory structure, it needs to
20 then be calculated for its parking requirement?

21 MR. ZIMMITTI: Because it is in excess of
22 600 feet square of gross floor area.

23 CHAIR GRIFFIS: Okay.

24 MR. ZIMMITTI: We also submit that even if
25 you don't agree with that interpretation, that

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1 pursuant to section 2118.9 of the Rules of
2 Interpretation, the same requirements that apply to
3 required parking spaces, as specifically set forth
4 under the table, also apply to accessory building
5 parking spaces. And I do take issue with Mr.
6 Lourenco's interpretation of that section, and I will
7 just read through it very briefly again with you.

8 "Except where otherwise indicated,
9 whenever the word all is followed by the words parking
10 spaces in the same sentence, the parking requirements,
11 as specified, shall apply to all parking spaces
12 whether or not the spaces are required by this
13 chapter." It then goes on to state, and the provision
14 that we're relying on is, that the requirements shall
15 also apply both to accessory parking spaces and
16 parking spaces that are constructed as a principal use
17 unless otherwise specified.

18 And we submit that the language, unless
19 otherwise specified, applies to any prefatory language
20 that is exclusional in nature before any relevant
21 provision in the Zoning Regulations. For example, in
22 2117.4, you will notice it's prefaced "except as
23 provided in section 2117.15." We would suggest that
24 that is the provision, that that is unless otherwise
25 specified, and that, in fact, each required parking

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1 space does require, including accessory parking
2 spaces, an impervious surface driveway by virtue of
3 that regulation, 2117.4.

4 It's inescapable that if you have to treat
5 the driveway, which you do, as requiring an impervious
6 surface, we are now well over the overlay limitation
7 of 50 percent pervious surface coverage for the entire
8 lot. And in part, this pervious surface driveway in
9 the June 13th revised permit is essentially a
10 subterfuge. It is just a means of getting around the
11 obvious fact, which is that you need to account for
12 every square inch of impervious surfaces on the lot
13 required by the rules, and that accessory building
14 driveway, we submit, is required by those relevant
15 regulations.

16 DR. WOLF: I would like to supplement Mr.
17 Zimmitti's statement by pointing out to the Board that
18 really, this issue today has the potential to set an
19 extraordinary and unusual precedent in terms of a new
20 interpretation of driveway requirements in not just
21 our overlay district, but in the District of Columbia,
22 that anybody who wants to build an accessory parking
23 space, if you accept the intervenor's interpretation
24 and their zoning expert, has to accept, therefore,
25 that they can be built of pretty much anything they

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1 want, because they are not specified, according to
2 them, in these regulations.

3 This defies the common sense
4 interpretation of these regulations that have been
5 followed for years and that are represented in the
6 orders of this Board time and again. In every case in
7 which the word accessory came up in terms of parking
8 spaces in the orders that I have reviewed, it was
9 followed by the statement that these spaces must, and
10 it will be allowed, but only insofar as they are
11 accessed by impervious driveways, plain language.
12 This --

13 CHAIR GRIFFIS: Right. That's understood
14 and we heard that. Now, do I need the applications
15 for exemption or relief from impervious driveways?

16 DR. WOLF: There was, for example, I can
17 cite one where -- Order No. 11956, this was one of a
18 number. "Special exception denied to permit accessory
19 parking using a brownstone surface instead of an all
20 weather impervious surface."

21 CHAIR GRIFFIS: And it was going to
22 required parking?

23 DR. WOLF: It was going to accessory
24 parking. This was accessory parking.

25 CHAIR GRIFFIS: I understand. You're

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1 making a leap of this accessory structure being an
2 accessory parking, but there is a whole different
3 realm of the reality of what accessory parking is,
4 especially in something of that nature.

5 DR. WOLF: What I'm saying is that
6 required parking is not at issue here. Everybody, I
7 think, accepts that the regulations addressing
8 required parking stipulate that they must be served by
9 impervious driveways. But the Board orders are full
10 of examples where they both permitted accessory
11 parking only so long as it followed the provisions for
12 impervious surfaces and denied accessory parking,
13 which is what the intervenors are claiming this is.
14 It's accessory parking in an accessory building, that
15 it was denied when surfaces were used that were other
16 than all weather impervious surface.

17 CHAIR GRIFFIS: Okay. The case, what was
18 the application number of the case you just cited?

19 DR. WOLF: 11956.

20 CHAIR GRIFFIS: And was that 11956?

21 DR. WOLF: Right. It's very easy to track
22 these.

23 CHAIR GRIFFIS: And were those accessory
24 parking spaces required by that?

25 DR. WOLF: Pardon me?

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1 CHAIR GRIFFIS: Were those accessory
2 parking spaces required based on the use that the
3 application was under?

4 DR. WOLF: I do not recall the details of
5 that case.

6 CHAIR GRIFFIS: Okay. Go ahead.

7 DR. WOLF: My point only is this, is that
8 accessory parking spaces, whether they are in an
9 accessory garage, an open accessory parking space, any
10 kind of accessory parking space, was subject to the
11 same access requirements in every case I could find,
12 meaning an impervious surface. You know, I'm just
13 dealing in common sense interpretation of the
14 regulations.

15 CHAIR GRIFFIS: Right. Our trouble is the
16 regulations often don't follow common sense, but I
17 understand your point.

18 DR. WOLF: But they have always been
19 interpreted this way.

20 CHAIR GRIFFIS: Indeed. Ms. Miller? I'm
21 sorry. Are you finished?

22 DR. WOLF: Yes.

23 VICE CHAIR MILLER: Do you want to direct
24 our attention to any other Board orders on that or
25 just that one?

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1 DR. WOLF: No, you can go on the web and
2 look at them. There's countless -- I got tired of
3 looking at them.

4 CHAIR GRIFFIS: Okay.

5 DR. WOLF: They all ended the same way.

6 CHAIR GRIFFIS: That's what we do in our
7 spare time.

8 DR. WOLF: Yes.

9 CHAIR GRIFFIS: Okay. Any other questions
10 from the Board? Closing remarks? Thank you very
11 much, Dr. Wolf. And let me just state, first of all,
12 you pressed upon the fact that this is precedential in
13 value in our decision, and that may make great
14 headlines and, you know, quotes in the paper and such,
15 but everything we do is looked at on the record that
16 is presented before us and we look at the facts in the
17 case.

18 And I was being a little facetious, but I
19 think there is some reality to it. Sometimes, it does
20 come across as if common sense seems to tell you that
21 this is the way to do it, but especially in appeal, we
22 are so bound directly to the issues in the appeal and
23 directly to the regulations of which we have to look
24 at, that it may not without a better and fuller
25 understanding, which I'm sure you have and I know you

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1 have, it may not always look as if a decision was made
2 to follow common sense.

3 And that is what my little bit of
4 struggling to find humor, but it is based, in fact, in
5 some reality, but we do take it under advisement and,
6 clearly, we always weigh the precedential value or the
7 impact of what our decisions would be and their
8 outcome.

9 Okay. Anything else from the Board? Very
10 well. Thank you all very much. We do appreciate
11 this. I'm glad we got through this today within a
12 reasonable fashion. Let us go to, first of all, our
13 schedule and get this done. We have two submissions,
14 if I'm correct. We still held out there that,
15 actually, we would ask everyone that's participating--
16 oh, I don't know how we do this.

17 DCRA is going to provide their
18 understanding of how pervious was used, and so we can
19 have that. That can be submitted. And then Mr.
20 Lourenco was going to submit his written statement of
21 today. I would think that we could have all of that
22 within a week. And then, Ms. Bailey, we'll set this
23 for the public meeting, which will be regularly
24 scheduled.

25 MS. BAILEY: In March?

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1 CHAIR GRIFFIS: On the first Tuesday of
2 March.

3 MS. BAILEY: That's March 2nd, Mr.
4 Chairman?

5 CHAIR GRIFFIS: Yes.

6 MS. BAILEY: Okay.

7 CHAIR GRIFFIS: Oh, let me also query
8 whether responses to Nutley's letter should be
9 anticipated by the Board. Are we keeping the record
10 open for that?

11 BOARD MEMBER ZAIDAIN: Who?

12 CHAIR GRIFFIS: Oh, what did I say?

13 MR. ZIMMITTI: Nutley.

14 CHAIR GRIFFIS: See, I'm getting hungry.
15 I have got some cashews back there. Okay. Nunley.
16 Is the record to remain open for it? I'm going to
17 allow a week. Is that appropriate time? Okay. And
18 then we'll have responses to that if needed. Okay.
19 Ms. Bailey?

20 MS. BAILEY: You said you're leaving the
21 record open for a week, Mr. Chairman, so a week from
22 today would be --

23 CHAIR GRIFFIS: Well, it's due. Any
24 responses, yes. I'm sorry. I cut you off.

25 MS. BAILEY: A week from today, Mr.

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1 Chairman, will be February the 10th for the
2 submissions.

3 CHAIR GRIFFIS: Excellent.

4 MS. BAILEY: And then the responses would
5 be due a week later, which would be February 17th. And
6 then the decision, March 2nd.

7 CHAIR GRIFFIS: And we can have proposed
8 findings and conclusions a week before, prior.

9 MS. BAILEY: The 24th.

10 CHAIR GRIFFIS: Excellent. Okay.
11 Everybody clear? Everybody know what they are
12 responsible for? Excellent. Note that we just have a
13 week for the last submissions, so let's get those in.

14 If there is nothing else then, anything else for the
15 morning session?

16 MS. BAILEY: No, Mr. Chairman, but I think
17 there is quite a few people in the audience that may
18 be here for the afternoon.

19 CHAIR GRIFFIS: That's very true.

20 MS. BAILEY: Okay.

21 CHAIR GRIFFIS: Okay. Well, let me
22 conclude the morning session, and then while we're
23 here, let me just state we're going to take a 20
24 minute recess. I have got to feed this Board.
25 Otherwise, we're going to be useless. We're going to

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1 come back in. We have two cases set for the
2 afternoon, and I would anticipate dealing with both of
3 those.

4 And then we will take another break to
5 finish whatever we started eating, and then we'll go
6 into our Public Meeting mode after the Public Hearing
7 in the afternoon. That would be for the deciding of
8 upwards of 13 cases this afternoon. So whoever is
9 interested, we have got plenty to watch today. So
10 that being said, is that clear? Everyone pretty
11 clear? Let's do that. We'll be back in 20, 25
12 minutes.

13 (Whereupon, the hearing was recessed at
14 12:59 p.m. to reconvene at 1:38 p.m. this same day.)
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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 1:38 p.m.

3 CHAIR GRIFFIS: Good afternoon, ladies and
4 gentlemen. Let me call to order the afternoon session
5 of the Board of Zoning Adjustment of District of
6 Columbia. It is still the 3rd of February 2004. Let
7 me run through quickly, and I appreciate everyone's
8 patience with us. Obviously, we had a long morning,
9 and so we have taken just a quick break in order to
10 get our afternoon started.

11 First of all, copies of today's agenda are
12 available to you, as I had said in the morning, which
13 you all were probably not here for. Our whole
14 schedule has kind of turned upside down, so the
15 printed may not reflect what will happen, but I will
16 run through all the specifics of what we are going to
17 embark on in the afternoon.

18 There are several very important issues
19 that I need to alert everyone to in my opening
20 statement, and here they come. First of all, all
21 proceedings before the Board of Zoning Adjustment are
22 recorded. They are recorded now in two fashions.
23 First, we have a court reporter who is creating the
24 transcript and creating an official transcript in the
25 record. Secondly, we are also pleased to announce

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1 that we are broadcast live on the Office of Zoning
2 website, so this is being videoed and broadcast.

3 To that, there are several things. First
4 of all, when coming forward, you will need to first
5 fill out two witness cards. Witness cards are
6 available at the testimony table in front of us, and
7 also on the table where you entered into the hearing
8 room. Those two cards go to the recorder who is
9 sitting on the floor. That is, of course, to
10 establish any statements made are actually given
11 credit to you and your name.

12 Secondly, we asked that when presenting,
13 that you come forward. You will need to speak into a
14 microphone. The microphone should be on. Otherwise,
15 you will not be on the record. After concluding any
16 speaking, we would ask that people just turn them off,
17 so that we don't have any sort of feedback. And with
18 that also, we ask that people present in the hearing
19 room not engage in any disruptive noises or actions,
20 so that we don't have a disruption of those giving
21 testimony in front of the Board. I would also ask
22 that people turn off cell phones and beepers, at this
23 time, also not to create any sort of disturbance.

24 The order of procedure for the special
25 exceptions and variances will be first, we'll have the

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1 statement of witnesses by the applicant. Second, we
2 would have Government reports attendant to the
3 application, such as Office of Planning or Department
4 of Transportation or any other agency that responds to
5 the application. Third, we would have the report from
6 the ANC, the Advisory Neighborhood Commission.
7 Fourth, we will have persons or parties in support of
8 the application. Fifth, would be persons or parties
9 in opposition. Finally, sixth, we'll have closing
10 remarks by the applicant.

11 Of course, pursuant to our regulations,
12 3117.4 and 3117.5, the Board sets time for each
13 application and appeals. I am going to skip through
14 that in order to save time, because I will not be
15 setting time limits. However, there is a standing
16 time limit for people giving testimony, personal
17 testimony in any application, and that is for three
18 minutes.

19 The record that will be established before
20 us today will be closed at the conclusion of our
21 hearing, except for any material that is specifically
22 requested by the Board, and we will be very specific
23 as to what is to be submitted into the Office of
24 Zoning and when it is to be submitted. After that
25 material is received, of course, it goes without

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1 saying that the record would then finally be closed
2 and no additional information would be accepted into
3 the record. So the importance of that, of course, is
4 to tell us what you need to today. Otherwise, we
5 won't be able to deliberate on it.

6 The Sunshine Act requires that we conduct
7 all hearings in the open and before the public.
8 However, this Board may enter into executive session,
9 according to its rules and procedures and the Sunshine
10 Act. This would be for the purposes of reviewing the
11 record or deliberating on a case. The decision of
12 this Board in contested case, of which all of these
13 cases are, must be based exclusively on the record,
14 which is why I keep talking about establishing this
15 record. We must base all of our deliberations and
16 decisions exclusively on that.

17 So there are several other things and most
18 important, of course, being we ask that people present
19 today not engage Board Members in conversations, so
20 that we do not give the appearance of receiving
21 information outside of the record.

22 At this time, we will hear any preliminary
23 matters attendant to the afternoon. Preliminary
24 matters are those, which relate to whether a case will
25 or should be heard today, such as requests for

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1 postponements, continuances or withdrawal or whether
2 proper and adequate notice of an application has been
3 provided. If you are not prepared to go forward with
4 a case today or you believe that the Board should not
5 proceed with the case, now would be the time to bring
6 that to our attention.

7 I will take a preliminary matter by
8 indication of someone having a preliminary matter if
9 they would come forward and have a seat at the table,
10 and I will get to them. I'm going to ask staff if
11 they have any preliminary matters for us, at this
12 time, and also say a very good afternoon to Ms. Bailey
13 and Mr. Moy from the Office of Zoning.

14 Ms. Bailey, are you aware of any other
15 preliminary matters for us?

16 MS. BAILEY: Mr. Chairman and to all, good
17 afternoon. There is, Mr. Chairman. It has to do with
18 Application No. 17055 of the Army Distaff Foundation,
19 and Mr. Paul Tummonds has his microphone on, so I am
20 assuming he's ready to go.

21 CHAIR GRIFFIS: Okay. Mr. Tummonds?

22 MR. TUMMONDS: Yes, thank you, Mr.
23 Chairman, Members of the Board. On January 20th on
24 behalf of the Army Distaff Foundation, we filed a
25 letter with the Board requesting a postponement of

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1 today's hearing. The representatives of the
2 applicant, the Knollwood Army Retirement Facility,
3 have agreed to enter into a formal mediation process
4 with the party opponents in this case.

5 Mr. Scallet is here on behalf of Knollwood
6 Neighbors as well. We have had discussions, and
7 through the help of the Office of Planning, we have a
8 list of mediators, which we are now looking to come to
9 some agreement as to what mediator to choose, and then
10 to move forward with the formal mediation process. So
11 we are requesting that the Board agree.

12 CHAIR GRIFFIS: Did you say you're getting
13 a mediator to find out which mediator you use?

14 MR. TUMMONDS: No, I apologize. We're
15 trying to find a mediator.

16 CHAIR GRIFFIS: No, I'm just kidding.
17 Understandable. Okay. I think we're clear on that.
18 Did you want to address that?

19 MR. SCALLET: Well, sir --

20 CHAIR GRIFFIS: Could you just state your
21 name for the record?

22 MR. SCALLET: My name is Edward Scallet.
23 I am here on behalf of Knollwood Neighbors.

24 CHAIR GRIFFIS: Okay.

25 MR. SCALLET: Which is the party that was

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1 going to --

2 CHAIR GRIFFIS: And that's the party that
3 we actually established in this case.

4 MR. SCALLET: That's correct.

5 CHAIR GRIFFIS: Is there anyone else here
6 attendant to this application today, persons or
7 parties or think they are? Okay. The ANC is not
8 here. Is that correct? Oh, indeed. Would you mind
9 coming forward? If you wouldn't mind just stating
10 your name and address for the record.

11 MR. BUCHOLZ: My name is Frank Bucholz.
12 My address is 5877 Nebraska Avenue, N.W., Washington,
13 D.C. I am the ANC Commissioner for 3-G-02, which is
14 where Knollwood is located.

15 CHAIR GRIFFIS: And you just recently
16 submitted something. Is that correct?

17 MR. BUCHOLZ: I believe we just recently
18 submitted a letter supporting the request for
19 mediation.

20 CHAIR GRIFFIS: Right. Okay. So you
21 don't oppose the request for a continuance?

22 MR. BUCHOLZ: No, we don't.

23 CHAIR GRIFFIS: And does Knollwood
24 Neighbors?

25 MR. SCALLET: No, Mr. Chair.

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1 CHAIR GRIFFIS: Okay. Board, any
2 questions, concerns, objections to granting the motion
3 for a continuance? Very well. How long do you think
4 you need for mediation?

5 MR. TUMMONDS: In discussions with
6 Knollwood Neighbors, we really thought that maybe the
7 most -- the best way to address this would be to have
8 our initial meeting with the mediator and get his,
9 like some expert advice as to how long he thinks a
10 mediation process would be beneficial in this case.
11 And then we thought based on that input, we would
12 contact the Office of Zoning staff to come up with
13 what an appropriate rescheduled hearing date would be.

14 CHAIR GRIFFIS: Okay. I will take that
15 under advisement. I don't hear any objections from
16 the Board of granting the continuance, so let me just
17 take a quick opportunity. I have some trepidation. I
18 don't think you're ready to go today and I don't want
19 to put everyone in that point, but some trepidation of
20 what we have actually seen that happened in the past
21 of applications that come in and everything is sealed.
22 The deal is done. The community is happy. The
23 applicant is happy. They come to us and yet, we still
24 have a job to do. We still have to look at things.

25 And so what I want to caution is the fact

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1 of bring up some of these issues and you cannot wait
2 until they are all resolved. I mean, obviously,
3 resolve all the non zoning issues outside, because I
4 don't want to hear those anyway, but don't lose the
5 fact that we have an important role to play in
6 reviewing the application, so even just making sure.

7 Even if the mediation doesn't resolve all
8 the problems and everyone is happy, I think at the
9 best case scenario, just meeting, we'll be able to
10 identify, clarify the issues that need to come before
11 us. This Board is not afraid of tough issues, and so
12 I don't think that we're wanting everyone to get
13 peaceful. I mean, that would be the best situation,
14 but we're not, as I say, cautious about stepping into
15 it.

16 So I want to set a date, because, first of
17 all, this is the only time and the best time for us to
18 do a public announcement of the date. I would give
19 you three months to get it done and then to come back.

20 Is there any objection to three months?

21 MR. TUMMONDS: I think realistically, some
22 of the conversations we have had with the Office of
23 Planning is in mediation process, there is a lot of
24 work done at the beginning and then a lot of work done
25 at the end, and that interim middle period seems to

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1 kind of ebb and flow with what your end date is.

2 CHAIR GRIFFIS: Three months is too short?

3 MR. TUMMONDS: Too long.

4 CHAIR GRIFFIS: Too long? Interesting.

5 MR. SCALLET: Oh, well, see, I was about
6 to say it was too short.

7 CHAIR GRIFFIS: All right. That's the
8 first topic for the mediator.

9 MR. TUMMONDS: Right. Exactly.

10 CHAIR GRIFFIS: Item 1, how long is this
11 going to be? Okay. Well, first of all, I'm going to
12 set it for three months and I'm going to indicate that
13 I think really, I applaud the fact that you're doing
14 this and want it to get done, and so be very
15 productive. There is no way we can hear it before
16 three months, quite frankly. I don't have any time in
17 the schedule.

18 Ms. Bailey, do you see anything?

19 MS. BAILEY: No, Mr. Chairman. The Office
20 of Zoning will support the three month period of time.

21 In addition, if the mediation has not worked, at
22 least the participants can give us a progress report
23 as to where they are.

24 CHAIR GRIFFIS: Okay. And what date are
25 we proposing that?

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1 MS. BAILEY: May 25th, Mr. Chairman.

2 CHAIR GRIFFIS: May 25th? Conflicts? Yes,
3 Mr. Zaidain?

4 BOARD MEMBER ZAIDAIN: Yes, I -- Mr.
5 Tummonds has referred the Office of Planning a couple
6 of times. Are they running this process?

7 MR. TUMMONDS: No.

8 MR. SCALLET: No, they suggested --

9 BOARD MEMBER ZAIDAIN: Okay.

10 MR. SCALLET: -- a list of mediators,
11 which is what we're going to be working off of.

12 CHAIR GRIFFIS: And who else is going to
13 the mediation? I mean, OP is not going to be part of
14 that. Is that correct?

15 MR. SCALLET: That's correct, yes.

16 BOARD MEMBER ZAIDAIN: We haven't granted
17 party status in this, have we?

18 CHAIR GRIFFIS: Yes, we have.

19 BOARD MEMBER ZAIDAIN: Oh, we have?

20 CHAIR GRIFFIS: Yes.

21 BOARD MEMBER ZAIDAIN: Okay. I'm sorry.

22 CHAIR GRIFFIS: At the first continuance,
23 we established that the Knollwood Neighbors are the
24 party. And I think, if I recall correctly, I'm sorry,
25 I didn't get through all of this, we also denied one.

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1 MR. SCALLET: That's correct.

2 CHAIR GRIFFIS: All right. Any other
3 questions, clarifications, conflicts with the day that
4 we have set? Are we talking an afternoon case?

5 MS. BAILEY: Do you have a preference, Mr.
6 Chairman? Do you have a preference?

7 CHAIR GRIFFIS: It depends what's serving
8 for lunch, but yes, let's put it first in the
9 afternoon. We don't have anything else on that date.
10 Is that correct?

11 MS. BAILEY: No, sir.

12 CHAIR GRIFFIS: Okay. We're going to set
13 it for the first in the afternoon. And I would
14 imagine on some of these -- well, I think we probably
15 wouldn't schedule anything else in that afternoon, but
16 I can't guarantee that. Okay. Ms. Bailey, if you
17 wouldn't mind, just tell me the date again.

18 MS. BAILEY: That's May 25th, first in the
19 afternoon.

20 CHAIR GRIFFIS: Okay. Everybody clear?

21 MR. SCALLET: Yes.

22 CHAIR GRIFFIS: All set? Excellent.
23 Anything else we can answer process wise?

24 MR. SCALLET: We're all set.

25 CHAIR GRIFFIS: Okay. Do you anticipate

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1 in the next few months any sort of submissions into
2 the record at all?

3 MR. TUMMONDS: Well, I think -- well,
4 obviously, two weeks prior to.

5 CHAIR GRIFFIS: Right. It's set from
6 standard.

7 MR. TUMMONDS: We'll have our prehearing
8 statement. Right.

9 CHAIR GRIFFIS: Okay. All right. And we
10 have established all the parties. We know who is
11 getting served, so we'll look forward to that. Great.
12 Any other preliminary matters for this afternoon?

13 MS. BAILEY: No, sir.

14 CHAIR GRIFFIS: Okay. If I would ask
15 then, does anyone else have any preliminary matters
16 that's here today? Very well. Then if you are going
17 to address the Board or give any sort of testimony, I
18 would ask that you stand, at this time, and give your
19 attention to Ms. Bailey. She is going to administer
20 the oath.

21 (The witnesses were sworn)

22 MS. BAILEY: Thank you. Please, have a
23 seat at the table.

24 CHAIR GRIFFIS: Okay.

25 MR. WHEATLEY: Yes. My name is Lorenz

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1 Wheatley. I am the co-applicant for Case No. 17096 in
2 Ward 5, and I am here to give testimony as to why we
3 should have a zoning adjustment, a variance rather,
4 area variance for this application.

5 CHAIR GRIFFIS: Excellent. Thank you, Mr.
6 Wheatley. First of all, I understand that you are
7 under some time restraint this afternoon, so I
8 appreciate you being patient with us. You are here
9 actually as we have changed your application for a
10 special exception, and I think the Board has reviewed
11 and is processing it in that fashion.

12 I am finding that the record is entirely
13 full and complete on this, and would offer you the
14 opportunity to stand on the record, which would mean
15 you would just adopt what's in here and not provide
16 any -- I will obviously give you time if you want to,
17 but not provide any additional information at this
18 point.

19 MR. WHEATLEY: Okay.

20 CHAIR GRIFFIS: Well, in order to make
21 this official, I need to call your case. So I'm going
22 to give you a moment to think about that. Is anyone
23 else here attendant to this application that will give
24 testimony? Is anyone else here for Application 17096?
25 Very well. Ms. Bailey is going to call the case.

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1 MS. BAILEY: Application, as you have
2 indicated, Mr. Chairman, 17096 of Cecilia and Lorenz
3 Wheatley, pursuant to 11 DCMR 3103.2, for a variance
4 from the lot occupancy requirements under section 403,
5 a variance from the nonconforming structure provisions
6 under section 2001.3, to allow a two-story rear
7 addition to a single-family row dwelling in the R-2
8 districted premises, 1302 Allison Street, N.E.

9 CHAIR GRIFFIS: Good. Thank you very
10 much. Okay. Back to it.

11 MR. WHEATLEY: Yes. I just need some
12 clarification. You're saying that you want to change
13 this from a variance issue to a special exception
14 issue?

15 CHAIR GRIFFIS: That's correct.

16 MR. WHEATLEY: And what is the reason
17 again?

18 CHAIR GRIFFIS: The special exception,
19 that was adopted in our regulations under section 223,
20 allows additions to nonconforming structures and they
21 are nonconforming or specified in the regulations and
22 through a review of the Office of Zoning, your
23 application, although it was referred by the Zoning
24 Administrator for two variances, the Office of Zoning
25 has done the calculation and review of the

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1 application, and says it does comply under the
2 requirements to come under special exception.

3 Obviously, special exception is a lesser burden
4 in terms of a test of zoning relief, and 223 is an
5 excellent section of our regulations that was written
6 for this type of circumstance of which often, if not
7 always, our exiting townhouse structures are
8 nonconforming and, therefore, are not able to be added
9 to or changed in my respects.

10 MR. WHEATLEY: Okay.

11 CHAIR GRIFFIS: So if you are comfortable
12 with that or I can provide more information for you.

13 MR. WHEATLEY: Well, you say there is less
14 of a burden of proof on my part?

15 CHAIR GRIFFIS: That's correct.

16 MR. WHEATLEY: Okay. Well, that's what I
17 initially filed and then I was told it should be a
18 variance, so I guess I'm happy with a special
19 exception.

20 CHAIR GRIFFIS: Okay.

21 MR. WHEATLEY: Well, although, I'm not
22 sure if I -- well, I'll just make my case as best as I
23 know how under the circumstances.

24 CHAIR GRIFFIS: Good.

25 MR. WHEATLEY: You should have before you

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1 material that I submitted with respect to this
2 application. As you know, we're in an R-2 zoning
3 area, and part of the issue is that our lot, the lot
4 size doesn't conform with current zoning standards.
5 It's a much smaller lot than what is the existing
6 standard for an R-2 lot.

7 So on that basis, we're asking for a
8 special exception to the extent that we want to build
9 a two-story addition plus a basement level addition
10 beyond the existing footprint of the house. And I can
11 draw your attention to -- let me get my notes in order
12 here. Okay. Essentially, what we're doing is going
13 to have a tiered design, such that the basement level
14 will extend out the furthest. The first story, about
15 7 feet less than that and the top story, about 5 feet
16 from the existing structure. And I need to just
17 verify those dimensions, so if you bear with me a
18 minute.

19 CHAIR GRIFFIS: Not to worry. Actually,
20 it's in the record.

21 MR. WHEATLEY: Okay.

22 CHAIR GRIFFIS: And it has already been
23 looked at.

24 MR. WHEATLEY: Okay.

25 CHAIR GRIFFIS: Let me ask you a few

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1 questions.

2 MR. WHEATLEY: Sure.

3 CHAIR GRIFFIS: In reviewing this and also
4 talking to your neighbors and anybody else that might
5 be adjacent, have you found any evidence that this
6 would unduly affect the available light and air to the
7 neighboring properties?

8 MR. WHEATLEY: Well, when you say unduly,
9 I know a lot of this is subjective, as well as
10 objective. We have our immediate neighbor to the
11 east. She objected to the design inasmuch as she says
12 she won't be able to see what's happening on Sergeant
13 Road. We have currently a garage in the back, which
14 we plan to raise and that would, to some degree, add
15 to the light.

16 CHAIR GRIFFIS: How far out from the
17 adjacent property is this going to project?

18 MR. WHEATLEY: Well, I think what's most
19 at issue with our neighbor is the first level
20 addition, the first level, and that would project,
21 approximately, as I said, 7 feet. Let me just double
22 check though.

23 CHAIR GRIFFIS: Right. 7 feet to the
24 exterior.

25 MR. WHEATLEY: Right. So that -- so from

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1 her back porch or stoop, she would not be able to see
2 to the west and she does now. I don't know if it
3 would be fair to say that she spends most of her time
4 on the front porch, but that's --

5 MR. WHEATLEY: Is it your opinion that
6 this would unduly affect the light and air of the
7 adjacent neighbors?

8 MR. WHEATLEY: Not -- no, I don't think it
9 would.

10 CHAIR GRIFFIS: Okay.

11 MR. WHEATLEY: No.

12 CHAIR GRIFFIS: Would it unduly compromise
13 the privacy, use or enjoyment of the neighboring
14 properties?

15 MR. WHEATLEY: No, inasmuch as all our
16 windows that we plan to put on the addition would be
17 facing the alley, north, so we have no planned windows
18 or entrances or exits on the sides, either the east or
19 west side of the structure.

20 CHAIR GRIFFIS: And the addition, do you
21 find it to be in character with the surrounding
22 architecture and massing?

23 MR. WHEATLEY: Well, there will be a
24 difference, I mean, understandably. We're a middle
25 row house and what we're -- we would be breaking new

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1 ground. I have to admit that much, but what we
2 thought initially, we were going to try to have a two-
3 story addition pretty much squared out, and we figured
4 if we tier it, it won't disrupt the character as much
5 as the original plan.

6 CHAIR GRIFFIS: Okay.

7 MR. WHEATLEY: So we thought we made a
8 compromise in going to this design.

9 CHAIR GRIFFIS: Let me ask you. This
10 addition, would it visually intrude on the street
11 frontage at all?

12 MR. WHEATLEY: No.

13 CHAIR GRIFFIS: Would you be able to see
14 it from the street?

15 MR. WHEATLEY: No, not at all.

16 CHAIR GRIFFIS: Okay. What else would you
17 like to add?

18 MR. WHEATLEY: Well, as you may know, the
19 ANC was supposed to weigh in on this and we were
20 scheduled to have a meeting this past Wednesday, but
21 because of the weather the meeting was postponed. So
22 I don't have the benefit of the ANC's recommendation
23 one way or the other on this, in this matter. But
24 they were aware of the two neighbors' objections.
25 Now, I do have petitions from some of the other

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1 neighbors who were in support of this, and I don't
2 know if I can -- if this would be an appropriate time
3 to submit that for the record.

4 CHAIR GRIFFIS: Letters of support?

5 MR. WHEATLEY: Well, I have a petition.

6 CHAIR GRIFFIS: Oh, sure.

7 MR. WHEATLEY: Okay.

8 CHAIR GRIFFIS: Did you receive this
9 letter from the ANC 5-A from Mr. Bowser?

10 MR. WHEATLEY: We had a hearing, a single
11 member district hearing scheduled of which no one --
12 of whom no one showed up.

13 CHAIR GRIFFIS: Right. That's how --

14 MR. WHEATLEY: It was just myself, my
15 wife, Mr. Bowser and Cary Clennon who we are on the
16 center line of two single member districts.

17 CHAIR GRIFFIS: I see.

18 MR. WHEATLEY: So across the street is
19 Cary Clennon's single member district, on the south
20 side of Allison Street.

21 CHAIR GRIFFIS: Okay. Well, the single
22 member commissioner has indicated that he recommends
23 that we just go ahead without them.

24 MR. WHEATLEY: Okay.

25 CHAIR GRIFFIS: All right. Why don't you

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1 put that in? Actually, hold onto the petition at this
2 point.

3 MR. WHEATLEY: Okay.

4 CHAIR GRIFFIS: Do you have copies of it?

5 MR. WHEATLEY: I did not make a copy of
6 it.

7 CHAIR GRIFFIS: Okay. Why don't we just
8 accept it as your testimony? Where are the petition
9 signers? Are they all neighbors in the block?

10 MR. WHEATLEY: Well, they are within the
11 200.

12 CHAIR GRIFFIS: 200?

13 MR. WHEATLEY: Foot radius.

14 CHAIR GRIFFIS: Okay. And you have
15 signatures from the adjacent neighbors, except for
16 one?

17 MR. WHEATLEY: My neighbor to the west was
18 out and I didn't -- I mean, I was getting the --

19 CHAIR GRIFFIS: That's okay.

20 MR. WHEATLEY: Okay. No.

21 CHAIR GRIFFIS: The issue, when talking to
22 these people, getting signatures of support, were
23 there any issues that were brought up?

24 MR. WHEATLEY: No.

25 CHAIR GRIFFIS: Any concerns that you are

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1 aware of?

2 MR. WHEATLEY: No, they were very
3 supportive. As a matter of fact, they stated --
4 mostly, they stated that it shouldn't be an issue, but
5 I stated that this wasn't a Matter-of-Right, and
6 that's why we're going through this process.

7 CHAIR GRIFFIS: Okay. Are those fixed
8 windows in the back elevation?

9 MR. WHEATLEY: Fixed windows? They will
10 probably be casement windows. I don't know if
11 that's --

12 CHAIR GRIFFIS: So double-hung?

13 MR. WHEATLEY: Well, casement.

14 CHAIR GRIFFIS: Casement?

15 MR. WHEATLEY: Yes, yes.

16 CHAIR GRIFFIS: Okay.

17 MR. WHEATLEY: We have current -- we are
18 going to try to salvage what's there now and put them
19 into the new addition.

20 CHAIR GRIFFIS: Okay. Good. Anything
21 else then?

22 MR. WHEATLEY: Not that I can think of.

23 CHAIR GRIFFIS: Excellent. Okay. Let me
24 just run down the rest of the things that, of course,
25 are required for us to go through this and establish

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1 the entire record. First of all, we would now go to
2 Office of Planning. Office of Planning is not present
3 this afternoon. They have submitted a report.

4 Do you have a copy of the Office of
5 Planning's report?

6 MR. WHEATLEY: I believe I do.

7 CHAIR GRIFFIS: Okay. You have seen it
8 then. Is that correct? You have read it?

9 MR. WHEATLEY: That was -- yes.

10 CHAIR GRIFFIS: Okay.

11 MR. WHEATLEY: Yes.

12 CHAIR GRIFFIS: Office of Planning, of
13 course, is recommending approval of this. You can
14 take the time and look through the further details.
15 Did you have any questions of the Office of Planning
16 that you recall?

17 MR. WHEATLEY: Actually, I'm not sure that
18 I have that. No, as a matter of fact, I didn't get a
19 record, a copy of that.

20 CHAIR GRIFFIS: Okay. Well, we'll get you
21 a copy.

22 MR. WHEATLEY: Okay.

23 CHAIR GRIFFIS: Are you aware of any other
24 Government reports sent to this application? I have
25 no record of any other submissions.

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1 MR. WHEATLEY: No, sir.

2 CHAIR GRIFFIS: Okay. The ANC we have
3 already addressed. In terms of 5-A, we had continued
4 it, so that they could have this meeting and then all
5 of a sudden, it snowed. That being said, we're moving
6 well ahead. Is there anyone else here attendant to
7 this application, 17096, to give testimony in support
8 or in opposition to this application? Not seeing any
9 indications that we have testimony, we'll move on.

10 There is a letter of concern. That was
11 the Corbett family. Is that the adjacent family?

12 MR. WHEATLEY: That's my immediate
13 neighbor to the east.

14 CHAIR GRIFFIS: Okay. And the Board has
15 looked at that and reviewed it. It is Exhibit No. 21.
16 We also do have, as I stated in the beginning,
17 Exhibit No. 6, the Zoning Administrator's memo of
18 referral of which we have changed and readvertised.

19 You're proposing a home based business.
20 Is that correct?

21 MR. WHEATLEY: I currently have a home
22 based business. I am basically doing media
23 production.

24 CHAIR GRIFFIS: I see.

25 MR. WHEATLEY: I do not incur any traffic,

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1 because I go out to see clients.

2 CHAIR GRIFFIS: Okay.

3 MR. WHEATLEY: So it's basically an in-
4 home production facility.

5 CHAIR GRIFFIS: Okay. Well, let me just
6 give you a recommendation. Of course, we're here for
7 the addition and such.

8 MR. WHEATLEY: Right.

9 CHAIR GRIFFIS: There is some Zoning
10 Regulations that deal with home based business, but I
11 would also make you aware that there is -- well, there
12 is licensing requirements that, of course, are beyond
13 our jurisdiction, but you can take care of that.

14 MR. WHEATLEY: Sure.

15 CHAIR GRIFFIS: On your own. I don't have
16 anything else attendant to this application. Unless
17 anyone is aware of any or wants to bring up any other
18 points, let me turn it over to you then for any
19 closing remarks that you might have.

20 MR. WHEATLEY: Well, I just want to thank
21 the Board for the opportunity to make this
22 presentation, and whatever your decision, you know,
23 we're prepared to deal with by rule of law.

24 CHAIR GRIFFIS: So ominous, so ominous.
25 Very well. Board Members, last questions, comments,

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1 additional information required? If not, I would --
2 Mr. Zaidain?

3 BOARD MEMBER ZAIDAIN: No.

4 CHAIR GRIFFIS: Very well then. I would
5 move approval of Application 17096 of Cecilia and
6 Lorenz Wheatley that is for the special exception
7 under section 223, which would allow for a two-story
8 rear addition to a single-family row dwelling at the
9 premises of 1302 Allison Street, N.E., and I would ask
10 for a second.

11 BOARD MEMBER ZAIDAIN: I second that, Mr.
12 Chair.

13 CHAIR GRIFFIS: Thank you very much. I
14 know we have breezed very quickly though this, but
15 this is a very straightforward case and I think we
16 have touched upon it. In fact, oral testimony has
17 provided with the entire criterion for compliance to
18 223. There has not been evidence of any sort of undue
19 effect to the light, air, privacy.

20 It certainly fits within the character of
21 the area surrounding. It is, as calculated, compliant
22 with 223.3 for the lot occupancy. They have
23 submitted, in accordance to 223.2, proper
24 documentation and graphic representation for us to
25 review and understand the project.

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1 The special exception requirement, of
2 course, under 223 and in addition to that, which is
3 enumerated in the regulation specific, is also the
4 general special exception test. And I have not seen
5 any evidence to the fact that this would somehow not
6 be in harmony with the general purpose and intent of
7 the Zoning Regulations and Map, and I think it's very
8 so and that it wouldn't attend to affect the
9 neighboring properties, which we have already
10 established under 223. And therefore, I think it is
11 ripe for approval from this Board.

12 Further deliberation? Comments? Not
13 noting any, then I would ask for all in favor to
14 signify by saying aye.

15 ALL: Aye.

16 CHAIR GRIFFIS: And opposed? Why don't we
17 record the vote?

18 MS. BAILEY: The vote is recorded as 4-0-1
19 to approve the application. Mr. Griffis made the
20 motion, Mr. Zaidain second, Mr. Etherly and Ms. Miller
21 are in support, and the Zoning Commission member is
22 not present today.

23 CHAIR GRIFFIS: Thank you very much, Mr.
24 Wheatley.

25 MR. WHEATLEY: Thank you.

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1 CHAIR GRIFFIS: Get home safety.

2 MR. WHEATLEY: All right.

3 MS. BAILEY: Summary order, Mr. Chairman?

4 CHAIR GRIFFIS: Yes, thank you. That
5 being said, that dispenses with our public hearing for
6 the afternoon. Is that correct?

7 MS. BAILEY: Yes, sir.

8 CHAIR GRIFFIS: No other business for us?

9 In which case, we are going to be recessing for 30
10 minutes. We're going to come back and then call our
11 public meeting. We have, and I will send an order for
12 that upon return, I think we may have upwards of 13
13 decisions in the afternoon, so we will be back
14 shortly.

15 (Whereupon, the Public Hearing was
16 concluded at 2:09 p.m.)

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