

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

FEBRUARY 17, 2004

+ + + + +

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

BOARD OF ZONING MEMBERS PRESENT:

| | |
|----------------------|--------------------|
| GEOFFREY H. GRIFFIS, | Chairperson |
| RUTHANNE MILLER | Vice-Chairperson |
| CURTIS ETHERLY, JR. | Board Member |
| DAVID ZAIDAIN | Board Member, NCPC |

ZONING COMMISSION MEMBER PRESENT:

| | |
|------------------|--------------|
| JOHN G. PARSONS, | Commissioner |
|------------------|--------------|

OFFICE OF ZONING STAFF PRESENT:

| | |
|------------------|-------------------|
| CLIFFORD MOY, | Acting Secretary |
| BEVERLEY BAILEY, | Zoning Specialist |

D.C. OFFICE OF CORPORATION COUNSEL:

MS. SKINNER, ESQ.
LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

| | |
|--------------------|--------------------|
| DAVID MCGHETTIGAN, | Office of Planning |
| ARTHUR JACKSON, | Office of Planning |
| TRAVIS PARKER, | Office of Planning |

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

9:43 a.m.

CHAIRMAN GRIFFIS: Good morning, ladies and gentlemen.

I call to order the 17th of February, 2004 Public Hearing of Board of Zoning Adjustment for the District of Columbia.

My name is Jeff Griffis, I am Chairperson. Joining me today is Vice Chair Ms. Miller and also Board member Mr. Etherly. Representing the National Capital Planning Commission with us today is Mr. Zaidain.

Copies of today's hearing agenda are available to you. They are located where you entered into the hearing room on the wall. Please pick that up and you can see what we will going through this morning and, for that matter, this afternoon.

Two points of importance. First of all, all proceedings before the Board of Zoning Adjustment are recorded. They are now recorded in two fashions.

First and most importantly, is the recorder who is sitting to my right. The recorder will of course create the official transcript that goes into the record. The second, we are being broadcast live on

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1 the Office of Zoning's webpage. So with both of
2 those recording devices, we ask that people please
3 reframe from any disruptive noises or actions in the
4 hearing room. And I would ask that people turn off
5 their cell phones and beepers at this time so that we
6 do not disrupt the proceedings and anyone that might
7 be presenting in front of us. The order of
8 procedures for special exceptions and variances is,
9 first, we hear from the applicant, their statement
10 and any witnesses.

11 Second, will be any government reports
12 attendant to the application such as the Office of
13 Planning or Department of Transportation.

14 Third, we will have the report of the
15 Advisory Neighborhood Commission.

16 Fourth, would be parties or persons in
17 support of the application.

18 Fifth, would be parties or persons in
19 opposition to the application.

20 Sixth, finally we will have closing
21 remarks by the applicant.

22 All persons planning to testify when
23 coming forward, they need to do several things.
24 First of all, I'm going to ask that people fill out
25 two witness cards. Witness cards are available in

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1 front of us at the table. They're also available
2 where you entered into the hearing room. Those two
3 witnesses cards needs to go to the recorder prior to
4 coming forward to speak.

5 When you are ready to speak and address
6 the Board, and I would ask that you come forward and
7 make yourself very comfortable and state your name
8 and address for the record. That will, of course,
9 help us to give all the credit to the important
10 things that you say in the official transcript.

11 Pursuant to 3117.4 and 3117.5 we are
12 allowed and it is well within our jurisdiction to set
13 times, times for applications and their proceedings.
14 I'm going to dispense with that this morning because
15 I think we can get through it fairly quickly.
16 However, an important aspect of that if you are a
17 person giving testimony, you are limited to three
18 minutes. And I will keep an eye on the clock and
19 make sure that you stay well within that.

20 Cross examination of witnesses, of
21 course, is permitted by the applicant and parties in
22 the case. The ANC within which the property is
23 located is automatically a party in the application
24 and therefore, of course is afforded the opportunity
25 cross examine witnesses.

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1 The record will be closed at the
2 conclusion of all hearings, except for any material
3 that the Board specifically requests, and we will be
4 very specific as to what is to be submitted and when
5 it is to be submitted into the Office of Zoning. This
6 is an important piece to understand. First of all,
7 we are establishing an official record here and that
8 will be the basis of all our deliberation. So we ask
9 that you do state what you need to or submit into
10 writing. And, as I say, after this hearing we will
11 not accept anything else into the record except that
12 which we have requested.

13 The Sunshine Act requires that this Board
14 hold all proceedings in the open and before the
15 public. This Board may, however, enter Executive
16 Session during or after an application for the
17 purposes of deliberating on a case or reviewing the
18 record. And that, of course, would be in accordance
19 to our rules of procedure and the Sunshine Act.

20 The decision of this Board in contested
21 cases must be based on this important record that I
22 keep talking about. Therefore, we ask that people
23 present today not engage Board members in any type of
24 conversation so that we don't give the appearance of
25 receiving information outside of the record.

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1 I believe we can entertain any
2 preliminary matters at this time.

3 Preliminary matters are those which
4 relate to whether a case will or should be heard
5 today, such as a request for a postponement,
6 continuance or withdrawal or whether proper and
7 adequate notice of the application has been provided.

8 If you have a preliminary matter for the attention
9 of the Board, I would ask that you come forward and
10 have a seat at the table and that will, obviously,
11 let me know you do.

12 And with that, let me also say a very
13 good morning to Corporate Counsel that's with us,
14 also, Ms. Bailey on my very right who is with the
15 Office of Zoning and Mr. Moy, who is closer to us on
16 my right.

17 Are there any preliminary matters for the
18 Board at this time?

19 MS. BAILEY: Mr. Chairman, members of the
20 audience and to everyone, good morning.

21 No, sir. There are no preliminary
22 matters at this time from staff.

23 CHAIRMAN GRIFFIS: Very well. The Board
24 has one preliminary matter then, and it's in the form
25 of more of an announcement than any sort of

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1 deliberative or official action. I believe that it
2 is the Board's intention to reopen the deliberation
3 and reconsider part of a vote on a recent
4 application. And that is for the application of
5 NCRC. That will be scheduled on the 2nd of March, I
6 believe, which is our regularly scheduled public
7 meeting.

8 MR. MOY: Yes, that's correct, Mr.
9 Chairman.

10 CHAIRMAN GRIFFIS: I'm awfully glad it
11 is.

12 Okay. With that, then let's call the
13 first case if there's nothing else for us to deal
14 with right now.

15 MS. BAILEY: And that is application
16 17116 of 1701 18th Street, L.L.C., pursuant to 11
17 DCMR ? 3101.2, for a variance from the floor area
18 ratio requirements under section 402, a variance from
19 the court width requirements under section 406, a
20 variance from the nonconforming structure provisions
21 under section 2001.3, to allow the conversion of a
22 chancery to an apartment building in the D/DC/R-5-B
23 District at premises 1701 18th Street N.W. also known
24 as Square 153, Lot 132.

25 Please stand all those persons who will

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1 be testifying in this application. Please stand to
2 take the oath.

3 (Witnesses sworn).

4 MS. BAILEY: Mr. Chairman, there is a
5 request for party status in this application.

6 CHAIRMAN GRIFFIS: Indeed, Thank you. I
7 believe it's from Shawn Shahida, is that correct? Is
8 Mr. Shahida present? Any other pronunciation on
9 that? Of 1730 18th Street, Northwest.

10 Not being present, Board members let's
11 just run through this very quickly. It was timely
12 submitted. It is Exhibit 21.

13 The significant, distinct and unique
14 aspect and character of this application for party
15 status would be that they, obviously, live and park
16 in the neighborhood is what's stated on the
17 application. Any comments on that? I take this more
18 as the possibility of submitting testimony, and I
19 think we can look at it in that fashion.

20 Ms. Miller?

21 VICE CHAIRMAN MILLER: I would concur
22 since the person is not here, he can't participate as
23 a party actively in this case, in any event. So it
24 would be appropriate just to take this as testimony.

25 CHAIRMAN GRIFFIS: Okay. Of course, it's

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1 not a requirement to be present to establish party
2 status, but I understand the point.

3 Anyone else? Does the applicant have any
4 opinion on the request for party status?

5 MS. PRINCE: Allison Prince from Shaw-
6 Pittman. We did talk to Mr. Shahida in advance of
7 this hearing. We had the impression that he would
8 not be attending today. I believe --

9 CHAIRMAN GRIFFIS: Do you object to the
10 party's application for the granting of party status?

11 MS. PRINCE: I object to granting party
12 status since he's not here.

13 CHAIRMAN GRIFFIS: Okay. Board embers,
14 anything else? Comments?

15 Is there any objection to denying the
16 party status application at this time? Not noting
17 any objection, it is the consensus of the Board and
18 submit this Exhibit 21 as written testimony into the
19 record.

20 Very well. Is there anything else, Ms.
21 Bailey?

22 MS. BAILEY: No, Mr. Chairman.

23 CHAIRMAN GRIFFIS: Okay. Then, let us
24 proceed.

25 MR. BURGER: Good morning, members of the

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1 Board.

2 MS. PRINCE: I go first.

3 MR. BURGER: Oh, you do?

4 MS. PRINCE: Yes.

5 Good afternoon, Chairman Griffis, and
6 members of the Board. I'm Allison Prince of Shaw-
7 Pittman and I'm here today on behalf of the
8 applicant.

9 Today's application involves an
10 opportunity to return a building, an original
11 residential building, to residential use after 50
12 years of office and chancery use.

13 I should note that the chancery use
14 involved a long history of litigation with the Dupont
15 Circle community which may be part of the reason why
16 the ANC voted unanimously to support this
17 application.

18 The application involves the conversion
19 of the property into nine condominiums. A total of
20 five parking spaces will be created.

21 This is really a classic variance case.
22 There is a situation with the property, a condition
23 with the property, that gives rise to the need for
24 the variance. There is a triple height space within
25 the building, a very significant volume of space that

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1 was built to house an organ that is no longer there.

2 And it is condition that gives rise to the need for
3 the variance, because it would be extremely awkward
4 to convert that space to residential use. So the
5 owner is seeking permission to install floors to
6 break the three level space into three separate
7 levels by extending the second and third floors of
8 the building.

9 In so doing, multiple variance are
10 required because the building is already very
11 nonconforming with respect to lot occupancy. And, as
12 you know, you cannot do any kind of expansion to a
13 building that's nonconforming as to lot occupancy.

14 In addition, the building already exceeds
15 the maximum permitted FAR. And while these changes
16 are internal only, they will add to gross floor area.

17 And finally, there's a very technical
18 variance required because of the court, and I'll let
19 the architect explain that.

20 I should note that now the only parking
21 that occurs on the premises is in the existing court
22 area, perhaps about two spaces can fit in that area.

23 And that area will be replaced with a ramp to go to
24 a parking garage below that will house a total of
25 five parking spaces. The parking spaces will not

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1 measure the required 9x19, rather they'll measure
2 8x19. But a parking variance is not required, nor a
3 variance from the dimensional requirements for
4 parking spaces, because the property is not required
5 to provide any parking given it's historic status.

6 Finally, as the architect will describe,
7 due to some code issues the roof structure is changed
8 very slightly. Nothing about this application
9 affects the roof structure There's no relief
10 required in connection with the roof structure.
11 However, to be very cautious, we thought we'd best
12 show the most recent version of the roof structure in
13 the plans that we're submitting to you today. So I
14 have additional sets for the Board that show the very
15 most recent version of the roof structure. Again, it
16 does not effect any area of relief. We have never
17 required roof structure relief, and we still don't
18 require roof structure relief. But given the state
19 of the Office of the Zoning Administrator I thought
20 we should be cautious about making sure that the
21 plans that we get approved are the exact plans that
22 we'll submit for permit.

23 I've already submitted the posting
24 affidavit. We're aware of no opposition to the
25 application with the exception of the request for

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1 party status from Mr. Shahida.

2 And if the Board has no questions, I'd
3 like to proceed with the testimony of the applicant
4 Keith Burgess and then proceed with the testimony of
5 the architect, Greg Zahn.

6 CHAIRMAN GRIFFIS: Excellent.

7 MR. BURGER: Good morning, members of the
8 Board. My name is Keith Burgess. I live in
9 Rockville, Maryland. I'm the principal in the Burgess
10 Properties, L.L.C. And I'm here today as the
11 applicant.

12 My development company has been involved
13 in several recent projects including a 17 unit condo
14 project on the corner of 13th and Taylor in Petworth,
15 a 16 unit project on the corners of Florida 5th and
16 New Jersey known as the Ellenton.

17 CHAIRMAN GRIFFIS: Does that related to
18 this?

19 MR. BURGER: It does not. I'm just giving
20 some background.

21 CHAIRMAN GRIFFIS: Okay.

22 MR. BURGER: And various row houses.

23 My business is primarily devoted to
24 creating residential opportunities in the District of
25 Columbia, and I'm extremely pleased about the

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1 opportunity we have to convert this building today.

2 My company purchased 1701 18th Street
3 approximately four months ago. And as the architect
4 Greg Zahn will describe, the building is quite
5 significantly architecturally. And I believe the
6 nine units that we'll be provided will be quite
7 extraordinary.

8 I look forward to returning this former
9 chancery into residential use and restoring the
10 building because it's currently in deteriorating
11 condition. As Greg will describe in greater detail
12 the building occupies a significant portion of the
13 lot and has a quite extraordinary triple height space
14 which was constructed to house an organ many years
15 ago. I'm pleased to announce that we have found a
16 new home for the organ. We've denoted the organ to a
17 church on the corner of 16th and O Street where it
18 will be installed, restored and used.

19 Again, we're here today to seek relief to
20 add floors to the triple height space and create
21 apartments of a more workable configuration.

22 We have extensive discussion with the
23 community about this project from the onset, which
24 may explain why the ANC 2-B had unanimous support of
25 the project.

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1 And I'll be pleased to answer any
2 questions.

3 CHAIRMAN GRIFFIS: Good. This building
4 was built in 1906, is that correct?

5 MR. BURGER: Yes.

6 CHAIRMAN GRIFFIS: And conceivably it
7 could have been built with floors on all the area
8 where the organ, the triple height space is that your
9 understanding?

10 MR. BURGER: I'm sorry. It could have
11 been?

12 CHAIRMAN GRIFFIS: It could have been
13 built with three floors in the open area now?

14 MR. BURGER: Yes, it could have been.

15 CHAIRMAN GRIFFIS: Okay. Any other
16 questions?

17 Okay. Thank you.

18 No, you won't be on the record.

19 MR. ZAHN: Okay. First, my name is Greg
20 Zahn, Zahn Design Architects. I reside at 1727 21st
21 Street, which is just three blocks west of this
22 project, so I'm a neighbor.

23 My firm has been involved in historic
24 renovations in the neighborhood and in the District
25 since 1986.

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1 Let me just quickly out the revision that
2 we handed out, this piece of penthouse or roof
3 structure -- this piece of roof structure was
4 eliminated, this piece was added. And, again, as
5 Allison stated, this does not effect any area of
6 relief.

7 18th Street is at the bottom here. This
8 is our street.

9 The footprints of the building. Here is
10 the location of the open court to a public alleyway.

11 The building was built in 1905 and 1905.

12 The architectural firm was Horn, Blower & Marshall.

13 It is a significant mansion in the
14 Italian Pilatzo style, however it's relatively simple
15 in its detail from the time period. The Belmont
16 Mansion, which stands just to the south, is a much
17 more ornate structure.

18 The main entertaining floors of the
19 mansion are on the second floor in the Italian style.

20 The triple height space is accessed from
21 the first floor starting here and to include this
22 large window.

23 The building is in good structural
24 condition. It suffers from many years of deferred
25 maintenance.

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1 The interior detailing, most of it has
2 been stripped with the exception of the main interior
3 stair is in good condition and most of the fireplace
4 mantels. Those will all be incorporated into the
5 proposed project.

6 A typical floor layout is shown here.
7 The building is going to be divided into nine
8 condominium units. A typical floor will have two
9 units. The first floor will have three smaller
10 units.

11 There is a natural structure division in
12 the building consisting of a main structural wall,
13 the two stairs and the elevator divide kind of
14 naturally divide the structure's two portions. The
15 units will range in size from about 800 square feet
16 to the largest being approximately 200 square feet.

17 Here we're illustrating the parking area
18 in the basement. The ramp will come down from the
19 alley on the north. Five parking spaces are
20 provided. The parking spaces, we could have provided
21 the regulation 9 foot wide parking spaces, however
22 that would have required placing utility, electric
23 and gas meters as well as trash on the exterior of
24 the basements. All those functions we've been able
25 to incorporate into the lower level plan.

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1 The technical relief regarding the court
2 is a result not of a taller building, but technically
3 the height of the court becomes larger because we're
4 excavating the ramp. The court must be measured from
5 the lowest point of the court, which would be here.

6 The triple height space measures roughly
7 18 feet wide, 60 feet long and 35 feet tall. These
8 floors -- the floors already are generous. Zahn
9 Design has done many multiple level loft condominiums
10 in recent history, however none of those floor-to-
11 floors exceed eight or nine feet. In this case we
12 have floor-to-floor ranging from 11 to 13 feet.

13 So here's the section through the tripe
14 height space. And remember, it's only 18 feet wide.

15 So essentially a 12 foot bedroom would have a
16 proportion roughly like this. A 5 foot bathroom
17 would have a proportion roughly like this.

18 In addition to these kind of unusual or
19 absurd proportions, heating and ventilating a space
20 like this would be difficult. You would end up with
21 cavities of unused space. And then going back to the
22 natural division, splitting the building essentially
23 into two parts because of the two stairs. It's
24 difficult to make maybe multiple living areas in the
25 triple height space and putting services in other

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1 areas.

2 So, in conclusion the additional floor
3 area does not add any volume to the building. It's
4 always interior existing volume. And the exception
5 to the court dimension, the increased court
6 dimension, again, is because we are excavating to
7 great addition height in the court, but not creating
8 any additional volume of the building that would
9 adversely effect any neighbors.

10 CHAIRMAN GRIFFIS: Thank you.

11 So it seems like the intent of the court,
12 obviously, is to keep an open area right for light
13 and air. Is that your understanding? The intent of
14 the regulations to require courts?

15 MR. ZAHN: Yes.

16 CHAIRMAN GRIFFIS: Okay. And what we
17 have from your statement, I'm gathering that you find
18 the existence of this building is a unique condition?

19 MR. ZAHN: Yes.

20 CHAIRMAN GRIFFIS: And you're finding it
21 unnecessarily burdensome if you had to conform with
22 the regulations of the required court because you're
23 in fact not building into the court, reducing it, but
24 actually you're increasing it by going below grade?

25 MR. ZAHN: That's correct.

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1 CHAIRMAN GRIFFIS: I see. Okay.

2 This is a contributive building in the
3 historic District of Dupont, is that correct?

4 MR. ZAHN: Yes.

5 CHAIRMAN GRIFFIS: And where are you in
6 the Historic Preservation review process?

7 MR. ZAHN: We have been in somewhat
8 constant communication with Steve Calpot, the staff
9 member. And at the moment it is his opinion that
10 this does not require Board review. It will be
11 delegated to staff.

12 CHAIRMAN GRIFFIS: Wouldn't that have to
13 go on the consent calendar in order to do that? Okay.

14 So your anticipation is that, and how soon do you
15 think that's going to happen? Do you know a schedule
16 at all?

17 MR. ZAHN: The schedule would be -- I
18 believe the deadline is the second Thursday for the
19 fourth Thursday, so we would be into a March or April
20 meeting.

21 CHAIRMAN GRIFFIS: Very good.

22 Understandable. Okay.

23 Any other questions of the Board at this
24 time? Mr. Zaidain?

25 BOARD MEMBER ZAIDAIN: Well, first of

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1 all, I'd say this is a rather fascinating project.
2 It was really interesting reading through the plans
3 last night and seeing how you're dealing with the
4 internal space.

5 But I have a question regarding the core
6 and its connection to the parking that you're
7 providing. It seems to me that the exemption from
8 parking for these sort of buildings is that it
9 precludes these types of variances. If parking were
10 required in these sort of structures, we would have
11 to deal with these pretty much constantly. But
12 that's why they're not required is because you have a
13 historic building which usually comes with challenges
14 on the sites or they don't -- you know, you're not
15 required to provide this type of parking. So it's a
16 choice that you've made to provide the parking which
17 has lead to this variance request concerning the
18 court. So to me that limits the practical difficulty
19 argument right off the bat.

20 So can you provide some more testimony as
21 to why you need to provide this parking? The public
22 good that it might be achieving? I mean, you've
23 presented the difficulties for providing it, but
24 you're not required to provide it. So it seems to me
25 we need to hear a little bit more testimony on why

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1 it's needed, what public good it may be achieving and
2 things such as that, which I guess is kind of a
3 detriment to the opposition, party opposition not
4 being here. Because I was hoping to get some
5 dialogue on the parking issue.

6 CHAIRMAN GRIFFIS: Let me see if I
7 understand what you're saying. You're saying that
8 the reason why we're having this zoning, the waiver
9 for parking on a historically contributing buildings
10 is so that we preclude or limit the variances that
11 might be necessary?

12 BOARD MEMBER ZAIDAIN: No, no. I'm
13 saying that if parking were required --

14 CHAIRMAN GRIFFIS: Right.

15 BOARD MEMBER ZAIDAIN: -- we would see
16 this a lot more.

17 CHAIRMAN GRIFFIS: Right.

18 BOARD MEMBER ZAIDAIN: But it's not
19 required. So it's a choice that's made by the
20 applicant.

21 CHAIRMAN GRIFFIS: It would be
22 understanding of the zoning regulations to try to
23 strike a balance between the historic preservations
24 interests and the zoning requirements. Therefore--

25 BOARD MEMBER ZAIDAIN: Sure. Yes. And I

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1 agree with that. And if there's a historic
2 preservation interest for providing the parking,
3 that's wonderful. I just don't think we've heard it.

4 CHAIRMAN GRIFFIS: Well, I understand
5 what you're saying. But I don't agree because I
6 think there's a connection that you're making that
7 isn't necessarily there. But let me ask the
8 applicant to address it.

9 BOARD MEMBER ZAIDAIN: What's the
10 connection?

11 CHAIRMAN GRIFFIS: Well, you seem to be
12 saying the fact that since parking is not required,
13 they don't have to do it so we should not let them,
14 or it's not a big --

15 BOARD MEMBER ZAIDAIN: No, I'm not saying
16 that at all. I'm just saying that the challenge of
17 the site -- the practical difficulty is a tough test
18 to make because you don't have to provide it. So
19 telling us how the challenges in providing it to me
20 limits that arguments. I'm just saying we need to
21 hear more testimony on why they're providing it and
22 what public good is there in providing it.

23 CHAIRMAN GRIFFIS: As the architect as
24 stated, I mean I think what you need to do is in my
25 mind in looking at this particular application and

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1 look, at okay, part of the project is to provide this
2 aspect.

3 BOARD MEMBER ZAIDAIN: Okay.

4 CHAIRMAN GRIFFIS: And there is a
5 practical difficulty in doing that. It's unduly
6 burdensome with the restrictions of the zoning in
7 order to facilitate that.

8 BOARD MEMBER ZAIDAIN: What's burdensome
9 of the zoning to provide the parking?

10 CHAIRMAN GRIFFIS: The court requirement.

11 BOARD MEMBER ZAIDAIN: To provide -- yes,
12 but the zoning does not require it.

13 CHAIRMAN GRIFFIS: You know, conceivably
14 if they don't put parking in there and it's just
15 where their are, access just to the trash, would be
16 difficult to get to.

17 BOARD MEMBER ZAIDAIN: I don't understand
18 what you're saying with the trash. I guess they're
19 not providing access to the trash.

20 CHAIRMAN GRIFFIS: Any sort of access to
21 that level from the alley if you had to bring a
22 vehicle, even if it's just a small cart, some sort of
23 ramp would be required.

24 BOARD MEMBER ZAIDAIN: Well, I'm glad you
25 think that, but we haven't heard the architect say

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1 that. So, I mean, that's what I was trying to get
2 from the panel here was a little bit more testimony.

3 CHAIRMAN GRIFFIS: Yes. I'll stop talking
4 and let them answer.

5 BOARD MEMBER ZAIDAIN: And don't say the
6 trash, he already said it.

7 MR. ZAHN: We went immediately to the
8 neighborhood when we had control of this project.
9 And it is almost exclusively the only concern, and if
10 there's further testimony. It's all about parking.
11 Every single neighbor was supportive of the project
12 with the exception the only -- virtually only the
13 qualm had to do with the parking. This was a
14 solution to the parking.

15 BOARD MEMBER ZAIDAIN: Well, what do you
16 mean a qualm, the parking? The original plans did
17 not show parking and they wanted it? What does that
18 mean?

19 BOARD MEMBER ZAIDAIN: We did not embark
20 on any plans until we contacted the neighbors.

21 BOARD MEMBER ZAIDAIN: Okay.

22 MR. ZAHN: The neighborhood, the ANC.
23 And actually the original plans did not include below
24 grade parking. The original plans did not include
25 below grade parking.

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1 Without the ramp you would have two cars
2 and a bunch of dumpsters in that space. So with this
3 plan, we are accommodating five cars and no trash,
4 and we'll have a clean paved ramp area in that court
5 with no impact on any light and air requirements that
6 would be negative to this building or to adjacent
7 buildings.

8 BOARD MEMBER ZAIDAIN: Okay. So for my
9 understanding, what I understand you're saying is the
10 public around you wanted you to provide the parking
11 to help to alleviate the impacts of this building on
12 the site, is that correct?

13 MR. ZAHN: That's correct.

14 BOARD MEMBER ZAIDAIN: Okay.

15 CHAIRMAN GRIFFIS: Anything else?

16 Further question of the Board?

17 Anything else?

18 MS. PRINCE: No further comments.

19 CHAIRMAN GRIFFIS: Good. Let's go to the
20 Office of Planning's report then. Office of Planning
21 is recommending approval. It is Exhibit 25. The
22 applicant has receipt of the Office of Planning's
23 memo? Yes? Okay.

24 Mr. McGhettigan, good morning.

25 MR. MCGHETTIGAN: Good morning, Mr.

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1 Griffis, members of the Board.

2 My name is David McGhettigan from the
3 Office of Planning.

4 CHAIRMAN GRIFFIS: Oh, I'm sorry. Can I
5 interrupt you for a quick second?

6 MR. MCGHETTIGAN: Sure.

7 CHAIRMAN GRIFFIS: Is the representative
8 from the ANC here, 2-B? I'm sorry. I need to afford
9 you the time to cross examine any of the witnesses
10 that you've just heard. Do you have any cross
11 examination questions?

12 COMMISSIONER HALLIGAN: No, sir.

13 CHAIRMAN GRIFFIS: Thank you. Okay.

14 MR. MCGHETTIGAN: All right. Thank you,
15 Mr. Chair.

16 I think that Mr. Zahn has pointed out the
17 exceptional size of this space. If you look at the
18 floor plan, it's almost 40 percent of the floor plan.

19 And if you stood in the room, you would see how huge
20 it is. And if you tried to envision building any
21 sort of walls to create smaller spaces in there, it
22 would be just 30 foot high walls and you couldn't get
23 your duster up there to dust the corners.

24 So, residentially speaking the space
25 couldn't be reused. And the solution that's proposed

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1 to divide it up into two floors makes sense. It
2 divides into manageable spaces.

3 This is an interior, so it's not
4 increasing the bulk or mass of the building, only the
5 floor area. And I think the nine units proposed are
6 of good size, that they make sense in the building.

7 We don't have any objections to the
8 application. We think it meets the test.

9 And I can answer any further questions.

10 CHAIRMAN GRIFFIS: Thank you. Any
11 question of the Board? Really?

12 BOARD MEMBER ZAIDAIN: I have a question.

13 I think you heard the discussion between the Chair
14 and I regarding the court and the parking. What's
15 Office of Planning's take on that? Is the parking
16 being provided for -- I mean will the parking that
17 they're providing mitigate the negative impacts of
18 this, do you think there's a unique practical
19 difficulty in the parking though they're not required
20 to provide it? What was OP's take on that angle?

21 MR. MCGHETTIGAN: Well, I think as far as
22 the detriment, it helps offset any detriment of
23 granting this variance. I think from the practical
24 difficulty standpoint we just looked at what could be
25 reasonably done with the court and actually

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1 increasing the volume of the court. So it's almost a
2 technicality that it's actually not meeting the
3 zoning ordinance, and therefore we don't see any
4 problem with granting that variance.

5 CHAIRMAN GRIFFIS: When you say it's
6 actually a technicality, you mean the fact of the
7 matter is the court's actually increasing in some
8 respects but by the way we measure courts it is
9 appearing to the regulations to be decreasing?

10 MR. MCGHETTIGAN: Yes, it's increasing in
11 the volume of air that's in that space.

12 CHAIRMAN GRIFFIS: Right. So rather than
13 an adequate form to the court, it's actually a
14 subtractive area?

15 MR. MCGHETTIGAN: Right.

16 CHAIRMAN GRIFFIS: Follow it, Mr.
17 Zaidain?

18 BOARD MEMBER ZAIDAIN: No, no. It's a
19 good point.

20 CHAIRMAN GRIFFIS: Okay. Any other
21 questions from the Board?

22 Does the applicant request examination of
23 the Office of Planning?

24 MS. PRINCE: No cross examination.

25 CHAIRMAN GRIFFIS: Does the ANC have any

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1 questions of the Office of Planning?

2 COMMISSIONER HALLIGAN: No.

3 CHAIRMAN GRIFFIS: Do you have the Office
4 of Planning's report?

5 COMMISSIONER HALLIGAN: No.

6 CHAIRMAN GRIFFIS: Have you seen it,
7 reviewed it at all?

8 COMMISSIONER HALLIGAN: I haven't.

9 CHAIRMAN GRIFFIS: Okay. Why don't we
10 make a copy of that available to you.

11 COMMISSIONER HALLIGAN: I have one here
12 now. Thank you.

13 CHAIRMAN GRIFFIS: Excellent. Good.

14 If there's nothing further then, Mr.
15 McWhettigan, thank you very much. An excellent
16 report, as usual.

17 What is most intriguing actually in their
18 report outside of really the substance of it, but the
19 zoning analysis that shows the numerous areas of
20 conformity with our current regulations. Of course,
21 our regulations are probably 50 years older than this
22 building, or rather we're instituted 50 years after
23 it was built. But, it was amazing to kind of walk
24 down.

25 And also, I might just take a moment to

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1 say, these aerial photographs are stunning. So
2 everyone just be aware that satellites are taking
3 pictures constantly and can probably tell when you're
4 in the shower.

5 But, in all seriousness, let's move on.
6 If there are no other questions for the Office of
7 Planning, of course they are recommending approval.
8 Let's go to the ANC 2-B for their presentation, as I
9 don't have any other government reports attendant to
10 this application at this time.

11 COMMISSIONER HALLIGAN: Good morning, Mr.
12 Chair, Board. I'm Rob Halligan, Commission 2-B-01.
13 I'm at 1711 Riggs Place, Northwest.

14 This structure does not fall within my
15 single member district, but it's extremely close to
16 my single member district's border and about 70 yards
17 from my house. The Commissioner whose SMD this is in
18 is out of the country. And from the beginning of
19 this project, I've been following it more closely
20 than he in that it's extremely close to my house and
21 I know most of the neighbors in this area. And so he
22 and I have been working together on this.

23 Is the Board in possession of the letter
24 from my ANC stating my status as the representative
25 from the ANC. I have one if you don't.

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1 CHAIRMAN GRIFFIS: Yes. It's the January
2 23rd letter?

3 COMMISSIONER HALLIGAN: There's only one.
4 So, yes.

5 CHAIRMAN GRIFFIS: Okay. Exhibit 23.

6 COMMISSIONER HALLIGAN: That's it. Yes,
7 January 23.

8 So this building having been empty for
9 ten years is one of the last, and probably the last
10 empty structure in a neighborhood that's changed a
11 lot in the past ten years.

12 The Taiwanese government has owned this,
13 and they don't really have diplomatic status, their
14 estranged. So it was a chancery, but it wasn't quite
15 a chancery which lead to a lot of complications in
16 dealing with them when the neighbors 15 years ago
17 would say are they really a government, can we force
18 them to do certain things like not park in the
19 neighborhood.

20 So we're glad that this empty building is
21 going to be developed and we've been working with
22 this development group since October, just after they
23 purchased they contacted me. And we have just been
24 making sure that the neighbor's concern were
25 addressed.

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1 As Mr. Zahn indicated, we're all
2 concerned that there isn't much parking around the
3 building, and we're concerned that there would be a
4 lot of units. It's a large building, they only have 9
5 on it. So we were pretty happy that they proposed
6 just 9 units.

7 And when they come with the idea of
8 parking in the basement, we were very pleased with
9 that.

10 So those are the two things that you'll
11 see our support is contingent on in the letter. We
12 would prefer that the density stay low, so we have
13 less parking, less impact on the neighborhood, and
14 that there be parking. It was exempted from parking
15 due to historical regulations, but they have met
16 above the standard; you should have about 50 percent
17 of the units should have a parking space. If you
18 didn't have the exemption, it met that. So we're
19 pleased to see the parking basement, actually.

20 I do have Mr. Shawn Shahida on my email
21 list. He has been aware of these issues since I
22 probably made a general email to all my constituents
23 about this in November. And I have yet to hear from
24 him on this, so I'm not sure what his concerns are,
25 even though he's a constituent of mine.

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1 I have toured the structure three or four
2 times. And the building -- the organ room where
3 they're proposing to put these floors is a very
4 strange structure, and I can see how that filling in
5 is the most practical thing to do and don't have a
6 problem with that.

7 The building is already over FAR and it's
8 not increasing the FAR that much. And the density is
9 generally pretty low. A two bedroom unit, 2200 feet
10 is a pretty low density even though the floor area
11 ratio is high.

12 All that being said, we generally support
13 the project. We're very happy with the developer's
14 communications with us, their openness. I think it's
15 going to be a good project for the neighborhood.

16 CHAIRMAN GRIFFIS: Good. Thank you very
17 much.

18 And just as a note of course, the letter
19 submitted, Exhibit 23, does comply with all our
20 regulations and requirements, and therefore will be
21 granted and afforded a great weight.

22 You make an excellent point, actually
23 several. One, you've just indicated the
24 correspondence between density and FAR. And I think
25 it's an important point to look at this and FAR, of

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1 course, goes to regulating density. And your point
2 is that the community is very supportive of 9 units
3 as opposed to 18 or 36 units.

4 COMMISSIONER HALLIGAN: Sure.

5 CHAIRMAN GRIFFIS: So that the FAR, the
6 numbers don't really relate to the overall density,
7 but the units themselves do in this R-5 zone. Very
8 well said.

9 And in terms of talking about Mr.
10 Shahida.

11 COMMISSIONER HALLIGAN: Shawn Shahida.

12 CHAIRMAN GRIFFIS: It seems to me in his
13 written submission of the party's application he was
14 talking about a large apartment building, which seem
15 to share in the concern of which you've just
16 addressed in terms of the density. I'm sure, as your
17 statement just said, it's a large building and
18 probably could accommodate much more than 9 units.
19 It seems that his testimony and concern was based on
20 that same thought.

21 So it would appear to me, but correct me
22 if I'm wrong, is that you may well share the same
23 concerns and have addressed them and are satisfied
24 with that?

25 COMMISSIONER HALLIGAN: Yes. In fact,

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1 probably in December after I heard the initial
2 proposal, I sent it out to my email list. And quite
3 a few architects on that email list, quite a few
4 developers, got some people coming back to me. There
5 was an ANC meeting. There's been plenty, an
6 extraordinary amount of public comment.

7 CHAIRMAN GRIFFIS: Good.

8 COMMISSIONER HALLIGAN: And I am sort of
9 have a casual acquaintance with Mr. Shahida. I see
10 him around and say hi to him occasionally.

11 CHAIRMAN GRIFFIS: Okay.

12 COMMISSIONER HALLIGAN: So I'm not aware
13 of why he didn't come up earlier.

14 CHAIRMAN GRIFFIS: Okay. Good.

15 And then the other issue that you brought
16 up, it seems to be that everyone's describing this
17 room as strange.

18 COMMISSIONER HALLIGAN: Yes.

19 CHAIRMAN GRIFFIS: Perhaps we should
20 strange regulation wordings and add to the uniqueness
21 back to the strange factor as part of establishing
22 the first test of the area variance requirement. But
23 in all seriousness, any other questions from the
24 Board? Mr. Zaidain?

25 BOARD MEMBER ZAIDAIN: Yes. When this

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1 deliberated on at the ANC and with all the public
2 testimony you heard, and I hate to ask this kind of
3 speculative question, but was this project basically
4 supported based on the fact that it was providing
5 parking? And the reason why I'm saying that is that
6 if it would not have provided parking, do you think
7 there would have been a greater outcry in the
8 community against this project?

9 COMMISSIONER HALLIGAN: Yes, I do.

10 BOARD MEMBER ZAIDAIN: Okay.

11 COMMISSIONER HALLIGAN: Every concern was
12 oh they're going in there, what about parking. So we
13 were very glad that the solution of building a
14 basement came up. In fact, if you look at it from
15 marketing perspective, these are going to be
16 expensive condos. And for them to not have parking,
17 wouldn't be a very good marketing from their
18 perspective. So they were happy also to do it.

19 BOARD MEMBER ZAIDAIN: But from an impact
20 standpoint, it's your testimony that this project
21 will work because it's providing parking?

22 COMMISSIONER HALLIGAN: Yes. As you see
23 the letter, our support is contingent on the parking
24 remaining as is.

25 BOARD MEMBER ZAIDAIN: Okay. Thank you.

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1 COMMISSIONER HALLIGAN: Thank you.

2 CHAIRMAN GRIFFIS: Any other questions?

3 Currently it states in the application
4 that there's two or there's parking on the public
5 space. Is it your opinion that it also is part of
6 the positive aspects of this project is to put the
7 parking in the building or is it more advantageous
8 for the community to park out front on the sidewalk
9 area? Not that they could, but --

10 COMMISSIONER HALLIGAN: If you see the
11 diagram here, there's a circular driveway.

12 CHAIRMAN GRIFFIS: Yes.

13 COMMISSIONER HALLIGAN: That, while the
14 building has been empty, is often been used by people
15 and it's barely wide enough to cars to fit in without
16 being on the sidewalk. So we -- that was discussed
17 at the ANC meeting and in private conversations. The
18 notion is that if delivery trucks, leave that there
19 for delivery trucks and maybe maintenance workers,
20 but it not being an official parking space since it
21 is public space.

22 CHAIRMAN GRIFFIS: Right.

23 COMMISSIONER HALLIGAN: There's really--
24 I don't think there's any other way to do it.

25 CHAIRMAN GRIFFIS: So the ANC supports

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1 the elimination of the parking pad on the public
2 space, the one adjacent to the circular drive or the
3 crescent drive?

4 COMMISSIONER HALLIGAN: Yes.

5 CHAIRMAN GRIFFIS: Yes? Excellent.

6 Any other questions of the Board?

7 BOARD MEMBER ZAIDAIN: Yes. Just want to
8 make sure I'm -- you guys were throwing around the
9 term "public space." That's on their property?

10 COMMISSIONER HALLIGAN: No.

11 CHAIRMAN GRIFFIS: No, it isn't.

12 BOARD MEMBER ZAIDAIN: It's not?

13 CHAIRMAN GRIFFIS: That actually is
14 public space. The property line, according to the
15 documents shown, going to the building face.

16 BOARD MEMBER ZAIDAIN: Oh. So the
17 circular drive and then that concrete pad's in public
18 space?

19 CHAIRMAN GRIFFIS: Right.

20 BOARD MEMBER ZAIDAIN: It's not -- okay.

21 COMMISSIONER HALLIGAN: While this was an
22 "embassy" quote/unquote -- so the people could park
23 here.

24 BOARD MEMBER ZAIDAIN: You need to be on
25 a mike.

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1 CHAIRMAN GRIFFIS: Yes, he needs to be on
2 a microphone. We have it in front of us if you just
3 want to describe it. I mean, the point is that they
4 put a hard surface out there in the public space. Of
5 course, it wouldn't ever count towards the parking
6 requirements in the regulations. But it seems to me
7 it was a point that was brought up in the application
8 about if not supported, a positive public amenity to
9 remove that. So I'm just trying to get from your
10 opinion from the ANC that that is correct?

11 COMMISSIONER HALLIGAN: There was quite a
12 bit of argument back and forth on that point whether
13 it would be a benefit to have parking spaces on the
14 public space, which would need to be permitted by
15 public space.

16 CHAIRMAN GRIFFIS: Right.

17 COMMISSIONER HALLIGAN: It would be very
18 complicated. So I'm not sure where we ended up on
19 that. There was lots of discussion.

20 CHAIRMAN GRIFFIS: Okay.

21 COMMISSIONER HALLIGAN: And the letter
22 says we wanted that bit removed.

23 In some properties the public space, the
24 city owned property goes right up to the building
25 line, and that's the case here. Okay. Sometimes

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1 it's ten feet back, sometimes it's not. But in this
2 particular case, all that area is city land.

3 CHAIRMAN GRIFFIS: Okay. That means the
4 District comes and shovels that whole area and cuts
5 your grass.

6 COMMISSIONER HALLIGAN: Right.

7 CHAIRMAN GRIFFIS: Okay. Ms. Miller?

8 VICE CHAIRMAN MILLER: I'm just curious,
9 what does that mean that it's going to be removed?
10 Is it going to be changed? Is it going to be changed from
11 concrete to something else or what?

12 COMMISSIONER HALLIGAN: I'm not sure.
13 The letter says it's going to -- there was talk about
14 in the long term it shouldn't be parking in that
15 anyway, if it were a cement pad, technically anyone
16 could park there because it's public space.

17 CHAIRMAN GRIFFIS: Do you want that
18 answered, Ms. Miller? What they're going to do with
19 the area?

20 VICE CHAIRMAN MILLER: Yes.

21 CHAIRMAN GRIFFIS: Mr. Burgess, can you
22 tell us what you're going to do with that area?

23 MR. ZAHN: Could I comment?

24 CHAIRMAN GRIFFIS: I guess.

25 VICE CHAIRMAN MILLER: Yes, please.

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1 MR. ZAHN: First of all, it's illegal to
2 park in public space. I think it's a \$40 ticket
3 every time.

4 The parking pad is planned to be removed
5 and, you know, meticulously landscaped as would be
6 expected from a, you know, a very luxury condominium
7 regime.

8 CHAIRMAN GRIFFIS: Landscaped?

9 MR. ZAHN: Landscaped.

10 CHAIRMAN GRIFFIS: Okay.

11 VICE CHAIRMAN MILLER: So that means it's
12 not going to be a place for delivery trucks? It's
13 going to be landscaped?

14 CHAIRMAN GRIFFIS: No, there's two areas
15 that we're talking about.

16 VICE CHAIRMAN MILLER: Oh.

17 CHAIRMAN GRIFFIS: There's a large
18 parking pad which is just a cemented -- let's just
19 call it a front yard. Because, you're right, if you
20 park on the sidewalk you're going to get a ticket.
21 But there are accommodations where you can park on a
22 public space area which is off the sidewalk and off
23 the street. But not going to get into that because
24 it has nothing to do with us.

25 So the kind of crescent drive which

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1 brings it up where there's a very formal entrance to
2 the front door, is being maintained, is that correct?

3 MR. ZAHN: That's correct.

4 CHAIRMAN GRIFFIS: And so that will be
5 just more of what we might call, you know, a drop off
6 area.

7 MR. ZAHN: A drop off, exactly.

8 CHAIRMAN GRIFFIS: And so, you know, if
9 you have --

10 MR. ZAHN: And particularly since 18th
11 Street is just one lane with no curb lane, it's
12 important to be able for taxis and delivery trucks to
13 pull off there.

14 CHAIRMAN GRIFFIS: To get off the street.
15 Right. And they build it originally, if it's my
16 understanding, for the organ repair cart that would
17 come in and would need to access the organ.

18 MR. ZAHN: That would come in frequently.

19 CHAIRMAN GRIFFIS: Okay. Any other
20 questions? Clarifications? Okay.

21 Thank you very much. Oh, I'm sorry.
22 Does applicant have any cross examination of the ANC?

23 MS. PRINCE: No.

24 CHAIRMAN GRIFFIS: Okay. In which case,
25 let's move on then. I don't have any other

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1 submissions at this time. I think we can go -- is
2 there any persons here to testify in regards to this
3 application of 1701 18th Street, application number
4 17116, persons to give testimony either in support or
5 in opposition? Not noting any indication of persons
6 here to give testimony, let's go to any summation
7 remarks the applicant might have.

8 MS. PRINCE: Some brief closing comments
9 on behalf of the applicant.

10 I believe we've met the burden of proof
11 and demonstrated that the property is unusual and
12 that the unusual features of the property give rise
13 to practical difficulties in the strict application
14 of the regulations.

15 I think where we got a little mixed up
16 on parking is in this way: A practical difficulty is
17 not with respect to meeting the requirements. A
18 practical difficulty is with respect to meeting the
19 court requirement. And if we think of it in that
20 way, I think it's clear that our practical
21 difficulties do relate to the court, the lot
22 occupancy and the FAR requirements and not the
23 parking requirements.

24 With respect to the public space issue,
25 obviously this Board has no jurisdiction over public

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1 space, but I would like to point out that the
2 Taiwanese government unlawfully paved that area in
3 front of the building with a pad, a concrete pad.
4 And the ANC asked us to remove it, and we will
5 happily remove it and put in landscaping.

6 Since you have no jurisdiction over it, I
7 don't think you can condition your order, but I
8 wanted to put that in the record to show our good
9 faith with the ANC because they had specifically
10 asked that.

11 CHAIRMAN GRIFFIS: And I was looking
12 forward to picking the shrubs. Okay.

13 MS. PRINCE: The project is really ready
14 to start, and we would really appreciate your prompt
15 action in deciding the application so that we may
16 proceed.

17 And we thank you for your time today.

18 CHAIRMAN GRIFFIS: Good. Thank you very
19 much.

20 Any clarifications, questions from the
21 Board? Very well.

22 I think it's appropriate to proceed on
23 this as the record is entirely full. And I would
24 move approval of application 17116 of 1701 18th
25 Street for the variance from the FAR requirements

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1 under 402 and also from the court width requirements
2 under section 406. Of course, it is under the total
3 umbrella of the variance from the nonconforming
4 structure provision under 2001.3, and would ask for a
5 second.

6 BOARD MEMBER ETHERLY: Second, Mr. Chair.

7 CHAIRMAN GRIFFIS: Thank you very much,
8 Mr. Etherly.

9 I think there's a substantial amount of
10 uniqueness in regard to this and I think it's full in
11 the record.

12 First of all, the existing structure
13 itself and its mass, one when it was built in 1906
14 was well beyond what we now consider as conforming.
15 Those aspects are not adjusting or changing in terms
16 of the mass and that which would go to additional
17 area variances, but rather it's an accommodation of a
18 contributing historic structure which also falls well
19 in line with the comprehensive plan, as indicated in
20 the Office of Planning. It's reanimating some of
21 these old structures and it also I think holds for
22 them the preservation intent, but that's outside of
23 our jurisdiction.

24 The uniqueness and the fact of the room
25 which I think was well illustrated in the

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1 submissions, but also in the testimony that we've
2 just heard today. I mean, picturing trying to put a
3 unit on the floor with, I think it was 30 foot high
4 ceilings in a 12 foot bedroom would be close to
5 living in the chimney which is being shown there or
6 an analogous to -- it's just not a dynamic of even in
7 the most unique urban units that are now being
8 created, it doesn't seem to be practically
9 proportioned for utilization.

10 The other aspect of it in terms of the
11 uniqueness and also the practical difficulty that
12 arises is it intriguing to me in 1906 that this could
13 have full floor all the way through. It could have
14 had the existing FAR that's now being proposed. But
15 rather in an interior design decision and, obviously,
16 to accommodate something described as strange but we
17 might think of it as unique to this property, the
18 floors were left out to create a huge volume which,
19 really, I don't think was stressed enough. The
20 volume itself was created for a specific and unique
21 function as opposed to some of these that we might
22 see that have a beautiful ballroom that has 15 foot
23 ceilings and you want to put a floor in there to get
24 7 foot high ceilings. This goes well beyond a
25 situation of that nature.

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1 It's interesting, I mean, in terms of the
2 practical difficulty. Of course then, as the ANC
3 well said, in providing the reanimation or the reuse
4 of this building, you bump into the FAR which, of
5 course, is a regulating of density and really in this
6 particular case in terms of the R-5, but in terms of
7 the residential really the density we should be
8 looking at more analogous to the impact on the
9 general area is the unit count, not necessarily the
10 square footage.

11 What's also fascinating to me in terms of
12 the square footage, of course the stairs, the
13 interior stairs and all of that goes toward FAR. And
14 if you look at a fairly complex utilization of
15 circulation throughout and they're maintaining some
16 of the original features, that also compounds the
17 additional FAR and the uniqueness and the practical
18 difficulty of it.

19 Regarding the court, I think we've
20 discussed that quite extensively, but it is
21 fascinating to me that we're actually -- I don't
22 think the regulations ever anticipated that you would
23 be increasing the openness of a court but thereby
24 being required to make it larger. I think the intent
25 of the regulations, of course, is when you tried to

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1 fill in the first floor to that court may or may not
2 have, or rather if you added onto the top of the
3 building that the court would then have to be larger,
4 obviously to incorporate or to maintain and ensure
5 the light and air. This is doing the opposite,
6 actually, and dropping it down.

7 As stated in this application, of course,
8 the requirement of the applicant is to not show that
9 they have to do this, and therefore it's a hardship
10 but rather that it's unnecessarily burdensome or
11 creates a practical difficulty. And the practical
12 difficulty is in order for them to utilize the
13 basement. And that, folded back into it, I think,
14 goes to the third and last of course in terms of the
15 public good, which I think is well addressed by the
16 ANC in terms of this area, the demand for parking and
17 that this project is trying to accommodate that. So
18 I think the applicant's representative stated well
19 that we're looking at a court variance, not a
20 parking, but it all is of the same -- it all leads to
21 the same place in terms of our understanding what is
22 trying to be provided.

23 And that being said, of course, I would
24 support the motion. But let me open it up to Mr.
25 Zaidain.

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1 BOARD MEMBER ZAIDAIN: Yes, I just want
2 to provide some clarification over what my discussion
3 was. I'm pretty clear that there's no parking
4 required here. That's pretty clear from the
5 regulations, and that was where my concern was coming
6 from was a variance, in this instance a court being
7 created by the choice of providing something that it
8 is not required to be provided; in that instance this
9 is parking. For instance, the argument about the
10 spaces. That is absolutely correct. You know, they
11 can make them whatever dimension they want because
12 they're not required.

13 So what I was concerned with coming in
14 here was, okay, they're providing something that is
15 not required to be provided and that's creating a
16 variance. So right off the bat you're thinking the
17 practical difficulty was rather limited, so I wanted
18 to hear some testimony on the public good. and I
19 think we got that.

20 I think what we heard from the ANC in
21 terms of the negative parking or the parking
22 conditions around the site and how this project
23 planned to that, I think was critical in providing
24 that public good. And I think the Office of Planning
25 also provided some testimony.

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1 So, on that basis and not necessarily my
2 argument with the Chair, I would be more than happy
3 to support the motion.

4 CHAIRMAN GRIFFIS: Were we arguing?

5 BOARD MEMBER ZAIDAIN: No. I just didn't
6 want to ask a good question when you get jumpy.

7 CHAIRMAN GRIFFIS: All right.

8 VICE CHAIRMAN MILLER: I just want to add
9 with respect to the public good element. A point
10 brought by Office of Planning as well as the
11 applicant that this project furthers the goal of the
12 compressive plan in that it returns the building to
13 residential use and provides additional housing
14 opportunities for residents in the District.

15 CHAIRMAN GRIFFIS: Thank you.

16 Very well. If there's no other further
17 deliberation on this, the motion is before us, and
18 has been stated. I'd ask for all those in favor to
19 the motion signify by saying aye.

20 ALL: Aye.

21 CHAIRMAN GRIFFIS: And opposed?

22 MS. BAILEY: The vote is recorded as
23 four/zero/one to approve the application.

24 Mr. Griffis made the motion, Mr. Etherly
25 second. Mr. Zaidain and Ms. Miller are in support.

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1 And are we doing a summary order, Mr.
2 Chairman?

3 CHAIRMAN GRIFFIS: Yes. Very well. Let's
4 do a summary order. Good.

5 Thank you very much. Good luck.

6 Okay. Let's move on then and call the
7 next case for the morning.

8 MS. BAILEY: Mr. Chairman, is it possible
9 to swear all the witnesses in now so we just do it
10 one time rather than --

11 CHAIRMAN GRIFFIS: Yes, indeed. I would
12 ask if anyone is here to present testimony to the
13 Board through the morning, if you would please stand
14 and Ms. Bailey's going to administer the oath.

15 (Witnesses sworn).

16 MS. BAILEY: The second case of the day
17 is application 17115 of Rainbow Lofts, L.L.C.,
18 pursuant to 11 DCMR ? 1303.2, for a variance from the
19 residential recreation space requirements under
20 section 773, to allow the development of a 21-unit
21 residential building in the Arts/C-3-A District at
22 premises 1445 Church Street, Northwest, Square 209,
23 Lot 106.

24 CHAIRMAN GRIFFIS: Good morning. We're
25 ready.

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1 MR. TUMMONDS: Great. Good morning, Mr.
2 Chairman, members of the Board. I am Paul Tummonds
3 with the law firm of Shaw-Pittman. With me here this
4 morning is Jeff Utz, also of my firm. And we are
5 here to represent Lofts, the applicant in BZA
6 application 17115.

7 Rainbow Lofts is here this morning
8 seeking minor variance relief from the residential
9 recreation space requirements of the zoning
10 regulations enumerated in section 773 for the
11 development of a 21 unit residential building located
12 1445 Church Street.

13 We believe that our prehearing statement
14 discusses in detail how the 1445 Church Street
15 property, the existing structure on that property
16 which has been deemed to be a contributing building
17 to the greater 14th Historic District, and the
18 proposed residential project satisfy the three prongs
19 of the area variance relief test.

20 We note that this application has
21 received the unanimous support of ANC 2-F, and that
22 the Office of Planning recommends approval of this
23 application.

24 We have two witnesses this morning who
25 will provide brief statements and are available to

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1 answer any questions that you may have.

2 Our first witness is Beth DeLucenay on
3 behalf of Rainbow Lofts.

4 MS. DeLUCENAY: Good morning.

5 Rainbow Lofts is a 21 unit condominium
6 project under construction. We started construction
7 in July of last year. It will be completed in July of
8 this year.

9 We are located within the 14th Street
10 Historic District. This is an old three story
11 autobody shop that we are converting into lofts and
12 taking a very small narrow piece adjacent to it and
13 building additional square footage.

14 What we are seeking is a variance or more
15 of a relaxation to the zoning requirements to provide
16 two additional parking spaces. We currently have a -
17 - shown on the site plan in part of the application
18 package, 272 square feet of outdoor recreation space
19 that we are seeking to convert to parking space.

20 This building will still provide a
21 significant amount of recreation space as a common
22 element for us by all condominium owners, and that
23 is the entire roof deck shown on the roof terrace
24 sketch and also part of the application package. We
25 have over 2800 square feet of roof top space that

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1 will be, in our belief, far more usable and
2 attractive pleasant space than two spaces on the
3 alley behind the building.

4 CHAIRMAN GRIFFIS: Is all 2800 plus
5 according to the regulations to count toward
6 residential rec?

7 MR. TUMMONDS: If I may. Within the last
8 week -- within the last two weeks we have had
9 numerous discussions facilitated by the Office of
10 Planning with the Zoning Administrator's Office.

11 CHAIRMAN GRIFFIS: Right.

12 MR. TUMMONDS: We believe that my most
13 recent discussion with the Zoning Administrator's
14 Office is that, yes, the entire area up there now
15 would satisfy that requirement.

16 CHAIRMAN GRIFFIS: Mr. Tummonds, if you
17 don't mind and your witnesses don't mind, I'd like to
18 get to the heart of this. I think we can get to this
19 fairly quickly, however I think the Board is not
20 clear on exactly, first of all, what the total
21 requirement is, what's actually being provided and
22 then what's the relief.

23 MR. TUMMONDS: Great. Good.

24 Then I will have architect, Steve Dickens
25 with Eric Colbert & Associates address those issues.

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1 CHAIRMAN GRIFFIS: Okay.

2 MR. DICKENS: Fine. Steve Dickens with
3 Eric Colbert & Associates. I also live at 1525 Q
4 Street, Northwest, so I'm a neighbor of this project.

5 The requirement is in this particular
6 zone, which is C-3-A with the Arts overlay, the Arts
7 overlay not modifying this particular requirement, is
8 for 15 percent of the gross floor area devoted to
9 residential.

10 CHAIRMAN GRIFFIS: Right.

11 MR. DICKENS: Be provided as residential
12 recreation space. In addition, if it's on the roof
13 there is --

14 CHAIRMAN GRIFFIS: We know the
15 regulations. Give me the numbers.

16 MR. DICKENS: Okay.

17 CHAIRMAN GRIFFIS: What's the total
18 residential count, what's the 15 percent of that,
19 what are you providing now?

20 MR. DICKENS: We have 23,843 square feet.

21 CHAIRMAN GRIFFIS: Okay.

22 MR. DICKENS: Is the total residential.
23 If you take 15 percent of that, you get 3,276 square
24 feet. In the proposal that is before you, which is
25 eliminating the 272 square feet, you end up with

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1 3,004 square feet, which consists of 2,814 in a roof
2 deck and 190 in a lobby.

3 CHAIRMAN GRIFFIS: Okay. And you're
4 indicating that all that square footage on the roof
5 complies with the 25 foot dimension required in the
6 regulations?

7 MR. DICKENS: Based on our discussions
8 with the Zoning Administrator and with the Office of
9 Planning over the last two weeks, yes.

10 CHAIRMAN GRIFFIS: That's a lot of
11 qualifying. Does it or not? How can discussions
12 change that?

13 BOARD MEMBER ZAIDAIN: Can you point out,
14 maybe just to clarify it, you know there wasn't a lot
15 of information in the record or on our submittal
16 about the roof top issue. Can you point out the areas
17 of concern of what the problem is?

18 MR. DICKENS: Well, I can point. I can
19 explain it, too.

20 BOARD MEMBER ZAIDAIN: Okay.

21 MR. DICKENS: The basic question is
22 whether the 25 foot rule for regulation means it
23 literally has to be 25x25 feet.

24 BOARD MEMBER ZAIDAIN: Right.

25 MR. DICKENS: You know, do you have to

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1 have that absolute complete square, and anything
2 falling outside of that square doesn't count or if it
3 reasonable to assume that you have a certain amount
4 of that, that the spaces around it and connecting it
5 can logically count toward your square footage.
6 That's the essential discussion that we've been
7 having.

8 CHAIRMAN GRIFFIS: Interesting.

9 BOARD MEMBER ZAIDAIN: No wonder there's
10 no consensus.

11 CHAIRMAN GRIFFIS: I was going to say
12 that. You just forecasted some of our future.

13 MR. DICKENS: Well, if you could adjust
14 the requirement, you'll reduce your future.

15 BOARD MEMBER ZAIDAIN: Well, it seems
16 like the only issue is then was between the elevator
17 core and, I guess, the rooftop structure. But is
18 that the problem area?

19 MR. TUMMONDS: Yes. Well, I think
20 originally with the removal of the 272 square feet of
21 space adjacent to the alley --

22 BOARD MEMBER ZAIDAIN: Right.

23 MR. TUMMONDS: -- we were under. So we
24 had said that's why we need to come to seek variance
25 relief.

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1 BOARD MEMBER ZAIDAIN: Okay.

2 MR. TUMMONDS: Through the discussions
3 with Office of Planning taking a look at this, they
4 had the Zoning Administrator's Office take another
5 look at what's going on, like with what's going up on
6 the roof. And they said well, yes, there is the one
7 section, 773.6 I believe it says there has to be a
8 minimum of 25 foot width. And we said, well, since
9 we're seeking variance relief, we're seeking relief
10 from the 15 percent requirement, we will present
11 that.

12 And then last week they said, you know
13 what? We're going to look at this whole 25 foot
14 requirement and we're going to look at, say, in this
15 instance you do have general areas up there. The
16 roof is greater than 25 feet. I think the concern
17 would be if people were going to and say, you know,
18 you have a long narrow, almost passageway, well then
19 that's 20 feet wide.

20 CHAIRMAN GRIFFIS: Yes, but what's the
21 threshold then? Show me an area that has a 25 foot
22 dimension but doesn't meet the minimum 25 dimension.

23 MR. DICKENS: The area that meets it
24 without any question is this eastern end of the roof
25 which is 25 by 39 foot 6 inches which in and of

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1 itself satisfied approximately 5 percent of the
2 requirement.

3 CHAIRMAN GRIFFIS: Okay.

4 MR. DICKENS: Or one-third of the 15
5 percent, depending on how you look at it.

6 This was an area that was in question
7 because it does meet it but then it has this bump in,
8 which this area you've noted, the elevator bumps down
9 into it.

10 CHAIRMAN GRIFFIS: Gotcha.

11 MR. DICKENS: That was the area that
12 occasioned the most discussion. However, in the end
13 where the Zoning Administrator and Office of Planning
14 left it was that their feeling was that with these
15 two large areas and then another area which doesn't
16 quite meet it, but in the end they felt that --

17 CHAIRMAN GRIFFIS: What's the dimension
18 of that other area that doesn't quite meet it?

19 MR. DICKENS: It's 15 foot 3 and then
20 across the other direction it's not dimensioned, but
21 I'm going to guess it's 3 foot 6 back, so that's
22 going to be about --

23 CHAIRMAN GRIFFIS: It's about 26 feet?

24 MR. DICKENS: Twenty-three feet.

25 CHAIRMAN GRIFFIS: Twenty-three? Okay.

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1 MR. DICKENS: Yes, something like that.

2 CHAIRMAN GRIFFIS: All right. Well, all
3 this great interruption, Mr. Tummonds, and your point
4 of not having a width I think is what you said of 25
5 feet is actually not what the regulations says.
6 Regulation 77.37 says if any portion of the roof is
7 to be used for residential recreation, the roof shall
8 have no dimension less than 25 feet.

9 MR. TUMMONDS: Right.

10 CHAIRMAN GRIFFIS: Now, I don't know if I
11 agree with that, but that's what it says. It's pretty
12 clear.

13 MR. TUMMONDS: Right.

14 CHAIRMAN GRIFFIS: So I guess the point
15 in question is, and this not uncommon for the Board
16 to look at this in terms of residential rec on the
17 roof and the intent is well said, that yes, it's open
18 area, it's all connected. It's one large area that
19 can actually accommodate quite a bit. But I don't
20 want us to get into a trouble where you're actually
21 coming in with an interpretation and then asking for
22 less than what you really actually need to be asking
23 for. Does that make sense?

24 MR. TUMMONDS: Yes. And I think that's
25 why we wanted to put into the record this roof plan.

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1 CHAIRMAN GRIFFIS: Right.

2 MR. TUMMONDS: And this site plan to show
3 that so when this -- if this case is approved, we can
4 then go back and obtain a building permit with the
5 BLRA that says BZA application 17115 approved this
6 roof plan, this site plan and it was approved
7 variance --

8 CHAIRMAN GRIFFIS: How much of the 2814
9 square foot on the roof actually comply with the
10 regulations?

11 MR. DICKENS: That is it has both
12 dimensions fully at 25 feet by 25 feet?

13 CHAIRMAN GRIFFIS: I'm not saying it.
14 The regulations say no dimension less than 25 feet.

15 MR. DICKENS: 994 square feet.

16 CHAIRMAN GRIFFIS: 994?

17 MR. DICKENS: And that's the eastern
18 portion, that's 25 by 39 feet 9 inches.

19 BOARD MEMBER ZAIDAIN: Just a couple more
20 questions here. Some clarification. The structure
21 is the elevator core and the heat pump structure,
22 those are all existing, correct?

23 MR. DICKENS: No, it's new.

24 BOARD MEMBER ZAIDAIN: It's new? Okay.

25 MR. DICKENS: Yes.

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1 BOARD MEMBER ZAIDAIN: And how is this
2 being used? You know, residential rec sometimes
3 fascinate me. How is this being used as rec space?
4 Just because it's open to the tenants and they can
5 come up and recreate or whatever?

6 CHAIRMAN GRIFFIS: How is it landscaped
7 for passive or active recreation you mean?

8 BOARD MEMBER ZAIDAIN: Is it passive or
9 active? You going to have yoga classes up there or -
10 -

11 MR. DICKENS: I would note that in terms
12 of the loft, they do not specify what it is used for
13 or how one might make it be useful, other than in
14 this particular case the dimensional size.

15 What we're doing is we're going to have
16 roof pavers so that as a useful space, as opposed to
17 gravel or ballast of some sort, which would mean it's
18 not a space you walk on.

19 We're also going to have potted plants up
20 there.

21 MS. DeLUCENAY: We will also provide as
22 part of our development budget, tables and chairs and
23 inviting spaces.

24 BOARD MEMBER ZAIDAIN: So it'll be ana
25 active space? People can get up there and do

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1 whatever?

2 MR. DICKENS: Yes.

3 BOARD MEMBER ZAIDAIN: Okay.

4 MS. PRINCE: The intention is --

5 CHAIRMAN GRIFFIS: In an active space
6 they can go passively recreate.

7 MS. DeLUCENAY: Correct.

8 CHAIRMAN GRIFFIS: And this is for -- the
9 regulations actually do state what it should be. It
10 doesn't just leave it open to the dimension. The
11 regulations under 773 say that it would be safe,
12 secure, suitably equipped or landscaped for active or
13 passive recreation use to the residents. Of course,
14 we're hard pressed to tell you what passive or active
15 is. But it does give some indication that something
16 has to be provided for, whatever it is.

17 MR. DICKENS: I would like to note, too,
18 there's been no effort on our part to deceive you.
19 That is in fact the entire reason we've had the
20 flurry of meetings over the last two weeks with the
21 Zoning Administrator Office and Office of Planning.

22 CHAIRMAN GRIFFIS: Right.

23 MR. DICKENS: Is to try to get -- pin
24 down what exactly is counting and isn't.

25 CHAIRMAN GRIFFIS: Right. Which goes to

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1 the next question. Lobby. How is the lobby
2 outfitted, designed, how is it being built out?

3 MR. DICKENS: The lobby is essentially an
4 open space.

5 CHAIRMAN GRIFFIS: Are you counting that
6 towards your residential rec?

7 MR. DICKENS: Yes, we are.

8 CHAIRMAN GRIFFIS: How can you do that?

9 MS. DeLUCENAY: Well, we had found in our
10 condominium projects is that lobby tends to be a
11 place for happy hours, we'll do some of our meetings
12 there because there's not meeting room so we'll set
13 up chairs to hold so me of the homeowner's meeting,
14 that type of function.

15 MR. DICKENS: I'd also just like to note
16 that, you know, I'm with Eric Colbert & Associates.
17 We've designed over 50 apartment buildings in this
18 city.

19 CHAIRMAN GRIFFIS: Do you always count
20 the lobby as residential rec space?

21 MR. DICKENS: Well, obviously, it's only
22 an issue if you're in a commercial district, and the
23 majority of ours are not. But the ones that are, we
24 have always counted the lobby and there's never been
25 any question about it. We've never received a

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1 question about it.

2 I mean, even in this one where we're
3 receiving an incredible level of scrutiny, that is
4 one area that the Zoning Administration has not
5 questioned at all.

6 MR. TUMMONDS: I mean, I think that I
7 understand the concern about the most recent
8 interpretation from the Zoning Administrator. And,
9 you know, I think that in this case we don't need
10 that interpretation, it doesn't change the area of
11 relief that we're requesting. We think that in our
12 discussion of the 2800 square feet on the roof
13 terrace really maybe goes to the third prong of the
14 variance standard, you know, does this granting this
15 relief impair the intent and integrity of the zone
16 plan? I don't think it does. You know, by having
17 this big open large amount of space really goes to
18 what the intent is behind having a residential
19 recreation space requirement.

20 CHAIRMAN GRIFFIS: Okay. But for my
21 clarification, because I'm slow, on all this square
22 footage, we have 3276 required.

23 MR. TUMMONDS: Correct.

24 CHAIRMAN GRIFFIS: And now we have 994
25 being provided on the roof.

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1 MR. TUMMONDS: Correct.

2 CHAIRMAN GRIFFIS: And on the interior
3 how much?

4 MR. DICKENS: 190.

5 CHAIRMAN GRIFFIS: 190?

6 MR. DICKENS: One-nine-zero, yes.

7 CHAIRMAN GRIFFIS: And then on the
8 exterior on grade, of course, is what we're talking
9 about is was --

10 MR. DICKENS: 272.

11 CHAIRMAN GRIFFIS: 272?

12 MR. DICKENS: Yes.

13 CHAIRMAN GRIFFIS: Okay. So conceivably
14 out of 3276 you're providing -- boy, my math isn't
15 working fast today.

16 MR. DICKENS: It works out to about six
17 percent.

18 CHAIRMAN GRIFFIS: I see. So it's 1185
19 square feet. Does that sound correct?

20 MR. DICKENS: Yes, that's what we're
21 asking for.

22 BOARD MEMBER ZAIDAIN: When you say 6
23 percent, you're comparing that to the 15 percent that
24 you're supposed to have, right? When you say 6
25 percent, you're talking about 6 percent of the total

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1 requirement?

2 MR. DICKENS: Right.

3 BOARD MEMBER ZAIDAIN: Okay.

4 MR. DICKENS: Well, no. Not 6 percent of
5 the 15 percent.

6 BOARD MEMBER ZAIDAIN: Right.

7 MR. TUMMONDS: It's 6 percent as opposed
8 to 15 percent.

9 CHAIRMAN GRIFFIS: But if 15 percent was
10 a 100 percent, then 6 percent would be --

11 BOARD MEMBER ZAIDAIN: I got it. Thank
12 you.

13 CHAIRMAN GRIFFIS: Now we got the
14 calculators out.

15 Okay. Let me just clarify for the Board
16 then. Of course, we're looking at a 50 percent
17 requirement of residential rec, which would equal to
18 base don the given residential gross per feet of
19 3276. What is being provided is 1184, which is
20 roughly half of -- I won't start doing that, will I.

21

22 MR. DICKENS: It's less than half.

23 CHAIRMAN GRIFFIS: So it's 6 percent.

24 Okay. I'm clear.

25 What else?

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1 MR. TUMMONDS: I think that's all we have.

2 CHAIRMAN GRIFFIS: Okay. And just so we
3 don't lose track of the fact that, the two spaces
4 that are showing, of course, in the site plan which
5 is also in your submission is an area that was being
6 proposed. This didn't come in for any other relief,
7 did it?

8 MR. DICKENS: No.

9 CHAIRMAN GRIFFIS: This has never been
10 before this?

11 MR. DICKENS: No.

12 CHAIRMAN GRIFFIS: Okay.

13 MR. DICKENS: It received historic
14 approval, which is, I might add part of the
15 difficulty that we are facing that historic in terms
16 of where things go on the roof, historic wanted to
17 push everything back from the front.

18 CHAIRMAN GRIFFIS: Right.

19 MR. DICKENS: The neighbors across the
20 alley wanted to push everything from the back.

21 CHAIRMAN GRIFFIS: Right.

22 MR. DICKENS: So it all ended up in the
23 middle, which makes it impossible for us to crate
24 this 25 foot wide space in all areas.

25 CHAIRMAN GRIFFIS: Right. Yes, and that

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1 was well stated and understood in the submission of
2 the application. Believe me, I think the Board is
3 well aware of those and the impacts of that.

4 I think, obviously, from what we have in
5 evidence in the record it has turned out to be an
6 amenable situation, if not a good one. The area of
7 the parking, I don't think -- and it is in the
8 submission, really looks that viable for any sort of
9 passive or active, for that matter, recreation space.

10

11 I just say -- well, I'll leave that for
12 the end.

13 Anything else? Any other question of the
14 Board of the applicant. Good.

15 Let's move on then. Is the ANC 2-F
16 represented today. The ANC representative is not
17 here today.

18 In which case, let's go to the Office of
19 Planning. Exhibit 27. The Office of Planning is, of
20 course, recommending approval of the application. It
21 was timely filed.

22 Mr. Jackson, welcome this morning.

23 MR. JACKSON: Good morning, Mr. Chairman,
24 members of the Board.

25 Just to restate the highlights of the

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1 Office of Planning report.

2 CHAIRMAN GRIFFIS: Excellent.

3 MR. JACKSON: The OP report looked at the
4 basis for the application, as was stated. The
5 question was referred to the Zoning Administrator
6 about just what regulation space was defined 00 was
7 identified within the structure, what the actual
8 requirement was and close to the requirement did the
9 application actually come.

10 As is noted in the original submission,
11 the application was processed by the DCRA and it
12 approved based on all the recreation space being
13 provided that was required as per their calculation.
14 On re-examining the plans the DCRA discovered that
15 there was some discrepancy with the width of some of
16 the recreation space. As such, there's been
17 recalculation of the space that was provided.

18 And the last figures that I received from
19 the DCRA was that there were 23,942 square feet of
20 residential space that's being provided within the
21 building and that the submitted amount of recreation
22 space required was 3591, which was 15 percent. And
23 then there were various numbers that came out in
24 terms of what area was actually meeting the
25 requirements of the zoning regulations as per reviews

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1 by the Office of Zoning of this plan and of
2 modifications that were faxed or delivered thereon.
3 But given the current numbers of 3,400 square feet
4 that would be provided -- that would have been
5 accepted by the Zoning Administrator as being
6 suitable, that would be 12.5 percent provision of
7 recreation space. However, if you go to the smaller
8 number, which would be the 994 square feet plus the
9 190, then you come up with 4.94 percent of recreation
10 space, which is a greater reduction.

11 But at any rate, the applicant obviously
12 with all the changes that have happened since the
13 plans were approved, this is a unique situation. And
14 so the uniqueness test is met with flying colors.

15 The other issues raised, however, are
16 that the provision of parking instead of recreation
17 space along the street would probably be a greater
18 benefit for the community in that it would increase
19 the amount of parking that's provided for this
20 project, which is not required to provide parking at
21 all because it's determined to be historic and it's
22 been determined eligible for the waiver of parking.

23 So weighing all these factors, the Office
24 of Planning thinks that their request of variance is
25 -- does meet the standards as described in the zoning

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1 regulations. And we also note that the comprehensive
2 plan does not seem to conflict with this proposal and
3 that the ANC supported it.

4 We also noted that the application was
5 submitted to the Department of Transportation and the
6 police and fire departments to see if they had any
7 concerns, none were expressed. But we'd also note
8 that it would probably be good too if the BZA would
9 grant a variance specific to a percentage just so the
10 Zoning Administrator knows what's been approved.

11 With that, the Office of Planning
12 completes its brief summary of report and the many
13 changes that this application has gone through, and
14 we're available to answer questions.

15 CHAIRMAN GRIFFIS: Thank you very much.

16 Questions from the Board?

17 Mr. Jackson, what's the Office of
18 Planning's opinion about counting 190 square feet of
19 the main entrance lobby towards residential rec
20 space?

21 MR. JACKSON: We've seen a number of
22 interior spaces to buildings counted, including store
23 rooms, exercise areas, places where people can
24 gather. And I think that the intent of recreation
25 space has been pretty broad in its application.

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1 I think essentially, though, if there is
2 a space where people can gather, chairs can be set
3 up, activities can be undertaken by the members of
4 the condominium or the residents who stay in the
5 units, we think that in general meets the intent,
6 which is that there would be opportunities for
7 members to communication and experience space within
8 the building and without as long as that space on the
9 exterior meets certain standards.

10 CHAIRMAN GRIFFIS: Excellent. Thank you.

11 Any other question from the Office of
12 Planning from the Board?

13 Does the applicant have any questions
14 from the Office of Planning?

15 MR. TUMMONDS: No questions.

16 CHAIRMAN GRIFFIS: Okay. Then let's move
17 on to the ANC report, 2-F. It is Exhibit 23 and they
18 did unanimously approve with a vote of six to zero.
19 And I do believe that meets our requirement standards
20 to be given great weight.

21 Any clarifications or any address from
22 the Board of the ANC report? Does the applicant have
23 anything to comment on the ANC report?

24 MR. TUMMONDS: No comments.

25 CHAIRMAN GRIFFIS: Okay. I do not have

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1 any other submissions attendant to this applicant
2 unless you're aware of any?

3 MR. TUMMONDS: I think there was one
4 letter.

5 CHAIRMAN GRIFFIS: Oh, indeed. I'll get
6 tot hose. I was thinking more of the formal
7 submission. But there is one letter written of
8 concern. It is Exhibit 26. I don't know if anyone
9 wants to speak to that or highlight aspects of it.
10 It is in the record and the Board has read and
11 reviewed it.

12 BOARD MEMBER ZAIDAIN: It's very well
13 written, Mr. Chair.

14 CHAIRMAN GRIFFIS: So noted. It's an
15 interesting letter.

16 Okay. Then is there anyone here in
17 support, persons in support or in opposition to the
18 application 17115 of the Rainbow Loft, L.C.C. Now is
19 the time to give testimony if you are here attendant
20 to this application. Not noting any persons here to
21 testify, let's go to any closing remarks you may
22 have.

23 Mr. Tummonds?

24 MR. TUMMONDS: Very briefly.

25 With regards to the amount of square

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1 footage we're actually providing, the degree of the
2 variance we're requesting, we would agree to say that
3 yes this could be an approval be based on providing
4 994 square feet of residential recreation space on
5 the roof as shown in the plans submitted in our
6 prehearing statement, in addition the 190 square feet
7 in the lobby so that we could condition approval of
8 this case on providing that amount of residential
9 recreation space.

10 And with that, we would -- based on we
11 believe we satisfaction of the variance standards,
12 the support from the ANC as well as the Office of
13 Planning, we would request that the Board take a vote
14 on this case today, if you believe that's
15 appropriate.

16 CHAIRMAN GRIFFIS: Okay. Thank you very
17 much.

18 Board members, last questions,
19 clarifications? Ms. Miller?

20 VICE CHAIRMAN MILLER: I just want to
21 clarify the percentage that we're talking about.
22 You're providing 6 percent recreation space, so it's
23 a variance of 9 percent, is that correct?

24 MR. TUMMONDS: Yes, without having done
25 the math myself. Yes.

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1 CHAIRMAN GRIFFIS: It seems to work out.
2 I think it would probably be safer if we moved in
3 that fashion. Any other questions? Mr. Zaidain?

4 BOARD MEMBER ZAIDAIN: Just make sure I'm
5 clear on the testimony regarding the roof. It was
6 HPRB or meeting the requirements basically of HPRB in
7 a local community that led you to locate these
8 elements where they are. And it would not be a good
9 idea to move them again, correct?

10 MR. TUMMONDS: That's correct.

11 BOARD MEMBER ZAIDAIN: Okay.

12 CHAIRMAN GRIFFIS: Are there two stairs
13 coming off the roof?

14 BOARD MEMBER ZAIDAIN: No.

15 MR. DICKENS: No, there's only one.

16 CHAIRMAN GRIFFIS: How do you one stair
17 with 2800 square feet? Don't answer that.

18 MR. DICKENS: You put a sign saying --

19 CHAIRMAN GRIFFIS: Okay. I actually
20 really don't want to hear.

21 Okay. Then let's move. Any other
22 questions on this application?

23 Mr. Zaidain, does that satisfy your
24 question?

25 BOARD MEMBER ZAIDAIN: Yes, it does.

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1 CHAIRMAN GRIFFIS: Okay. Anything
2 further? Very well.

3 I think it is appropriate to move
4 approval of application 17115 of the Rainbow Lofts,
5 L.L.C. pursuant to the variance of the residential
6 rec space requirements under 773 which would allow
7 the continued and finished development of a 21-unit
8 residential building at premises 1445 Church Street.

9 And I agree with the Board that we need to clarify
10 the exact amount of relief outside of the
11 percentages. It would be for the provision of 1,184
12 square feet of residential rec and the record shows
13 that 3276 are required, and that may well be roughly
14 6 percent provided. And I'd ask for a second.

15 BOARD MEMBER ZAIDAIN: I'd second that,
16 Mr. Chair.

17 CHAIRMAN GRIFFIS: Thank you very much.

18 I think we've gone through, frankly,
19 maybe even given you a hard time on this because --
20 well, I don't know why. But nonetheless, I think the
21 clarification that was brought to this is important.

22 There is clearly a unique situation here
23 in terms of: (1) the existing structure and then the
24 addition of the structure to the changing of the
25 uses, which was implicit and also directly addressed

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1 in the submission of the application.

2 I mean, here you are accommodating a
3 adoptive reuse of not a residential building.
4 Residential buildings, of course, give their own
5 requirements of layout and plan that impact the
6 building in the placement, in addition to having the
7 Historic Preservation Review Board and the community
8 concerns folded into it. There's a unique condition
9 that's obviously arising, the practical difficulty of
10 providing residential rec space, most importantly on
11 the roof. And I think we well flushed out the issue
12 of this strict requirement of the regulations,
13 whether it's right or wrong or whether it needs to be
14 rewritten or revisited, it is what it is for us and
15 773.3 indicates that no dimension can be smaller than
16 25.

17 I do not disagree with the intent is
18 being provided. I mean, there's an awful lot of space
19 up there if you count up the square footage, but that
20 which would require, somewhat like our last
21 application, a parking space that isn't dimensioned
22 correctly doesn't count, even though you can park it.

23 The same thing is happening here. And I think it's
24 going to be a wonderful and beautiful deck.

25 In terms of the reduction of the alley, I

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1 think it is going to benefit to the public good.
2 Obviously, an additional benefit to the public good
3 to provide parking at that area rather than in an
4 area that would -- I'm not sure how it would be
5 utilized nor secured nor landscaped or in any fashion
6 used other than parking or loading, for that matter.

7 But parking is what's being provided here.

8 And in terms of the comprehensive plan
9 and the intent, rather, the intent and integrity of
10 the zone plan and map here is where I think is a
11 critical point of a brief discussion. I know my
12 Board will be happy to hear that brief discussion of
13 mine in terms of the residential recreation area.
14 We've labored with some of the issues of what is it,
15 you know, and labored with how do you define passive
16 or active and do you then outfit an area in order to
17 accommodate that. And I think we need to go back
18 even further, first of all in looking at the zone
19 plan and map, the Arts overlap that's happening in
20 this C-3 area is obviously trying to establish a very
21 animated, a very urban, a very street life oriented
22 area. It seems like the intent of the regulation is
23 not to have people caught inside the building and a
24 100 percent provided for within the building, but
25 rather out on the streets and walking to the gym and

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1 then shopping on the way. And I think we're afforded
2 in the city great opportunities in terms of the
3 public parks.

4 It's seems to me an antiqued -- and this
5 Board has asked numerous times and has never received
6 why is the residential rec required in this city. I
7 think it's well aware of why it might be in other
8 cities in a commercial zone in a dense area like --
9 actually the letter that was submitted here was
10 saying that this isn't New York. Well, say it was,
11 in a commercial zone you build a tenant, it would be
12 perfectly appropriate to provide some sort of
13 residential recreation space, as there wouldn't be
14 any outside of the building or in close proximity.
15 But in this city, in this area, it seems like it is
16 either antiquated or misapplied for a lot of what
17 we're trying to create.

18 But, that may not have been as brief as
19 my Board would have liked. However, that is what I
20 see on this application.

21 I'd take any other deliberation of the
22 motion that's been -- has it been seconded it?

23 BOARD MEMBER ZAIDAIN: I seconded it.

24 CHAIRMAN GRIFFIS: I lost track.

25 Any further, Mr. Zaidain, comment,

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1 deliberation?

2 BOARD MEMBER ZAIDAIN: No. I think you
3 summarized it well and the residential rec space is -
4 - I mean, we always struggle with and end up having a
5 pretty philosophical discussion about, and usually
6 it's longer. So I appreciate you keeping it brief.

7 I'd be more than happy to support the
8 application. I think the testimony regarding the
9 roof structures provided the practical difficulty and
10 uniqueness aspects, which I thought was lacking in
11 the original submission. And that was because of the
12 clarification of relief that was needed.

13 So, since that's been satisfied, I'm
14 ready to support the motion.

15 CHAIRMAN GRIFFIS: Good. Thank you.

16 The last work on this then is it also is
17 difficult for us to deal with the areas -- I think
18 I've said it, but I think the Board, and maybe this
19 is just a shot to the Zoning Commission or whoever
20 wants to deal with it, but either we take it out or
21 we define it. Because it seems to be so many times
22 that we're asked to look at these specific cases and
23 it either is or it isn't.

24 And I can tell you, I think the Board if
25 we looked at our procedural history and some of the

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1 cases, we have not allowed it in some areas and we've
2 allowed it others for some reason.

3 So clarity and definition I think is
4 important, but that doesn't impact, again, the test
5 for the variance as met here today.

6 And if there aren't any further
7 discussion by the Board, then I would ask for all
8 those in favor of the motion signify by saying aye.

9 ALL: Aye.

10 CHAIRMAN GRIFFIS: And opposed?

11 MS. BAILEY: The vote is recorded as
12 four/zero/one to approve application 17115 with the
13 condition that 1,184 square feet of the residential
14 recreation space, that's 6 percent of the 15 percent
15 required, is to be provided per plans marked in the
16 record.

17 And I'm assuming, Mr. Tummonds, you're
18 going to give me those plans. Okay.

19 Summary order, Mr. Chairman?

20 CHAIRMAN GRIFFIS: Yes. I see no reason
21 for an order on this.

22 Very well. Thank you very much.
23 Appreciate you coming down here this morning.

24 We're just going to take a quick five
25 minute break and then we'll be back for the last

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1 application of the morning.

2 CHAIRMAN GRIFFIS: Very well. Let's
3 reconvene and call the third case of the morning.

4 MS. BAILEY: Thank you, Mr. Chairman.

5 And that's application 17114 of Ingleside
6 at Rock Creek, pursuant to 11 DCMR ? 3104.1, for a
7 special exception to add 13 independent living units
8 in an existing comminuted based residential facility.

9 This is a community resident facility/health care
10 facility, under section 219 and 219. The property is
11 located in the R-1-A District at premises 3050
12 Military Road, Northwest, Square 2287, Lot 809.

13 CHAIRMAN GRIFFIS: Good. Thank you.
14 Let's proceed.

15 MS. PRINCE: Good morning, Chairman
16 Griffis and members of the Board. I'm Allison Prince
17 of Shaw-Pittman, and I'm here today on behalf of
18 Ingleside at Rock Creek, a continuing care retirement
19 community at 3050 Military Road in Northwest. The
20 property is now located in Ward 4. It was located in
21 Ward 3 when we came before this Board in '96 to
22 secure permission to build an independent living
23 wing.

24 CHAIRMAN GRIFFIS: Did you move the whole
25 thing into a new ward?

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1 MS. PRINCE: WE did. We picked it up and
2 we moved it.

3 CHAIRMAN GRIFFIS: Gotcha.

4 MS. PRINCE: We're here today seeking
5 approval under sections 218 and 219 to achieve an
6 interior reconfiguration of this existing continuing
7 care retirement community to allow for the creation
8 of 13 new units.

9 With me is Peter Heck the Executive
10 Director of Ingleside, Michael Bennins from Ingleside
11 and Brian Frickle of Kerns Group.

12 As I mentioned, Ingleside is located at
13 3050 Military Road, Northwest. It's a very large
14 campus. It's well buffered from neighboring uses.

15 The independent living addition that was
16 approved by the Board in '96 contains 102 units, and
17 it has been remarkably successful in terms of the
18 interest that it's generated from residents of
19 District of Columbia and people who live outside of
20 the District.

21 Through the reconfiguration of existing
22 storage, garage and crawl space, the new units will
23 be created. The application, we clearly meet all
24 requirements under the zoning regulations, all
25 zoning, code and licensing requirements will be

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1 satisfied. There will be adequate parking and there
2 will be no adverse impacts because of traffic, noise
3 or number of similar facilities in the area.

4 In terms of parking, I should note that
5 the existing garage that's associated with the
6 independent living units, we did a utilization study
7 of that garage because we're eliminating eight of the
8 spaces in that garage. And the utilization study
9 showed that at absolute peak time 32 vacant spaces
10 existed in the garage. So there was little concern
11 about the elimination of eight spaces because there
12 would still be 24 vacant spaces in the garage at the
13 peak time.

14 CHAIRMAN GRIFFIS: An issue that was
15 brought up in your written submission, is that the
16 same number?

17 MS. PRINCE: No.

18 CHAIRMAN GRIFFIS: There was 24 in the
19 written?

20 MS. PRINCE: Right. We had Wells &
21 Associates go out to the site and do an actual count.

22 CHAIRMAN GRIFFIS: I see.

23 MS. PRINCE: And it turned out there were
24 32 vacant at the peak time. so with the subtraction
25 of the eight, 24 would be available.

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1 CHAIRMAN GRIFFIS: And what is the peak
2 time?

3 MS. PRINCE: The peak time was done
4 between -- the count was done on Thursday, January
5 22nd between 10:00 a.m. and 12:00 midnight. I
6 maintain that given the weather during that time
7 frame, it was probably the highest peak occupancy of
8 a garage you'll ever see because nobody was leaving
9 to go anywhere during that time period.

10 CHAIRMAN GRIFFIS: I see.

11 MS. PRINCE: So we think it was a pretty
12 accurate count and it shows that the garage is simply
13 not fully utilized.

14 Finally, the final standard we have to
15 meet is to show that the program goals of the
16 District cannot be met by a facility of a smaller
17 size. Mr. Heck has very detailed information on the
18 demand for this facility that shows we are simply
19 meeting an existing need.

20 We appeared before Advisory Neighborhood
21 Commission 3-4-G recently and achieved the unanimous
22 support of the ANC.

23 I do want to note there's an issue of
24 great interest to Ingleside and the ANC that may not
25 be of great interest to you, but again I want to

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1 state it for the record. There's a moratorium in
2 place, essentially a protected area of the Ingleside
3 site that cannot be subject to a special exception
4 application by Ingleside anytime prior to 2016. And
5 I'm just here to restate that moratorium. This is a
6 swath of property on the east side of the ravine that
7 is separated from the independent living apartments
8 by a substantial distance.

9 CHAIRMAN GRIFFIS: Okay. Well, to
10 address your statement, first of all, we're
11 interested in everything. But whether it's relevant
12 or our jurisdiction -- let me ask you, does this
13 application at all have any impact on the area east
14 of the ravine?

15 MS. PRINCE: It has no effect whatsoever
16 on the property east of the ravine? It has no effect
17 on the building footprint whatsoever.

18 CHAIRMAN GRIFFIS: Okay.

19 MS. PRINCE: We're just taking this
20 opportunity to restate that we have a moratorium
21 because there was concern in the ANC about whether
22 this effected in anyway the moratorium.

23 CHAIRMAN GRIFFIS: Understood. So it
24 would be of my opinion that this would have no
25 relevancy at all to the application that's before us.

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1 Okay.

2 MS. PRINCE: If the Board has no further
3 questions, I can proceed with the testimony of Mr.
4 Heck, Peter Heck, the Executive Director of Ingleside
5 and then we'll proceed with Brian Frickie.

6 CHAIRMAN GRIFFIS: Ms. Miller has a
7 quick question.

8 VICE CHAIRMAN MILLER: I do.

9 Would you clarify for me is this facility
10 that's at issue in this case a health care facility
11 or a community residence facility?

12 MS. PRINCE: It's both Ingleside at Rock
13 Creek is a continuing care retirement community,
14 meaning that it has assisted living beds, independent
15 living beds and nursing beds, full blown nursing beds
16 which are health care beds. So every time I apply
17 for anything to do with Ingleside, I seek relief
18 under both of those sections, community residence
19 facility and health care facility because that is
20 what the community is.

21 Our regs, as you know, are locally out of
22 date and there is just not a single category
23 continuing care retirement community. Were they one
24 category, I would file under one section.

25 VICE CHAIRMAN MILLER: Thank you.

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1 BOARD MEMBER ZAIDAIN: Just to follow up
2 on that, it's clearly not a CBRF, though, right? I
3 mean, you're within the parameters of 218 and 219 but
4 you don't meet the standards of a CBRF as are defined
5 in the definitions, correct?

6 MS. PRINCE: Health care facilities and
7 community residents facility are subcategories.
8 There are seven subcategories of community based
9 residence facility, and these are two of the seven
10 subcategories.

11 If you look at the definition --

12 BOARD MEMBER ZAIDAIN: No, I -- I
13 understand. I understand. Deal with that later.

14 The question I had on page 2 of your
15 submission, and I just wanted some clarification as
16 you go through your presentation, it says "Ingleside
17 requests permission to perform any construction
18 necessary to meet the requirements of the ADA, such
19 as elevators if applicable." So does that mean
20 you're looking for some flexibility in what you're
21 going to do here or is what you're presenting exactly
22 what you're coming for? I just wanted to make sure I
23 was clear on that.

24 MS. PRINCE: What we're presenting is
25 what we need zoning relief on.

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1 BOARD MEMBER ZAIDAIN: Okay.

2 MS. PRINCE: To the extent there are code
3 required upgrades, we will make them in accordance
4 with the permit --

5 BOARD MEMBER ZAIDAIN: It won't effect
6 any kind of approvals or --

7 MS. PRINCE: It shouldn't effect any
8 relief before you today.

9 BOARD MEMBER ZAIDAIN: Okay. Thank you.

10 MS. PRINCE: One final comment. This
11 conversion will take place over a five year period.
12 Your orders are good for two years.

13 I have seen a few instances where the
14 Board has acknowledged that as long as the initial
15 permit is sought within two years, the work can take
16 as long as it needs to take. Maret School recently
17 secured approval for a phased development.

18 So we would be seeking some type of
19 condition that would make it clear that the order
20 wouldn't expire immediately upon completion of the
21 first few units.

22 CHAIRMAN GRIFFIS: Okay. That's clear.
23 Any other question of the Board? Very
24 well.

25 MR. HICKS: Good morning, Chairman

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1 Griffis and members of the Board. My name is Peter
2 Heck, and I am the Executive Director of Ingleside at
3 Rock Creek, the retirement community located at 3050
4 Military Road, Northwest. I also reside at 3006
5 Military Road, directly adjacent to the Ingleside
6 Campus.

7 I am pleased to be here today to present
8 our proposal to convert under utilized space in the
9 existing facility at Ingleside into 13 additional
10 independent living units and a small amount of
11 storage.

12 By way of background, Ingleside has had a
13 significant presence along Military Road for over 43
14 years of its 98 year history. The campus consists of
15 approximately 14 acres. The campus has developed to
16 a small fraction of its maximum permitted occupancy
17 of 40 percent. The overall lot occupancy is
18 approximately 14 percent.

19 The portion of the property where the
20 renovation is proposed is on the east side of the
21 property. That portion of the property is largely
22 buffered from the houses on 29th Street, Northwest
23 due to a large wooded ravine.

24 The only change to the outside of the
25 facility will be the addition of windows that will

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1 match identically the windows already existing on the
2 building's facade.

3 The facility was constructed as a result
4 of this Board's approval of application number 16138
5 which involved 102 unit expansion of Ingleside in
6 1996.

7 Ingleside now seeks special exception
8 approval for the conversion of crawl space, office
9 space and exercise space into residential units. The
10 uses proposed under this special exception
11 application will be in accordance with the use
12 intended by Order 16138 and only add a small amount
13 of population to Ingleside's residents.

14 The proposed uses permitted with special
15 exception approval by this Board pursuant to sections
16 218 and 219 of the zoning regulations which govern
17 community residents and health care facilities.

18 The granting of this special exception
19 will increase the number of Ingleside residents only
20 slightly and will have very little impact on the
21 surrounding community. It will, however, help to
22 address the large demand for the services of
23 Ingleside, since there are 279 people on the waiting
24 list, many of whom reside in Wards 3 and 4. Given
25 the low turnover of units, there is very little

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1 chance that many of these 279 people on the waiting
2 list will ever be able to move into Ingleside.

3 There will be little traffic impact from
4 the proposed conversion to the neighboring
5 properties.

6 There will be no increase in the
7 footprint of the buildings under this proposal.
8 Instead, Ingleside merely requests permission to
9 renovate and redesign the interior of the facility to
10 add the proposed units and a small amount of storage
11 space.

12 Also, Ingleside requests permission to
13 perform any construction necessary to meet the
14 requirements of the Americans with Disabilities Act,
15 such as wheelchair ramps, as mentioned earlier.

16 There will be little traffic impact from
17 the proposed conversion to the neighboring
18 properties. Even at peak times, there are several
19 vacant parking spaces in our garage, as Ms. Prince
20 just mentioned.

21 We are confident that the additional
22 units will operate with no adverse impacts on the
23 surrounding community while enhancing Ingleside's
24 offerings. Therefore, Ingleside will be able to
25 assist in addressing the District's need for senior

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1 housing in Wards 3 and 4 and still adhere to the
2 intent of the zoning regulations.

3 We look forward to your decision on this
4 application.

5 I am pleased to answer any questions you
6 may have.

7 CHAIRMAN GRIFFIS: Good thank you very
8 much.

9 Are you compliant with the previous Order
10 16138?

11 MR. HICKS: Yes.

12 CHAIRMAN GRIFFIS: And just a note of
13 perhaps more curiosity, you've indicated that this
14 won't have any traffic impact, and I think we have
15 evidence to show that. But in the submission,
16 written submission early on, you said you were in
17 close proximity and served well by public
18 transportation?

19 MR. HICKS: That is correct.

20 CHAIRMAN GRIFFIS: Buses, is that on
21 Military Road?

22 MR. HICKS: Yes, the Metro that passes.
23 A number of routes pass right along Military Road,
24 that's correct.

25 CHAIRMAN GRIFFIS: Okay. Good.

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1 Any other questions from the Board? Very
2 well.

3 Thank you.

4 MR. HICKS: You're welcome.

5 MR. FRICKIE: My name is Brian Frickie.
6 I'm with Kerns Group Architects. Our address is 4600
7 North Fairfax Drive in Arlington, Virginia.

8 The project location, this is a
9 photograph that supplements the information you have
10 in your package. The home, the Ingleside at Rock
11 Creek, also known as the Presbyterian Home, is in
12 this location of Military Road, Broad Branch and the
13 ravine that was mentioned is this area right here.
14 The east side of the ravine, the west side of the
15 ravine.

16 This is the project that was the subject
17 of the previous zoning application, 16138. It's an
18 underground parking garage, two stories, community
19 facilities, the support spaces, underground facing
20 out onto the ravine. And then three buildings, the
21 north, middle and south buildings.

22 As you enter the property from Broad
23 Branch or from Military Road, you come into a spot
24 right here and the entrance to the Ingleside project
25 is right along the south side of the south building.

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1 This is that entrance, the main entrance, there with
2 the entry building. And the other building beyond it
3 is the south building, extending out into the ravine.

4 At the entry you may also go up the level
5 to the gardens that are indicated on the upper level.

6 From that level you go into the courtyards. There
7 are two courtyards, a small one and a major one. This
8 is the major courtyard looking back at the middle
9 building. The middle building is not effected by any
10 of the application before you.

11 This is looking from the other side, the
12 other courtyard, the small courtyard back at the
13 central building. The north building in the
14 distance. And the area that we're talking about is
15 now on the lowest level, what is currently now crawl
16 space.

17 If we go all the way to the north end of
18 the property and look back, we see the north building
19 and the portion of the building that goes into the
20 ravine. The lowest level of this building is the
21 location for the proposed units and the crawl space.

22 Just to give you some kind of idea of how
23 the building is configured. I mentioned that there
24 is a support building that's underground with two
25 levels of parking. This is the lowest level.

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1 Currently there's a swimming pool in the middle
2 pavilion and the south building there's a crawl space
3 and in the north building there's a crawl space.
4 These are the two areas where the six and the four
5 apartment units are proposed.

6 In the south building six units. And the
7 south building, you can see, is the portion of the
8 building that faces the ravine. This is the assembly
9 of windows and openings that are in the current
10 facade. These are the proposed additional windows at
11 the base of the building and the current crawl space.

12 We're going to move around to the south
13 and to the north side of this same building, the
14 south side showing the newer windows for the crawl
15 space and the north side the new windows for the
16 crawl space units at that level.

17 Moving to the north building, you can see
18 in this configuration that we not only have four
19 units, but we're connecting across the parking
20 structure to the core of the buildings where the
21 elevators are. There is currently an empty shaft in
22 this location. This is where the new elevator that's
23 proposed is going in. And as a matter of moving
24 across the parking in order to enclose this space as
25 part of the residential use, we're converting that

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1 from the parking use to residential use. And in this
2 area in the very center of that, an exercise room to
3 be relocated to this level.

4 Immediate above that area where the
5 current exercise room is located, one additional
6 apartment would be located.

7 When we look at the evaluation of the
8 north building, this is the east face of the north
9 building facing the ravine. You can see here the new
10 windows in the crawl space level and in this location
11 are the windows that already exist now for the
12 existing exercise room that will be converted to one
13 apartment unit.

14 The south face of the north building,
15 these are the new windows. North face, these are the
16 new windows for the units. And this is the new set
17 of windows for the exercise room. And this is the
18 existing exercise room which will be converted to a
19 unit.

20 There's no work in the residential area
21 at the commons level. This is the commons level that
22 extends from end of the building to the other. This
23 is the level where you enter the building.

24 Immediately above the parking ramp,
25 though, there is a space that ranges from 14 to 28

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1 feet in height. And the Ingleside project here is to
2 add storage above that ramp. It's basically
3 inserting a floor into a volume of space that
4 currently doesn't have anything in it.

5 And the final phase of the project is to
6 take above the existing entrance to the marketing
7 office space to put in two additional units. These
8 two units would be reconfiguring space that already
9 exists. There is no additional square footage
10 associated with these units. And the windows for
11 those two units are in this location right here.

12 I can take any questions.

13 CHAIRMAN GRIFFIS: Any question of the
14 Board? I think we're clear.

15 MS. PRINCE: That completes our
16 testimony. I do have the parking count from Wells &
17 Associates that I neglected to submit earlier.

18 CHAIRMAN GRIFFIS: Okay. Before that
19 comes in, first of all, in terms of the previous
20 Order 15138, was the parking count required, was it
21 enumerated in the order?

22 MS. PRINCE: It was enumerated in the
23 order.

24 CHAIRMAN GRIFFIS: And was it one of the
25 conditions?

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1 MS. PRINCE: I don't believe it was a
2 condition. I believe it's reflected in the approved
3 plans.

4 CHAIRMAN GRIFFIS: Oh, I see.

5 MS. PRINCE: It's in the findings.

6 CHAIRMAN GRIFFIS: So in the approved
7 plans.

8 MS. PRINCE: Yes.

9 CHAIRMAN GRIFFIS: Okay. Where do you
10 see it? On page 3.

11 VICE CHAIRMAN MILLER: Yes. There's a
12 summary of evidence, it looks like it's included as
13 well.

14 MS. PRINCE: Right.

15 BOARD MEMBER ZAIDAIN: So just to
16 understand, that in the previous proceeding there was
17 plans submitted, the Board looked at those and, I
18 guess, determined that that was sufficient and just
19 approved it. There was --

20 MS. PRINCE: No.

21 BOARD MEMBER ZAIDAIN: There was no
22 determination by the Board on what the parking level
23 should be. They just accepted the -- what the
24 applicant submitted?

25 MS. PRINCE: I don't believe it's a

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1 specific conditions.

2 BOARD MEMBER ZAIDAIN: Okay.

3 MS. PRINCE: I'd have to look at the
4 order.

5 CHAIRMAN GRIFFIS: Well, it's not a
6 condition of the order, I can say that.

7 MS. PRINCE: Right, it's not a condition
8 of the order.

9 BOARD MEMBER ZAIDAIN: Yes, I didn't see
10 it either.

11 CHAIRMAN GRIFFIS: Okay. Good. Let's
12 take that in then.

13 And are there any other questions from
14 the Board at this time?

15 Then let's go to the ANC if they have any
16 cross examination.

17 COMMISSIONER RENSHAW: No.

18 CHAIRMAN GRIFFIS: No cross? Okay.

19 In which case, let's move on then to the
20 Office of Planning's report.

21 MR. PARKER: Thank you, Mr. Chairman.
22 Good morning, members of the Board.

23 The Office of Planning finds that the
24 applicant has met the standards of section 218 in
25 regards to this application.

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1 And I'd be happy to discuss any of those
2 particular items further, but absent any questions
3 from the Board, I'll stand on the report as submitted
4 and recommend approval of the application.

5 CHAIRMAN GRIFFIS: Any question of the
6 Board?

7 Did Office of Planning's basis or one of
8 the basis of the recommended approval that there
9 would not be any detrimental impact by increasing the
10 units and decreasing the parking?

11 MR. PARKER: That's correct, based on the
12 number submitted by the applicant, it appeared that
13 there was ample parking for the current use and for
14 the addition.

15 CHAIRMAN GRIFFIS: Okay. Anything else?
16 The ANC have any cross examination of the Office of
17 Planning.

18 Okay. Good. Thank you very much.

19 Then let's go the to the ANC's report.

20 MS. BAILEY: Mrs. Renshaw, were you sworn
21 in?

22 COMMISSIONER RENSHAW: Yes. I stood up
23 with the rest of them.

24 Good morning to the Board and to the
25 staff. My name is Anne Renshaw, and I'm the ANC

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1 Commissioner representing Ingleside and Ingleside's
2 neighborhood. This is ANC-3-4G. Physically we have
3 not picked up and moved. We just have a new ward and
4 a new Council person representing us.

5 I am also an abutter to the Ingleside
6 property, living at 2910 Military Road. And, of
7 course, I went through the original 1997 DCA case on
8 this property. By now, matters have straightened
9 themselves out and I'm happy to say that this
10 appearance today should be a slam dunk for this case.

11 I trust that you have received the ANC's
12 letter concerning its unanimous approval. If you
13 have not, that's our mistake and I'm glad I'm here to
14 give you the vote of the ANC; if you have not
15 received our letter which was supposed to have been
16 faxed to you last week and also sent out by mail.

17 By the way, I would like to receive a cop
18 of the Office of Planning's report because we would
19 like to have that in our file.

20 The ANC voted on February 9th to vote
21 unanimously on its approval to these minor
22 alternations to add 13 units to Ingleside and to
23 adjust the cap of 102 units. There's not going to be
24 any change in the footprint, save the addition of
25 some windows. It's not going to have any adverse

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1 impact insofar as noise and operations and traffic on
2 Military Road or Broad Branch. And it's not going to
3 effect the use of our property at all. So,
4 therefore, it is in our opinion a slam dunk and
5 should be approved.

6 Now, at the ANC meeting I can remember
7 one or two questions having to do with the parking,
8 the elimination of 8 indoor spaces. But we were
9 assured that there was sufficient space on the
10 surface lot to pick up any additional parking, should
11 that be the case. Parking was originally back in the
12 '90s, in the late '90s when this case came before the
13 Board, was a big issue because at the time there was
14 parking in the neighborhood and the neighbors wanted
15 that to stop.

16 The other question of the Board, while
17 not pertinent to this case, was the issue of the
18 moratorium and whether the Board of Directors of
19 Ingleside was fully aware of the moratorium issue,
20 which was a significant issue back in the '90s and
21 was part of the 1998 settlement agreement with the
22 abutters; that we would have a building moratorium on
23 institutional use on the east side of the ravine
24 until 2016. Unfortunately, the BZA order only says
25 2008.

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1 The good of having this case come before
2 the Board is that it forces all of us to open the old
3 case and to read the record, and to see that we have
4 got to have a little patchwork done between now and
5 what we thought would be our moratorium deadline of
6 2016.

7 So we are going to enter into a covenant
8 agreement with Ingleside to officially set down into
9 our records and protect our neighbors that the
10 moratorium would not be 2008, but would be 2016.

11 I polled the neighbors in advance of our
12 February 9th ANC meeting. And the only questions
13 that came back to me were questions about the
14 moratorium. The neighbors did not have any issue
15 with the minor expansion of Ingleside. We remember
16 Ingleside as the Presbyterian Home. Their only
17 concern, again, was this moratorium issue. And they
18 are pretty much in agreement that this is not going
19 to change anything.

20 We are well buffered from Ingleside for
21 six months out of the year when the trees flush out.

22 Through six months out of the year we're not as well
23 buffered. It is a visual impact that we have with the
24 home itself.

25 However, we want to also tell you that a

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1 plus of the new administration of Ingleside
2 represented by Peter Heck this morning is the fact
3 that we have an advisory committee to Ingleside, and
4 we meet approximately quarterly. And it's at that
5 time when the little issues that could grow into big
6 issues come to the attention of the management of
7 Ingleside, such things as noisy pipes, air
8 conditioning unit, too early deliveries, trash in the
9 ravine. And it is an opportunity for the management
10 to say we're going to address these issues and move
11 ahead.

12 We look to harmony with our neighbors.
13 We don't want adversarial situations. And I think
14 the addition of this advisory committee is a certain
15 plus to this whole arrangement that we have, this
16 partnership that we have with Ingleside in the
17 neighborhood.

18 I would like to recommend on behalf of
19 our ANC that you support this project unanimously.

20 We are working in good faith with
21 Ingleside from here on as far as the moratorium
22 issue, the covenant agreement and also working out a
23 construction agreement with Ingleside so that we
24 understand truck routes and how long it's going to
25 take, and what the hours of operation are going to

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1 be.

2 But just in closing, I want to tell you
3 just a wee story of one of the residents of Ingleside
4 who is in firm support of this project who lives
5 closer than I live to the project. He lives right
6 above the area that is going to be excavated. So we
7 recommended to him that Ingleside send him on a world
8 cruise; whether or not that's going to happen, you'll
9 have to come back and ask the management if that is
10 going to take place.

11 CHAIRMAN GRIFFIS: Well, we want in on
12 that.

13 COMMISSIONER RENSHAW: I said that I
14 recommended that I carry the bags, but I, alas, was
15 not picked up on that offer.

16 So in any case, I do hope that you take
17 the recommendation and give good weight to the ANC's
18 unanimous approval of this project. And, again, it
19 has been done with every thought to those on the
20 waiting list wanting to get people who want to get
21 into the property into the property, and it is not
22 going to affect our lives in anyway.

23 CHAIRMAN GRIFFIS: Excellent. Thank you
24 very much, Ms. Renshaw.

25 And I should say, and should have said

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1 when you first came up, it is a pleasure to see you
2 again, especially in this room.

3 I've noted that you stated that the ANC
4 unanimously approved and indicated that there would
5 be no negative impact. We do not have a record of
6 the facts or letter, so we need to get that into the
7 record.

8 COMMISSIONER RENSHAW: Can we get that to
9 you immediately and have it put it in the file.

10 CHAIRMAN GRIFFIS: Okay. Excellent.

11 COMMISSIONER RENSHAW: All right.

12 CHAIRMAN GRIFFIS: And we can, obviously,
13 run with the testimony that we've heard today
14 regarding all the specifics.

15 COMMISSIONER RENSHAW: Mr. Chairman, it
16 does state in our draft minutes that I am the
17 authorized representative on this case.

18 CHAIRMAN GRIFFIS: Okay.

19 COMMISSIONER RENSHAW: All right.

20 CHAIRMAN GRIFFIS: Well, we'll extend a
21 great arm of trust and wait for that to come in.

22 COMMISSIONER RENSHAW: Thank you.

23 CHAIRMAN GRIFFIS: Also, in term of the
24 advisory committee that you've spoke of so well that
25 meets quarterly, that is out of the previous order

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1 condition number one, is that correct?

2 COMMISSIONER RENSHAW: Yes. Yes, it is.

3 CHAIRMAN GRIFFIS: Okay. And so you find
4 that it is up and running and is being very
5 productive?

6 COMMISSIONER RENSHAW: It is very
7 productive. And we bring our problems to this
8 committee. And we do have problems. It has not been
9 a peaceful time insofar as having nothing on the
10 agenda. We do have issues. But the administration--

11 CHAIRMAN GRIFFIS: It would be shocking
12 if we heard otherwise.

13 COMMISSIONER RENSHAW: Exactly. But it
14 is an opportunity for us to hear problems that
15 Ingleside might have with the city, and as an ANC
16 representative I have to take those problems to the
17 city, such as the curbing and the sidewalk along the
18 3000 block of Military Road. And we're working with
19 the Department of Transportation to get that project
20 underway so that we have a better walk space for
21 pedestrians along a very busy street.

22 We're also working with Washington Gas
23 Company because we've had problems in the gas lines
24 at 30th and Military. And also problems with the
25 Water and Sewer Authority, because water has gotten

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1 into the gas line. And we were bothered, for
2 instance, last night by traffic going over a huge
3 steel plate in the eastbound lanes of Military Road
4 right at 30th Street on Military. So we picked that
5 up with the Emergency Management Office and with
6 WASA. And they took the matter into their hands and
7 put up some cones, so at least we could get a good
8 night's sleep. But we have constant problems where
9 we are located, and it just is helpful to have the
10 weight of Ingleside, the Presbyterian Home supporting
11 the community's desire for improvements in our
12 neighborhood.

13 CHAIRMAN GRIFFIS: Indeed. Good. Okay.
14 Any other questions from the Board?

15 BOARD MEMBER ZAIDAIN: I just have a
16 quick one.

17 CHAIRMAN GRIFFIS: Yes, Mr. Zaidain.

18 BOARD MEMBER ZAIDAIN: It's good to see
19 you, Ms. Renshaw.

20 COMMISSIONER RENSHAW: Yes, good to see
21 you.

22 BOARD MEMBER ZAIDAIN: You mentioned
23 something in your testimony that I don't recall
24 reading, and I don't want any details. It's just
25 more of a curiosity. You said that there's a

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1 settlement agreement that reflects this moratorium as
2 well? so there's some sort of civil instrument out
3 there that's reflecting this?

4 COMMISSIONER RENSHAW: That's correct.

5 BOARD MEMBER ZAIDAIN: Okay. Thank you.

6 COMMISSIONER RENSHAW: But again, our
7 agreement is 2016 but the BZA order only say 2008.

8 BOARD MEMBER ZAIDAIN: Okay.

9 COMMISSIONER RENSHAW: And we were not
10 able to get it into the record in a timely fashion.

11 BOARD MEMBER ZAIDAIN: Okay. Thank you.

12 CHAIRMAN GRIFFIS: Okay. Anything else?

13 Does the applicant have any cross
14 examination of the ANC? None.

15 Very well. Ms. Renshaw, thank you very
16 much.

17 Let me just ask you one more quick thing.
18 Is when do you think you can submit that letter into
19 the record?

20 COMMISSIONER RENSHAW: Well, let's see.
21 today is Tuesday, tomorrow is Wednesday, we'll be in
22 the office. We can fax it down to you tomorrow.

23 CHAIRMAN GRIFFIS: Tomorrow?

24 COMMISSIONER RENSHAW: All right?

25 CHAIRMAN GRIFFIS: Okay.

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1 COMMISSIONER RENSHAW: Is that timely?

2 CHAIRMAN GRIFFIS: Yes. Good. Thank you
3 again, very much.

4 Let me ask then is there anyone else here
5 present to give testimony as persons either in
6 support or in opposition of application 17114
7 Ingleside at Rock Creek, they can forward and have a
8 seat at the table. Not seeing any indication of
9 testimony by a person, I believe we can go to closing
10 remarks.

11 MS. PRINCE: I think I'll just skip the
12 closing statement and ask for the Board's expedited
13 consideration of this application. Thank you.

14 CHAIRMAN GRIFFIS: Thank you very much.

15 Last questions, clarification of the
16 applicant?

17 Let's take five minutes on this. We're
18 just going to go into Executive Session for five
19 minutes and we'll return.

20 (Whereupon, at 12:03 p.m. a recess until
21 12:14 p.m.)

22 CHAIRMAN GRIFFIS: Very well. Let's
23 resume. We are back at application 17114 of
24 Ingleside at Rock Creek.

25 We've concluded the testimony part of the

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1 application and it is before the Board now. Unless
2 there are any final questions, comments or
3 clarifications needed of the applicant or the ANC
4 from the Board; not noting any, then I think we
5 should move ahead.

6 I believe that the record is full on
7 this. One in the submissions and then in the
8 testimony that we've heard today and having the
9 representative from the ANC here was also very
10 informative, and therefore I would move approval of
11 application 17114 of Ingleside at Rock Creek. This
12 is would be pursuant to a special exception to add 13
13 independent living units under section 218 and 219
14 and a reduction -- I lost my count here. And a
15 decrease in the number of parking spaces by seven
16 within the existing use. And I'd ask for a second.

17 VICE CHAIRMAN MILLER: Second.

18 CHAIRMAN GRIFFIS: Thank you very much.

19 I think it's pretty clear, first of all
20 on the outset, that the controlling aspect is a
21 previous special exception by this Board which is
22 Order 16138. And, of course, that would not in
23 anyway change any of the conditions of that order.
24 And it wouldn't in any sense change any aspects
25 outside of that that is part of the application

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1 today.

2 Looking at 218 and 218 I think it was
3 well said by the applicant's representative under
4 undue caution coming in under both, they are very
5 similar if not one might say identical. And so the
6 test as we run through, and I think it's been pretty
7 clear, how they have met each of the burdens of 218.

8 There is the proximity of the residential
9 facility. First of all, looking at 219.2 I think we
10 can rely on the previous Board's special exception
11 which was granted, and that is not a new condition,
12 nor was there evidence related to whether
13 accumulative impact of the separate facilities would
14 be of detriment. And so I think we can proceed with
15 that.

16 Likewise on all the others, in terms of
17 adequate appropriate located parking, again we have
18 an existing condition and I think we can rely on the
19 previous order. 218.4 with the applicable licensing,
20 we've had testimony in the written submission that it
21 is able to meet all of those requirements.

22 And in terms of the adverse impact on the
23 neighborhood, I think it's fairly clear that this is
24 of interior nature. The reduction of the parking, I
25 think, also was submitted. That the peak parking

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1 times, the actual demand for it, is somewhat in
2 excess of what is provided, and we did not have any
3 evidence to the contrary from the surrounding area or
4 the ANC.

5 I think it's particularly persuasive and
6 we will take into the official letter of the ANC into
7 the record, but persuasive the testimony that was
8 given today about the long journey that this has been
9 on and the communication that's happened in the
10 community and in the neighborhood. And that out of
11 this application there were no negative impacts that
12 were evidenced.

13 Parking, of course, was one of the issues
14 that was talked about. As in most neighborhoods in
15 this city, still with the action of the ANC it was
16 unanimous support of this, indicating that the impact
17 was not of high negative detriment that would,
18 obviously, have diminished or turned their support
19 for this.

20 I believe that's all I needed to say on
21 this. And let me open up to other Board members for
22 further deliberation on the motion. Anything else?

23 Very well. Nothing, any other comments
24 on this. We have a motion before us for approval and
25 it's been seconded. I'd ask for all the Board

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1 members to indicate, all Board members that support
2 the motion indicated by saying aye.

3 ALL: Aye.

4 CHAIRMAN GRIFFIS: Opposed? Any
5 abstaining? Very well, why don't we record the vote?

6 MS. BAILEY: The vote is recorded as
7 four/zero/one to approve the application.

8 Mr. Griffis made the motion, Ms. Miller
9 second, Mr. Zaidain and Mr. Etherly are in support.
10 The Zoning Commission member is not present today.
11 And that is for special exception to add 13
12 independent living units and decrease in the number
13 of parking spaces by eight.

14 And, Mr. Chairman, will the conditions of
15 the previous order obviously with the modifications
16 necessary be carried over into this order?

17 CHAIRMAN GRIFFIS: I'm not clear actually
18 how that should be done. I would indicate that, no,
19 we wouldn't attach the previous conditions to this
20 order, as we have not actually entertained any
21 changing or adoption of those. But I think the
22 intent and purpose, and as I stated at the beginning
23 of the motion, was that the previous order will stand
24 except for that which has changed. So how we actually
25 issue that, it may well just be a note in the summary

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1 order indicating the validity of the previous order.

2 So that not being directly in answer to
3 your question, I think we can work it out.

4 MS. BAILEY: And is this a summary order,
5 Mr. Chairman.

6 CHAIRMAN GRIFFIS: Yes.

7 MS. BAILEY: Thank you, sir.

8 CHAIRMAN GRIFFIS: Good. Thank you very
9 much.

10 Is there any other business for the Board
11 this morning?

12 MS. BAILEY: Not this morning, Mr.
13 Chairman.

14 CHAIRMAN GRIFFIS: Very well. Does the
15 Board have any other issues?

16 Okay. In which case then, I can
17 adjourned the morning of 17th of February 2004 and
18 wish you all a great day.

19 And thank you all very much.

20 We will be back at 1:15 for our afternoon
21 session.

22 (Whereupon, at 12:20 p.m. the hearing was
23 adjourned, to reconvene this same day at 1:24 p.m.)

24

25

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

1:24 p.m.

CHAIRMAN GRIFFIS: Good afternoon, ladies and gentlemen. Let me call to order the 17th of February, 2004 Afternoon session of the Board of Zoning Adjustment for the District of Columbia.

My name is Jeff Griffis, I am Chairperson. Joining me today is Vice Chair Ms. Miller and also Board member Mr. Etherly. Representing the Zoning Commission with us this afternoon is Mr. Parsons. And representing the National Capital Planning Commission is Mr. Zaidain.

Copies of today's hearing agenda are available to you. They are located where you entered into the hearing room on the wall. Please pick that up and you can see what is before this afternoon.

Also, please be aware that all proceedings before the Board of Zoning Adjustments are recorded. They are now recorded in two fashions. The most important being the court reporter, who is sitting to my right. He is establishing the transcripts will become the official record. Secondly, I would also, and it is my pleasure to announce, that we are now being broadcast live on the

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1 Office of Zoning's website. So attendant to both of
2 those important aspects of recordation, I ask that
3 people please refrain from making any disruptive
4 noises or actions in the hearing room. And also I
5 would ask that people turn off their cell phones and
6 beepers at this time so that we do not have any
7 disruption in the proceedings.

8 Of technical note, I will go through a
9 few further pieces. As you come forward, of course,
10 you're going to need to speak into a microphone.
11 that microphone should be on. At times I may have
12 you turn off the microphones or if you are attendant
13 to it, you can turn off the microphones when you're
14 finished speaking so that we don't have any feedback
15 or sound reverberation for our recordings.

16 All persons planning to testify either in
17 favor or in opposition should fill out two witness
18 cards. Witness cards are available to you where you
19 entered into and also in front of us at the table
20 where you will give testimony. Those two witness
21 cards go to the recorder who sits to my right, as
22 stated. That is, of course, so that you will be
23 credited with all the very important things that you
24 are about to tell us.

25 The order of procedures for special

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1 exceptions and variances -- well, we have an
2 interesting afternoon. We have two appeals on the
3 schedule for this afternoon, so let me run through
4 the order of what we'll be the procedure for the
5 appeals.

6 First we will statement and witnesses of
7 the appellant. Second would the Zoning Administrator
8 or the government's case. Third we'll have the case
9 of the owner, lessee or operator of the property.
10 And fourth would be the ANC within which the property
11 is located. Fifth we will have the intervenor's
12 case, if they are so established by the Board. And
13 sixth we will have rebuttal and closing statements by
14 the appellant.

15 It should be noted in that procedure
16 outside of the appellant, which is given a separate
17 time for closings, that everyone should include their
18 case presentation at the time allotted. If that is
19 not clear, I will restate it when we call cases to
20 order and run through them.

21 Pursuant to our regulations, and it's
22 3117.4 and 5 the following time constraints will be
23 maintained or established by the Board.

24 Well, first, let me just state the
25 applicant and appellant and persons and parties

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1 except the ANC including witnesses will have a
2 decided time. Our regulations state that 60 minutes
3 collectively would be provided, however under our
4 regulations we are allowed to establish without
5 prejudice an equitable solution of what the time will
6 be. And we will be establishing times for
7 presentations on each of the cases in the appeals.

8 Cross examination of witnesses is
9 permitted, of course, by the applicant and
10 intervenors or parties in the case.

11 The ANC within which the property is
12 located is automatically a party and, obviously,
13 would therefore be given the opportunity for cross
14 examination.

15 The record will be closed at the
16 conclusion of our proceedings, except for any
17 material that is specifically requested by the Board,
18 and we will be very specific as to what is to be
19 submitted and when it is to be submitted into the
20 Office of Zoning. Of course, it should go without
21 saying that after that material is received, no other
22 information would be received into the record and the
23 record would then be finally closed.

24 The Sunshine Act requires that this Board
25 conduct all proceedings in the open and before the

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1 public. This Board may, however, in accordance with
2 its rules and procedure in the Sunshine Act enter
3 Executive Session. Executive Session is used for the
4 purposes of reviewing the record or deliberating on
5 each case.

6 The decision of this Board in contested
7 cases must be based exclusively on the record, which
8 is why it's so important to have your microphone on
9 when you speak into it to establish that record. We
10 must base all our deliberations and decisions on that
11 record, and so we also ask that people present not
12 engage Board members in conversation so that we don't
13 give the appearance of receiving information outside
14 of the record.

15 We will make every effort to conclude our
16 afternoon session by 6:00. I will update people as
17 we progress through the afternoon and how we are
18 dealing with each of the applications.

19 At this time the Board will consider any
20 preliminary matters.

21 Preliminary matters are those which
22 relate to whether a case will or should be heard
23 today, such as requests for a postponement,
24 continuance or withdrawals or whether proper and
25 adequate notice has been provided. If you believe

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1 the Board should not proceed with a case today based
2 on some of those issues or others, I would ask that
3 you come forward and have a seat at the table as an
4 indication of a preliminary matter. If not, I will
5 turn to staff and see if there are any preliminary
6 matters that they are aware of, and also state a very
7 good afternoon to Ms. Bailey who sits to my very far
8 right representing the Office of Zoning. To my close
9 in right, Mr. Moy, also with the Office of Zoning.

10 Representing us, our legal counsel, is
11 the Office of Corporation Counsel. It is represented
12 this afternoon by Ms. Skinner and Ms. Monroe.

13 With that, Ms. Bailey, are there any
14 preliminary matters for the Board at this time?

15 MS. BAILEY: Mr. Chairman, and to all, a
16 good afternoon.

17 No, Mr. Chairman. Staff has no
18 preliminary matters at this time.

19 CHAIRMAN GRIFFIS: Very well. Then I
20 think we're able to proceed.

21 I would ask that everyone that is going
22 to give testimony today to please stand and give your
23 attention to Ms. Bailey. She is going to administer
24 an oath.

25 (Witnesses sworn).

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1 MS. BAILEY: Ready for the first case,
2 Mr. Chairman.

3 CHAIRMAN GRIFFIS: Absolutely.

4 MS. BAILEY: And that is appeal number
5 17086 of Sheridan Kalorama Neighborhood council,
6 pursuant to aa DCMR ? 3100 and 3101, from the
7 administrative decision of Karen Edwards, General
8 Counsel, Department of Consumer and Regulatory
9 Affairs allowing the transfer of the Jordanian
10 Chancery to the Yemeni Chancery without the approval
11 of the Foreign Mission Board of Zoning Adjustment.
12 The property is located in the D/R-1-B zoned subject
13 premises at 2319 Wyoming Avenue, Northwest, Square
14 2522, Lot 4.

15 Mr. Chairman, this was continued from
16 January 13th of this year.

17 CHAIRMAN GRIFFIS: Good. Thank you very
18 much. And, indeed, from the continuation we had axed
19 for numerous submissions, of which we have received.

20 Let me ask if I can have the participants
21 just quickly up here for a moment. The appealee and
22 also the intervenors. I'm asking you one question.
23 What I'd like to do is set up one quick procedure. I
24 am tending to give 20 minutes for the presentation of
25 each case. I think the written submissions were quite

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1 substantial and additional time to address the
2 submissions that are in. So let me just hear any
3 comments on that.

4 Zoning Administrator

5 MR. NETTLER: Richard Nettler on behalf
6 of the appellant.

7 As you know, we had already finished
8 presenting our case.

9 CHAIRMAN GRIFFIS: Right.

10 MR. NETTLER: We were at the point in
11 which we stopped, Department of Consumer of
12 Regulatory Affairs I understood was going to be
13 presenting a prehearing statement as well as a
14 witness for this hearing. I have no objection to 20
15 minutes being provided for they and the intervenors.

16 CHAIRMAN GRIFFIS: Okay. And is there
17 additional time that you require in order to address
18 some of your submissions?

19 MR. NETTLER: That will depend on what
20 they --

21 CHAIRMAN GRIFFIS: So you can do that in
22 rebuttal?

23 MR. NETTLER: Correct.

24 CHAIRMAN GRIFFIS: Okay. Twenty minutes.

25 MS. BELL: Good afternoon.

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1 CHAIRMAN GRIFFIS: Hi.

2 MS. BELL: We don't object to 20 minutes,
3 but I might add we do object. We noticed in the
4 appellant's response that he raised a number of
5 arguments that were not raised in the earlier
6 hearing, and I assume he will use his 20 minutes to
7 discuss those new arguments. So to the extent that
8 his arguments today are not limited to the position
9 that he raised earlier, that DCRA would object.

10 CHAIRMAN GRIFFIS: I'm sorry. In the
11 extent that today your arguments aren't limited to
12 the previous?

13 MS. BELL: No. I assume his arguments
14 aren't limited.

15 CHAIRMAN GRIFFIS: Right.

16 MS. BELL: Because in his response, what
17 he did in his response was basically reformulate his
18 argument and raise a number of arguments, as I'm sure
19 the Board is aware, that were never raised in the
20 beginning. I assume he's going to rely on them
21 today, and that would be part of his 20 minute
22 presentation.

23 CHAIRMAN GRIFFIS: And how does that
24 impact you? What are you asking for?

25 MS. BELL: Well, first of all, we would

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1 ask initially that his 20 minutes or whatever time
2 that he's allowed to argue, would be limited to those
3 arguments that he originally raised, not new
4 argument. But to the extent that the Board may rule
5 against us, then perhaps we may need more than 20
6 minutes.

7 MR. NETTLER: If I might respond, our
8 arguments are essentially our arguments that we've
9 made before. and while we're certainly responding to
10 contentions made by the State Department in their
11 filing, they're not in anyway inconsistent with what
12 the position that we've consistently taken, which is
13 that this matter should be -- this transfer should
14 have been something that was heard by the Foreign
15 Missions Board of Zoning Adjustment.

16 CHAIRMAN GRIFFIS: Right. Yes, I mean
17 the see the critical issues. I think there was
18 additional information, but I'm going to hear from
19 you quickly on what the additional items were because
20 it seems to me that in going through this that we
21 have, perhaps, five large issues.

22 I mean, we have the jurisdiction.
23 Jurisdiction of this Board and the FMBZA.

24 We certainly have the grandfathering
25 provision, whether it's attended to or clear the

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1 directive on this.

2 We have the nondiscrimination which
3 actually brought up -- I don't recall it -- well, I
4 can look at my past notes, but in the filings for
5 sure.

6 Well, I guess I'll lump the others
7 together. But the issue was brought up whether
8 there's a difference between the change of use or a
9 continuation of a nonconforming.

10 What were the other issues that you see
11 were not raised?

12 MS. BELL: Well, I would say initially
13 that wasn't an argument that was raised earlier. It
14 appears, and Mr. Nettler is correct, apparently in
15 response to the State Department he has decided to
16 expand. The State Department has raised a lot of
17 issues that DCRA, for instance, hasn't raised. One
18 of them is the issue of jurisdiction.

19 CHAIRMAN GRIFFIS: Right.

20 MS. BELL: As the Board may recall, I
21 think the State Department still has that position.

22 CHAIRMAN GRIFFIS: I'm just trying to get
23 an idea of just, frankly, the scheduling for the
24 afternoon. Are you saying that you're unprepared to
25 speak to certain issues that were raised in the

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1 written submission?

2 MS. BELL: No, I'm not saying that we're
3 unprepared. I guess what the District is trying to
4 say or argue is that we believe that the issues
5 should be narrow with regard to this case. And it
6 seems to continue to expand.

7 CHAIRMAN GRIFFIS: I see. Go ahead.

8 MS. BELL: I realize the State Department
9 might have a different position as the intervenor.

10 CHAIRMAN GRIFFIS: Okay.

11 MS. BELL: But that would be the
12 District's position.

13 CHAIRMAN GRIFFIS: So in some sense
14 you're bringing a motion to strike certain elements
15 from hearing? You got to give me some to act with.

16 I'll tell you what, let's just run with
17 this. I don't anticipate having Mr. Nettler speak
18 very much today. As he said, he's put in his written
19 submissions and they've presented their case.

20 MS. BELL: Okay.

21 CHAIRMAN GRIFFIS: But if there is more
22 additional information that we require, then maybe
23 he'll address it.

24 MS. BELL: Okay.

25 CHAIRMAN GRIFFIS: Does that make sense?

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1 MS. BELL: Yes, it does.

2 CHAIRMAN GRIFFIS: I'm really just trying
3 to flush out the --

4 MS. BELL: Yes. We really don't raise a
5 motion. We would just like the Board to be aware
6 that we just believe the issue is fairly narrow.

7 CHAIRMAN GRIFFIS: Okay. And can you
8 address that in your presentation?

9 MS. BELL: Yes.

10 CHAIRMAN GRIFFIS: Excellent.

11 Good afternoon, Mr. Mlotek, how are you?

12 MR. MLOTEK: Good afternoon, Mr.
13 Chairman. And may it please the honorable Board, for
14 the record Ron Mlotek for the Office of Foreign
15 Missions.

16 I think to a certain extent we subscribe
17 to what Ms. Bell for the District just said. I think
18 it was an issue of fairness of the proceeding is what
19 she was getting at. I mean, 20 minutes for each of
20 us is fine, but I do think that Mr. Nettler had a
21 good bit more than 20 minutes at the last time. So
22 there is a certain degree of unfairness in the
23 proceeding to limit us to 20 minutes.

24 CHAIRMAN GRIFFIS: Excellent. Note your
25 opinion that it's unfair. What time do you need?

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1 MR. MLOTEK: And, well, before I answer
2 on that could I ask whether the Chair contemplated
3 affording Mr. Nettler additional time at this
4 hearing? I think because Ms. Bell's question or
5 point, I think was predicated on her assumption that
6 Mr. Nettler would be granted also 20 minutes in
7 addition to the hour and something that he had
8 before.

9 CHAIRMAN GRIFFIS: Indeed. I show all my
10 cards.

11 MR. MLOTEK: So in other words it would
12 be 20 minutes per party here?

13 CHAIRMAN GRIFFIS: That's correct.

14 MR. MLOTEK: All right.

15 CHAIRMAN GRIFFIS: Not Mr. Nettler,
16 though. Mr. Nettler has said that he's going to go
17 and utilize his time for rebuttal testimony and
18 closings and cross examination of --

19 MR. MLOTEK: Well, I think we would want
20 40 minutes.

21 CHAIRMAN GRIFFIS: Forty minutes for your
22 presentation?

23 MR. MLOTEK: Yes. Because we have a
24 witness, too. And reserving 40 minutes, I'm
25 reserving ten of them for rebuttal or reply.

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1 MR. NETTLER: Well, I would object. There
2 is no --

3 CHAIRMAN GRIFFIS: Thirty?

4 MR. NETTLER: -- under the rules there is
5 no reply by intervenors or --

6 CHAIRMAN GRIFFIS: Right.

7 MR. MLOTEK: All right. Well then 40
8 minutes for our --

9 CHAIRMAN GRIFFIS: Good. And just to
10 make clarification, in my opening statement I said I
11 would revisit this. It is true that I'm going to be
12 asking you to present your entire case.

13 MR. MLOTEK: Right.

14 CHAIRMAN GRIFFIS: So you're going to
15 close it and then we'll move on.

16 MR. MLOTEK: Well then I think 40 minutes
17 would be appropriate.

18 CHAIRMAN GRIFFIS: Forty minutes.

19 The District needs how much time?

20 MS. BELL: Actually, the District
21 probably needs ten minutes, because we do have one
22 witness -- 20 minutes, I'm sorry. If we don't use the
23 entire 20 minutes, I'd be glad to give Mr. Mlotek the
24 remaining --

25 CHAIRMAN GRIFFIS: Oh, no. There's no

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1 sharing here.

2 MS. BELL: Okay.

3 MR. MLOTEK: She can't yield her --

4 CHAIRMAN GRIFFIS: I get all the time
5 back. Okay.

6 That being said, we're going to set the
7 clock for 40 minutes on the presentation of the
8 cases. And we will run with it in that fashion.

9 Any other questions, clarifications?
10 Good.

11 Now, Board members as we get ready, we
12 will set up and we will start with the Zoning
13 Administrator's case at this point. I think that's
14 where we left off.

15 We did have, Mr. Mlotek, you brought up
16 in your written submission a request, and actually
17 the motion to revisit the previous motion.

18 What I'd like to hear from Board members
19 if they have the opinion of opening that up to
20 revisit that issue, and I would gladly yield the
21 microphone to anyone that wants to speak on that.

22 MR. MLOTEK: Just to clarify, we weren't
23 necessarily urging that the Board consider that as a
24 preliminary matter to this. We understood, and we
25 accepted and respected the Chair and the Board made

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1 before that they would just like to hear the entire
2 case in chief since everyone had prepared it. So
3 that's fine with us.

4 In other words, our request was simply
5 that in the fullness of time when you do in fact
6 deliberate on this and you review all its complexity
7 and all the arguments for and against, we do wish you
8 will revisit this issue of whether the Board has
9 jurisdiction over this in the first place.

10 CHAIRMAN GRIFFIS: I see.

11 MR. MLOTEK: We're not trying to impede
12 the --

13 CHAIRMAN GRIFFIS: Okay. I think that
14 makes a lot more procedural sense than reminding us
15 that we do have the ability to dismiss this for want
16 of jurisdiction. We'll absolutely take that under
17 deliberation.

18 In that case then, we'll have you have a
19 seat, get comfortable. And when you're ready, you
20 can begin.

21 MS. BELL: Thank you, Mr. Chairman.

22 We filed a supplement earlier today along
23 with a declaration from the acting Zoning
24 Administrator, Mr. Noble. I hope the Board members
25 received a copy of that.

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1 CHAIRMAN GRIFFIS: Certainly received it
2 today.

3 MS. BELL: I understand.

4 CHAIRMAN GRIFFIS: Has everyone else?
5 Was it served on anyone?

6 MS. BELL: Yes, it was served on the
7 parties.

8 CHAIRMAN GRIFFIS: Okay.

9 MS. BELL: Mr. Noble could not be with us
10 today, but we do have the Zoning Chief here. And so
11 that we don't get into the same problem we got into a
12 little bit earlier, I will just talk about a few
13 facts and from that point turn it over to the
14 witness.

15 If I may?

16 CHAIRMAN GRIFFIS: Oh, please, proceed.

17 MS. BELL: All right. And one other thing
18 I would like to mention, I indicated in our filings
19 that there were two permits that were issued, one
20 having to do with the exterior work related to the
21 fence. There was also a second permit. It's not
22 really at issue here, but there was also a second
23 permit issued with regard to the fence. So I just
24 want to point that out so that the record is complete
25 and accurate.

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1 CHAIRMAN GRIFFIS: So there's two permits
2 regarding the fence?

3 MS. BELL: Yes.

4 CHAIRMAN GRIFFIS: Okay.

5 MS. BELL: The exterior work. all the
6 parties had sort of referred to two permits; one for
7 the interior work and one for the exterior work.

8 Okay. As we indicated in our filing, we
9 believe that this is relatively simple case with
10 regard to the Foreign Missions Act.

11 The Foreign Missions Act as codified in
12 the D.C. Code can be interpreted by the Zoning
13 Administrator and was interpreted by the Zoning
14 Administrator and DCRA with regard to both this case
15 and other cases of transfers.

16 As we pointed out, under the Federal
17 statute it's at 22 USC 4301, for the D.C. Code it's
18 at section 61301. We think the pertinent statute
19 that applies to this case, which is a transfer of a
20 foreign mission at a site in which a foreign mission
21 has been located since 1958; that's 2319 Wyoming
22 Avenue, Northwest.

23 The Republic -- and I apologize if I'm
24 pronouncing incorrectly -- Hashimite Kingdom of
25 Jordan took possession of that property in December

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1 2, 1958. And they've used that property continually
2 as a chancery. It's zoned R-1-B District.

3 The Republic of Yemen purchased that
4 property from Jordan in 2001 to also use it as a
5 chancery. Following that they obtained consent from
6 DCRA and building permits to make minor changes to
7 the facility. They did interior work and they also,
8 as I said just earlier, got two permits for the
9 exterior work. Both the buyer and the seller of the
10 property are both embassies, and I don't think any of
11 the parties here argue that they are not. And none
12 of the parties here argue that the use of the
13 property changed between the Kingdom of Jordan and
14 the Republic of Yemen.

15 We believe the issue here with regard to
16 the appellant is the appropriate interpretation of
17 the Foreign Missions Act as it is also codified in
18 the D.C. Code, not just the Federal statute and its
19 relationship to the local regulations, the zoning
20 regulations.

21 As you know, the appellant has argued
22 that 201.1 govern this particular transfer. In other
23 words, that an embassy -- excuse me. Not an embassy,
24 a chancery does not as a matter of right have the
25 opportunity to transfer it's use to a subsequent

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1 foreign ministry without FMBZA approval. First of
2 all, with regard to the issue of jurisdiction, the
3 District believes this Board does have jurisdiction
4 to hear this matter and it is not a matter that needs
5 to be brought before the FMBZA for the reasons that
6 it argued in the earlier hearing.

7 The second issue with regard to the
8 appropriate interpretation of the Foreign Missions
9 Act, the District would obviously argue that it's a
10 appropriate jurisdiction is as it is expressly
11 stated. And as I said, 13 06H, and if I could read
12 that for the Board.

13 "Approval by the BZA or the Zoning
14 Commission is not required for continuing use of a c
15 chancery by a foreign mission to the extent that the
16 chancery was being used by a foreign mission on
17 October 1, 1982." And the term chancery and embassy
18 are defined in the statute.

19 Since Jordan had use of that property in
20 1982 as a chancery, the Zoning Administrator
21 correctly determined that that continued use could be
22 transferred to a subsequent foreign mission, which in
23 this case was the Republic of Yemen under that
24 particular statute.

25 Now, the issue has arisen with regard to

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1 the history of practice of the Zoning Administrator
2 and other cases of transfers, and much has been sort
3 of argued by the appellant about the appropriateness
4 of the history. What we can say is as the State
5 Department has noted, the Zoning Administrator has
6 consistently allowed transfers of this nature where
7 the use is the same with regard to a subsequent
8 foreign mission in adherence to the Foreign Missions
9 Act, not in adherence, necessarily, to the local
10 regulations.

11 Now, the appellant has also offered the
12 Zoning Commissioners' order 509-A which he applied to
13 his original submission. And we made earlier
14 arguments with regard to that particular order
15 dealing with outlander chanceries; that is chanceries
16 that are outside of the Diplomatic Overlay. We're
17 not going to raise any other issues with regard to
18 that. That's the position that we have.

19 With regard to this particular instance,
20 the 2319 Wyoming address, that address isn't outside
21 of Diplomatic Overlay. It is indeed inside. So that
22 particular order wouldn't even apply to this
23 particular case.

24 Now, if there aren't any other questions
25 with regard to the District's legal argument, we'll

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1 have the Zoning Chief talk a little bit about this
2 transfer in particular.

3 I might add that with regard to the
4 history of the Zoning Administrator and transfers,
5 the Department of State provided a declaration from
6 Mr. Massey who talked about the instances in which
7 the transfer was done in this manner. And Mr.
8 Noble's declaration also supports all of that
9 information and then provides some other information
10 about the internal DCRA process.

11 CHAIRMAN GRIFFIS: Okay. Thank you.

12 Can you briefly address some of the
13 information that you had in your first filing of
14 today, and that is how the District deals with the
15 combination of chancery/embassy uses if it's under
16 one roof and how it would, in fact, is there a
17 threshold difference of the majority of use in a
18 building that make the District look at it
19 differently in terms of what we're dealing with, or
20 any other aspect?

21 MS. BELL: I think it might be best to
22 have our witness, so I don't get into that problem of
23 becoming a witness.

24 CHAIRMAN GRIFFIS: Okay. Ms. Miller,
25 your question?

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1 VICE CHAIRMAN MILLER: Could you refresh
2 my memory, maybe other Board members, of the Zoning
3 Administrator order you're referring to 509-A?

4 MS. BELL: Yes. That was apparently
5 attached to Mr. Nettler's original submission. There
6 was an original submission and then, I think, revised
7 it. And then he provided a response recently. So it
8 would be the first submission that he provided. And
9 if you'll just give me a minute.

10 He provided it with his statement in
11 support of his appeal. And it's attached.

12 BOARD MEMBER ZAIDAIN: It's a Zoning
13 Commission order, correct?

14 MS. BELL: Correct.

15 VICE CHAIRMAN MILLER: What's your point
16 with respect to that Zoning Commission order?

17 MS. BELL: Well, he offered that as
18 support with regard to the interpretation of the
19 Zoning regulations. And what we would like the Board
20 to note is that particular order relates to outlander
21 or outlier chanceries. In other words, chanceries or
22 foreign embassies that are looking for locations
23 outside the Diplomatic Overlay. This particular case
24 does not deal with that kind of circumstance.

25 VICE CHAIRMAN MILLER: Okay. Thank you.

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1 CHAIRMAN GRIFFIS: Mr. Zaidain?

2 BOARD MEMBER ZAIDAIN: Yes. You've
3 mentioned there were two permits for exterior work,
4 is that correct?

5 MS. BELL: Yes. That's right.

6 BOARD MEMBER ZAIDAIN: Okay. What was
7 the substance of those permits? I know in the
8 previous hearing I think there were some discussion
9 about a retaining wall being repaired.

10 MS. BELL: Yes.

11 BOARD MEMBER ZAIDAIN: And then now
12 you're saying it's a fence. And I just wanted some
13 clarification on that, and maybe Ms. Ogunneye can
14 provide it. I'm not sure who to direct the question
15 to. But can you give us some substance as to about
16 what these permits were for, and specifically whether
17 or not there was any zoning issues related to these
18 permits?

19 MS. BELL: Okay. I will allow her to
20 talk to the zoning issues. But what I can say is
21 initially what we talked about was that there was
22 exterior work done because they had a fence that
23 needed to be repaired. And so that was what that
24 permit was issued for.

25 And then there was a subsequent permit

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1 issued so that they could put up an iron gate.

2 BOARD MEMBER ZAIDAIN: Okay. I mean,
3 this wasn't replacing any existing iron gate? It was
4 a new iron gate, do you know?

5 MS. BELL: Yes, that's my understanding.

6 BOARD MEMBER ZAIDAIN: Okay. And if you
7 wouldn't mind, if your witness could talk about
8 whether or not this represented any zoning issues,
9 I'd appreciate that.

10 I'm sorry, what did you want her to
11 address?

12 BOARD MEMBER ZAIDAIN: I didn't want to
13 hold up your presentation, I was just asking if you
14 could just -- at whatever time during your
15 presentation if you could just elaborate on whether
16 or not there were any zoning issues related to the
17 fence and the iron gate. Or just the exterior work
18 permits themselves, if there's anything else attached
19 to that.

20 MS. OGUNNEYE: Right. I'm trying to
21 determine if the fence was actually along the
22 property line or within the property line.

23 BOARD MEMBER ZAIDAIN: Okay.

24 MS. OGUNNEYE: It makes a difference if
25 it's outside of the property lot lines, then it's not

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1 a zoning issue.

2 BOARD MEMBER ZAIDAIN: But if it's
3 inside, it is a zoning issue?

4 MS. OGUNNEYE: Correct.

5 BOARD MEMBER ZAIDAIN: Okay. If you
6 can't answer this now, I know I'm asking some
7 detailed questions but, you know, just if you could
8 let us know where in the zoning it regulates fences.
9 And like I said, you don't have to ask it now. But
10 I think it would be helpful for us to know what parts
11 of the zoning regulations these permits had to deal
12 with, aside from the issues of use as an embassy and
13 chancery.

14 Like I said, if you don't have it now, I
15 don't want to hold up the presentation but it might
16 help at a later time.

17 CHAIRMAN GRIFFIS: Well, let's start with
18 the basics. Do we have that sheet, that drawing in
19 the record?

20 MS. BELL: No, you do not. Because that
21 only deals with the fence.

22 CHAIRMAN GRIFFIS: Going to answer all of
23 Mr. Zaidain's questions. Why don't we put it in?

24 MS. BELL: Okay.

25 CHAIRMAN GRIFFIS: When you get a chance,

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1 we get a copy.

2 Okay. Let's go to you.

3 MS. OGUNNEYE: We have submitted a
4 declaration from Danzil Noble, the Acting Zoning
5 Administrator. And I've had the opportunity to
6 review it. And I am in agreement that's everything
7 that's stated therein.

8 Basically, he pretty much covers how BLRA
9 reviews chanceries that do come before us.

10 The key point that I'd like to point out
11 is that 2319 Wyoming happens to be in the Diplomatic
12 Overlay. And under the Diplomatic Overlay -- the
13 Diplomatic Overlay was established to implement the
14 Foreign Missions Act. And the Foreign Missions Act
15 states that for continuing use of a chancery by a
16 foreign mission to the extent of the -- that the
17 chancery was being used for a foreign mission on or
18 before the effective date of this section on October
19 1, 1998. And that's pretty much the section by which
20 we -- the section we applied in reviewing this
21 address.

22 The other point I'd like to note is that
23 uses run with the land as opposed to the operator.
24 And there have been court of appeal opinions
25 established to affirm that uses do run with the land

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1 and not with the operator.

2 Unless there's any other questions,
3 that's pretty much my stand.

4 Oh, I want to add one more thing, which
5 is that whenever there's a new chancery or an
6 addition to an existing chancery, then that needs to
7 be put before the FMBZA.

8 CHAIRMAN GRIFFIS: What's a new chancery?

9 MS. OGUNNEYE: Brand new, it's not an
10 existing use at any given address.

11 CHAIRMAN GRIFFIS: Okay. Questions? Ms.
12 Miller?

13 VICE CHAIRMAN MILLER: Well, do you mean
14 just new construction or do you mean if a chancery
15 was going into a building that previously wasn't a
16 chancery?

17 MS. OGUNNEYE: Correct. That's what I
18 mean by new.

19 VICE CHAIRMAN MILLER: That includes that
20 building that wasn't a chancery?

21 MS. OGUNNEYE: Correct. As long as the -
22 --

23 VICE CHAIRMAN MILLER: It would have to
24 go before the FMBZA, is my question, if it was moving
25 into a building that wasn't new but the building

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1 hadn't been used as a chancery before?

2 MS. OGUNNEYE: Correct.

3 VICE CHAIRMAN MILLER: Okay.

4 BOARD MEMBER ZAIDAIN: And if I just kind
5 of stick within those lines. If there's an existing
6 chancery with a new country moving into it, a new
7 foreign mission, and they're going to expand it so
8 like in this instance, as part of the permit they
9 were going to add a new wing addition, would that
10 come before the FMBZA?

11 MS. OGUNNEYE: Correct. Yes, it will.

12 BOARD MEMBER ZAIDAIN: Okay. Thank you.

13 CHAIRMAN GRIFFIS: Any other questions?

14 MS. BELL: Yes. There are actually two
15 other things I would like to note. In my submission
16 I did indicate hat there is the preemption clause. I
17 note that Ms. Nettler did not comment on that
18 particular provision, but both the State Department
19 and the District are in agreement that the Foreign
20 Missions Act does include a clause that relates to
21 preemption. And we believe it also is helpful for
22 analysis in this particular case. In fact, to the
23 extent that it specifically refers to local zoning
24 regs and when they are in conflict with the Federal
25 statute. And that is 4306 that the District added in

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1 their submission.

2 If I could just have a moment.

3 Nothing in the other statutes 6-1302 and
4 I see, Ms. Miller, you're a little confused. 6-1301
5 and subsequent provisions is the Foreign Mission Act
6 in the D.C. Code. 6-1306 is the preemptive statute.

7 And that says, and I'll just read the pertinent
8 part, nothing in any of the statutes 1302 to 1305 and
9 excluding actually the provision that we're talking
10 about today that relates to location and expansion
11 and replacement may be construed to preempt any state
12 or municipal law or government authority regarding
13 zoning land use and etcetera.

14 So the appellant actually is incorrect in
15 his assessment that Congress did not specifically
16 take a look at instances when there is a conflict
17 between the local zoning regs and the statute, and
18 neither did the City Council when it made a
19 determination to adopt it.

20 VICE CHAIRMAN MILLER: And what is 4306?

21 MS. BELL: I'm sorry?

22 VICE CHAIRMAN MILLER: You made
23 reference, I thought, a statutory provision 4306.

24 MS. BELL: That's the Federal statute.

25 You know, the Federal statute is 22 YSC 43 00

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1 VICE CHAIRMAN MILLER: Okay.

2 MS. BELL: And D.C. is 6-13.

3 VICE CHAIRMAN MILLER: Thank you.

4 MS. BELL: Now, with regard to the
5 additional arguments, if I could just say two words
6 about that because I guess I've already complained
7 about that. But to the extent that the appellant has
8 raised the issue about whether not the Zoning
9 Administrator is the proper entity to interpret the
10 zoning regs and the D.C. Code, we don't have any
11 comment because we don't think there's any legal
12 support to that premise at all to his argument that
13 the State Department is attempting to enforce the
14 Foreign Missions Act instead of interrupting it.
15 I'll let Mr. Mlotek deal with that.

16 To the issue of the grandfathering
17 provisions, we really don't think that this was the
18 type of case that we need to discuss grandfathering,
19 because we believe that it is something that you can
20 determine and analyze looking at the express lane,
21 which are the provision. The District really would
22 not like to get involved in an argument about what's
23 a proper grandfathering use.

24 And the last argument he appeared to
25 raise in his, I guess, response had to do with the

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1 jurisdiction of the board. and we've commented on
2 that.

3 All right. Is there any other information
4 we can provide?

5 CHAIRMAN GRIFFIS: Yes. Can you bring
6 some further clarification to your statements in your
7 submission that we received today? On page 3 of it
8 and going to this issue, it indicates that although
9 the statute allows for local zoning regulations to
10 preempt its requirements, it does not provide for the
11 circumstances upon application of section 61307. And
12 also then to follow up to say that you make a
13 statement that's fairly bold. I guess this is now on
14 page -- no, maybe it's not making sense to me because
15 all my pages are incorrectly tabulated. Well, I
16 don't want to say.

17 MS. BELL: And I'm not quite sure I meant
18 to be bold.

19 CHAIRMAN GRIFFIS: The appellant's
20 contention is the Zoning Administrator must adhere to
21 the D.C. zoning regulations in all circumstances is
22 not well founded.

23 MS. BELL: That's correct. Our point
24 there is that the Zoning Administrator's job is to
25 adhere to the applicable law. And to the extent that

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1 here may be some inconsistencies with regard to, as I
2 said earlier, local regulations and a Federal statute
3 or even with regard to a statute that is codified in
4 the D.C. Code as a D.C. law, he would be obligated
5 to follow the law.

6 Now, there was a little discussion with
7 regard to areas where the zoning regulations may be
8 inconsistent or may seemingly appear to be
9 inconsistent with a D.C. statute. And in those
10 cases, the Zoning Administrator would have to make a
11 determination about which laws is applicable and
12 which to follow. But he is not charged --

13 CHAIRMAN GRIFFIS: He would decide which
14 laws to follow and which statutes were correct?

15 MS. BELL: No. As I said before, the
16 statute would be the law -- the D.C. Code would be
17 the law.

18 CHAIRMAN GRIFFIS: Right.

19 MS. BELL: As opposed to local regs. The
20 appellant's argument is that the local regulations
21 would be the preeminent law in this area if it is
22 inconsistent with the FMA, whether it's the Federal
23 statute or it's the D.C. Code.

24 There are circumstances, as I understand
25 from our zoning division, where the regulations are

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1 not as -- are not consistent with new case law coming
2 out of the court of appeals or not necessarily
3 consistent with the D.C. code or the law as codified
4 in the D.C. Code. And although those instances are
5 rare, apparently they do exist. And that is also
6 part of the D.C. Administrator's obligation to make
7 recommendations about changes to the Commission.
8 Because, as you know, the D.C. regs often times are
9 not necessarily --

10 CHAIRMAN GRIFFIS: But isn't that --
11 making recommendations for possible additions or
12 corrections to bring them into compliance and then
13 actually rendering a decision about what is
14 appropriate or what rules or what doesn't, or
15 actually interpreting the D.C. statute?

16 MS. BELL: Well, you know, the Zoning
17 Administrator has several roles. One of them is, as
18 I noted in the reorganization plan, one of them is to
19 make recommendations to the Zoning Commission to make
20 recommendations --

21 CHAIRMAN GRIFFIS: Well, I don't contest
22 that.

23 MS. BELL: -- with regard to the zoning
24 regs. So that's one of his duties.

25 CHAIRMAN GRIFFIS: I understand.

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1 MS. BELL: Whenever that person takes the
2 position.

3 With regard to the appropriateness of
4 making an assessment about which law is applicable,
5 you cannot apply a law that -- you can't apply a
6 local regulation to the extent that it eviscerates
7 the priority of a federal law or D.C. law.

8 CHAIRMAN GRIFFIS: Okay. Any other
9 questions? That's all we have then.

10 MS. BELL: Okay. Thank you very much.

11 CHAIRMAN GRIFFIS: Oh, I'm sorry. That's
12 it for you? Excellent.

13 MS. BELL: Yes.

14 CHAIRMAN GRIFFIS: That's well done.
15 Let's open you up to cross examination at this point.

16 MS. BELL: I was just moving over.

17 CHAIRMAN GRIFFIS: Oh, good. Good. I
18 didn't want to lose you.

19 MR. NETTLER: Richard Nettler for the
20 appellant. Actually, I think where the Chairman has
21 left off is probably a good place to start.

22 I'm going to direct my questions to the
23 Acting Zoning Administrator. But are you familiar
24 with the Reorganization Act that established the
25 responsibilities for the Zoning Administrator?

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1 MS. OGUNNEYE: Sorry. State that again.

2 MR. NETTLER: Are you familiar with the
3 Reorganization Act adopted by the Mayor that
4 establishes the Department of Consumer and Regulatory
5 Affairs as well as the Zoning Administrator's
6 responsibilities?

7 MS. OGUNNEYE: Yes, I am.

8 MR. NETTLER: Okay. Could you tell me
9 where in the reorganization plan or actually there
10 are a number of plans, it provides the Zoning
11 Administrator with the authority to interpret and
12 adopt regulations related to zoning?

13 MS. BELL: I actually would object to
14 that question. That's actually a legal question and
15 she is the Chief of the Zoning Department. That's
16 the first thing.

17 The second thing is as the lawyer, I
18 noted where in the reorganization plan in my
19 supplement. So if you want to ask her --

20 MR. NETTLER: Since the Zoning
21 Administrator purports to be the person whose made
22 these decisions regarding these various
23 responsibilities that they have and don't have, I
24 think it's fair to ask the Zoning Administrator
25 whether the Zoning Administrator believes she has the

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1 authority to make these decisions.

2 CHAIRMAN GRIFFIS: I agree. I don't
3 think it's stretching into a legal interpretation.
4 He's just asking her where she gets her knowledge for
5 what she's stated that she does.

6 MS. BELL: I guess I'm a little confused.
7 He asked where in the reorganization plan, which as
8 many people know, there are several reorganization
9 plans. It's very confusing. That is a legal
10 question. Like where in the law as opposed to saying
11 where do you understand this to be part of the --

12 CHAIRMAN GRIFFIS: Legal or not, it's
13 certainly more expeditious if he points right to it
14 and asks if that is --

15 MR. NETTLER: Well, she says she's
16 familiar. I can't find anything in the
17 reorganization plan that gives them this authority,
18 so I'm trying to find out if she's aware. She says
19 she is. I've asked her where.

20 CHAIRMAN GRIFFIS: Okay.

21 MS. OGUNNEYE: Well most of what we go by
22 is whatever is in the zoning regulations unless it
23 states otherwise. And in this particular case we're
24 working with a Diplomatic Overlay that refers to the
25 Foreign Mission Act. And in this particular case

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1 that is what we pretty much --

2 MR. NETTLER: Okay. Where in the overlay
3 that was adopted by the Zoning Commission does it ask
4 the Zoning Administrator to look at the Foreign
5 Missions Act when interpreting the regulations that
6 the Zoning Commission adopted?

7 MS. OGUNNEYE: Okay. Under the general
8 provisions, it tells you under section 1000.1 that
9 the mixed used Diplomatic Overlay District is
10 established to implement the Foreign Missions Act,
11 which is approved August 24, 1982.

12 MR. NETTLER: Okay. The Zoning
13 Commission is providing a predicate for why it's
14 doing what it does.

15 MS. OGUNNEYE: Correct.

16 MR. NETTLER: Where in that section does
17 it say that the Zoning Administrator should in
18 performing its responsibilities look to the Foreign
19 Missions Act in terms of what it must do with regard
20 to these regulations?

21 MS. OGUNNEYE: Again, I mean the best way
22 I can answer it is when you look at the Foreign
23 Missions Act --

24 MR. NETTLER: No, I'm asking you -- let's
25 go to the regulations. Where in the regulations --

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1 we're dealing with chapter 10 of the zoning
2 regulations that was adopted by the Zoning
3 Commission. Where in those regulations, this is a
4 very simple question, where in this regulations does
5 it direct the Zoning Administrator to look to the Act
6 when applying these regulations as distinct from the
7 regulations themselves?

8 MS. BELL: If I could just interrupt for
9 a second. You know, I think if the witness can just
10 answer, and if that's the answer she provides, that's
11 the answer she provides. The badgering and cutting
12 her off and all that, it's not necessary.

13 MR. NETTLER: Okay.

14 CHAIRMAN GRIFFIS: I'll keep an eye and
15 ear on it.

16 Do you understand the question that's
17 before you at this time, Ms. Ogunneye?

18 MS. OGUNNEYE: Yes, I do.

19 CHAIRMAN GRIFFIS: Can you answer the
20 question?

21 MS. OGUNNEYE: I've answered it the best
22 I can.

23 CHAIRMAN GRIFFIS: So you thought it had
24 been asked, and you've already answered it.

25 MS. OGUNNEYE: Yes.

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1 CHAIRMAN GRIFFIS: Mr. Nettler?

2 MR. NETTLER: Well, since I haven't heard
3 an answer, only objections to it --

4 MS. OGUNNEYE: No, I've given you the
5 answer, if you want to point out --

6 MR. NETTLER: So 1000.1 provides you with
7 that authority? It's your belief that that
8 subsection of the zoning regulations provides you
9 with that authority?

10 MS. OGUNNEYE: In respect to this
11 particular case, yes.

12 MR. NETTLER: Okay. You know that when
13 the Zoning Commission and the Board of Zoning
14 Adjustment adopts orders with regard to particular
15 developments, it provides in those orders that the
16 applicant for the relief that they were seeking must
17 also comply with the Human Rights Act? You're
18 familiar with that as well?

19 MS. OGUNNEYE: Yes.

20 MR. NETTLER: Okay. So when you are
21 looking at an application that's filed with you for a
22 project that's been approved by the Zoning Commission
23 or the Board of Zoning Adjustment, do you look at the
24 Human Rights Act or statute and apply those and make
25 interpretations of those as well?

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1 MS. OGUNNEYE: I don't see how that
2 pertains with this question.

3 CHAIRMAN GRIFFIS: Well, don't question
4 his question. Just answer it if you can.

5 MR. NETTLER: Do you?

6 MS. OGUNNEYE: Can you rephrase it,
7 please.

8 MR. NETTLER: You know that the Zoning
9 Commission and the Board of Zoning Adjustment
10 provides in its orders that for applications seeking
11 certain relief that there must be compliance with the
12 Human Rights Act by those applicants. And I'm asking
13 you that when those applicants coming before you
14 after obtaining those relief, do you interpret or
15 apply the Human Rights Act regulations or statute?

16 MS. OGUNNEYE: If it's stated in the BZA
17 order, yes, we will.

18 MR. NETTLER: And do you recall instances
19 when you've done so?

20 MS. OGUNNEYE: Personally no. Not with
21 Human Rights.

22 MR. NETTLER: Okay. Are there other
23 statutes of the D.C. Code that you understand that
24 you have a responsibility for interpreting and which
25 other agencies have the responsibility for adopting

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1 regulations?

2 MS. OGUNNEYE: I'm sorry. Could you
3 state that again.

4 MR. NETTLER: Are there statutes, are
5 there are D.C. Code statutes that you understand that
6 you have the responsibility for interpreting even
7 though other D.C. agencies have the responsibilities
8 for adopting regulations for those statutes?

9 MS. OGUNNEYE: Yes. Again, like I
10 stated. If it is specific in the DCMR Title 11, yes
11 it would apply.

12 MR. NETTLER: We're now off of the zoning
13 regulation.

14 MS. OGUNNEYE: Okay.

15 MR. NETTLER: I'm trying to understand
16 what it is -- how broad you think your authority is
17 to go beyond merely the application of the
18 regulations and to interpret statutes as well. And
19 I'm asking you are there other situations where you
20 believe that even though you don't the responsibility
21 for adopting the regulations, you can take on the
22 responsibility for interpreting and applying certain
23 D.C. code statutes?

24 MS. OGUNNEYE: I'm here in the capacity
25 of the Chief. And depending on what issue is in front

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1 of me, I would get input if I needed it from the
2 Acting ZA. Again, my first rule would be to check
3 with the DCMR 11. Wherever it refers me to, that is
4 where I would refer to and apply it.

5 MR. NETTLER: Okay. By DCMR 11 you're
6 referring to the zoning regulations?

7 MS. OGUNNEYE: Correct.

8 MR. NETTLER: So beyond the zoning
9 regulations you don't have any -- you're not able to
10 testify here today as to what other circumstances
11 outside of Title 11 but other D.C. Codes, other D.C.
12 regulations that you believe you have the
13 responsibility for interpreting?

14 MS. OGUNNEYE: In this particular case
15 based on the Foreign Missions Act --

16 MR. NETTLER: I'm not asking about --

17 MS. OGUNNEYE: -- that is what I am here
18 for.

19 MR. NETTLER: Okay. You said that -- you
20 spoke about the preemption provision of the Foreign
21 Missions Act. Can you tell me what you understand
22 the preemption provision mean?

23 MS. BELL: Again, I would have to object
24 again. That is something that the lawyer raised as
25 part of her legal argument. she's here to talk about

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1 the factual aspects of the --

2 CHAIRMAN GRIFFIS: Okay. Mr. Nettler,
3 maybe you can phrase it in some fashion that she can-
4 -

5 MR. NETTLER: I'll move on. I'll strike
6 that.

7 Do you believe that the Zoning
8 Administrator has the authority to ignore a Zoning
9 Commission regulation if it believes the law is
10 different than what the regulation provides?

11 MS. OGUNNEYE: No.

12 MR. NETTLER: No. Okay.

13 You have Chapter 10 in front of you?

14 MS. OGUNNEYE: Yes, I do.

15 MR. NETTLER: Okay. Good.

16 Could you tell me where in Chapter 10 it
17 provides that only some foreign missions seeking to
18 locate in a D zone must, as distinct from all foreign
19 missions, must seek Board of Zoning Adjustment
20 review? Can you tell me where in, I guess it goes
21 from sections 1000.1 to 1002.10.

22 MS. OGUNNEYE: In respect to additions,
23 new chanceries or --

24 MR. NETTLER: No. I said where in these
25 regulations does it distinguish between some foreign

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1 missions that are seeking to locate in a zone, a
2 diplomatic zone area and other foreign missions that
3 want to locate there? Is there some distinction
4 that's made in these regulations between the two as
5 to whether they have to seek Board of Zoning
6 Adjustment review or not?

7 MS. BELL: Again, and I would --

8 MS. OGUNNEYE: The beginning of the
9 chapter refers to the Foreign Missions Act. When I
10 refer to the Foreign Missions Act it tells me for
11 continuing use of a chancery from one government to
12 the next is allowed.

13 MR. NETTLER: I'm asking you about the
14 regulations.

15 MS. OGUNNEYE: And that's the case at
16 hand.

17 MR. NETTLER: Let's deal with the
18 regulations themselves. Where in the regulations
19 does it say that?

20 MS. BELL: I'm going to object because --

21 MS. OGUNNEYE: 1000.1

22 MS. BELL: Right.

23 CHAIRMAN GRIFFIS: Okay. Let's slow down
24 a little bit.

25 Ms. Ogunneye, of course when your

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1 attorney objects, you might want to give her a moment
2 to state her objection before you continue on.

3 The objection is?

4 MS. BELL: It's the same objection.

5 Unfortunately, what's happening here is he is asking
6 the Chief of the Zoning branch to make a lot of legal
7 arguments and to support the legal arguments made by
8 counsel.

9 She just said repeatedly, and I've
10 counted it now five times, that she based her
11 decision on to the extent she understand the decision
12 was based on her interpretation of 1000 which refers
13 to the Foreign Missions Act. And he has repeatedly
14 asked the question four or five different times and
15 sort of aggressively has tried to limit her to what
16 he wants her to say. And that is her answer.

17 MR. NETTLER: If I might respond?

18 CHAIRMAN GRIFFIS: Quickly.

19 MR. NETTLER: Because I think maybe I
20 shouldn't hold back as much as I think I have.

21 But the fact is that the Zoning
22 Administrator's Office has misconstrued the arguments
23 that have been made by the appellant in this matter.
24 I am trying to get -- notwithstanding that fact, I'm
25 trying to get the Zoning Administrator herself to

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1 focus in on exactly where she believes her authority
2 exists to take the position that she says has been
3 taken consistently by the Office of the Zoning
4 Administrator in the past with regard to the
5 dichotomy between the regulations themselves and what
6 they provide and she thinks the statute provides.

7 CHAIRMAN GRIFFIS: I understand that, Mr.
8 Nettler. But doing a fishing expedition through the
9 regulations and trying to have her pinpoint, if you
10 want to illuminate a couple of sections it may also
11 override the objections that you're hearing --

12 MR. NETTLER: Well, since I cannot find
13 anything in the regulations themselves that support
14 the position that she's taking, I guess my --

15 CHAIRMAN GRIFFIS: Certainly there's a
16 point in the section you could point to that refutes
17 her assertions then, could you not?

18 MR. NETTLER: Well if we want to go about
19 it that way.

20 Let's look at 1002.1. That provides a
21 Board of Zoning Adjustment review, does it not?

22 MS. OGUNNEYE: Yes, it does.

23 MR. NETTLER: Okay. And it provides that
24 to locate, replace or expand a chancery in a R-D-5 R-
25 5-ESP or D District an application shall be made to

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1 the Board of Zoning Adjustment. Is there anywhere in
2 that section where it says only if there's not an
3 existing chancery located on the site? Just look at
4 the language of that particular section.

5 MS. OGUNNEYE: Yes.

6 MR. NETTLER: Okay. Does it distinguish
7 between new chanceries, new chanceries on the site of
8 old chanceries, new chanceries that are just seeking
9 to expand, old chanceries seeking to expand? Is
10 there any distinctions that are made there other than
11 the fact that to locate, replace or expand a chancery
12 in a D District an application shall be made to the
13 Board of Zoning Adjustment?

14 MS. OGUNNEYE: What I read is to locate,
15 replace and expand a chancery in the R-5-D --

16 MR. NETTLER: Okay. It doesn't say "and
17 expand," does it? It says "or expand," right?

18 MS. OGUNNEYE: Right. But in specific
19 zones, which would be the R-5-D, R-5-E and SB --

20 MR. NETTLER: And D? And there's a D
21 District there, too, isn't there?

22 MS. OGUNNEYE: I can only state it the
23 way it's been applied. And --

24 MR. NETTLER: Okay. I'm asking you, does
25 it say D District?

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1 CHAIRMAN GRIFFIS: 1002.1?

2 MR. NETTLER: Yes.

3 MS. OGUNNEYE: Yes.

4 CHAIRMAN GRIFFIS: I think we're all --

5 let's move on.

6 MR. NETTLER: Fine. All right.

7 And you're saying this --

8 MS. OGUNNEYE: I'm sorry.

9 MS. BELL: She hasn't said anything about
10 it. It's your question.

11 MR. NETTLER: And does this -- well, she
12 hasn't answered it either. And you're saying that
13 somewhere in this section that distinguishes between
14 chanceries that are seeking to locate -- locate in a
15 D District on the site of an existing chancery as
16 distinguished from one where a chancery doesn't exist
17 in a D District.

18 MS. BELL: I'm going to object to that.
19 She hasn't made any at all conclusion. She hasn't
20 even cited or made --

21 CHAIRMAN GRIFFIS: Let's take a break.

22 (Whereupon, at 2:23 p.m. a recess until
23 2:24 p.m.)

24 MR. NETTLER: You know, I'm trying to
25 move this thing along, and maybe not as quickly as we

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1 all would like, but as directly as possible. And
2 that is I'm simply asking where in that section it
3 provides -- does that section provide --

4 MS. BELL: If I could just say briefly,
5 you know, we have not cited or relied upon this
6 section. This is he's sort of asking the question in
7 the reverse.

8 He has identified a section what he
9 believes is --

10 (Whereupon, loudspeaker announcement).

11 CHAIRMAN GRIFFIS: Okay.

12 MS. BELL: I think the gods are trying to
13 tell us something.

14 CHAIRMAN GRIFFIS: Perhaps. But that's
15 open for interpretation. Okay. Let's continue on in
16 all seriousness.

17 Let's not take up a lot of time in terms
18 of --

19 MR. NETTLER: Well, I didn't do what you
20 suggest, which you said I shouldn't do, which is a
21 fishing expedition.

22 CHAIRMAN GRIFFIS: Understand.

23 MR. NETTLER: Directing her to the
24 specific --

25 CHAIRMAN GRIFFIS: Understand. Let's get

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1 to it.

2 MR. NETTLER: -- provision that sets up
3 the responsibilities here. And I'm asking where in
4 that section it provides a distinction between
5 chanceries that are seeking to locate in a D Zone and
6 chanceries that are seeking in a D Zone that are
7 occupied -- is already occupied.

8 CHAIRMAN GRIFFIS: Indeed.

9 Ms. Ogunneye, do you understand the
10 distinction that he's drawing in 1002.1?

11 MS. OGUNNEYE: Yes, I do.

12 CHAIRMAN GRIFFIS: Do you see that at
13 all?

14 MS. OGUNNEYE: No.

15 CHAIRMAN GRIFFIS: Okay. Next question.

16 MR. NETTLER: Okay. Thank you.

17 MS. OGUNNEYE: My mike was off.

18 CHAIRMAN GRIFFIS: The answer was no.

19 Mr. Nettler?

20 MR. NETTLER: Thank you. You, I
21 understand, have adopted the declaration of Mr.
22 Noble, correct?

23 MS. OGUNNEYE: Correct.

24 MR. NETTLER: Okay. And you say that the
25 consisting position of the Office of the Zoning

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1 Administrator has been that whenever a chancery seeks
2 to locate at the site of a former chancery, that it
3 need not seek -- that it has been their position that
4 it need not seek Board of Zoning Adjustment approval,
5 is that correct?

6 MS. OGUNNEYE: Correct.

7 MR. NETTLER: Okay. Are you familiar
8 with the application of the Kingdom of Sweden to
9 locate at the site of the Republic -- the Chancery of
10 the Republic of Cape Verde?

11 MS. OGUNNEYE: What would that address
12 be?

13 MR. NETTLER: It's in the 2400 block of
14 Massachusetts Avenue.

15 BOARD MEMBER ZAIDAIN: Mr. Nettler, which
16 country was Sweden replacing in your question?

17 MR. NETTLER: Cape Verde.

18 BOARD MEMBER ZAIDAIN: Okay.

19 MS. OGUNNEYE: That would not be on our
20 list.

21 MR. NETTLER: So if that was the
22 situation in which an application was filed with the
23 Board of Zoning Adjustment to allow it to occupy the
24 site of a former chancery in a D Zone, would that be
25 inconsistent with what you're saying is the

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1 consistent position of your agency?

2 CHAIRMAN GRIFFIS: First of all, how
3 could she answer that?

4 MS. BELL: That's right.

5 CHAIRMAN GRIFFIS: In that she's not --
6 she's indicated it's not on her list.

7 Are you aware of the case that he's
8 talking about or the situation?

9 MR. NETTLER: Are you aware of all the
10 foreign mission applications that have been filed
11 since 1982?

12 MS. OGUNNEYE: I'm aware of the ones that
13 we do have on file, which I believe we put in a list.

14 MR. NETTLER: Okay. Is that the list
15 that the State Department gave you?

16 MS. OGUNNEYE: No.

17 MR. NETTLER: That was a list that you
18 generated?

19 MS. OGUNNEYE: Correct.

20 MR. NETTLER: All right. And how many
21 are on that list?

22 MS. OGUNNEYE: Fifteen.

23 MR. NETTLER: Okay. And if that list did
24 not include situations in which a chancery had sought
25 Board of Zoning Adjustment approval to locate on a

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1 site of a preexisting chancery, would you say that
2 that list was complete or not?

3 MS. BELL: I'm going to --

4 CHAIRMAN GRIFFIS: Do you understand the
5 question, Ms. Ogunneye?

6 MS. OGUNNEYE: Yes, I do.

7 CHAIRMAN GRIFFIS: You do?

8 MS. BELL: I don't understand it, and
9 quite frankly I'm going to object to it. I don't
10 know quite what he's saying. I guess if his point is
11 that --

12 CHAIRMAN GRIFFIS: No, don't -- ask him
13 then, can you restate it.

14 MR. NETTLER: If the witness understands
15 it --

16 CHAIRMAN GRIFFIS: Indeed.

17 MR. NETTLER: -- if the counsel doesn't
18 understand it.

19 CHAIRMAN GRIFFIS: Ms. Ogunneye?

20 MS. OGUNNEYE: My understanding is that
21 you're asking if everything in here is actually all
22 that there is since 19 --

23 MR. NETTLER: That's right. That's
24 correct. And if it isn't, is there a -- is that
25 everything that's in there?

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1 MS. OGUNNEYE: This is everything that
2 I've had access.

3 MR. NETTLER: Okay. So it's possible --

4 MS. OGUNNEYE: There could be more that I
5 might not have run into, but this is what we do have.

6 CHAIRMAN GRIFFIS: Okay.

7 MR. NETTLER: So it may not be accurate
8 to say that the consistent position has been that a
9 foreign mission seeking to locate on a site of an
10 existing foreign mission in a D Zone has always been
11 treated the same way?

12 MS. BELL: I'm going to --

13 MR. NETTLER: You haven't had access to
14 all of those applications, is it?

15 MS. BELL: I'm going to object to that.

16 CHAIRMAN GRIFFIS: On what?

17 MS. BELL: Because that's not her
18 testimony and her testimony is she looked at the
19 files and this is what DCRA has on record. There is
20 nothing to say that Sweden transferred the property
21 to Cape Verde other counsel has made an argument. He
22 hasn't provided any evidence of a transfer. He
23 hasn't provided any deed. He hasn't provided a CFO.
24 Nothing to even indicate that the transfer --

25 CHAIRMAN GRIFFIS: Okay. It seems like

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1 you're asking her to do a heck of a lot of
2 speculating on what is out there that she's not aware
3 of, and therefore not having a definitive list. So I
4 would say an objection would be more appropriately
5 stated as how can she answer that and what value
6 would her answer actually be?

7 MR. NETTLER: So your testimony is that
8 you cannot confirm that this is the entire list of
9 all chancery applications?

10 MS. OGUNNEYE: That's correct.

11 MR. NETTLER: Okay. Do you have section
12 201.1M?

13 MS. OGUNNEYE: Yes, I do.

14 MR. NETTLER: Okay. Could you explain
15 how this provision applies in your view, to what
16 circumstances this provision applies?

17 MS. OGUNNEYE: It applies to any chancery
18 existing on September 27, 1987 provided they met all
19 the requirements listed thereunder.

20 MR. NETTLER: Okay. And with regard to -
21 -

22 CHAIRMAN GRIFFIS: Hold on.

23 Mr. Mlotek?

24 MR. MLOTEK: Thank you. I don't know if
25 this is working.

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1 I have an objection to make.

2 CHAIRMAN GRIFFIS: Yes.

3 MR. MLOTEK: That Mr. Nettler's own
4 appeal, the description of his appeal, which was read
5 at the beginning of this session by Ms. Bailey,
6 states that what he is appealing is the decision of
7 the legal counsel of DCRA, not of the witnesses here.
8 In fact, not even of the Zoning Administrator, her
9 boss. What Mr. Nettler is appealing is a legal
10 decision, a legal opinion, if you will, a legal
11 interpretation or a legal determination.

12 So in point of fact really, much if not
13 all of Mr. Nettler's cross examination of this
14 witness is objectionable on the grounds of relevance.

15 It doesn't have any relevance since it is totally
16 irrelevant what this witness might say, either one
17 way or the other. The only thing that is relevant is
18 what decision the attorney, the general counsel for
19 DCRA took.

20 CHAIRMAN GRIFFIS: Understand the point,
21 Mr. Nettler?

22 MR. NETTLER: Yes. I thought Mr. Mlotek
23 was at the last hearing where the Board said that
24 they wanted a witness here who could testify from the
25 Zoning Administrator's Office rather than having me

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1 cross examine the attorney from whose decision we
2 were appealing, which apparently itself was based on
3 what the Zoning Administrator's interpretation.

4 So if what Mr. Mlotek is saying is that
5 the purpose of this continuance was a waste of time,
6 I would certainly disagree. We have a witness here
7 whose supposedly been presented by DCRA as capable of
8 affirming and providing testimony on the decisions
9 that they've made. And I think that she's certainly
10 appropriate for the one person to be asked questions
11 of on those interpretations.

12 MS. BELL: What I would say is I think
13 Mr. Mlotek is sort of underscoring my argument
14 throughout this -- that this is a factual witness.
15 And to the extent that he is trying to wrestle out of
16 her legal interpretations, it's inappropriate. It's
17 not only outside of the scope of her employment.
18 DCRA did not offer her for that. And not only is it
19 relevant -- not only to the extent that it's not
20 relevant, I am concerned based on some of the
21 responses that it will -- that this questioning will
22 sort of direct the Board in an area or down a path
23 that's really not appropriate.

24 With regard, for instance, to the list
25 that she's referring to that Mr. Nettler was able to

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1 wrestle out of her in argument that it was not an
2 accumulative list, well it is the files that were
3 available in BLRA that she reviewed. So that's why,
4 you know, my point about whether or not Sweden and
5 Cape Verde is even a transfer that we would have
6 documentation on. So it is an exhaustive list for
7 the agency.

8 So to the extent that he wrestled some
9 other --

10 CHAIRMAN GRIFFIS: Understand.

11 MS. BELL: You know, I think it's going
12 to sort of misdirect the Board.

13 CHAIRMAN GRIFFIS: Okay. I think there
14 is an equitable situation to do here. Mr. Nettler,
15 what I suggest is that we get through this
16 expeditiously, ask important question, get right to
17 the heart of the matter and let's move on.

18 I tend to agree in part with Mr. Mlotek's
19 position that this was an appeal and it is based on
20 the legal interpretation. However, I do agree with
21 the Board's decision to have a witness here, and that
22 is giving the rise -- giving the core of how that
23 decision would have arisen out of DCRA. And so, you
24 know, basically we're moving ahead in the same
25 direction, however I do want to move it a little bit

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1 more expeditiously.

2 Mr. Mlotek --

3 MR. NETTLER: Wait. I haven't had a
4 chance to respond to either of them yet before Mr.
5 Mlotek comes back.

6 CHAIRMAN GRIFFIS: Okay.

7 MR. NETTLER: The fact is that the --
8 excuse me, a chance to respond to DCRA. I did
9 respond to Mr. Mlotek.

10 The fact is that there have been factual
11 statements that have been made and interpretations
12 that are supposedly are consistent interpretations of
13 the Zoning Administrator, interpretations about their
14 responsibilities in looking to the act as opposed to
15 the regulations. And I think it's important for this
16 Board as to whether it accepts either one of those,
17 whether the factual interpretations or the legal
18 position being made by DCRA to understand what it is
19 that the Zoning Administrator understands the
20 regulations to provide. And the questions regarding
21 2001.1M are specifically addressed to that.

22 CHAIRMAN GRIFFIS: Okay. Follow up?
23 Yes?

24 MR. MLOTEK: So just to try to save the
25 Board's time in the end, with respect to any further

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1 questions that Mr. Nettler wants her to answer about
2 this famous case of Sweden, we can save a whole lot
3 of time.

4 We are very cognizant of this case.

5 MR. NETTLER: No, wait a minute. Wait.
6 This is testimony. Wait a minute.

7 CHAIRMAN GRIFFIS: I understand.

8 MR. NETTLER: Mr. Mlotek is getting into
9 testimony here. My questions on 2001.1 have nothing
10 to do with Sweden.

11 CHAIRMAN GRIFFIS: Right.

12 MR. NETTLER: If Mr. Mlotek wants to say
13 something about Sweden, then when he comes back he
14 can't do that. But that has nothing to do --

15 CHAIRMAN GRIFFIS: Understand.
16 Appreciate that.

17 MR. MLOTEK: I'm simply proffering --

18 CHAIRMAN GRIFFIS: Love the country.
19 Don't really care about it outside -- what we've just
20 heard. So let's move on.

21 I'm already way down a list of issues
22 passed that. So we left of at 201.1M.

23 MR. NETTLER: 1M1.

24 CHAIRMAN GRIFFIS: Right.

25 MR. NETTLER: As you as a Zoning

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1 Administrator tell me how that provision is
2 interpreted by you or the Zoning Administrator's
3 Office?

4 COMMISSIONER PARSONS: Mr. Nettler, I
5 think it would be helpful if that was read into the
6 record so some of us wouldn't have to go looking for
7 it.

8 MR. NETTLER: Let me do that. This is
9 under uses as a matter of right in the R-1 District.
10 It says "Chancery existing on September 22, 1978
11 provided that the following requirements shall be
12 met: After January 23, 1990 the continued use of the
13 chancery shall be limited to the government that
14 lawfully occupied on the chancery on that date."

15 Can you tell me what that means?

16 MS. OGUNNEYE: It means that whatever
17 chanceries that did exist before the date referenced
18 can -- it's just stating that the continued use of
19 the chancery shall be limited to the government that
20 lawfully occupied the chancery on that date. But
21 that's not the case at hand in an R-1 zone. And
22 usually when we have an underlying zone and an
23 overlay, the overlay is usually more restricting --
24 apply to more restricting.

25 MR. NETTLER: Okay. So in the R-1 zone

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1 let's say it doesn't have an overlay of a D on it,
2 what you're saying is that a chancery that existed as
3 of 1990 in an R-1 zone that does not have a D, cannot
4 -- the continued use of that building is solely
5 limited to that government?

6 MS. OGUNNEYE: Correct.

7 MR. NETTLER: Okay. I have no other
8 questions.

9 MS. BELL: I'm just a little -- she's
10 reinterpreting what you are asking about 201.1
11 correct?

12 MR. NETTLER: And she's answered the
13 question already. There aren't any more questions.

14 CHAIRMAN GRIFFIS: All right. Okay.

15 Mr. Mlotek?

16 MR. MLOTEK: Okay. I'll be real brief in
17 cross examination.

18 Ms. Ogunneye, in your job at DCRA would
19 it be correct to assume that you on many occasion are
20 required to interpret regulations?

21 MS. OGUNNEYE: Yes.

22 MR. MLOTEK: You would consider that to
23 be an inherent part of your job?

24 MS. OGUNNEYE: Yes, it is.

25 MR. MLOTEK: And if you get into a

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1 situation where there is some question about what a
2 regulation means or whether a regulation may be in
3 conflict with an underlying statute, what would you
4 do or whom in DCRA would you go to?

5 MS. OGUNNEYE: The Zoning Administrator.

6 MR. MLOTEK: Would you also go to your
7 attorneys?

8 MS. OGUNNEYE: Right. And general
9 counsel.

10 MR. MLOTEK: All right. So if you have a
11 question about interpretation of a regulation or a
12 statute, you go to your attorneys. And would you
13 think that that is an unusual manner of proceeding or
14 an unusual operation procedure for an administrator
15 in your position?

16 MS. OGUNNEYE: No.

17 MR. MLOTEK: Okay. That's all I have on
18 that issue.

19 CHAIRMAN GRIFFIS: What are we doing?
20 You guys want to take a moment and confer before the
21 cross examination questions continues.

22 MR. MLOTEK: No. She was asking
23 something else.

24 CHAIRMAN GRIFFIS: I can't imagine every
25 attorney is not objecting to this right now, but --

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1 MR. MLOTEK: I'm just going to leave it
2 there.

3 CHAIRMAN GRIFFIS: Okay. Redirect?
4 Nothing?

5 MS. BELL: Nothing.

6 CHAIRMAN GRIFFIS: Very well. Any last
7 clarification of the Board questions? Yes, Ms.
8 Miller?

9 VICE CHAIRMAN MILLER: I have a question
10 for Ms. Bell. With respect to your position on
11 statutory construction, the way I understand it is
12 you're saying that if a zoning regulation conflicts
13 with a D.C. statute or a Federal statute or a court
14 of appeals decision or a federal court decision, if a
15 federal law is at issue, that the statute of the
16 court decision prevails over the regulation. Is that
17 correct?

18 MS. BELL: Yes. I believe DCRA's
19 argument in this instance is that is correct?

20 VICE CHAIRMAN MILLER: Do you have other
21 instances where that has been the case with respect
22 to the zoning regulations?

23 MS. BELL: Actually, I hate to say it,
24 but can I confer with the zoning -- the zoning
25 division is far better able than we are to sort of

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1 identify instances when the zoning regs may not be
2 consistent.

3 CHAIRMAN GRIFFIS: Anything come to mind?

4 MS. BELL: Yes, it does. But I hate to
5 say this, could we give you another -- could we
6 research it and give you another example?

7 BOARD MEMBER ZAIDAIN: Are we talking
8 about looking at the regs and --

9 MS. BELL: Specific instances --

10 BOARD MEMBER ZAIDAIN: -- of where a reg
11 may be inconsistent with federal law, I mean just in
12 general? Is that what we're going for?

13 MS. BELL: The zoning regs.

14 BOARD MEMBER ZAIDAIN: The zoning regs?

15 MS. BELL: Yes.

16 CHAIRMAN GRIFFIS: The zoning regs.
17 Inconsistent with federal law.

18 BOARD MEMBER ZAIDAIN: Well, it seems
19 like if I understand it, isn't there a task force
20 that's looking at that?

21 MS. BELL: Yes.

22 BOARD MEMBER ZAIDAIN: I mean, the zoning
23 regs are pretty out to date all over the board.

24 MS. BELL: Right.

25 BOARD MEMBER ZAIDAIN: I'm not sure how

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1 much -- I mean, that might be a truckload of
2 information we don't have time for.

3 MS. BELL: Well, she asked for another
4 instance, I mean the problem is it raises other cases
5 that have been and are before you. For instance --

6 BOARD MEMBER ZAIDAIN: You don't have to
7 name any.

8 MS. BELL: So I feel a little awkward
9 saying.

10 BOARD MEMBER ZAIDAIN: Let's not.

11 MS. BELL: I mean, yes, there are other
12 instances.

13 VICE CHAIRMAN MILLER: Do you feel
14 awkward in mentioning in any other case that comes to
15 mind --

16 CHAIRMAN GRIFFIS: A case?

17 VICE CHAIRMAN MILLER: -- where a zoning
18 regulation has been inconsistent with a statute or a
19 court case and the Zoning Administrator has been
20 advised to follow the court case or the statute as
21 opposed to the regulation, which sounds like that's
22 what you're saying the Zoning Administrator should do
23 in this case?

24 MS. BELL: There has been some confusion
25 with the Zoning Administrator with cases involving

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1 the Fair Housing Act and Reasonabler Accommodations
2 and those kinds of issues.

3 CHAIRMAN GRIFFIS: Okay.

4 VICE CHAIRMAN MILLER: Thank you.

5 CHAIRMAN GRIFFIS: Any other question of
6 the Board? Any cross on that new single answer?

7 MR. NETTLER: With regard to the Fair
8 Housing Act, has the Zoning Administrator declined to
9 apply the zoning regulations where that issue has
10 been raised?

11 MS. OGUNNEYE: The zoning regulations
12 does refer to the Fair Housing Act, and that is the
13 way we would apply it. I think it's written
14 specifically --

15 MR. NETTLER: No. My question was have
16 you in instances where it's been alleged that the
17 Fair Housing Act and the zoning regulations are
18 inconsistent, refused to apply the zoning regulation
19 and instead applied your interpretation of the Fair
20 Housing Act?

21 MS. BELL: You know, again, I will say
22 this is a legal argument.

23 MR. NETTLER: No, this is not a legal
24 argument.

25 CHAIRMAN GRIFFIS: No. He's asking --

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1 and, frankly, Ms. Ogunneye, it's a yes, no or I don't
2 know answer. So if you don't understand the
3 question, ask Mr. Nettler to repeat it or rephrase it
4 so that you might. Because we should be able to move
5 on fairly quickly from this.

6 MS. OGUNNEYE: Okay. Can you please
7 rephrase that?

8 MR. NETTLER: Have there been instances
9 where someone has claimed to you that the application
10 of the zoning regulations would be inconsistent with
11 the Fair Housing Act and you have declined to apply
12 the zoning regulations and instead have rendered an
13 interpretation of the Fair Housing Act?

14 MS. OGUNNEYE: Yes.

15 MR. NETTLER: Okay. Has that also been
16 true with regard to the Religious Freedom Protection
17 Act?

18 MS. BELL: I'm going to object.

19 CHAIRMAN GRIFFIS: I think that's far
20 enough.

21 MS. BELL: That's outside the scope.

22 MR. NETTLER: Okay. Let's go to the Fair
23 Housing Act.

24 CHAIRMAN GRIFFIS: Can you turn your
25 microphone on, Ms. Ogunneye, please.

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1 CHAIRMAN GRIFFIS: Okay.

2 MS. OGUNNEYE: I'm sorry.

3 MR. NETTLER: Could you tell me what that
4 instance was with regard to the Fair Housing Act and
5 the zoning regulations.

6 CHAIRMAN GRIFFIS: I'm not sure we need
7 to know.

8 MS. BELL: I'm going to object to that,
9 also.

10 MR. NETTLER: Well, if all she can say is
11 yes without giving us an example, it's hard to see
12 whether that example is analogous to this situation.

13 CHAIRMAN GRIFFIS: Well, it comes from a
14 question of Ms. Miller.

15 MR. NETTLER: That's right.

16 VICE CHAIRMAN MILLER: I don't think we
17 have to know the specific case.

18 CHAIRMAN GRIFFIS: Right.

19 VICE CHAIRMAN MILLER: I think we have to
20 know whether or not DCRA has taken a consistent
21 position or not if that's -- which is their position.

22 That was the point I was getting to. I don't want to
23 get into other cases that may still be at issue, per
24 se.

25 CHAIRMAN GRIFFIS: Right. Nor do I, nor

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1 should we.

2 Okay. Anything else? Any other
3 redirect? Fabulous. Good. Thank you very much.

4 Mr. Mlotek, you ready to go?

5 MR. MLOTEK: And once again for the
6 record, and may it please this honorable board, I'm
7 Ron Mlotek, legal counsel of the Office of Foreign
8 Missions at the U.S. Department of State. With me
9 today is the Office of Foreign Missions Director of
10 Property and Travel Programs, Mr. Richard Massey who
11 is the author of the now famous Massey Declaration,
12 which was appended to our original submission and
13 talks about prior experiences in this area of
14 grandfathering.

15 Also Ms. Susan Benda of our Office of the
16 Legal Advisor, who is seated on my right.

17 Mr. Chairman, I know we are on a tight
18 schedule, so I'm going to be concise as I possibly
19 can be. Some would suggest that I'm not capable of
20 that, but we'll see if I can prove them wrong.

21 CHAIRMAN GRIFFIS: Good. And our clock
22 is also having some technical difficulty. Of course,
23 I have one in front of me which I'll just keeping
24 note of. If we close to ten minutes into 40, which
25 means 30 minutes in, I'll just let you know.

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1 MR. MLOTEK: Okay. I'll be watching.
2 I'm not going to, obviously, repeat
3 everything that is our submissions, just to hit the
4 highlights. And I'm going to take them a little bit
5 out of order, both for the purpose of adding a little
6 spice to the presentation and also to more directly
7 respond to what Mr. Nettler has said.

8 If you remember from the January 13th
9 hearing and again today, to some degree, Mr. Nettler
10 has hung virtually his entire case on this well known
11 zoning regulation 201.1M and spent a lot of time
12 trying to argue that it would take primacy or
13 supremacy even if a federal statute or a District
14 statute were in contravention of it.

15 The Zoning Administrator would be obliged
16 to follow this regulation, come hell or high water.
17 I suppose then leave it up to the courts is his
18 unstated implication if somebody wants to challenge
19 it.

20 As we noted in our reply submission, the
21 entirety of Mr. Nettler's case is based on
22 irrelevancies. Irrelevant cases, which are cited to
23 support irrelevant regulations or interpretations of
24 irrelevant regulations. There is none there in
25 appellant's entire case. Now, let me prove this by

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1 demonstrating one important thing.

2 Ms. Miller, and others I believe, asked
3 about Zoning Commission order 509-A, which was very
4 important in this context, because 509-A is the
5 Zoning Commission action which promulgated this now
6 famous regulation 201.1M. So that's why it's of
7 relevance.

8 And it is very clear, as we noted in our
9 written submission, it is very clear that when we
10 look at Zoning Commission order 509-A where it talks
11 about why it is promulgating this new regulation,
12 201.1M, it is entirely related to the outliers. The
13 so called outliers. The outliers were simply a term
14 used to refer to those chanceries that were at the
15 time of the enactment of the Foreign Missions Act,
16 1982, were lying outside the D Overlay. Sort of
17 abortion chanceries, if you will, that were now after
18 1982 and then certainly after the subsequent
19 amendment of the Diplomatic Overlay map, these
20 chanceries were now located in places which were
21 presumptively to be determined or considered by the
22 FMBZA, the Foreign Missions BZA as "not appropriate."
23 Not appropriate for chancery location.

24 So, there is some significance then,
25 potentially, procedural or legal significance to a

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1 chancery lying outside the D Overlay. Obviously, the
2 Zoning Commission when it considered order 509-A --
3 well, first 509 and then A is the amended order --
4 decided on the basis of comments received from
5 residents and from the Mayor, I believe at the time,
6 or certain members of Council that those outlier
7 chanceries should not be able allowed to expand. In
8 fact, they shouldn't be allowed to be grandfathered
9 or handed over to anyone else.

10 Well, that's all very well and good. We
11 know for the record that even that, even that would
12 fly in the face of the Foreign Missions Act and would
13 therefore have to fall because it would not be valid.

14 But it's not the case here. This whole issue is a
15 totally phony one.

16 Regulation 201.1M has nothing whatever to
17 do with this case. Because by its own terms it only
18 applies to outliers, to chanceries, existing chancery
19 locations that are not in the D Overlay. Yemen is in
20 the D Overlay, ergo 201.1M has nothing to do with
21 this case. It is Chapter 10 of the zoning
22 regulations, not 201.1 that deals with chanceries
23 that are within the Diplomatic Overlay, and there is
24 nothing in there as Mr. Nettler well knows that has
25 to do with this issue or that would apply in the

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1 matter he suggests it would apply to prohibit the
2 automatic grandfathering of a prior chancery use
3 without the necessity of a BZA hearing.

4 So that's point number one. It was listed
5 a little further down in our brief not as point
6 number one, but in this presentation that's we think
7 a very important argument that the Board should be
8 aware of.

9 This whole discussion that we've beaten
10 to death here about what the Zoning Administrator has
11 to follow if there's a conflict and what case
12 authority is there on one side or the other is
13 entirely irrelevant and a phony argument it doesn't
14 apply here.

15 Secondly, Mr. Nettler cited a case to
16 support this argument. He said during the hearing on
17 January 13th that he could remember from his time in
18 court counsel's office working there that there was a
19 case, presumably it had something with the District
20 of Columbia therefore he dealt with it or some
21 passing acquaintance with it, but he couldn't
22 remember it and he would cite it. He did cite a case
23 in a letter which he wrote to the Board at the
24 Board's request to produce the legal authority. And
25 that case, of course, also has nothing whatever to do

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1 -- says nothing about the obligation of an
2 administrator such as the Zoning Administrator.

3 First of all, it's a federal case. Had
4 nothing to do with the District of Columbia at all.
5 Had to do with, I think, federal energy regulation.
6 But the court made it very clear there that one of
7 the tests of whether an administrative official such
8 as, perhaps, the Zoning Administrator of the District
9 of Columbia, one of the tests of whether such an
10 official had acted properly and reasonably and
11 therefore would be upheld by the court was the extent
12 to which the Administrator had acted in accordance
13 with the statute. Well, that's precisely what was
14 argued here. It doesn't say the court will check and
15 see whether the Administrator acted in accordance
16 with the regulation. It's whether he acted in
17 accordance with the statute, presupposing that the
18 regulation would be in accord with the statute. I
19 don't think there's any question at all how the court
20 would have ruled if faced with the issue that Mr.
21 Nettler has posed exists here. But that issue
22 doesn't exist here, as I've said, because the
23 regulation doesn't even apply.

24 And number two, the court case that Mr.
25 Nettler cites to prove this point also does not

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1 apply. It doesn't say what he says it says.

2 Now, we'll proceed back to the other main
3 points that were in our submission, just to highlight
4 them.

5 The plain language of the Foreign
6 Missions Act makes it clear that a chancery in this
7 sort of situation can grandfather and must be allowed
8 to grandfather without the need for a separate and
9 new BZA approval. An act is supposed to be
10 interpreted in accordance with its plain language.
11 Its plain language is supposed to be given effect by
12 any tribunal, adjudicatory tribunal such as this, as
13 well as administrators such as the Zoning
14 Administrator. And the words of the act are very
15 clear, as we outlined there.

16 Congress could have used other terms.
17 They could have, for example, if they wanted to make
18 it very clear that chanceries could not grandfather,
19 they would have said in 4306H2 that no approval was
20 required "for continuing use of a chancery by a
21 foreign mission to the extent that the chancery was
22 being used by such a foreign mission or by that
23 foreign mission, or by the same foreign mission."
24 But a general rule of statutory construction is that
25 Congress is deemed or any legislative body is deemed

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1 to understand the English language. The plain
2 implications of using certain words as opposed to
3 using other words. And in this case Congress used
4 those words.

5 And what's also very enlightening, as we
6 mentioned in our submission, is that in the very
7 previous provision, we are looking at 4306H2 which is
8 the one that governs here, 4306H1 immediately above
9 does not apply here. But notice that in that
10 provision Congress was able to use the word "the."
11 So that is a very clear statutory signal under a
12 wonderful legal principle in Latin called expression
13 unis usat allerus, "The expression of one excludes
14 other interpretations." But it's very clear.
15 Congress knew in 4306H1 what the word "the" means,
16 because they wanted the benefit, this amnesty
17 benefit, if you will, that is incorporated in 4306H1
18 to apply only to that one chancery, not to some
19 successor. So they say approval of the BZA shall not
20 be required for location, replacement or expansion of
21 a chancery to the extent the authority to proceed or
22 rights or interests with respect to the location,
23 replacement or expansion were granted by or otherwise
24 acquired by the foreign mission. So it's very clear
25 there. If you compare H1 and H2, they're not

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1 separated by anything except white space there. No
2 intervening words.

3 In 4306H1 Congress knew to use the word
4 "the." In 4306H2 Congress knew to use the word "a",
5 meaning any; not necessarily the same one. The
6 statutory language has to be given effect, and it's
7 very clear.

8 To debate my note, very interestingly,
9 Mr. Nettler's original submission of 13 pages, which
10 was then supplemented by his reply of 21 pages, in
11 his original submission you think you'd come out with
12 your best arguments in your original submission. He
13 never even discusses the Foreign Missions Act, as if
14 it were totally irrelevant, I guess. The only things
15 that are relevant are the acts of the Zoning
16 Commission. But, unfortunately, as I said the one act
17 of the Zoning Commission that he mentioned is not
18 relevant here at all, because it only applies to
19 chancery outliers, and not to ones that are in the D
20 Overlay.

21 The practice of the last 20 years. A
22 great deal was made of this, and we have Mr. Massey
23 here who is prepared, I will spend a little time
24 examining him, not just yet, about our experience and
25 our practice.

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1 Mr. Nettler says in his reply it doesn't
2 matter what the State Department's practice has been
3 because the State Department doesn't determine that.

4 Well, we're not sure that the State Department has
5 no role in this. We are the primary agency and body
6 intended to implement the Foreign Missions Act and
7 administer the Foreign Missions Act overall. I don't
8 want to quibble about how the Act parses out those
9 responsibilities in section 4306 as between the
10 District's officials, the State Department's
11 officials. In any event, it's not necessary to even
12 go there.

13 The important point is the intent and
14 significance of Mr. Massey's declaration and of
15 listing all of the other cases that we listed there
16 since 1982 that we could remember and find
17 documentation for in our files, the purpose was
18 simply to show how the District itself acted. And
19 that, as you'll hear, is with undeviating and
20 unvarying continuity of allowing one chancery to hand
21 off to another. And since that is a reasonable
22 practice, we understand that the Board is not
23 required and we're not arguing that you are required
24 to follow the administrative practice and the
25 administrative determinations and interpretations

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1 that the Zoning Administrator has done or has made,
2 but certainly legal processes such as this should
3 proceed by precedent. This is a reasonable
4 precedent. Everybody has accepted it. And we note
5 with particular significance that many, if not most -
6 - I didn't count them all. Many if not most of the
7 cases that are listed in our declaration, Mr.
8 Massey's declaration, where in Sheridan Kalorama
9 itself. No one in Sheridan Kalorama decided before
10 now to raise an issue of this, but that doesn't mean
11 they're not allowed to. They are. We'd just point
12 out that even evidently the vast majority of prior
13 chair people of the Sheridan Kalorama Neighborhood
14 Commission and the ANC Commissioners there never gave
15 this a second thought and thought it was simply
16 commonplace understanding that one chancery could
17 succeed another chancery under the grandfathering
18 clause.

19 Third point or fourth point in my order
20 presentation. That any interpretation one would want
21 to make of the famous grandfathering clause here, H2,
22 other than the one that the District and the
23 Department of State are taking and are urging upon
24 you, would be taking a position -- anyone making such
25 an argument as Mr. Nettler is doing, would be

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1 interpreting the statute in a way which is totally
2 unnatural to zoning principles and land use
3 principles in the District of Columbia, and most
4 other places I might add, in general.

5 The whole net result of doing or making
6 such an interpretation, such a twisted or tortured
7 interpretation of the Act would be to construe in a
8 way which is alien to the way Zoning Administrators,
9 land use officials, boards of zoning adjustment
10 interpret and apply the laws.

11 You heard the witness from DCRA say that
12 in their everyday practice zoning follows the use.
13 Zoning is supposed to be blind to the nature -- to
14 the identity of the user. That is why prior
15 nonconforming uses can be transferred. Nobody
16 questions that. In a very real sense, this is what -
17 - if you want to draw an analogy, this is what
18 Congress had in mind in 4306H2, the grandfathering
19 clause. That a preexisting chancery to some extent
20 could be analogized or thought of as a nonconforming
21 use. It's there, it's an office, it's in a
22 residential neighborhood. Maybe they didn't have
23 zoning approval originally. Maybe they were there
24 before there was even zoning, a lot of them were.
25 But nevertheless, they can remain there. And not

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1 only they can remain there, but the use -- that's the
2 use. Because that is the way zoning law works in
3 general.

4 And then allied or connected to that
5 argument that I just made is the very important anti-
6 discrimination of the Foreign Missions Act. The
7 Foreign Missions Act makes it very, very clear.
8 Congress did not want foreign missions, chanceries in
9 this case, to be discriminated against or to be
10 treated less favorably than other nonresidential,
11 than other institutional user in any zone, it doesn't
12 matter here.

13 So here we are in a residential zone. In
14 a residential zone, Sheridan Kalorama, for example
15 take, there are some existing nonconforming
16 institutional uses there; schools, the textile
17 museum, other things that one can think of off the
18 top of one's head. No one doubts that those uses can
19 be transferred to other nonresidential institutional
20 users provided that more or less the new use, the
21 succeeding use is going to be relatively the same in
22 terms of character and identity and intensity of use.

23 Therefore, under the Foreign Missions
24 Anti-Discrimination clause, which is at 4305B3 one
25 cannot deny to chanceries what is granted under the

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1 laws of the District of Columbia an the Zoning
2 Commission's regulations to non-chancery users. This
3 is a very important point and it is a very important
4 principle in the Foreign Missions Act.

5 Lastly, we come to the jurisdictional
6 argument. We do not believe, with all respect, that
7 this Board has jurisdiction here. Nothing wrong with
8 this Board. It's a very competent Board. And
9 paradoxically by now you're very modern. really into
10 the age of the information age with the webcasting of
11 these proceedings, which I'd like to commend the
12 Board on. It's a great initiative and everyone on
13 the staff deserves a lot of credit for that. I
14 watched all this morning's session. Very good
15 transmission.

16 And in this case the luck of the draw so
17 happened to turn out that we do in fact on this Board
18 have a composition of two federal members. But that
19 was the lack of the draw from the Zoning Commission,
20 as you know, in this case. It would not be in every
21 case.

22 So here we have a situation where you
23 would have a case involving a foreign chancery,
24 Yemen, a foreign mission being decided by a board
25 that potentially could have less than the required

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1 two federal members on it. But more importantly,
2 that is governed by rules of procedure that are
3 contested case or adversarial nature, cross
4 examination as you saw.

5 We could in this case, perhaps it would
6 have been useful or relevant, to have a
7 representative of the Embassy of Yemen present since
8 it is their chancery, after all, that is on the line
9 here and their issues that are on the line. But we
10 wouldn't do so as the Department of State because we
11 wouldn't to subject them to cross examination. And
12 that is precisely what Congress did not want to have
13 happen. That is why Congress in passing the Foreign
14 Missions Act specifically provided special procedures
15 for this FMBZA.

16 If you go back and you look at the
17 hearing and the conference reports, you see that that
18 is what Congress had in mind in creating these
19 special rules. There is, of course, no such body
20 actually known as the Foreign Missions Board of
21 Zoning Adjustment. It doesn't have its own staff,
22 it's own quarters. It's just the regular Board of
23 Zoning Adjustment operating with different members,
24 by statute, and different procedural rules by
25 statute. And those rules and membership do not apply

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1 in this present proceeding and, therefore, we believe
2 it is not appropriate.

3 Not only do we believe it's not
4 appropriate, but we believe that the entire weight of
5 the case law. The Foreign Missions Act now has been
6 subject to fairly rigorous judicial interpretation.
7 There have been a number of cases. They all come out
8 in the same way; that in the view of the courts
9 interpreting courts, this is both federal courts and
10 D.C.'s own courts, the intent of Congress the courts
11 have said is that the Foreign Missions Board of
12 Zoning Adjustment be the exclusive and the preclusive
13 body for handling any and all issues. There are no
14 exceptions.

15 There should not be another exception
16 here carved out, because it would be totally contrary
17 to the weight of the judicial decisions, which is
18 this Board has to follow, of course.

19 I'm not going to read you court opinions
20 here, but they're in our submission. The courts,
21 especially in the Turkey case, which I think was the
22 seminole case in terms of how long it went on and how
23 many times courts looked at it. And there's a very,
24 very well written court of appeals, Federal Circuit
25 Court of Appeals decision in that. And the court

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1 makes it very clear that one is not permitted, as Mr.
2 Nettler wishes to do, to read the Foreign Missions
3 Act narrowly when it comes to the issue of the
4 FMBZA's exclusive jurisdiction.

5 There cannot -- there simply cannot if
6 you read these decisions, there cannot be conceivably
7 be any situation in which the FMBZA wouldn't have
8 jurisdiction.

9 We understand the issue that the current
10 regulations do not precisely authorize the bringing
11 of an appeal such as this. But my response to that
12 is twofold. Number one, I don't think there's
13 anything that precludes it. The State Department
14 certainly wouldn't have objected if Mr. Nettler's had
15 come to the FMBZA said well we want to initiate a
16 case here or we want to initiate an appeal, this,
17 that or the other issue. I mean even this one. We
18 wouldn't have objected on the grounds that there was
19 no provision to be here.

20 But secondly, if anyone believes in the
21 end, if corporate counsel opines in the end that
22 there is this gap or lack, well then that's a problem
23 of the Zoning Commission's regulatory writing
24 process. They should write a regulation or revise
25 the Foreign Missions Board of Zoning Adjustment's

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1 rules of procedure precisely to allow what has
2 happened in this case.

3 So, that's basically my presentation. I
4 did want to just briefly respond to a couple of
5 things that I heard questions from the Board on
6 during Ms. Bell's presentation.

7 I think I've answered Ms. Miller's issue
8 about regulation 201.1M and its relationship to order
9 509-A, Zoning Commission order 509-A.

10 Mr. Zaidain asked about what zoning
11 approvals were involved in the case of Yemen. Well,
12 since all of those have to come through us, we are
13 cognizant of that. And I can tell you there really
14 aren't any. The issue with the wall and the fence,
15 and all of these things, are issues of historic
16 preservation. Now those are land use issues, and
17 they have to deal with them. But there are not
18 precisely zoning issues.

19 However, in the nature of the way the
20 jurisdiction of the FMBZA works, in the event that
21 for some reason Yemen wanted to do something with its
22 wall or its fence that they were not getting a permit
23 for, that the permit was being withheld from them on
24 historic preservation grounds, the route of appeal
25 would be to the FMBZA so they be heard anyway.

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1 And then Sweden, as I said, that is a
2 total canard to throw that in so as to show as Mr.
3 Nettler apparently wants to show, that all the cases
4 that we cited, I think there are 16 in all involving
5 11 different properties, that this history of
6 grandfathering, allowing chanceries to grandfather
7 without a BZA hearing is not unexceptional. There is
8 in fact one exception he would like to say, and it's
9 Sweden.

10 Well, I think we'll save it for my
11 examination of Mr. Massey, because it's a factual
12 matter he will explain. But it is, suffice it to
13 say, now it is inapplicable and it is a total canard.

14 It doesn't apply at all, the case of Sweden to show
15 that there was an instant in which a foreign chancery
16 was denied an grandfathering right by the District.
17 It's never happened.

18 So, if there's any questions. If not,
19 I'll go to --

20 CHAIRMAN GRIFFIS: Any questions?

21 VICE CHAIRMAN MILLER: I just want to
22 follow up. Did you say if there were to be an
23 historic preservation issue, it would be brought to
24 the FMBZA?

25 MR. MLOTEK: Yes. This is usually -- Ms.

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1 Miller, this usually always comes as a shock when
2 there's a new member on the Board of Zoning
3 Adjustment because they say well usually we don't do
4 historic preservation. And the answer is, yes, you
5 do. There's one exception, and that is in
6 chanceries.

7 In chanceries basically the FM Board of
8 Zoning Adjustments acts in a way that the Historic
9 Preservation Review Board would normally act, or the
10 Mayor's agent. You are the HPRB. And the reason that
11 is also comes from the statute, the Foreign Missions
12 Act where it says that no other agency or official
13 may hold a proceeding, conduct a proceeding or make a
14 determination with respect to location or place and
15 expansion of chanceries except the Foreign Mission
16 Board of Zoning Adjustment.

17 VICE CHAIRMAN MILLER: Thank you.

18 CHAIRMAN GRIFFIS: Good. Refresh our
19 recollection.

20 BOARD MEMBER ZAIDAIN: Well, I'd like to
21 hop in on that same getting to the issue that I
22 brought up with the permits. It's not just historic
23 preservation, correct? If it was just a chancery or
24 a foreign mission was going into a building that's
25 not contributing or historic and they wanted to

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1 expand, add a wing, whatever, that would still go to
2 the FMBZA?

3 MR. MLOTEK: Grandfathering -- this is a
4 very important point so that you understand that
5 we're not overreaching in our arguments, which I
6 think might be a concern.

7 BOARD MEMBER ZAIDAIN: Okay.

8 MR. MLOTEK: The issue that's before us
9 today in Yemen of grandfathering under the Foreign
10 Missions Act has only to do with location. Obviously,
11 if Yemen goes in there and wants to add on a wing,
12 even wants to put a flag poll -- I mean most
13 embassies have flag poles -- if they wanted to put up
14 a flag pole they'd have to go --

15 BOARD MEMBER ZAIDAIN: Okay.

16 MR. MLOTEK: They're not allowed to do
17 anything with respect to appearance, to height, bulk,
18 density, parking, anything --

19 BOARD MEMBER ZAIDAIN: Zoning issues?

20 MR. MLOTEK: That's right, or even non-
21 zoning land use issues. Zoning or land use, or even
22 building code; however broadly you want to define it.
23 Grandfathering has to do with one thing and one
24 thing only, which is why you'll soon hear that the
25 Swedish case has nothing to do with what we're

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1 talking about today.

2 The grandfathering clause in 4306H2 has
3 only to do with location. If there was a chancery
4 there on October 1, 1982 and it's been in continuing
5 use -- that's important. Some of them haven't been
6 and then the State Department doesn't ago and espouse
7 the right to grandfather. But if it's been in
8 continuing use and it's been there as of October 1,
9 1982, another chancery can succeed to that use.

10 BOARD MEMBER ZAIDAIN: Okay.

11 VICE CHAIRMAN MILLER: I just want to get
12 another clarification. You're saying almost for
13 anything they have to do; changing the appearance or
14 whatever, they have to come before the FMBZA. Okay.
15 That's a little bit broad.

16 For instance we have in this case permits
17 for changing the fence. Did that have to come before
18 the FMBZA?

19 MR. MLOTEK: Sorry. Maybe I perhaps
20 misspoke here, and I'll accept responsibility.

21 When I said they have to get permission,
22 I didn't mean necessarily from the FMBZA. They have
23 to go through the normal Zoning Administrator who
24 will then farm it out to Historic Preservation for
25 their staff level review or to Fine Arts Commission

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1 or to the Fire Marshall or to whomever it has to go
2 to, public space in some cases. Then, and if they
3 get approvals, then they get the approvals and that's
4 how people get approvals.

5 If however, the Zoning Administrator says
6 well, you know, your flag pole doesn't -- well the
7 Zoning Administrator would refer it to Historic
8 Preservation Review Board. Let's say Historic
9 Preservation Review said no way that we're going to
10 support this flag pole. It's too tall, it's too
11 prominent, we want it back. Well, in most cases the
12 embassy well fine, we'll shorten, we'll move it back.

13 But suppose the embassy said no, we want here and we
14 want it to be of this height. Then they would come
15 to you.

16 I doubt in that case they ever would. I
17 mean, that's a hypothetical question.

18 Usually the cases that involve Historic
19 Preservation that come to the FMBZA are major
20 construction issues, not minor things.

21 CHAIRMAN GRIFFIS: Okay. Let's move on.

22 MR. MLOTEK: All right.

23 CHAIRMAN GRIFFIS: Anything else?

24 MR. MLOTEK: All right. For the record,
25 please, Mr. Massey, could you state your name and

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1 your position and tell us what you do and how long
2 you've been doing it?

3 MR. MASSEY: My name is Richard Massey.
4 I'm the Office Director in charge of the Property and
5 Travel Programs. I have been responsible for the
6 real estate portfolio since 1985 in the Office of
7 Foreign Missions.

8 MR. MLOTEK: Right. And drawing your
9 attention to your declaration in which you mention a
10 number of previous cases. Could you just tell the
11 Board just how many there were in your list?

12 MR. MASSEY: Well, we listed in the list
13 of cases, although I'm not at all -- would not want
14 to say that that's exhaustive. It certainly was a
15 trip down memory lane for a lot of us. We don't keep
16 a separate file for the grandfather cases, although I
17 think we have one now.

18 But it was interesting. And I did go
19 through and try to find cases that would reflect the
20 fact that since I have been in the position, and
21 certainly since 1985, every Zoning Administrator has
22 agreed with our position on this. And I remember
23 them all. From Mr. Fahee in 1985 with Oman.

24 We have Mr. Boatner, we have several
25 cases from the '90s.

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1 And we've gone to quite a few Mr.
2 Boatner. Gladys Hicks. And up to and of course
3 Yemen with Mr. Noble.

4 I can say that to the best of my
5 knowledge there has been no cases that have come to
6 us that if I've known -- if we were aware that they
7 were owned and used -- they were used as a chancery
8 before '82, that I would write to the Zoning
9 Administrator asking them to issue an occupancy
10 permit and without an FMBZA hearing. And in all
11 cases they have complied.

12 MR. MLOTEK: Just to make sure the Board
13 understands this, Mr. Massey, there's a difference in
14 how we inform or direct embassies to proceed in a
15 residential neighborhood, I mean?

16 MR. MASSEY: Yes.

17 MR. MLOTEK: If it is a grandfathering
18 situation as opposed to if it not a grandfathering
19 situation?

20 MR. MASSEY: If it not a grandfathering
21 situation, then we inform the embassy that they will
22 need to go to the Foreign Missions Board of Zoning
23 Adjustment for a hearing. And that's a requirement.
24 And they comply.

25 MR. MLOTEK: And what about if it were a

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1 grandfathering situation but for the fact that some
2 other non-chancery users had use -- in other words,
3 the property was a chancery on October 1, 1982, but
4 then at some point was used for some other purposes,
5 maybe residential purpose. What do you do in that
6 cases?

7 MR. MASSEY: In those cases we would not
8 believe the grandfathering provision would apply and
9 that they would be required to go to the Foreign
10 Missions Board of Zoning Adjustment.

11 MR. MLOTEK: Right. Mr. Nettler in his
12 cross examination today and in his presentation
13 before, although you weren't here, but in his cross
14 examination today referred to the case of Sweden. Do
15 you recall the case of Sweden?

16 MR. MASSEY: I do recall that case. It
17 was a very controversial case here in the city. And
18 I think the key point there is Sweden wanted to build
19 a new chancery in place of the chancery. The issue
20 was not as in all these cases where they were moving
21 into an existing building and it was a use issue.
22 Had that had been the case, I'm sure this would not
23 have been the controversial case that it was at the
24 time. But, no, that is not example of the
25 grandfathering.

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1 MR. MLOTEK: So to your recollection back
2 in the case of Sweden that you mentioned, did anyone
3 object to Sweden's ability to move the Cape Verde,
4 the former Cape Verde chancery, simply to use as a
5 chancery as opposed to knocking it down and building
6 a new one?

7 MR. MASSEY: Well, Mr. Nettler probably
8 would have a good memory of this since I think he was
9 the attorney for that case. But I do believe that
10 one of the arguments against Sweden at the time was
11 the fact that if they only had wanted to move into
12 the existing building, which was much too small for
13 them, there would not be a problem. And that was one
14 of the arguments and they eventually were not allowed
15 to go forward.

16 MR. MLOTEK: So in other words, your
17 recollection is that the residential community at the
18 time, which was in opposition to the Embassy of
19 Sweden doing what it wanted to do --

20 MR. MASSEY: Yes.

21 MR. MLOTEK: -- the community at the time
22 didn't have a problem with Sweden simply moving in
23 and using the existing building?

24 MR. MASSEY: That is correct.

25 CHAIRMAN GRIFFIS: Do you recall the

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1 entire community's opinion on that issue?

2 MR. MASSEY: I do recall at the hearing
3 that the very, very strong opposition. And I
4 remember the plans that the Swedish government had to
5 put up there.

6 CHAIRMAN GRIFFIS: Okay. I see. It
7 doesn't strike me as greatly relevant to us, but I
8 wanted to make and stress the point under cross
9 examination I don't want to hear a lot about who in
10 the community, who was there, how did you know, how
11 can you speak for the entire community's opinion or
12 that they were in support.

13 MR. MLOTEK: We understand, Mr. Chairman.
14 It's just that Mr. Nettler put the matter at issue.

15 CHAIRMAN GRIFFIS: I understand.

16 MR. MLOTEK: So we have to respond. We
17 would never even mention the Swedish case at all had
18 Mr. Nettler not done so.

19 CHAIRMAN GRIFFIS: I understand.

20 MR. MLOTEK: And just finally, Mr.
21 Massey, are there any of the cases, the may cases
22 that we list of grandfathering situations that did
23 not require a BZA hearing, or any of them that stand
24 out more in your memory than others, or are that
25 noteworthy to point the Board's attention to?

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1 MR. MASSEY: Well, there's some of the
2 cases where we made -- the language that I used in my
3 letters to the Zoning Administrator, made it clear of
4 our position, our legal position that a BZA hearing
5 was not required.

6 There also was the case, I think it was
7 1717 Mass. Avenue where it had been turned over
8 twice. And --

9 MR. MLOTEK: So in other words you mean
10 there were two grandfatherings that occurred?

11 MR. MASSEY: Yes. Yes.

12 MR. MLOTEK: More than one?

13 MR. MASSEY: In 1990 the Turks wanted to
14 leave office space there. And we asked that the C of
15 O be issued and there was no hearing. And I have a
16 copy of the C of O. And then the same thing happened
17 with St. Vincent in the Grenadines, I think it was a
18 year later. They also --

19 MR. MLOTEK: Same building?

20 MR. MASSEY: Same building. And they also
21 were grandfathered in to that same building. And the
22 same language was presented to Mr. Boatner in my
23 letter. So --

24 MR. MLOTEK: And is it always the case,
25 Mr. Massey, that when you have grandfathering it's

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1 one chancery moving in to another chancery?

2 MR. MASSEY: Yes.

3 MR. MLOTEK: Or have there been cases
4 where more than one chancery moved into --

5 MR. MASSEY: Ah, I think my attorney's
6 referring to the interesting case where six countries
7 --

8 CHAIRMAN GRIFFIS: Number six on your
9 list?

10 MR. MASSEY: That's right. Yes.

11 CHAIRMAN GRIFFIS: Okay.

12 MR. MASSEY: Artigua, Barbuda, Dominican,
13 Grenada, St. Kitts and Nevis, St. Lucia and St.
14 Vincent. They altogether purchased the property at
15 3216 New Mexico Avenue. And that property former use
16 was a chancery. I do have a copy of their application
17 to the D.C. government. And they did -- we also
18 received an occupancy permit.

19 MR. MLOTEK: Okay. Thank you. I don't
20 have any further questions for the witness, so I'll
21 turn him over to --

22 CHAIRMAN GRIFFIS: And you're finished?

23 MR. MLOTEK: No. No.

24 CHAIRMAN GRIFFIS: Any other --

25 MR. MLOTEK: Well, is he going to be --

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1 CHAIRMAN GRIFFIS: He will be cross
2 examined.

3 MR. MLOTEK: All right. Then maybe when
4 he's finished cross examining, I may have to redirect
5 or just make a conclusion.

6 CHAIRMAN GRIFFIS: Okay. Very well.
7 That's fine. We'll do cross and any redirect and you
8 can do your conclusion.

9 MR. MLOTEK: Right.

10 CHAIRMAN GRIFFIS: Mr. Nettler?

11 Let me also ask if anyone from ANC 2-D is
12 here representing today? Very well.

13 Oh, Mr. Parsons did you have a question?

14 COMMISSIONER PARSONS: I'll wait.

15 CHAIRMAN GRIFFIS: Why don't we follow up
16 after the cross with our questions and see where it
17 leads.

18 MR. NETTLER: Sure.

19 Thanks.

20 Mr. Massey, since your attorney only
21 provided me with the list but not the documents that
22 you were just referring to, could I just see those a
23 moment?

24 MR. MASSEY: Sure.

25 MR. NETTLER: I'll give them right back

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1 to you.

2 Just begging your indulgence for a
3 minute.

4 CHAIRMAN GRIFFIS: What are you looking
5 at?

6 MR. NETTLER: Well, in answering your
7 questions he was referring to the letters that he
8 sent to the varying Zoning Administrators and the
9 applications and the certificate of occupancy.

10 CHAIRMAN GRIFFIS: Okay. Is that in the
11 record?

12 MR. NETTLER: I don't know whether he's
13 put into the record, but I've never seen these before
14 so --

15 CHAIRMAN GRIFFIS: Is that in the record?

16 MR. MLOTEK: We didn't enter into the
17 record, no. If you --

18 CHAIRMAN GRIFFIS: But doesn't he refer
19 to it in a declaration?

20 MR. NETTLER: He's referring to these as
21 instances when the grandfathering provision has been
22 applied consistently in the situations that would be
23 analogous to here.

24 CHAIRMAN GRIFFIS: I'm still not clear on
25 what that means, Mr. Nettler. Are you saying that he

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1 has the applications, the permit applications?

2 MR. NETTLER: He has the certificate of
3 occupancy applications --

4 CHAIRMAN GRIFFIS: Okay. So it's in
5 support of document that is listed in the -- is that
6 correct.

7 MR. NETTLER: Correct.

8 CHAIRMAN GRIFFIS: Okay.

9 MR. NETTLER: Now, Mr. Massey, in all of
10 these situations that you refer to, were these
11 instances when you say that the chancery that was
12 being located was taking the place of an existing
13 chancery, were these all in D zones?

14 MR. MASSEY: I believe so.

15 MR. NETTLER: Okay. Let me show you one
16 that you referred to here that's Grenada, St. Kitts,
17 Nevis, St. Lucia, St. Vincent. And can you look at
18 this certificate of occupancy and tell me what zone
19 that's located in?

20 MR. MASSEY: Well, that's in a commercial
21 zone. Good point.

22 MR. NETTLER: Okay. Thank you.

23 Let me show you the next one, which is
24 another one that you had of government of St.
25 Vincent, Grenada -- I guess it's 1717 Mass which you

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1 -- and tell me what zone that one's in?

2 MR. MASSEY: That's SP-2.

3 MR. NETTLER: Okay. Thank you.

4 Let me ask you the next one, which is the
5 Turkey which you said again it's 1717 Mass. Why
6 don't you tell me what District is located in?

7 MR. MASSEY: SP-2.

8 MR. NETTLER: Okay. So far we haven't
9 found a residential or a D Zone, have we?

10 Let's try 2343 Massachusetts Avenue. Do
11 you see what the zone is on that one; that's also on
12 your list?

13 MR. MASSEY: Let's see, what is that one.
14 Let's see where that one's listed.

15 MR. NETTLER: It doesn't show, does it?

16 MR. MASSEY: No, it doesn't show.

17 MR. NETTLER: Okay. What about 2134
18 Kalorama Road, which is your one for the Federal
19 Republic of Yugoslavia? Does that show that it's a D
20 or an R zone?

21 MR. MASSEY: It doesn't say.

22 MR. NETTLER: Okay. How about 1520 18th
23 Street, does that show that's in an R or a D Zone?

24 MR. MASSEY: I'm sure that it doesn't.

25 MR. NETTLER: Okay. And 2109 E Street,

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1 does that show whether that's in a R or an D Zone?

2 MR. MASSEY: Well, this is just the
3 application.

4 MR. NETTLER: Okay. So do you have the
5 copy of the certificate of occupancy?

6 MR. MASSEY: In some cases we do, in some
7 cases we don't.

8 MR. NETTLER: Okay.

9 MR. MASSEY: It depends on the practice
10 of the different Zoning Administrators.

11 MR. NETTLER: Do you have any that's
12 listed -- that's on your list there other than of
13 course the one that we're referring here today that
14 shows whether it's an R or a D Zone?

15 MR. MASSEY: We'd have to go back through
16 and see which ones that I have.

17 MR. NETTLER: Okay. We can do that.

18 MR. MLOTEK: May I talk to the witness,
19 please? Consult with him before he answers.

20 CHAIRMAN GRIFFIS: Before he answers that
21 question?

22 MR. MLOTEK: Yes.

23 CHAIRMAN GRIFFIS: Yes, I guess so, for a
24 moment.

25 MR. MASSEY: What was the question again,

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1 Mr. Nettler?

2 MR. NETTLER: I asked you whether you had
3 any information as to whether the other ones that are
4 on the list that we haven't covered already, whether
5 you have documentation showing whether they're in a R
6 or a D Zone, like a certificate of occupancy?

7 MR. MASSEY: I don't have all the
8 documentation with me, but I do believe that number
9 one was in an R Zone, France Oman. Number two --

10 MR. NETTLER: Tell me what zone is that
11 in? What R Zone is that in?

12 MR. MASSEY: I believe it was a
13 residential zone.

14 MR. MLOTEK: Can I object here, because
15 again on the grounds of relevance and wasting the
16 Board's time.

17 Number one, for the purposes of the
18 argument, the legal argument that we're making here,
19 it's irrelevant whether they were in an R or an SP
20 Zone or what R Zone they are. The law is the same.

21 Under the Foreign Missions Act even in an
22 SP Zone you are required as an chancery in general to
23 go before the BZA. So for the purposes of this
24 entire issue that we're discussing here, there is no
25 legal distinction between SP and R.

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1 Certainly within an R Zone, there is no
2 legal distinction at all between levels of R Zones.
3 The Foreign Missions Act doesn't even discuss that
4 except for the high density residential. None of
5 these -- I can proffer and represent to the Board
6 that none of them that are listed here are in high
7 residential zones.

8 So the line of questioning of Mr. Nettler
9 is irrelevant. It doesn't matter whether Mr. Massey
10 knows which zone, is it R-1 or R-2 or is it R-1-A, R-
11 1-B. It's irrelevant.

12 CHAIRMAN GRIFFIS: There are two issues
13 attendant to that. Mr. Nettler, yes?

14 MR. NETTLER: A couple of responses.
15 First of all, Mr. Mlotek's comment about what zone it
16 is as not being relevant is not accurate.

17 First of all and I know he's conversant
18 with the zoning regulations, but if he's intending to
19 rely on the nonconforming use provisions and the
20 discrimination provisions, and certainly somebody who
21 is well versed in the zoning regulations would know
22 that those provisions apply differently in the
23 residential zones as opposed to SP and certain SP-2
24 zones. Such that if you had an office use, certain
25 types of offices that were located in SP-2 zones,

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1 that the nonconforming use provisions, as I said,
2 would apply differently.

3 Secondly, it is relevant as to whether
4 we're talking about whether an R, D, SP-2, C-1, as
5 apparently some of them are, because if his argument
6 is that he's relying on the consistent position of
7 the State Department as to how it has applied this
8 and particularly with reference to this case, then I
9 think it's important to know how many have been in
10 the D Zone. Because his argument is that the 201.1M
11 provision that I referred to has no application here,
12 and notwithstanding that, the 201.1M provision is in
13 his view is inconsistent with the Foreign Missions
14 Act. And since the Zoning Commission has already
15 made a decision as to whether that's the case or not,
16 I think it's also relevant as to the -- goes to the
17 credibility both of the testimony that's given and it
18 goes to whether you should accept the legal position
19 that's being taken here, which I'll expand upon in my
20 closing argument, whether you accept the legal
21 position that's being offered here if it's not based
22 on the true facts.

23 CHAIRMAN GRIFFIS: Very well. I tend to
24 agree that there's some relevancy to know the
25 distinction of the zoning category that it's in.

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1 What I don't want to do is spend an awful lot of time
2 acting as if this some secret. Because can we not
3 find out what the zoning is for these particular
4 addresses?

5 MR. NETTLER: That's not the point is it.
6 The real point --

7 CHAIRMAN GRIFFIS: No. I understand. And
8 so my point is, is maybe we can expedite some of the
9 questions, and I'll get further to your point.
10 Because actually you've addressed some of them in
11 terms of how one looks at the SP and the
12 nonconforming use and the continuing nonconformity.
13 But that's something that the Board has the
14 information on already and the basis of which we'll
15 deliberate on.

16 So let's just essentially cut to the
17 quick and get the facts in. Mr. Nettler, it might
18 well be if you know what the zoning is, to ask if
19 it's refuted of what it is, then we can move on.

20 MR. NETTLER: Well, I think we've
21 testimony already in terms of what they know is
22 correct or not, in terms of the -- the last question
23 that was pending was whether they had any additional
24 information. There was an objection at that point.
25 That was never answered. I can move on to the next

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1 question.

2 CHAIRMAN GRIFFIS: Well, no. I think the
3 last question was -- I think it was 2535 Belmont
4 where there was an R and what --

5 MR. NETTLER: Whether they had a
6 certificate of occupancy -- right.

7 CHAIRMAN GRIFFIS: And it didn't seem
8 like the witness was fully knowledgeable or able to
9 answer that question.

10 So do we want to move on or do you want
11 to provide that? You want to follow up.

12 MR. MLOTEK: I think for the record he
13 did answer the question.

14 CHAIRMAN GRIFFIS: He said it's an R
15 Zone.

16 MR. MLOTEK: Right.

17 CHAIRMAN GRIFFIS: I know. R what is the
18 next question.

19 MR. MASSEY: You want me to comment?

20 CHAIRMAN GRIFFIS: Comment?

21 MR. MASSEY: Yes.

22 CHAIRMAN GRIFFIS: You can certainly
23 provide an answer, but I guess a comment will be
24 okay.

25 MR. MASSEY: It's a non matter of right

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1 use. And this is how we focused when we go into
2 these. We look to see whether we believe it would
3 otherwise require a Board of Zoning Adjustment
4 hearing.

5 CHAIRMAN GRIFFIS: All of these are non
6 matter of right uses?

7 MR. MASSEY: I would say the commercial
8 one might be --

9 MR. MLOTEK: Yes. And we'll have to go
10 back, because certainly if you look at this site, New
11 Mexico, 3216 New Mexico Avenue where the Embassy of
12 chancery of Finland was formerly located and now the
13 six chanceries of the OECS are located, it certainly
14 looks residential to me. Now, again, I don't have
15 the zoning map imprinted on my -- it is a building
16 that looks like it was built as a house. It is in a
17 large residence. It is entirely in a residential
18 appearing neighborhood. It looks like the commercial
19 -- it's across from Sutton Place. It looks like the
20 commercial district is across the street.

21 CHAIRMAN GRIFFIS: If you stay for the
22 appeal this afternoon, you'll see how obscure our
23 zoning districts can be.

24 MR. MLOTEK: Yes, I'm quite willing to do
25 that.

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1 CHAIRMAN GRIFFIS: Okay.

2 MR. MLOTEK: But at any rate ---

3 CHAIRMAN GRIFFIS: Well, the point is
4 made and I think we can move on with this. I mean,
5 Mr. Nettler was essentially trying to poke a little
6 bit of hole into this list which was given to us as
7 this blanket look; this happens all the time. These
8 are all grandfathered in.

9 MR. MLOTEK: Right.

10 CHAIRMAN GRIFFIS: There should be no
11 question. Clearly we now have some questions that
12 have been raised.

13 MR. NETTLER: One more last question
14 about New Mexico.

15 CHAIRMAN GRIFFIS: Okay.

16 MR. NETTLER: And that's my last
17 question.

18 CHAIRMAN GRIFFIS: Yes.

19 MR. NETTLER: Can you tell me whether the
20 New Mexico address is in a D Zone?

21 MR. MASSEY: I cannot.

22 MR. NETTLER: I have no other questions.

23 CHAIRMAN GRIFFIS: Okay. Mr. Parsons is
24 going to have a question.

25 MR. MLOTEK: I think there was some other

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1 cross examination.

2 CHAIRMAN GRIFFIS: Okay. Let's get
3 through all the cross. And then we're going to have
4 Board questions. And then I'm going to redirect and
5 recross. And then an afternoon snack, and then we'll
6 move on.

7 MS. BELL: Actually, it's not a redirect
8 as much as it is an attempt --

9 CHAIRMAN GRIFFIS: You don't redirect.
10 Cross examination questions.

11 MS. BELL: Right. Mr. Massey, you
12 indicated that with regard to the list of properties,
13 you also have copies of their certificate of
14 occupancy, is that correct?

15 MR. MASSEY: Not in all cases, but in
16 some cases.

17 MS. BELL: Okay. And I'm showing you
18 2535 Belmont Road.

19 MR. MASSEY: Yes.

20 MS. BELL: Which you gave testimony for
21 with regard to the transfer from France to Austria
22 and then also the Government of Oman, is that
23 correct?

24 MR. MASSEY: Yes.

25 MS. BELL: And I'm showing you a copy of-

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1 -

2 CHAIRMAN GRIFFIS: We don't need to
3 establish the evidence. Ask him the question.

4 MS. BELL: Okay. What's the zone, sir?

5 MR. MASSEY: The zone is D-R-1B.

6 MS. BELL: And that appears on the
7 certificate of occupancy. And 2430 --

8 MR. MASSEY: 2343 Mass. Avenue and 2450
9 Mass. Avenue, that was the Koreans taking it over
10 from the Canadians. That's a D-R-3.

11 CHAIRMAN GRIFFIS: Are you taking him
12 through the entire list?

13 MS. BELL: No. I'm just giving him -- for
14 the Board's reference, because he didn't have a copy
15 of the CFO in front of him. He wasn't able to tell
16 you what they were zoned.

17 CHAIRMAN GRIFFIS: That's fine. Let's
18 take into the record all the supporting documents on
19 the entire list.

20 MS. BELL: Okay.

21 MR. NETTLER: Just a follow up question.

22 CHAIRMAN GRIFFIS: Okay.

23 MR. NETTLER: Do you know whether the
24 building on Belmont is used as an embassy?

25 MR. MASSEY: When you say, do you mean

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1 residence?

2 MR. NETTLER: Correct.

3 MR. MASSEY: Which property are we
4 talking about?

5 MR. NETTLER: The one that was from
6 France to Austria to --

7 MR. MASSEY: I don't know right now
8 whether it's being used just as a residence or a
9 combination.

10 MR. NETTLER: When it was transferred,
11 was it transferred as a residence?

12 MR. MASSEY: No, I assume it was a
13 chancery.

14 MR. NETTLER: You assume, but do you know
15 for sure?

16 MR. MASSEY: Well, I haven't researched
17 that case in great detail.

18 MR. NETTLER: Okay.

19 CHAIRMAN GRIFFIS: Okay. Let's have some
20 Board questions and then we'll go to --

21 MR. MLOTEK: Wait. Just a one redirect
22 question. In your experience which you said was how
23 many years, Mr. Massey?

24 MR. MASSEY: Nineteen years now.

25 MR. MLOTEK: Right.

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1 MR. MASSEY: Some would say too long.

2 MR. MLOTEK: Has there ever been a case
3 where the Zoning Administrator declined to in a non
4 matter of right area we're talking about -- declined
5 to permit the grandfathering without a BZA hearing of
6 a chancery to another chancery preexisting provided
7 the requirements were met without a BZA hearing?

8 MS. BELL: To the best of my knowledge
9 there has never been a case that I have worked on
10 where I have requested the Zoning Administrator to
11 issue an occupancy permit in such situations where
12 they are refused to do so.

13 MR. MLOTEK: All right. Thank you.
14 That's it for the witness.

15 COMMISSIONER PARSONS: Mr. Massey, one
16 thing we have in this configuration is continuity.
17 As I recall, Mr. Mlotek actually predated all this
18 and helped write the law. So I'm trying to get to
19 this issue of an apparent -- apparent, and I don't
20 believe it is, apparent inconsistency between the
21 zoning regulations and the Act.

22 Now, the Act in a fairly limited amount
23 of time, only three pages, deals with criteria for
24 locating chanceries. And in H2, as you've pointed
25 out, it dealt with the issue of transfer of

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1 chanceries. It doesn't use the term transfer, but
2 that's the term of effect. That is the transfer of a
3 piece of real estate from one government to another
4 with no change to the facility at all.

5 So then we come to the term location,
6 expansion or replacement which are completely
7 different terms. And what I'm trying to do is get
8 from you in the continuity of your experience here in
9 this process what the term location has meant from
10 the beginning. Does it mean a new start in a
11 community? And that's what this Act was all about,
12 wasn't it? A new location in a community or the
13 change in the configuration of that? Because all the
14 Act allows the Foreign Missions Board of Zoning
15 Adjustment to deal with in that case is whether the
16 six pronged test, whether we can defend it, whether
17 or not it's a traffic burden, whether or not there's
18 historic preservation issues and that's it.

19 So that's what I've been struggling with
20 here all afternoon is it doesn't -- the Zoning
21 Commission apparently borrowed the terms from the
22 Act; locate, replace and reconstruct. And Certainly
23 the practice was in place long before the 1990
24 regulations for this issue of transfer, as evidenced
25 here. And did it ever come up?

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1 I'm asking a bunch of questions here.
2 But did it ever come up in the zoning proceedings of
3 this issue of transfer and should there be a
4 regulation dealing with that or was the law to be
5 relied on?

6 And if you don't know or you don't
7 recall, please --

8 MR. MLOTEK: Well, you did ask a lot of
9 questions in that. I'll try to get to all of them,
10 Mr. Parsons. They're all good and important
11 questions.

12 First of all, it's very important to
13 understand what I tried to stress very insidiously in
14 my main presentation here, what the Zoning Commission
15 -- that's what we're looking at now your question was
16 directed -- what the Zoning Commission had in mind
17 when it tackled on this issue of grandfathered
18 chanceries and outliers. And I've already half
19 answered the question by saying outliers.

20 We, the Department of State, appeared and
21 participated in those proceedings of the Zoning
22 Commission. There is a record in that proceeding.
23 We objected, it is a record, we objected to what the
24 Zoning Commission did and make it very clear at the
25 time to the Zoning Commission that we would in the

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1 appropriate factual situation challenge this, take it
2 to court, as being inconsistent with the Act. And
3 why haven't we since then? Because we've never had a
4 case, and this isn't a case now.

5 What the Zoning Commission was dealing
6 with -- this is very important to understand because
7 we keep focusing here on the Zoning Commission. Mr.
8 Nettler wants to direct your attention to the Zoning
9 Commission. I want to direct your attention away
10 because it isn't relevant. They weren't dealing with
11 the Yemens of the world. They were not dealing with
12 chanceries that were going to be within the overlay.

13 They were only considering chanceries outside these
14 so called outliers. Outside. That is why it was
15 driving me crazy when I first read Mr. Nettler's
16 original submission about what the Zoning Commission
17 did in Commission order 509-A. Because none of us at
18 the State Department, because Mr. Massey and I were
19 there all through this period, none of us could
20 understand how we could have sat there when the
21 Zoning Commission was doing something that was
22 clearly in conflict with the Act and not gone to
23 protest it. And when we went back to research, we
24 found out well what do you know, we did protest it.
25 It's just we didn't protest what Mr. Nettler is

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1 arguing. And why? Because the Zoning Commission
2 wasn't doing what Mr. Nettler was arguing.

3 Had the Zoning Commission done in order
4 509 and 509-A what Mr. Nettler says they did so that
5 it would apply to Yemen, which it doesn't, then you
6 can bet your bottom dollar we would have objected to
7 it. So we did object in order 509-A to what the
8 Zoning Commission did. Why they did? Politics, I
9 don't know. It's in violation of the Act. Even if
10 zoning regulation 201.1M did apply here, and it
11 doesn't, but even if it then we would be back arguing
12 our primary point about federal primacy and
13 preeminence that the regulation cannot withstand the
14 collision, the head on collision with the Federal
15 statute. The Federal statute must of course prevail,
16 and it's also a D.C. statute at this stage; so you
17 get a two for. But in any event, it's not relevant.

18 So there isn't much in this case, Mr.
19 Parsons, to try to answer your question as best I
20 can, there isn't much in this particular case that I
21 can add or respond to your question about what the
22 Zoning Commission did or why I think they did it, or
23 how they could refine what they've done because what
24 they did had nothing to do with the case of Yemen.
25 It had only to do with those -- I think there are 23

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1 -- I don't remember the master list. There are 23
2 outlier chanceries, none of them have turned over
3 since 1982, none of them have sought to be
4 grandfathered. If they did, we would be arguing that
5 they could do so without a BZA hearing, but it hasn't
6 happened. So it's a mute academic point. It's not
7 the case or controversy here.

8 And just to correct your statement about
9 what the FMBZA has authority to do in the case that's
10 within its purview, it's very broad and isn't just
11 limited to the questions of, you know, is there
12 adequate parking or does it comply with historic
13 preservation. One of the six criteria that the FMBZA
14 rules on is "the municipal interest." That is where
15 you factor all the views of the ANC, the neighborhood
16 groups, anything that anyone wants to say about why
17 there shouldn't be this chancery in our midst.

18 So the FMBZA has very complete and
19 plenary authority to inquire into, to look into any
20 kind of issue about whether this office use, which a
21 chancery admittedly is, it's an office use, whether
22 this office use in this residential place or SP
23 because SP is also required to be handled this way,
24 would be an intrusion on the residential -- an
25 impermissible or unwarranted intrusion on the

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1 residential character. And that they do under the
2 rubric of the -- so, I don't know. Have I answered?

3 COMMISSIONER PARSONS: No. I probably
4 shouldn't have run on. Because my basic question is
5 the definition of the word location. In other words
6 the H2 provides for transfer.

7 MR. MLOTEK: Right.

8 COMMISSIONER PARSONS: And location to me
9 is new location, and that's been the practice is what
10 I'm trying to elicit here. Because the zoning
11 regulation followed from the Act as to what the term
12 location meant.

13 MR. MLOTEK: Which zoning regulation, Mr.
14 Parsons? Again, 201 --

15 COMMISSIONER PARSONS: They use the same
16 words. Location. Well, they use the word locate,
17 replacement and expansion.

18 MR. MLOTEK: You mean the zoning
19 regulations or the D.C. Code provision which is --

20 COMMISSIONER PARSONS: The zoning
21 regulations borrow from the Act the three words.

22 MR. MLOTEK: Right.

23 COMMISSIONER PARSONS: And there's a
24 fourth word that's described in H2 that to me is
25 transfer.

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1 MR. MLOTEK: Right.

2 COMMISSIONER PARSONS: So there's four
3 things that are covered.

4 MR. MLOTEK: Right.

5 COMMISSIONER PARSONS: And that's why I
6 don't think the regulations are inconsistent if the
7 regulations are treating the word "location" as new
8 location, new land use.

9 MR. MLOTEK: Well, it means new land use
10 to locate a chancery in a site where there was not a
11 chancery before. That's what location clearly means
12 to us.

13 COMMISSIONER PARSONS: That's what I'm
14 trying to --

15 MR. MLOTEK: Not that it's a new
16 chancery. The chancery of Oman goes into the chancery
17 of France. That's not a new location, if that's what
18 your view is. That's your question is under the
19 Foreign Missions Act when it uses -- I mean, 4306 of
20 the Foreign Missions Act is essentially a zoning law.
21 It's an organic law or zoning regulation, which was
22 in this case adopted by Congress and placed upon the
23 existing zoning structure of the District of
24 Columbia.

25 Mr. Nettler is right, one of the few

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1 places that is the case -- Mr. Nettler is correct
2 when he says it was not the intent of Congress
3 through the enactment of the Foreign Missions Act to
4 completely vesicate the entire T of the District of
5 Columbia zoning laws as they apply to chancery. But
6 in some cases, of course, it supplants it.

7 And in this case location in the Foreign
8 Missions Act would be the same kind of concept you
9 would have in regular zoning law. It means the
10 location of a use, a chancery use for the first time
11 in a residential or SP zone. And that's required to
12 come to the FMBZA.

13 CHAIRMAN GRIFFIS: Indeed. Mr. Zaidain?

14 BOARD MEMBER ZAIDAIN: I think I was
15 following Mr. Parsons' questions. I think I had the
16 same kind of confusion I'm trying to pan out.

17 I'm very clear on 201.1M and your
18 argument with its applicability or lack thereof in
19 this case.

20 I think what I'm struggling with, and
21 maybe I'm missing your argument or you were to speak
22 to it was where 1002.1 comes in. Because that
23 regulation is clearly in the D Overlay and that talks
24 about locating, replacing or expanding a chancery,
25 which this is. And what I was trying to glean from

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1 your argument about the FMA and Mr. Parson's question
2 was are you saying it is that regulation, not 201.1M
3 but 1001.1 which is in conflict with the Foreign
4 Missions and that is what State Department came down
5 to testify?

6 MR. MLOTEK: No. There is no
7 inconsistency that we see in the Chapter 10 of the
8 zoning regulations and the Foreign Missions Act.
9 They do not prohibit.

10 When it talks about location --

11 BOARD MEMBER ZAIDAIN: Well, it also says
12 replace, and that's where I get hung up.

13 MR. MLOTEK: No. Replacement means you
14 knock down a building and put up a new one.

15 BOARD MEMBER ZAIDAIN: Okay.

16 MR. MLOTEK: That's what it means in a
17 land use and zoning context. It doesn't mean
18 replace. If you look at the legislative history of
19 the Act and the way it's been interpreted by
20 everyone, I mean even -- I mean anyone, any party.
21 No one has thought that the word replacement in the
22 Foreign Missions Act means replace the country of
23 France with the country of Oman.

24 BOARD MEMBER ZAIDAIN: Okay.

25 MR. MLOTEK: It means you replace the

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1 structure.

2 BOARD MEMBER ZAIDAIN: Okay. And then so

3 --

4 MR. MLOTEK: Otherwise you would have no
5 zoning --

6 BOARD MEMBER ZAIDAIN: And that helps me
7 with your argument.

8 And so expand, obviously we know what
9 that means.

10 Locate you're saying that's the original
11 location to the site?

12 MR. MLOTEK: Right.

13 BOARD MEMBER ZAIDAIN: Okay. So now I
14 understand your three arguments. Because to me
15 1001.21 is the chief regulation here. I'm pretty
16 clear on 201.1M and the fact that that applies to an
17 R-1 and it is not applying to a site that has the D
18 Overlay.

19 MR. MLOTEK: Correct.

20 BOARD MEMBER ZAIDAIN: This one is the
21 overriding regulation. So I just wanted to make sure
22 I was clear on your argument. Thank you.

23 CHAIRMAN GRIFFIS: Any other question of
24 the Board?

25 VICE CHAIRMAN MILLER: I have one.

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1 CHAIRMAN GRIFFIS: Ms. Miller?

2 VICE CHAIRMAN MILLER: This is somewhat
3 of a personal issue, I think, but since it was
4 addressed in the testimony. I think Mr. Massey just
5 said that with respect to the grandfather transfers
6 that are listed in your declaration that there wasn't
7 much community opposition. And my question is is
8 there any notice when you have these kind of
9 grandfather transfers to the public?

10 MR. MASSEY: I don't think so.

11 VICE CHAIRMAN MILLER: Okay. Thank you.

12 CHAIRMAN GRIFFIS: Anything else?

13 MR. MLOTEK: All right. If I could just
14 try to expound on that.

15 CHAIRMAN GRIFFIS: Well, I don't think
16 it's needed. Do you need expounding?

17 VICE CHAIRMAN MILLER: Not particularly,
18 no.

19 CHAIRMAN GRIFFIS: Indeed.

20 MR. MASSEY: I will say --

21 CHAIRMAN GRIFFIS: Objection, Mr.
22 Nettler?

23 MR. MASSEY: -- it certainly was for
24 Yemen. The neighbor became aware of it.

25 MR. MLOTEK: Well, I don't want to

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1 expound, I want to then ask a question. Can I do
2 that? Can I ask a question about what the intent of
3 Ms. Miller's question was?

4 CHAIRMAN GRIFFIS: Very well.

5 MR. MLOTEK: My understanding is that
6 when certificate of occupancy are issued they are
7 advertised, are they not? Is there not --

8 CHAIRMAN GRIFFIS: Certificate of
9 occupancies?

10 MR. MLOTEK: Are they --

11 CHAIRMAN GRIFFIS: Issued from the
12 District of Columbia?

13 MR. MLOTEK: Or was it only construction?
14 Construction. There's not notice given? Well, then
15 there isn't.

16 CHAIRMAN GRIFFIS: I don't know. There
17 may well be a process. I've never heard of it.

18 VICE CHAIRMAN MILLER: I'm sure it's
19 clearly different notice than when it's going to go
20 before the FMBZA is my point. And we can always draw
21 that to a conclusion of lack of community interest if
22 there's less notice.

23 MR. MLOTEK: Right. Except that a
24 community could come out after the embassy was there
25 and protest it as well. They did in this case.

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1 CHAIRMAN GRIFFIS: But I think the intent
2 or my understanding of Mr. Nettler might be talking
3 about is more of a -- well, I think we'll let it go
4 at that. There may well be announcements of decided
5 acts, whether a permit was issued or anything of that
6 nature. But that may be a different intention than
7 Ms. Miller's question.

8 Okay. Any other question of the Board?
9 Very well.

10 Thank you all very much.

11 MR. MLOTEK: Wait. Don't I have any --

12 CHAIRMAN GRIFFIS: Oh, you want to close.

13 MR. MLOTEK: Well, it says I have ten
14 minutes and 16 seconds, but I'm not going to take it.

15 First, in summary let me respond to Ms.
16 Miller's question. There are numerable things that
17 happen in the land use and zoning world in the
18 District of Columbia where certificates of occupancy
19 or construction permits or whatever the ultimate
20 permit in fact is are issued and that doesn't put to
21 rest the issue if there is opposition. The famous
22 antenna tower on Wisconsin Avenue being a stellar
23 case in point. So the fact that there is no advance
24 public notice that the chancery of Oman is going to
25 move into what was the chancery of France, the

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1 significance of that that there's no public notice,
2 is not really great in my opinion because if somebody
3 had a beef with it, if somebody had an opposition,
4 believe me we would have heard. People are not shy
5 here when it comes to zoning and land use, as we
6 know, bless their hearts. So I mean if somebody had
7 an objection, we'd have heard it. And I think the
8 testimony from Mr. Massey was simply that in the
9 course of these 22 years with these 11 different
10 sites, we never heard it.

11 Beyond that, let me just say in closing,
12 it doesn't matter on which ground you wish to analyze
13 this case. Whether you want to analyze it on the
14 grounds of what the history of prior cases was in
15 this case, whether you want to analyze it from the
16 standpoint of which law prevails; the Federal law or
17 the District zoning regulations. Whether you want to
18 analyze on the basis of whether the regulation that
19 Mr. Nettler hangs his entire case on, 201.1M applies
20 here or doesn't apply here. Whether you want to hang
21 it on the issue of the jurisdiction of this Board
22 which the courts have been very, very clear doesn't
23 exist. It exists only in the Foreign Missions Board
24 of Zoning Adjustment. There is no angle of this case
25 which possibly can be decided in favor of appellant

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1 here. It's not even a close case.

2 It's not like there are some good
3 arguments that are made, but we, the State
4 Department, prefer to take interpretation A as
5 opposed to interpretation B. None of them are close.
6 It's not a close case.

7 Mr. Nettler's trying to pick bones, for
8 example, with Mr. Massey's testimony about the nature
9 of the underlying zoning, except for the one case of
10 Finland which I concede we're not clear it was in a
11 commercial zone, and I still would like to go back
12 and check the zoning history of that to see. Even if
13 you strike that one off the list, there are still all
14 the others and there isn't a single case that can be
15 posed on the other side; that's the point.

16 The case of Sweden, which was mentioned,
17 was completely irrelevant because it had to do with
18 construction. Nobody challenged the point that
19 Sweden had a right to occupancy Cape Verde if the
20 Embassy of Sweden thought it could wedge itself into
21 this tiny little building that Cape Verde uses as a
22 chancery still to this day. The neighbors would have
23 been very happy. And my recollection of having
24 represented the Department of State in that case was
25 that the neighbors were saying that. We welcome them

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1 as a chancery if they want to live within this
2 building. They just can't knock the building down.
3 That was the issue. No one ever suggested that they
4 would not get a certificate of occupancy to occupy
5 that building. Only that they were not going to get
6 permission to tear it down. And the Foreign Missions
7 Board of Zoning Adjustment refused to grant them
8 approval in that case, and they were denied.

9 So that basically is our case. There is
10 no grounds here that the appellant really cites. And
11 I'll stop there.

12 CHAIRMAN GRIFFIS: Good. Thank you very
13 much.

14 I want to assess. Mr. Nettler, how long
15 do you need for your closing? Five or ten minutes?
16 Okay. When you're ready.

17 MR. NETTLER: Thank you.

18 Now, I know this going to seem somewhat
19 facetious, but I do have to commend Mr. Mlotek and
20 DCRA for, in my view at least, totalling confusing
21 what the position is that the appellants have taken
22 here and in my view also, doing a fair amount of far
23 reaching in terms of what the language of the statute
24 is, what the regulations are and what the process has
25 been since 1982 when the Foreign Missions Act was put

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1 into effect.

2 So what I would like to do is just focus
3 back onto a little bit of the history in the Foreign
4 Missions Act, the Zoning Commission's own actions,
5 what the issue here and how that issue plays out in
6 terms of the arguments that have been made here.

7 The first thing that should be know is --
8 and I think you probably know this to some extent
9 already, is that the Foreign Missions Act that was
10 adopted by Congress was a response to both the
11 Council's attempt and the Zoning Commission's attempt
12 in some limited circumstances to from the State
13 Department's view restrict the ability of foreign
14 missions to locate in certain areas around the city,
15 which they believe that they had been able to do
16 previously.

17 And one of the large debates that ensued
18 before Congress with Senator Moynihan leading in the
19 Senate and with Congressman Dellums leading it in the
20 House, was the issue as to recognizing that this
21 legislation was going to be adopted was how to make
22 sure that it was not going to undermine the
23 residential zones of the District of Columbia. And
24 to a great extent there was a lot of pull back in the
25 legislation in terms of how broad it was. Indeed,

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1 when it was first introduced it not only applied to
2 the District of Columbia but it applied to every
3 other jurisdiction around the country; New York, San
4 Francisco and other jurisdictions have quite a few
5 other foreign missions there, international
6 organizations. And because of some successful
7 lobbying on their part which was not successful by
8 the District you have that language in the preemption
9 provision that, unlike in the District of Columbia,
10 those laws are not preempted in other jurisdictions.

11 The laws of the District of Columbia, nevertheless,
12 and how the chancery location, expansion and
13 replacement regulations would apply were preempted.
14 And that's recognized by the courts subsequent to
15 that time, and by anyone who has participated in
16 these proceedings since then as well.

17 Another issue that was of large
18 importance and in fact NCPC was a very large part of
19 this before Congress, was in what to do with existing
20 chanceries both in terms of their ability to expand
21 and both in terms of if they weren't located were
22 because there hadn't have been in 1978 a diplomatic
23 zone that had already been created, what was going to
24 happen to them because prior to the District's
25 adoption of a comprehensive plan in 1986 NCPC had

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1 been adopting portions of the comprehensive plan,
2 including one that dealt with foreign missions and
3 provided in it provisions for dealing with situation
4 where you had existing chanceries in residential
5 zones and what would happen if those chanceries
6 either were replaced by other chanceries or what
7 would happen if those chanceries wanted to expand
8 themselves.

9 And you also had an additional issue that
10 was before Congress' mind when trying to deal with
11 this, and that was the fact that there were a number
12 of pending applications before the Board of Zoning
13 Adjustment to locate chanceries in particular areas
14 as well, and how were they going to deal with this
15 change of the law in applying those things.

16 And what Congress did was it carefully
17 set forth a means of replacing the District's zoning
18 regulations, historic preservation statutes and other
19 planning issues with an overriding scheme that was to
20 govern the location of any chancery, any chancery,
21 the replacement of any chancery, the expansion of any
22 chancery under a criteria, the six criteria that
23 you've dealt with now for almost 20 years.

24 And the second thing that it did was in
25 that section that we keep on referring back to here

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1 was it dealt with the situation involving both those
2 who had applications that were pending and those who
3 were existing chanceries that when the wash came out,
4 you weren't going to have them located in an area
5 that under the statute was going to allow for
6 chanceries to locate as a matter of right or which
7 were not going to be considered diplomatic zones.
8 Because there had to be a new -- and there was a new
9 rezoning that was done between NCPC and the Zoning
10 Commission working together to come up with a process
11 for adding additional zones that would be in the
12 Diplomatic Overlay.

13 And Congress did two things there. One,
14 it provided that for those who had applications
15 pending, that those applications be treated under the
16 law that existed prior to that time, so they weren't
17 going to be faced with any additional burdens in
18 terms of trying to locate where they wanted to
19 locate. And secondly, for those that existed, and
20 contrary to what the State Department said, there is
21 legislative history on this. For those that existed
22 in two Senate reports it stated that those that
23 existed that particular use, that particular use by
24 that chancery, was grandfathered. And that's the
25 term that they were focusing on because they were

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1 taking it directly from NCPC's Foreign Missions
2 element of the comprehensive plan and moving into the
3 Foreign Missions Act so that those entities would
4 have an ability to stay there and would not have to
5 face the prospect, since we're now leveling the
6 playing field in terms of what zoning regulations
7 would apply anymore to chanceries, would not have to
8 face reopening their location at those particular
9 sites to any FMBZA proceedings. They were
10 grandfathered. They were grandfathered just as some
11 office use in a residential zone may have been
12 grandfathered in 1958 when the zoning regulations
13 were adopted. They were grandfathered. The only big
14 difference was that unlike that use in 1958 that got
15 grandfathered -- we're not talking about a foreign
16 mission. Unlike that use in 1958 that got
17 grandfathered and when it changed or sold, or did
18 something else to its property in which it no longer
19 occupied it after 1958, there was going to be a
20 panoply of zoning regulations that would apply that.
21 Well, that wasn't going to happen with chanceries.
22 What was going to apply to it was the Foreign
23 Missions Act, the Foreign Missions Act criteria and
24 not the zoning regulations.

25 So to the extent that we're talking about

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1 discrimination or Congress already established to
2 some extent a setting apart of the way in which
3 chanceries would be treated under this scheme that it
4 was setting up. And it did so. And the Zoning
5 Commission was involved, Mr. Parsons was involved I
6 think both times in the hearings that were held on
7 adopting regulations to implement the Foreign
8 Missions Act.

9 We are not taking the position that any
10 of those regulations are inconsistent with the
11 Foreign Missions Act. We believe they're perfectly
12 consistent with the Foreign Missions Act. They took
13 the provisions dealing with the six criteria, and as
14 you know in Chapter 10 adopted the regulations and
15 the criteria in there and it doesn't distinguish
16 anywhere on the location issue between somebody
17 trying to locate on the site of something that used
18 to be a chancery, or is a chancery or may have been
19 occupied by a chancery ten years ago. The
20 chancery's vacated it, but nobody else has come in
21 there. That's not what it was dealing with. It was
22 dealing with the pure and simple issue of any foreign
23 mission wanting to locate in a particular area had a
24 process for it.

25 And the second thing it did -- and I'm

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1 glad to hear this from Mr. Mlotek admit it. Mr.
2 Mlotek, the State Department participated in that
3 second process, and that was to interpret the
4 provision that we're dealing with of 201.1M as it
5 would apply in non-diplomatic zone areas. We
6 recognize we're in a diplomatic zone here. But for
7 consistency purposes and for Mr. Mlotek's argument to
8 have any sense, which we don't believe it does, you
9 have to see how the statute works in pieces. Because
10 what Mr. Mlotek has admitted is that yes, when the
11 Zoning Commission adopted regulations that provided
12 for existing chanceries that were not located in
13 diplomatic zones to be limited only to that chancery
14 and no other chancery, and that's what 201.1M says,
15 the State Department objected to it.

16 And so what the State Department did in
17 response to that was they didn't file a lawsuit. They
18 didn't seek to have the regulations invalidated as
19 inconsistent with the Foreign Missions Act. What the
20 State Department did simply was violate it. They
21 have consistently violated that regulations, and he's
22 admitted to it. Violated that regulations because
23 they believed, they have taken the position that they
24 didn't have to comply with it because they thought it
25 was inconsistent with the Zoning Commission's

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1 regulations, recognizing that under the statute
2 adopted by Congress the Zoning Commission had the
3 authority to adopt those regulations, not the State
4 Department.

5 The response by citizens of the District
6 of Columbia, by organizations of the District of
7 Columbia, by people who participate in the zoning
8 process to any action taken by the Zoning Commission
9 adopting regulations is not to thumb their nose at
10 what the Zoning Commission does. It's either to
11 challenge it or wrong or comply with it. Instead the
12 State Department decided they would simply violate
13 every single time. And the fact that the people of
14 the District of Columbia weren't aware of it in most
15 circumstances until this thing happened, is no excuse
16 for allowing it to continue anymore.

17 And so what we have here is a process by
18 which the location of any chancery is to be judged by
19 six criteria wherever it's located in the District of
20 Columbia. That's what the regulation says. It
21 doesn't distinguish between situations where a
22 chancery previously existed there except if it's a
23 situation that comes under 201.1M. And that's not
24 this case, but if we want to be consistent, we got to
25 understand what the Zoning Commission did, how it

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1 adopted those regulations, what the responses were to
2 those regulations and what regulations apply today.
3 And what we say is the regulations adopted by the
4 Zoning Commission are consistent with the statute,
5 they're consistent with the legislative history,
6 they're consistent with common sense. They're
7 consistent with common sense because the big issue
8 that the Zoning Commission recognized when it finally
9 got to the point of that section, H2 -- I believe
10 it's H2. What the Zoning Commission recognized was
11 that given the impact of locating foreign missions
12 and chanceries in residential zones that one thing
13 the Zoning Commission was going to try and do was
14 protect those residential zones. And the only way it
15 figured it could protect them in any meaningful sense
16 when you had a chancery that was located there that
17 didn't belong there because of the way the area was
18 subsequently zoned, was to limit it to that chancery,
19 grandfather it just as the statute said. It was
20 grandfathered.

21 There's nothing in that section that says
22 anything about transfer. Nothing. And as far as my
23 dictionary go, "a" does not mean any. It means one.
24 That's all that "a" means. Not multiples of that.
25 And there's nothing in the statute that says it.

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1 And Congress was clear. The Senate
2 reports are very clear on what they were intending to
3 do. They were taking the National Capital Planning
4 Commissions' recommendation. They were inculcating
5 it into the statute so as to protect -- protect
6 existing chanceries on the one hand and to protect
7 the residents of District of Columbia in low lying
8 residential districts on the other hand. And that's
9 all that was done.

10 The fact that the State Department has
11 violated this and has conveniently convinced in some
12 circumstances the Zoning Administrator to go along
13 with it with nobody knowing about what was really
14 going on is not what's really before you. What's
15 really before you is whether the zoning regulations
16 are to be complied with and those zoning regulations
17 are pretty clear on their face as to what should
18 happen when a foreign mission wants to locate in the
19 District of Columbia and what should happen when a
20 foreign mission wants to locate in a D Zone and what
21 should happen when a foreign mission in a non-D Zone.
22 And what happens to the prior chancery it's, I think,
23 beyond argument to say that the regulations say
24 something other than what they specifically say. And
25 to say that they're inconsistent with the statute as

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1 a way of hanging your hat on an argument that the
2 State Department has made or to say that they can
3 thumb their nose at what the Zoning Commission does,
4 that's not the way we do things in the District of
5 Columbia, I hope. That's not the way the District of
6 Columbia expects us to do things.

7 A couple of more, I think, final point.

8 There are a number of misstatements made,
9 I think, by both DCRA on how the preemption applies,
10 by Mr. Mlotek in terms of what happened with Sweden,
11 what happened with Turkey, where Turkey was, where
12 all these other cases were. You know, these may be
13 cases in which there are some general principles
14 applied, but the one thing that none of them had ever
15 dealt with was the issue that we have before you.
16 And that is whether a foreign mission can locate in a
17 D Zone on the site of a former foreign missions,
18 whether it's been there for ten years, three years,
19 25 years and not come before the District of Columbia
20 agency that has the responsibility for determining
21 whether that use, that continued use, that use in
22 terms of what's gone on in that area, that use in
23 terms of its impacts may be different than the
24 existing use on that site.

25 And in the absence of any zoning

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1 regulations that can be applied in the specific
2 circumstances because of the way the Foreign Missions
3 Act works, in the absence of the historic
4 preservation process applying in those circumstances
5 in the way if there wasn't a chancery -- the clock
6 has stopped. Oh, I'm sorry.

7 We believe that this is the process that
8 is the appropriate one for having this issue
9 addressed and that the decision of the Department of
10 Consumer Regulatory Affairs should be set aside and
11 with directions that Yemen should be directed to the
12 Foreign Missions Board of Zoning Adjustment to file
13 an appropriate application.

14 Thank you.

15 CHAIRMAN GRIFFIS: Thank you very much,
16 Mr. Nettler.

17 Let's set this for decision making then.

18 I have in my records, Ms. Bailey will help me and
19 other Board members will help me in terms of the
20 submissions that need to come in. I have only noted
21 as of today that we'll get the background of the list
22 that is including the certificate of occupancy or
23 permit applications, whatever else was the supporting
24 documents on the State Department's list of those
25 properties.

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1 Ms. Bailey, do you have anything else?

2 MS. BAILEY: Mr. Chairman, I have DCRA
3 should provide the plat the shows the boundaries of
4 the fence and the iron gate that was previously
5 approved. I'm not quite sure if the Board still wants
6 that or not.

7 CHAIRMAN GRIFFIS: Sure. Why not? Is
8 that it?

9 MS. BAILEY: There were other things
10 discussed, but those were primarily the two things
11 that were asked for.

12 CHAIRMAN GRIFFIS: What other -- well --

13 MS. BAILEY: Whether the zoning
14 regulations is inconsistent with the Federal or local
15 statutes. For example, the Fair Housing Act.

16 CHAIRMAN GRIFFIS: No.

17 MS. BAILEY: No. And I'm not quite
18 whether -- actually identified the zoning of the
19 properties that are located on the list that the
20 State Department provided. If it doesn't, then that
21 would be something I'm assuming the Board may need.
22 That's the zoning of the --

23 CHAIRMAN GRIFFIS: Let's just get the
24 supporting documents on the list.

25 Okay. Thank you very much.

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1 I think we will leave the record open
2 also for findings and conclusions. How much time do
3 we need for that, Ms. Bailey?

4 MS. BAILEY: Well, Mr. Chairman, it
5 depends on when you're going to set this for a
6 hearing. Will that be in April?

7 CHAIRMAN GRIFFIS: I think it's safe to
8 say on the first -- April 6th at our regularly
9 scheduled public meeting.

10 MS. BAILEY: Yes, sir.

11 CHAIRMAN GRIFFIS: Okay.

12 MS. BAILEY: Submissions March 16th.
13 Responses 23rd. And then the findings would be the
14 30th of March.

15 CHAIRMAN GRIFFIS: 30th of March for the
16 6th.

17 Questions?

18 MR. MLOTEK: Yes. What submissions were
19 required of us, this additional submissions?

20 CHAIRMAN GRIFFIS: The background
21 documents on the list you provided.

22 MR. MLOTEK: Oh, I see.

23 CHAIRMAN GRIFFIS: There was stuff that
24 was going on in front here that we didn't see
25 anything about. I don't know whatever it was. Permit

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1 applications, certificate of occupancies, whatever
2 was in there.

3 MR. MLOTEK: And then proposed order,
4 findings of fact and --

5 CHAIRMAN GRIFFIS: Yes. Laying out that
6 you --

7 MR. MLOTEK: I'm just trying to make sure
8 I understand what they are.

9 CHAIRMAN GRIFFIS: That's correct. She'll
10 run through it again. We got a lot of time to get
11 all that in. And it's not that much.

12 MS. BAILEY: Repeat the dates, Mr.
13 Chairman?

14 CHAIRMAN GRIFFIS: Sure.

15 MS. BAILEY: March 16th will be the
16 submissions. 23rd of March if there are any
17 responses to those submissions. March 30th would be
18 the findings of fact. And then April 6th would be
19 the decision at the Board's public meeting.

20 And I must mention that the week of April
21 6th is shown on my calendar as the Easter weekend.
22 So, I don't know if that would be objectionable to
23 anyone.

24 CHAIRMAN GRIFFIS: Objectionable for the
25 submission on the 30th?

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1 MS. BAILEY: Findings of fact on the
2 30th, Mr. Chairman of March?

3 CHAIRMAN GRIFFIS: Isn't that what you
4 said?

5 MS. BAILEY: March 30th findings of fact.

6 CHAIRMAN GRIFFIS: Okay. I'm not clear
7 if it's objectionable. Yes?

8 MR. MLOTEK: That would not be a good
9 week, just I think from everyone's point of view
10 because it's school recesses, it's the religious
11 holiday.

12 CHAIRMAN GRIFFIS: You have until April
13 6th. That's when the homework will come to an end.
14 Actually, your homework is due March 30th. You're
15 saying in terms of attending the public meeting
16 there's difficulty on the 6th?

17 MR. MLOTEK: I think that would -- I
18 think a later date would be better, if possible.

19 CHAIRMAN GRIFFIS: Mr. Nettler?

20 MR. NETTLER: I'm fine with the 6th. If
21 he wants to do it later, I mean --

22 CHAIRMAN GRIFFIS: The next is the first
23 meeting in May.

24 MR. NETTLER: Well, I'd rather have it
25 the 6th then, I think. I'm sorry.

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1 CHAIRMAN GRIFFIS: Let me understand the
2 objection. It's problematic in terms of scheduling--

3 MR. MLOTEK: Attendance, right.

4 MR. NETTLER: I mean it's not like we
5 have any -- we don't participate on the 6th. It's we
6 listen to what you say, so if you're here --

7 CHAIRMAN GRIFFIS: That's true.

8 MR. NETTLER: I don't see why it should
9 be a problem if whether we're here or not here.

10 CHAIRMAN GRIFFIS: I was debating whether
11 I was going to come.

12 MR. MLOTEK: Well, we'll watch it on
13 webcast then.

14 CHAIRMAN GRIFFIS: See that. All of the
15 most important pieces.

16 I think I'd rather do that, otherwise I'm
17 going to extend it out until -- we have difficulty in
18 what we're getting caught up in setting up special
19 public meetings on every week which often gets us
20 into our schedule that is way off, which impacts
21 everybody.

22 Maybe we shouldn't meet on the 5th. Very
23 well, let's hold it on the 6th. If anything changes,
24 of course, we would have to give notification of
25 that. But at this point, the submissions would be due

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1 the 30th. Of course, that is our public meeting
2 schedule and it is, as Mr. Nettler has stated, our
3 deliberative session. No other information or
4 testimony would be provided, but you're welcome to be
5 here.

6 Any other questions or procedure due
7 dates on that?

8 Very well. We're going to take ten
9 minutes. We're going to let the next application and
10 appeal in the afternoon, set up and get ready. And
11 we're going to jump right into it when we return.

12 (Whereupon, at 4:17 p.m. a recess until
13 4:42 p.m.)

14 MS. BAILEY: The last case of the day,
15 this is an appeal of the Kalorama Citizen's
16 Association, pursuant to 11 DCMR ?? 310 and 3101,
17 from the administrative decision of David Clarke,
18 Director, Department of Consumer and Regulatory
19 Affairs from the issuance of Building Permit Nos.
20 B455571 and B455875, dated April 16, 2003,
21 respectively, to Montrose, L.L.C. to adjust the
22 building height to 70 feet and to revise penthouse
23 roof structure plans to construct a five story
24 apartment house in the R-5-D District. The appellant
25 is alleging that the under construction building is

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1 in violation of the building height, floor area ratio
2 and roof structure set-back requirements of the
3 zoning regulations. The property is located at 1819
4 Belmont Road, Northwest. Square 2551, Lot 45.

5 Mr. Chairman, there are several
6 preliminary matters before the Board at this time,
7 namely there is a motion from the appellants
8 requesting that the Department of Consumer and
9 Regulatory Affairs make documents available there
10 heretofore have been unavailable. There is requests
11 for intervenor or party status. And then lastly,
12 there is a request for dismissal of the application
13 from the property owner.

14 CHAIRMAN GRIFFIS: Good. Thank you very
15 much.

16 Let's establish intervenor party status
17 and then we can go on to the other motions and other
18 preliminary matters.

19 First of all, is there anyone present
20 currently that was not sworn in at the beginning of
21 the afternoon. Has everyone been sworn in?

22 If you would stand if you haven't been
23 sworn in, give your attention to Ms. Bailey on my far
24 right.

25 (Witnesses sworn)

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1 CHAIRMAN GRIFFIS: Okay. Is Mr. Gordon
2 Schwartz present? Can you come forward, please?

3 You're Mr. McAndrew, is that what you
4 just said?

5 MR. McANDREW: That's correct.

6 CHAIRMAN GRIFFIS: And can you just
7 repeat what you said so it's on the record?

8 MR. McANDREW: Yes. Gordon Schwartz
9 along with James and Mary McAndrew, Kevin Duffy and
10 Roy Paine are part of and in total the 1823 Belmont
11 Road Condominium Association. Because of work
12 schedules of the others, I'm here speaking for them.

13 CHAIRMAN GRIFFIS: Okay. Is Mr. Orloff
14 here, Jonathan Orloff? Okay.

15 You can stay right there, Mr. McAndrew,
16 if you wouldn't mind.

17 And Mr. Wilton? Laura Gubush? Donald
18 Brooks? Okay. And Ms. Hargrove?

19 If I could have you up here for a quick
20 second. If you wouldn't mind just introducing
21 yourself for the record?

22 MS. HARGROVE: My name is Ann Hargrove.
23 And we're going to have to shuffle our people
24 tonight.

25 CHAIRMAN GRIFFIS: It sounds fascinating.

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1 MS. HARGROVE: That's not what you wanted
2 to hear, but --

3 CHAIRMAN GRIFFIS: Not a preliminary
4 matter, I don't think.

5 MS. HARGROVE: It actually is because our
6 lawyer has jury duty and was unable to get out of it.

7 CHAIRMAN GRIFFIS: Oh, I see.

8 MS. HARGROVE: And so we do have to
9 change the order of the people who are speaking and
10 who is speaking for whom.

11 CHAIRMAN GRIFFIS: Okay. Well, let's go
12 to my first question. Ms. Hargrove, you've put in
13 for a request for party status but you're also
14 bringing the appeal.

15 MS. HARGROVE: I recognize we can't do
16 both.

17 CHAIRMAN GRIFFIS: Which would you like
18 to do?

19 MS. HARGROVE: But we were uncertain
20 because this contingency came up when we filed this
21 thing about how we could organize things. And so now
22 we'll just have to forgo the possibility of either my
23 husband or I being in that part of -- having a
24 separate appeal. Because we're going to both be on
25 the part of that's for Kalorama Citizen's

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1 Association.

2 CHAIRMAN GRIFFIS: I see. Okay.

3 Let's start with you, Mr. McAndrew, and
4 you're representing Schwartz and --

5 MR. McANDREW: Paine.

6 CHAIRMAN GRIFFIS: Did they put in an
7 application?

8 MR. McANDREW: Gubush.

9 CHAIRMAN GRIFFIS: I don't think they
10 did.

11 MR. McANDREW: I believe -- actually --

12 CHAIRMAN GRIFFIS: My point is this,
13 you've read the submissions by the Kalorama Citizen's
14 Association, have you not?

15 MR. McANDREW: Yes.

16 CHAIRMAN GRIFFIS: The issues attendant
17 to the appeal, is that correct?

18 MR. McANDREW: Yes. That's correct.

19 CHAIRMAN GRIFFIS: And do you think that
20 you are uniquely or distinctly impacted?

21 MR. McANDREW: The Kalorama Citizen's
22 Association will get into detail. But we are a
23 condominium association, one removed from 1819.
24 There's a building between us and them.

25 CHAIRMAN GRIFFIS: Okay.

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1 MR. McANDREW: The height of 1819 we feel
2 effects the light and air of our residents. It is the
3 towers over our structure as we face east. So the
4 rising sun and so on --

5 CHAIRMAN GRIFFIS: I understand that.

6 MR. McANDREW: The two top condominiums
7 on the top floor have outdoor decks. And this is on
8 the top of our floor building, and depending on how
9 you count the floors, it would be on top of the 5th
10 or 4th level look up to 1819 to a completely flat
11 solid unadorned wall that diminishes the view of
12 Adams Morgan and cast shadows on those two decks as
13 well as the common court. It is the -- our courtyard
14 has plants and a large stairway. It was positioned in
15 the middle of our common area --

16 CHAIRMAN GRIFFIS: Okay. Let me
17 interrupt you. I could understand your initial issue
18 of light, air. I can understand privacy on that.
19 You've also indicated in terms of your following
20 that the property value could diminish.

21 Let me just set out some clarity -- of
22 course, this is an appeal. It is not a variance
23 request. And so this will be based on very legal
24 issues of whether an error was created -- yes. Well,
25 whether an error was created or not. So in many

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1 respects, and I would anticipate in this respect, we
2 won't be hearing a lot of testimony about negative
3 impact or anything of that nature which may go to a
4 test for variance. Is that understood?

5 MR. McANDREW: I do understand that, but
6 as a citizen and living right there regardless of
7 your decision, it effects me.

8 CHAIRMAN GRIFFIS: I understand that. My
9 point, and to be very direct because I don't want
10 people to get the wrong impression of what the Board
11 cares about or doesn't care about, what you've just
12 stated to me right now I don't see any relevancy to
13 the appeal.

14 I understand there's severe relevancy for
15 you personally and on the block. And if this was a
16 variance, an area variance, a height variance or
17 anything of that nature, it would be perfectly
18 relevant. But in terms of the legal issues that we
19 need to conduct under an appeal, there seems limited
20 if any relevance here that we could even hear your
21 points.

22 So what I'd like to do is ask you whether
23 the concerns that you have representing the condo
24 association will actually be represented with the
25 KCA?

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1 MR. McANDREW: Yes.

2 CHAIRMAN GRIFFIS: Okay. Would you be
3 open to then joining in the appeal with KCA?

4 MR. McANDREW: Yes.

5 CHAIRMAN GRIFFIS: And then would KCA be
6 open to having additional -- I'm assuming just based
7 on the name, the Kalorama Citizen's Association, that
8 you actually do encompass the address. But in terms
9 of the specific names of the people, they could join?

10 MS. HARGROVE: Yes. The citizen's
11 association does encompass the area and has members
12 within that condo development as well.

13 CHAIRMAN GRIFFIS: Okay. And I think
14 that would be quite expeditious, but I think also
15 judicial in terms of how this appeal is going to run.

16 That doesn't preclude you from helping set up,
17 however you want to organize it or actually being
18 called as a witness if need be. That's going to be
19 left up to how you strategize in presenting your
20 case.

21 So I'm going to assume then that Schwartz
22 and McAndrew have also joined then the appeal under
23 the KCA.

24 Is the representative from Montrose here?

25 Is there any objection to that?

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1 VICE CHAIRMAN MILLER: Mr. Chair, I just
2 want to note for the record since Mr. Schwartz is not
3 here, that he says, as does Mr. McAndrew, that he
4 authorizes the Kalorama Citizen's Association to
5 represent him and to bind him in the appeal.

6 CHAIRMAN GRIFFIS: Thank you very much.

7 MS. BROWN: Mr. Chairman, Carolyn Brown
8 with the law firm of Holland and Knight on behalf of
9 the property owner, Montrose, L.L.C.

10 I just have a point of clarification.
11 When you say they're joining in the appeal, are you
12 saying that they're amending the appeal to encompass
13 more people or are they simply letting KCA represent
14 their views?

15 CHAIRMAN GRIFFIS: I think it's up to
16 them. I mean, on I think on the mere fact of what KCA
17 represents the area and the people that live there,
18 if I understand correctly, we'll get more on the
19 record in this application. It wouldn't take any sort
20 of amendment to the appeal, unless you see it
21 differently?

22 MS. BROWN: I have no objection.

23 CHAIRMAN GRIFFIS: Okay. Very well.

24 Let's continue down the list then and
25 look at Mr. Orloff of 1820 Belmont. Okay. Is Mr.

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1 Orloff present? Oh, yes, sir. If you wouldn't mind.
2 Just turn your microphone on and state your name and
3 address for the record?

4 MR. ORLOFF: Okay. Can you hear me?

5 CHAIRMAN GRIFFIS: Yes.

6 MR. ORLOFF: Good.

7 CHAIRMAN GRIFFIS: The question goes to
8 you also. Understanding what the appeal is and the
9 basis for the appeal, what will the Board will be
10 doing is hearing case presentation by all those that
11 are participating in this. We will be trying to
12 establish whether an error was created or not. In
13 reading your request for a party status, certainly
14 you don't like the structure by your own description
15 of it and adjectives.

16 MR. ORLOFF: That's clear.

17 CHAIRMAN GRIFFIS: I believe we've missed
18 a second part of your last, so I'll give you -- of
19 the answer to question six. It doesn't look like
20 I've paged down enough to give us. So, can you just
21 tell me how you would be significantly and distinctly
22 and uniquely effected in character or kind by the
23 proposed zoning action than any other persons in the
24 general public?

25 MR. ORLOFF: I'm not sure if you've ever

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1 seen the property, but to call it a tower is to
2 understate its relative height and presence compared
3 with the other properties on the block. I live
4 directly across the street. And we bought our home
5 in 1996. And I recall vividly not just falling in
6 love with our home or our home to be, but also the
7 block and the neighborhood. And while I don't own the
8 view, indeed that was no small consideration in our
9 decision to reside there and to make an offer and
10 eventually to purchase the property.

11 That part, so long as the structure
12 remains, will be taken away. I think I can't make it
13 more clear than that.

14 CHAIRMAN GRIFFIS: Okay. And that's
15 fully understood by the Board. But do you understand
16 what I say what we'll be dealing with in terms of the
17 appeal, which is my own characteristic, but very dry
18 legal issues.

19 MR. ORLOFF: Right.

20 CHAIRMAN GRIFFIS: And what we're going
21 to have to be doing is essentially dissecting the
22 regulation to see how the Zoning Administrator
23 implemented the regulations and whether they were
24 done correctly or not.

25 MR. ORLOFF: I think I do. May I simply

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1 ask, was there a variance asked for as requested in
2 this case?

3 CHAIRMAN GRIFFIS: Not that I'm aware of.

4 MR. ORLOFF: So that oddly enough because
5 it wasn't asked for, my views aren't taken into
6 consideration in the way they might otherwise be?

7 CHAIRMAN GRIFFIS: Not under a form of
8 appeal, that's correct.

9 MR. ORLOFF: Okay. Okay. That strikes
10 me as a situation where a variance might well have
11 been required.

12 CHAIRMAN GRIFFIS: That's probably
13 something that will be decided by the end of the
14 appeal.

15 MR. ORLOFF: Okay. Okay.

16 CHAIRMAN GRIFFIS: On the reverse, if
17 there was no forum for an appeal and a variance
18 wasn't pursued but may well have been, none of us
19 would be here nor would we hear about anything.

20 MR. ORLOFF: Well, I do understand, in
21 any event.

22 CHAIRMAN GRIFFIS: Okay. In which case,
23 I ask you the same question. Do you believe that
24 your interests in the appeal would be presented by
25 the KCA?

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1 MR. ORLOFF: I do.

2 CHAIRMAN GRIFFIS: And, Ms. Hargrove, is
3 there any objection to having Mr. Orloff?

4 MS. HARGROVE: No. He's a member of our
5 organization.

6 CHAIRMAN GRIFFIS: Excellent.

7 And Mr. Wilton was not here, is that
8 correct? And Mr. Brooks might be back. Okay.

9 Are there any others here today that
10 believe that they had requested party status or
11 intervenor status in this appeal that I have not
12 called upon?

13 Yes, sir?

14 MR. HARGROVE: Mr. Chairman, I'm Larry
15 Hargrove.

16 I believe Mr. Wilton's application for
17 party status may have contained some indication of
18 his desire to have KCA represent his interests in
19 this case in any event. I may be mistaken in that.
20 But I believe that's the case.

21 CHAIRMAN GRIFFIS: It's not jumping out
22 at me. It's not something I actually highlighted.
23 But I believe it's the intention of the Board that,
24 first of all, I'm going to have the description of
25 the Kalorama Citizen's Association given into the

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1 record. But I do not think the Board would preclude
2 it from accepting into its appeal those that
3 requested party status. And how you want to
4 enumerate who specifically is involved and who isn't,
5 I think we'll be a little bit liberal on. As I don't
6 see a great variation of the issues here. I think
7 they're well spelled out and I think they're very
8 direct. And so I think adding or subtracting names
9 off of the list of who is the direct participants
10 won't have any sort of prejudicial impact in any way.

11 So, if that's amenable to you, then I
12 think we can proceed in that fashion.

13 Oh, and I'm sorry, the ANC is represented
14 also. And if they had any comment or objection to
15 any of the requests or the actions that we've taken.

16 Who is that?

17 COMMISSIONER ROTH: Mr. Chairman, for the
18 record, my name is Alan Roth. I'm a Chairperson of
19 ANC 1-C. We don't have any objection to any of the
20 discussions that's gone before this. At the
21 appropriate time I do have one, I guess what would
22 amount to preliminary matter that hasn't been
23 referenced to Ms. Bailey, but would like the
24 opportunity to raise that.

25 CHAIRMAN GRIFFIS: Excellent. Okay.

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1 Don't let me forget it then.

2 Let me run down, because I think we've
3 now established all the requests for intervenor or
4 party status. And let me make sure. Schwartz, Mr.
5 Orloff, Mr. and Mrs. McAndrew, Ms. Gubush and Mr.
6 Brooks tentatively have joined the Kalorama Citizen's
7 Association. The only out is Mr. Wilton -- or did we
8 add Mr. Wilton into that? Did he have a statement in
9 his --okay. Very well.

10 Is that everyone's understanding? Did I
11 say Brooks. And Brooks, if I didn't say that.

12 Okay. And we'll look for clarification
13 from the citizen's association if any of those names
14 change or not.

15 Very well. We have additional
16 preliminary matters at this time. Why don't we hear
17 from the ANC to see what those are, because I think
18 we know what the others are.

19 COMMISSIONER ROTH: Thank you, Mr.
20 Chairman. Again, Alan Roth, Chairperson of ANC 1-C.
21 I'm accompanied by Commissioner Brian Weaver, who is
22 the single member district for the district in which
23 this is located, 1-C-03.

24 My dilemma is this: Council Member
25 Catania this evening is conducting his annual

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1 oversight hearings for all the ANCs in Ward 1, and
2 I'm required to be down at the Council at about 6:35.

3 I think it's doubtful, unless you're planning to go
4 very late this evening, that we're going to get to
5 the point where either the ANC has the ability to put
6 on its case and Commissioner Weaver in addition to --
7 obviously want to make a brief statement on behalf of
8 his constituents, he's also a fact witness to one
9 very important fact. And by the same token, I
10 certainly would like the opportunity to be able to
11 cross examine witnesses for the DCRA and the
12 developer.

13 Under those circumstances, I'm not sure I
14 know exactly what to do other than to beg your
15 indulgence and hope that we can structure the
16 proceedings in such a way that we can preserve our
17 rights. Because I probably have to leave here by
18 about 6:15 in order to make that oversight hearing.

19 CHAIRMAN GRIFFIS: Okay. I think it
20 makes sense that we would end our proceeding this
21 afternoon at or around 6:00. So I think might
22 accommodate that schedule. We'll see how far we get
23 through this. Of course, being an optimist, I think
24 we'll finish it in an hour. But if not, we'll
25 obviously set a new date for this.

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1 I think it makes sense for the Board to
2 do that as we've been through a very long day, and
3 you obviously had to sit through another appeal of
4 great complexity.

5 So I'll assess upward about 6:00. If that
6 changes, of course everyone's here and we'll figure
7 out what we do with that. Okay.

8 COMMISSIONER ROTH: Thank you, Mr.
9 Chairman.

10 CHAIRMAN GRIFFIS: Then the next, we had
11 a motion -- I'm just taking this essentially
12 chronologically. Now we had a motion from the
13 Kalorama Citizen's Association. And let Ms.
14 Hargrove, are you prepared to go forward today
15 without the documents requested?

16 MS. HARGROVE: The documents have been
17 provided and we're very thankful for that. They came
18 very quickly this past week. So we now have them.

19 CHAIRMAN GRIFFIS: Okay.

20 MS. HARGROVE: We sent a copy of the
21 letter over there, and I think that facilitated
22 matters.

23 CHAIRMAN GRIFFIS: Do we have them? We
24 have the documents?

25 MS. HARGROVE: No. Because they're not -

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1 -

2 CHAIRMAN GRIFFIS: Okay. All right.

3 MS. HARGROVE: I apologize for that.

4 CHAIRMAN GRIFFIS: Well, they're in so
5 we'll get them.

6 MS. HARGROVE: But I didn't realize they
7 didn't get them.

8 CHAIRMAN GRIFFIS: Let's make sure that
9 we get those so we can move along with that.

10 And my understanding is that that would
11 be the extent then of your motion?

12 MS. HARGROVE: Yes. But before we
13 finish, I hope you'll let us explain how we're going
14 to change things around a bit tonight.

15 CHAIRMAN GRIFFIS: Yes.

16 MS. HARGROVE: Because our lawyer is
17 missing.

18 CHAIRMAN GRIFFIS: Right. We'll get to
19 that procedure.

20 Now, we have also now just been given a
21 motion to dismiss. Ms. Hargrove, are you in receipt
22 of this also from the property owner?

23 MS. HARGROVE: I have not received it.
24 May I suggest at this point Larry Hargrove will speak
25 to this matter and related matters, because he will

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1 take Ms. Ferster's place tonight in the way we're
2 going to proceed.

3 CHAIRMAN GRIFFIS: Okay. I'm sorry, Ms.
4 Ferster is going to be representing you, is that
5 correct?

6 MS. HARGROVE: Yes. She was to be our
7 lawyer, but they would not let her get out of jury
8 duty. She found out late Friday night that she could
9 not get out of it, although she had managed to do it
10 three times before.

11 CHAIRMAN GRIFFIS: I understand.

12 MS. HARGROVE: And therefore, she
13 couldn't be here. So we have rearranged the way we
14 have to do things.

15 CHAIRMAN GRIFFIS: Okay. So it may be
16 advantageous to spend the hour and then set something
17 up later. Okay.

18 That being said, yes, Ms. Miller?

19 VICE CHAIRMAN MILLER: I was just
20 wondering, is she planning on coming after jury duty
21 because sometimes jury duty ends like at 5:00 or so.

22 MS. HARGROVE: She didn't show up, so I
23 assume that she felt that she had to stay until the
24 end. And I didn't have a cell phone number for her.

25 But if the case is continued, I'm sure she'll be

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1 back with us, assuming she doesn't hit again with
2 something like that.

3 VICE CHAIRMAN MILLER: Okay.

4 CHAIRMAN GRIFFIS: Ms. Hargrove, is that
5 enough time? Did you review it?

6 MS. HARGROVE: It's impossible to review
7 it in this short time. So I would ask Mr. Hargrove
8 to comment on it at this point since he will be our
9 counsel for tonight.

10 CHAIRMAN GRIFFIS: Actually, you don't
11 need to comment on it yet. I just wanted to know if
12 you were able to read the first page. The first page
13 and a half.

14 I'm going to have the developer's
15 representative introduce herself and then just
16 briefly outline what the motion is. Yes?

17 MS. BROWN: Thank you, Mr. Chairman.
18 Good evening members of the Board.

19 For the record again my name is Carolyn
20 Brown from the law firm of Holland and Knight. And
21 I'm here on behalf of Montrose L.L.C., the owner of
22 the property.

23 We are moving to dismiss the appeal on
24 two grounds. First, two of the three issues raised
25 in the appeal are not part of the October 2003

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1 permits that are being challenged. That is, the
2 appeal addresses the height of the roof deck and
3 railing and it also challenges the set-backs for the
4 penthouse areas. And neither of those issues is
5 addressed in the October 2003 permits.

6 The only potentially relevant issue is
7 FAR. The appellant has argued that the roof deck and
8 railing and their height exceed the 1910 Height Act
9 and that the east and west walls of the penthouse are
10 not properly set-back. These two items were only
11 authorized under the original March 11, 2003 building
12 permit and when the revision permits were submitted
13 in October, absolutely no changes were made to either
14 of these elements. Consequently, they are not before
15 you so they cannot be discussed or raised or
16 addressed. The Board's jurisdiction is limited to
17 the scope of the appeal before you, and that's
18 strictly the October permits.

19 And there is precedent for that from this
20 Board in a case that was heard last year and decided
21 in July. And that is BZA Appeal 16934 for 922
22 Constitution Avenue, Northeast. And there the ANC
23 had questioned the side yard issues for a particular
24 building. They appealed a foundation permit, failed
25 to appeal the building permit application and

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1 therefore, could not reach the issue of side yards.
2 And that case was dismissed on that basis that they
3 had appealed the wrong permits.

4 So in the same instance the two issues
5 dealing with penthouse set-backs and the 1910 Height
6 Act cannot be addressed by this Board is our
7 position.

8 The second ground for dismissal is on the
9 doctrine of latches and estoppel. On page 10 of our
10 statement we go through the standard of review for
11 that. And the complainant, in this case Montrose,
12 must show that it acted in good faith on the
13 affirmative acts of the District to make expensive
14 and permanent improvements in reliance on those
15 affirmative acts of the District and that equities
16 are in their favor in dismissing the appeal. And we
17 meet that standard because Montrose went forward with
18 its construction in good faith based on the
19 affirmative act of the District issuing the March
20 11th permit. They've made expensive and permanent
21 improvements in excess of \$700,000 on construction
22 costs plus another \$160,000 in cost overruns directly
23 attributable to the delays caused by this appeal.
24 And you will find the affidavit of Cail MontPlaisir
25 who is the President of Taurus Enterprise, and Taurus

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1 is the managing member of Montrose L.L.C. And that's
2 attached as Exhibit G to our submission.

3 And the equities are in Montrose's favor
4 because here we have a situation where they have a
5 building permit that was issued over six months ago
6 or almost a year ago. And they have put forth the
7 considerable expense of improving this property. And
8 there is no basis for the appeal to go forward on the
9 Height Act issue or the penthouse set-back issues.
10 And the FAR is within what's allowed. And to allow
11 the appeal to go forward at this late date would
12 serve a great injustice to Montrose L.L.C.

13 So those are the basis for requests for
14 dismissal.

15 CHAIRMAN GRIFFIS: When was the original
16 permit of 11 March posted on the property?

17 MS. BROWN: It was posted after it was
18 received. I know there's dispute as to whether or
19 not it was posted. It was inside the building in an
20 area where it could be visible to the public, but it
21 was an location where it could not be torn down, is
22 my understanding. And I can also state that there
23 are several other instances where the community
24 should have known that the building was going up to
25 that height. I would argue that if they tried to now

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1 appeal the March 11th permit it would be untimely, or
2 to get to the issues of penthouse set-backs or the
3 1910 Height Act of the building itself. Because they
4 had ample opportunity to do that. They had the March
5 11th permit. If they supposedly didn't have notice
6 of that, there was an ANC meeting, the Transportation
7 Committee of ANC meeting 1-C had a meeting on the
8 public space permit that Montrose had applied for for
9 a curb cut, at which time the elevation drawing was
10 shown to the community which had the penthouse shown
11 on it. It was in shadow because it was not in flush
12 with the front elevation, but it was clearly shown on
13 the elevation drawing.

14 Next, the --

15 CHAIRMAN GRIFFIS: What was the date on
16 the ANC meeting?

17 MS. BROWN: That was March 19th, 2003.

18 Third, the Kalorama Citizen's
19 Association, according to the Intowner newspaper
20 article submitted with their prehearing statement
21 claims that the KCA had a meeting in May and
22 discussed this particular project as being
23 unattractive, too tall for the neighborhood and
24 that's why they're going to be filing for, I believe,
25 a grant to get a historic survey conducted.

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1 Third -- in addition, they also had
2 notices that would have been published in the D.C.
3 Register for list of permits issued. There would
4 have also been a separate notice mailed to the ANC.

5 Fourth, they also have photographs that
6 they submitted with their September 10th submission
7 or letter to the Building and Land Regulation
8 Administration. And construction was actually
9 completed to that height by September 1st. So they
10 had the time period between September 1 and September
11 10th. And even at the time that they filed this
12 appeal on November 10th, they explicitly choose not
13 to appeal the March 11th permit. In their meetings
14 that they had in September, I believe it was, they
15 anticipated that an argument might be raised that the
16 appeal would be untimely as to the March 11th permit
17 and they -- the KCA even passed a resolution stating
18 to the extent we need it, let's get a waiver so we
19 can file an appeal of the March 11th permit
20 notwithstanding any untimely issue. And still, they
21 choose not to appeal the March 11th permit.

22 So any of those issues pertaining to that
23 original permit are not before the Board.

24 CHAIRMAN GRIFFIS: Okay.

25 MR. HARGROVE: Well, as you know, Mr.

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1 Chairman, we received this voluminous of motion to
2 dismiss about what? Fifteen minutes ago. And
3 obviously haven't been able to absorb is, let alone
4 prepare a response to it.

5 CHAIRMAN GRIFFIS: Let's set aside the
6 latches and estoppel at this point.

7 MR. HARGROVE: I beg your pardon?

8 CHAIRMAN GRIFFIS: We'll set aside
9 latches and estoppel at this point. What I'd like to
10 do is just run through. There's a chronology that
11 has been established by the statements.

12 MR. HARGROVE: Well, to that end let me
13 submit for the record a chronology which we had
14 prepared just to help all concerned keep the fact of
15 the case.

16 CHAIRMAN GRIFFIS: Agreed.

17 MR. HARGROVE: I have this in written
18 form. I'll be happy to go through it.

19 CHAIRMAN GRIFFIS: That's would be
20 perfect. Provide it to the staff on the right.

21 COMMISSIONER PARSONS: Mr. Chairman, I
22 just wanted to ask Ms. Brown why it was that this was
23 delivered to us a couple of hours ago? I mean,
24 certainly you were aware of these proceedings. And i
25 find this very disruptive.

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1 MS. BROWN: I can understand your
2 concern. I spoke with staff about it, because I had
3 the same concern. It just was not prepared in time
4 for this hearing.

5 COMMISSIONER PARSONS: So when did you
6 know that the hearing was scheduled?

7 MS. BROWN: We did know. We just went
8 over the motion to dismiss items this past week.

9 COMMISSIONER PARSONS: How long ago did
10 you know that this hearing was scheduled?

11 MS. BROWN: Since the date it was
12 scheduled?

13 COMMISSIONER PARSONS: Which is what?
14 Two or three months ago?

15 MS. BROWN: I believe it was scheduled in
16 December.

17 COMMISSIONER PARSONS: Why is it then
18 that this arrived this afternoon?

19 MS. BROWN: As I said, I understand your
20 predicament that it's not conducive necessarily to
21 our proceedings, and I apologize to the extent it's
22 disruptive. But nevertheless, it is before you and it
23 needs to be considered.

24 COMMISSIONER PARSONS: An apology doesn't
25 help me. It really doesn't. I mean, I've tried to go

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1 through this here in the last ten minutes and it's a
2 very complex case. I just don't know to deal with it,
3 other than to ignore it for the time being. I mean,
4 I don't know how we can proceed. I really don't.

5 I'm not asking for your advice. I want
6 to talk about it with my colleagues.

7 But part of your argument is the citizens
8 didn't get to the act of appealing. And then they
9 should be denied the opportunity for a hearing. And
10 that's essentially the way I feel about your behavior
11 of bringing this in at the last minute. So, it's a
12 two way street. But I don't know how to deal with
13 this this afternoon other than to ignore it and
14 proceed with the proceedings and deal with your
15 motion later.

16 MS. BROWN: The only response I would
17 have to that is that there is case law, I believe
18 Smith vs. the District of Columbia Board of Zoning
19 Adjustment that if dispositive motions are before the
20 Board, that they normally must be considered first
21 for a case before you can get to the merits. And that
22 there is no rule within the Board's regulations that
23 require a motion a dismiss to be filed at a certain
24 time. If there were, I certainly would have complied
25 with it.

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1 COMMISSIONER PARSONS: So that's a
2 failure in our regulations?

3 MS. BROWN: Yes, sir. It may be.

4 COMMISSIONER PARSONS: Well, I don't know
5 how to proceed, Mr. Chairman. We could take an hour
6 recess and try to absorb this.

7 CHAIRMAN GRIFFIS: If you would turn on
8 your microphone, Mr. Hargrove.

9 MR. HARGROVE: If I could suggest that at
10 a minimum we be permitted the opportunity to present
11 a formal and written response to this motion, which
12 would then be considered by the Board in the due
13 course of its business.

14 We would not have filed this appeal had
15 we not regarded it as timely. So we're not
16 completely unfamiliar with the question.

17 CHAIRMAN GRIFFIS: We don't often have
18 people coming in and saying this is an untimely
19 appeal. But go ahead.

20 MR. HARGROVE: It happens rarely if at
21 all, I'm sure.

22 CHAIRMAN GRIFFIS: Right.

23 MR. HARGROVE: I could make a few oral
24 responses without having read any more than the first
25 page of the response, but having heard counsel's

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1 comments. And that would, at any rate, give the Board
2 a preliminary idea as to the basis for rejecting any
3 motion to dismiss on the grounds of timeliness. Would
4 that be in order now?

5 COMMISSIONER ROTH: Mr. Chairman? Mr.
6 Chairman, can I be recognized on this?

7 CHAIRMAN GRIFFIS: Sure.

8 COMMISSIONER ROTH: First, it goes
9 without saying that none of the facts or alleged
10 facts stated by Ms. Brown are evidence. And, in
11 fact, I take issue and I'm certain that KCA takes
12 issue with virtually everyone of the so called facts
13 that she has set forth. And we have evidence and
14 intend to put on evidence that will address each and
15 ever one of those points, starting with from our
16 standpoint the March 11th permit and the March 19th
17 meeting of the ANC's Planning Zoning and
18 Transportation Committee which addressed a curb cut
19 and not the rest of the building. And continuing on
20 right up through September and October. And I don't
21 see how the motion can be disposed of without giving
22 the parties the opportunity to put on factual
23 evidence to refute the statements that Ms. Brown has
24 made.

25 Second, with regard to this claim of

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1 latches and estoppel. Latches and estoppel are
2 equity doctrines. My recollection from law school is
3 that equitable doctrines like those cannot be invoked
4 by a party who has unclean hands. And I was hoping we
5 wouldn't have to go there, but we again are prepared
6 to put on substantial evidence that relates to the
7 question of the developer's good faith and to the
8 question of unclean hands. And we have a lengthy
9 series of evidentiary pieces to put in on that
10 question.

11 And so, again, I don't see how the motion
12 can be disposed of without hearing the evidence.

13 As it turns out, much of the evidence
14 related to the timeliness issue that's being raised
15 by Ms. Brown is also central to how the case
16 developed as it did and how we came to have knowledge
17 of this problem or these problems asserted in the
18 KCA's appeal. And so I'm not enough of a D.C.
19 Administrative Procedure Act expert to know whether
20 or not this is permissible, but it seems to me that
21 the sensible thing to do under the circumstances
22 would be to allow the party's cases to go forward,
23 absorb all of the facts and all of the evidence
24 relevant both to the substance of the appeal and the
25 timeliness question and then the Board at the

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1 conclusion of the case can decide whether or not
2 sufficient evidence has been put in to resolve the
3 timeliness issue and at the same assuming that the
4 motion to dismiss is rejected on that basis, go ahead
5 and decide the case on the substance.

6 CHAIRMAN GRIFFIS: Well said. And, in
7 fact, that's why I was conferring with the Board. We
8 have three options that we've often done in cases
9 like this. Two of which you've evidenced. One we
10 could go forward right now and hold in abeyance the
11 motion or the motions and hear the case today to see
12 how far along we get today.

13 Second, we just set this for another date
14 and have submissions based on the motions and we pick
15 up the motions as a preliminary matter when we
16 resume, and then go into the case presentation if it
17 so warrants and the motions are denied.

18 And the third, we won't need to get into
19 because it hasn't been brought up yet.

20 Now, what I'm doing is just checking a
21 quick date to see what our total and full options
22 are. And so let me hear from staff.

23 Okay. Let me hear if there's any
24 objections from those that are participating in this.

25 Of course, Kalorama Citizen's Association, the ANC

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1 and the developer. I'd like to set this for March
2 9th, the first case in the afternoon, which will be
3 different than what today is. It will be the first
4 case called after our break.

5 MS. BROWN: Mr. Chairman, I believe
6 you've just called for comments from the parties
7 involved, is that correct?

8 CHAIRMAN GRIFFIS: Yes.

9 MS. BROWN: Okay.

10 CHAIRMAN GRIFFIS: Were you guys talking
11 when I was talking?

12 MS. BROWN: Can you believe that?

13 CHAIRMAN GRIFFIS: Let me start first
14 down here. The Kalorama Citizen's Association, any
15 objection to proceeding in that fashion?

16 MS. HARGROVE: We have no objection,
17 except to point out that we're worried about it
18 continuing too long because of the difficulty of the
19 building being rapidly constructed.

20 CHAIRMAN GRIFFIS: Well, that's exactly
21 why I'm actually bumping a case off to get this on in
22 two weeks. Our calendar opens up June now. So if I
23 was to pick a fresh date for us to set aside, I could
24 only pick June. I am going to move another appeal in
25 that afternoon so that I can call this one first. And

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1 that was my concern also. Next week if we could do
2 it, first of all, get it get a little bit of a
3 squeeze in terms of your response to the motions.
4 Secondly, we have a full afternoon.

5 Although -- no, I don't think that makes
6 sense. I think March 9th is going to be the closest
7 date in at this point.

8 MR. HARGROVE: Mr. Chairman, could I ask
9 how you would propose to proceed with the case on
10 that date? Taking the motion first or taking the
11 case --

12 CHAIRMAN GRIFFIS: What I'm going to do
13 if it's amenable, and it looks like it should be on
14 the 9th of March, first case in the afternoon. The
15 Board's going to ask for brief written submissions in
16 response to the motion. I don't think I'm going to
17 keep the record for responses to responses. The
18 information is in, we'll have everyone submit.

19 We'll have all that read, prepared for.
20 And what I would anticipate is the Board would come
21 in and deliberate on the motion. If we had
22 additional questions or clarifications that we
23 needed, we would ask questions.

24 I would not at this point be anticipating
25 that we'd have presentations necessarily. Of course,

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1 I always change my mind on things. But I wouldn't
2 anticipate having lengthy presentations of the
3 motion. We dispense of the motion and then that
4 would set us for what the rest of the afternoon was.

5 Does that answer your question or not?

6 MS. BROWN: I have a question.

7 MR. HARGROVE: Yes. I think we would hope
8 to have some opportunity for a succinct presentation
9 on that date on the motion.

10 CHAIRMAN GRIFFIS: Very well.

11 MS. HARGROVE: I do have one question,
12 and that is whether it wouldn't be appropriate for
13 people to put submissions in advance to the Board's
14 deliberation so that they can be read by everyone
15 before you --

16 CHAIRMAN GRIFFIS: On the motion?

17 MS. HARGROVE: Before you are hit cold on
18 the day of the --

19 CHAIRMAN GRIFFIS: I'm sorry if I wasn't
20 clear. They will be required in a week.

21 MS. HARGROVE: Oh, I see.

22 CHAIRMAN GRIFFIS: Which is why I didn't
23 want to set it for next week even if we could squeeze
24 it in because it won't give us time to prepare.

25 MR. HARGROVE: You're saying one week

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1 from today?

2 CHAIRMAN GRIFFIS: Don't worry about
3 date, because -- Ms. Bailey will get through all the
4 specific dates. But let's big picture process.

5 MR. HARGROVE: Mr. Chairman?

6 CHAIRMAN GRIFFIS: Yes.

7 MR. HARGROVE: One of the process
8 questions. To the extent that facts in evidence are
9 a part of our response to the motion, are we -- will
10 the Board accept affidavits as adequate, as a simple
11 statement adequate? How should that be handled?

12 CHAIRMAN GRIFFIS: Affidavits? You mean
13 in terms of somebody attesting to the truthfulness of
14 the fact that you're stating?

15 MR. HARGROVE: Yes, or refuting
16 statements that Ms. Brown made earlier.

17 CHAIRMAN GRIFFIS: That's fine. I don't
18 think the required threshold for the Board would be
19 affidavit notarized or anything of that nature. I
20 think statements are fine. Of course, it would be
21 brought up then for cross examination if needed in
22 the case presentation. So I think statements would
23 be fine.

24 MR. HARGROVE: Okay. Thank you.

25 CHAIRMAN GRIFFIS: Let's get through

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1 dates. Yes?

2 MS. GISOLFI GILBERT: May I just weigh in
3 one aspect of this motion --

4 CHAIRMAN GRIFFIS: Could you give the
5 name for the record, please.

6 MS. GISOLFI GILBERT: I'm sorry. Laura
7 Gisolfi Gilbert representing the Department of
8 Consumer and Regulatory Affairs.

9 First, I'd like to say that I'm in
10 partial support of the motion filed by Ms. Brown on
11 behalf of the property owner. I would not be
12 supporting the arguments of latches and estoppel.
13 You know, this is not three years from now --

14 CHAIRMAN GRIFFIS: Well, put it in
15 writing. We'll read it for the 9th.

16 MS. GISOLFI GILBERT: But what I did want
17 to say for today is that on a certain level I have to
18 second, even though I am representing the department,
19 I do think that, you know, we get into these long two
20 and three hour hearings on motions. And if the
21 motion is going to require testimony, then I think
22 that the proposal that we keep the issue of time
23 limits before the Board, because I certainly am not
24 relinquishing the department's position on the issue
25 of time limits, but by the same token I don't think

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1 it makes a lot of sense to spend three hours the next
2 time we come here arguing the motion and hearing
3 testimony on the motion, when we probably could have
4 handled the whole case in that period of time. And
5 then at the end of the case, you could --

6 CHAIRMAN GRIFFIS: Absolutely understood.

7 These are issues that are not new to the Board. We
8 hear timeliness in every appeal that we have, laches
9 and estoppel often given to us. What we need to do is
10 now fold that into the specifics of this case.

11 I think with the filings the week before,
12 we'll have no problem dispensing with it very
13 quickly.

14 How is the 9th of March? Any objection
15 to the first in the afternoon by the government, Ms.
16 Brown?

17 MS. BROWN: No objection. I'm just
18 clarifying that we are postponing it; that's what
19 before us now instead of arguing even just the
20 jurisdictional question?

21 CHAIRMAN GRIFFIS: Each moment that ticks
22 by --

23 MS. BROWN: Okay.

24 CHAIRMAN GRIFFIS: -- our decision is
25 being made for us.

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1 Yes. It looks like we are continuing on
2 this case, and so that afternoon is done.

3 Okay. Now, what I want to do is
4 establish as much as we can so we don't waste time
5 doing the procedures.

6 First of all, let me ask the KCA how much
7 time did they think they'll believe they'll need for
8 their case presentation?

9 MR. HARGROVE: We'd need the full 60
10 minutes, Mr. Chairman.

11 CHAIRMAN GRIFFIS: Okay. Good.

12 Other questions I can answer, I will get
13 through. Ms. Bailey's going to run through all the
14 specifics; when it's due, when you're coming back.
15 But other questions of procedure requirements,
16 anything of that nature. If there are none, I
17 obviously will take them up later, but Ms. Bailey,
18 would you mind?

19 MS. BAILEY: Mr. Chairman, to give the
20 participants the maximum amount of time, I would
21 suggest March 2nd unless you feel otherwise for the
22 submissions to be filed. And that should give the
23 Board sufficient time, I think, to get the packages
24 out.

25 CHAIRMAN GRIFFIS: Absolutely. March 2nd,

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1 that's a full week. No, that's two weeks.

2 MS. BAILEY: Actually, that's two weeks.

3 MR. HARGROVE: That's good.

4 CHAIRMAN GRIFFIS: Okay. Any
5 difficulties with that? That's submission addressing
6 the motion only. The motion is what we're talking
7 about taking additional submissions for at this time.

8 Are there other anticipated submissions
9 that the appellant's going to be making?

10 MR. HARGROVE: Well, we'll have some
11 written submissions in the form of summaries and
12 testimony on the case in chief.

13 CHAIRMAN GRIFFIS: Okay.

14 MR. HARGROVE: At the time that we get to
15 that.

16 CHAIRMAN GRIFFIS: Okay. In the ANC
17 anticipating any other additional documentation?

18 COMMISSIONER ROTH: We will have some
19 additional documents to submit for the record as part
20 of the case in chief.

21 CHAIRMAN GRIFFIS: Your case
22 presentation?

23 COMMISSIONER ROTH: Yes. I don't
24 anticipate that our case presentation would take more
25 than 15 minutes, maybe less.

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1 CHAIRMAN GRIFFIS: But, of course, you
2 guys are the ones that are on time --

3 COMMISSIONER ROTH: Pardon me? I'm
4 sorry?

5 CHAIRMAN GRIFFIS: I can't restrict your
6 time. I can restrict everybody else's.

7 Ms. Brown, are you anticipating other
8 submissions into the application?

9 MS. BROWN: No, I'm not. And I can tell
10 you that we probably anticipate no more than 10 to 15
11 minutes in our case.

12 CHAIRMAN GRIFFIS: And that's fine.
13 Okay. I'm going to ask -- well, first of all, we're
14 set for the first case in the afternoon on the 9th.
15 If there are other things that can be done ahead of
16 time, submissions, anything of that nature, it would
17 be very advantageous for everyone involved that they
18 come in. They come in and also are served to
19 everyone else so that everyone will be aware of what
20 we're looking at.

21 Clearly we have a requirement for the
22 submission date of any response to the motion to
23 dismiss, and that is on the 2nd of March. And, of
24 course, that is by 3:00 into the Office of Zoning.
25 And, of course, all those submissions need to be

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1 served on everyone else who has now been established
2 as a party, intervenor or other aspect of this case.

3 So if you don't know how people want to
4 be served, or if you don't rather, I would clearly
5 take the time now that you have and make sure
6 everyone is aware of where and how people are going
7 to be served.

8 Okay. Any other questions I can answer
9 then on procedure?

10 COMMISSIONER ROTH: Mr. Chairman?

11 CHAIRMAN GRIFFIS: Yes.

12 COMMISSIONER ROTH: I guess I have to
13 consult with KCA about this and probably informally
14 with my own fellow commissioners. But I assume
15 there's no problem or no objection if the ANC and the
16 KCA want to make a joint submission in response to
17 the motion to dismiss?

18 CHAIRMAN GRIFFIS: Oh, I don't see any
19 problem with that.

20 COMMISSIONER ROTH: Okay. Just wanted to
21 clarify that. Less paper for you?

22 CHAIRMAN GRIFFIS: Well, that's true. I
23 think it has -- there's more burden on you to get the
24 approval to do that in order, but that's something
25 that you guys can do.

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1 COMMISSIONER ROTH: Okay.

2 CHAIRMAN GRIFFIS: Okay. Anything else
3 then? Any other clarifications? Yes?

4 MS. GISOLFI GILBERT: Yes. I was just
5 trying to make a clarification about another matter,
6 the documents that we provided to the appellants?

7 CHAIRMAN GRIFFIS: Yes.

8 MS. GISOLFI GILBERT: In response to
9 their motion.

10 CHAIRMAN GRIFFIS: Right.

11 MS. GISOLFI GILBERT: And I didn't really
12 think of those things as necessarily being a part of
13 the record, but I suppose now since they --because
14 all of the plans are not necessarily a part of the
15 record.

16 CHAIRMAN GRIFFIS: First of all, what are
17 the documents that you provided?

18 MS. GISOLFI GILBERT: We provided
19 mechanical drawings --

20 CHAIRMAN GRIFFIS: Are they the permit
21 documents?

22 MS. GISOLFI GILBERT: We provided a FAR
23 computation of a handwritten FAR computation. And
24 what was the other --

25 MS. HARGROVE: The height certification

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1 material.

2 MS. GISOLFI GILBERT: Oh, height
3 certification which was -- I think is already in the
4 -- the height certification by the architect for the
5 builder.

6 MS. HARGROVE: There were two height
7 certifications. One at the beginning of the project,
8 which I believe was done by Gladys Hicks as an
9 outside contractor under self certification. And one
10 that was required either by Danzil Noble. And we
11 were asking for the initial one that had been done,
12 as well as the latter one.

13 CHAIRMAN GRIFFIS: Okay.

14 MS. BROWN: Mr. Chairman, to the extent
15 that any of those documents pertain only to the
16 original permit, I would object to their entry into
17 the record.

18 CHAIRMAN GRIFFIS: Understood. I don't
19 think I can take up the objection until we actually
20 process whether it's timely or not, since I'm
21 assuming that's the basis of the objection. Which is
22 an interesting point and one of the complications I
23 foresee is that we come in and if we do start looking
24 at what's in or what's out based on the base building
25 permit or the revised permit, how are we going to be

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1 able to assess that without both documents?

2 MS. BROWN: I would believe that you are
3 only allowed to look at what's part of the revised
4 permit, and that your scope is simply limited to
5 that. Whether or not those comply and whether
6 there's any error in those documents.

7 CHAIRMAN GRIFFIS: Right. Is the
8 appellant in receipt of the architectural documents?

9 MS. HARGROVE: We have been interested in
10 them all along, but I must say that that comment
11 appears to me to be in conflict with what she said
12 earlier, which is that she wanted us to make our
13 appeal on the basis of the original permits. We
14 never did get all of those materials. And, in fact,
15 our appeal was based on the latter permits. So just
16 which permits does she think we can legally have and
17 not have?

18 MS. BROWN: I'd be happy to respond if
19 the Chairman would like me to.

20 CHAIRMAN GRIFFIS: That's fine. Because
21 I didn't have the same view.

22 MS. BROWN: No. I believe my views have
23 been misrepresented or misconstrued.

24 We're not in the habit of telling an
25 appellant how they need to couch their appeal. What

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1 we have before us is only an appeal on the October
2 6th and October 16th 2003 permits. I'm not
3 suggesting that they do anything with the March 11th
4 permit other than that you do not consider it because it's
5 not before you.

6 CHAIRMAN GRIFFIS: Right. She's saying
7 that she wants to preclude me looking at the 11 March
8 permit document.

9 MS. HARGROVE: My problem with that is
10 that she said, if I understood her correctly earlier,
11 that we should have appealed on the basis of the
12 original permits.

13 CHAIRMAN GRIFFIS: That's true. She did
14 make that statement.

15 MS. HARGROVE: So if she made that
16 statement, how can she now deny us --

17 CHAIRMAN GRIFFIS: Because you have to
18 listen to the second part of the statement and which
19 is the basis of the motion where it says you should
20 have -- you didn't, it's not timely.

21 MS. HARGROVE: We asked for them and
22 never got them.

23 MR. HARGROVE: Mr. Chairman, we'll have
24 an opportunity to address the question.

25 CHAIRMAN GRIFFIS: Listen, I'm not

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1 expressing an opinion or anything. I'm just making
2 sure that everyone's clear on what's simply being
3 said today. And this is my quandary, because we will
4 run into this and the Board obviously has to make the
5 decision.

6 Ms. Miller?

7 VICE CHAIRMAN MILLER: Mr. Chairman, I
8 don't think we should be precluding what the
9 appellant can submit, particularly in connection with
10 their response to the motion to dismiss. I mean, it
11 may come in and if we decide that the issue is not
12 timely, then we won't consider it later in our
13 substantive deliberations.

14 CHAIRMAN GRIFFIS: I understand.

15 BOARD MEMBER ETHERLY: I would agree, Mr.
16 Chair. And I believe that it was Ms. Gilbert's
17 question that kind of got us there with respect to
18 the provision of a copy of what she provided to the
19 appellants.

20 CHAIRMAN GRIFFIS: Right.

21 BOARD MEMBER ETHERLY: And I would
22 probably suggest for those documents at this point,
23 perhaps the Board can just hold off on receiving
24 those. We'll receive all the documentation related
25 to the motion to dismiss and then probably can make a

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1 determination at that point as to whether the
2 additional that Ms. Gilbert provided to the appellant
3 would be useful for us.

4 CHAIRMAN GRIFFIS: Okay.

5 BOARD MEMBER ETHERLY: I think the issue
6 that Ms. Brown is getting to is the additional
7 documents, of course, will speak to some extent on
8 the height issue. And that really is the issue that
9 Ms. Brown is arguing. That you can perhaps talk
10 about FAR and maybe penthouse, but not height. But
11 that's to be decided. So, I would say hold off on
12 the documents right now.

13 CHAIRMAN GRIFFIS: Why did you want the
14 mechanical documents?

15 MR. HARGROVE: Mr. Chairman, we felt that
16 in order to prepare our appeal, we were entitled to
17 the plans as they were submitted.

18 CHAIRMAN GRIFFIS: Right. My very
19 question goes to your written motion and it asks it
20 for all architect's and mechanical drawings.

21 MS. HARGROVE: Part of the reason --

22 MR. HARGROVE: That's correct. We wanted
23 the mechanical drawings because, first, because they
24 were part of the plans --

25 CHAIRMAN GRIFFIS: Let me understand,

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1 because there just may be matter of schematics I
2 want to clear up. Were you looking for mechanical
3 electrical plumbing drawings or were you actually
4 looking for the architectural documents?

5 MR. HARGROVE: We were looking for the
6 drawings relating to the mechanical aspects of the
7 project regardless of which character they had.

8 CHAIRMAN GRIFFIS: Okay. I don't need to
9 belabor this, but I'm not sure I'm understanding.
10 What is a mechanical aspect of the project?

11 MR. HARGROVE: One of the issues has to
12 do with the so called attic.

13 CHAIRMAN GRIFFIS: And what's mechanical
14 about that?

15 MR. HARGROVE: Well, that's what we
16 wanted to find out.

17 CHAIRMAN GRIFFIS: So you're saying there
18 might be mechanical, you know, air handling units up
19 there which would establish it as an attic?

20 COMMISSIONER ROTH: Mr. Chairman --

21 MR. HARGROVE: We wanted to find out --
22 we wanted to find out what the use of all the space
23 in the structure was including the attic.

24 CHAIRMAN GRIFFIS: Okay.

25 MR. HARGROVE: Which is at issue. And

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1 the mechanical drawings being a part of the plans, we
2 felt that we were entitled to have in order to
3 prepare our appeal.

4 CHAIRMAN GRIFFIS: Okay.

5 MR. HARGROVE: They were not of principle
6 importance, but certainly in order to know what the
7 project was fully, we needed to have all of the plans
8 on the base of which the permit --

9 CHAIRMAN GRIFFIS: I don't disagree. I
10 was just interested to know the importance of that to
11 call out specifically the mechanical drawings.

12 Yes?

13 COMMISSIONER ROTH: Mr. Chairman, one of
14 the issues in the case is the characterization and
15 both actual or anticipated use of the space that the
16 developer labeled an attic.

17 CHAIRMAN GRIFFIS: Right.

18 COMMISSIONER ROTH: The utility of
19 getting the mechanical drawings would be to ascertain
20 what if any use was being made of that space.

21 CHAIRMAN GRIFFIS: Right.

22 COMMISSIONER ROTH: Now I think as it
23 turns out the drawings don't show any mechanicals in
24 that space.

25 CHAIRMAN GRIFFIS: Right. If I read this

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1 then, you're actually requesting the architectural
2 and mechanical drawings, not the architect's
3 mechanical drawings, which I'm not sure I'd pay an
4 architect to do mechanical drawings. But don't get
5 me involved.

6 MS. BROWN: Mr. Chairman, not to belabor
7 the point but I will just for a second.

8 CHAIRMAN GRIFFIS: Sure.

9 MS. BROWN: I have no objection to the
10 DCRA providing any documents to the appellant, it's
11 just what comes into the record. But point in fact
12 I'd say 99 percent of the documents pertaining to the
13 original permit are already part of the record. They
14 have already been submitted as part of their
15 prehearing --

16 CHAIRMAN GRIFFIS: By whom?

17 MS. BROWN: By KCA in their prehearing
18 statement.

19 CHAIRMAN GRIFFIS: Okay.

20 MS. HARGROVE: And I might also add in
21 terms of what Mr. Etherly --

22 CHAIRMAN GRIFFIS: It's a small set of
23 documents if 99 percent of them are in here. I mean,
24 as far as the exhibits I have, we have a couple of
25 plans in a section and, you know, a couple of other

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1 things. I mean, this is not a full permit document
2 set. It may be pertinent to what we have.

3 Okay. Do you have full sized sets of
4 these?

5 MS. HARGROVE: We have full sized sets of
6 these, which we reduced for the record. We've not
7 used all the drawings because they were not pertinent
8 to the particular appeal items that we wanted to
9 raise.

10 CHAIRMAN GRIFFIS: Okay. And that's
11 fine. Then that's what you should. You should edit
12 them and give us what you think is needed.

13 Okay. Then I'm just going to request --
14 yes, Mr. Parsons?

15 COMMISSIONER PARSONS: Ms. Brown, in your
16 motion you mentioned you went through the good faith
17 effort made by your client to get this before the
18 public. And you mentioned a series of drawings;
19 elevations. You also mentioned a perspective tonight
20 that clearly showed the penthouse. If that's part of
21 your argument, I think they should be closed somehow.

22 MS. BROWN: I'd be happy to provide them.

23 COMMISSIONER PARSONS: Maybe they're
24 already a part of the 90 percent.

25 MS. BROWN: I don't know if they are not.

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1 I would have to check with the architect.

2 COMMISSIONER PARSONS: I think it would
3 be helpful if it does become an issue, we don't have
4 to stall --

5 MS. BROWN: I'd be glad to provide them.

6 CHAIRMAN GRIFFIS: Okay. Good point.
7 Just some clarity about when, the date and where they
8 were presented, of course, would give some context.

9 Okay. So you're in receipt of the 11
10 March permit documents, is that correct?

11 MS. HARGROVE: We are in receipt of the
12 latest batch of things. We never did get all of the
13 documents we requested involving the original plans.
14 We were told they were lost.

15 CHAIRMAN GRIFFIS: What are you missing?

16 MR. HARGROVE: In fact, there seems to be
17 an issue --

18 MS. HARGROVE: In fact, that's one of the
19 issues we raised before.

20 MR. HARGROVE: -- that whether the set of
21 documents that we thought related which related to
22 the original project, were in fact the originally
23 submitted plans. There was a report, if I'm not
24 mistaken, by the developer at one point that the
25 whole set of plans had been lost and had to be

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1 resupplied to DCRA by the developer. We have what
2 purports to be a full set of plans on the project
3 from the date of the initial permit, which was
4 actually 2002 through to the second set of permits,
5 which is the basis for our appeal.

6 Although we can't attest to the
7 authenticity of those, but presumably they relate to
8 the full project beginning in late 2002 and
9 continuing to the present time.

10 MS. HARGROVE: We only recently got them
11 however. If you look at the total span of time, it
12 took considerable work with DCRA with FOIAs and
13 everything else to get the set of plans which may or
14 may not be the original plans and the revised plans.
15 And we did not see the full elevations even with one
16 side still missing that I think were never put
17 forward in the plans until sometime in September.

18 CHAIRMAN GRIFFIS: Okay. Well, here it
19 is. Not to waste everyone's time. I'm here. What
20 do you want? I mean, you're not sure of what you have
21 or don't have or whether they're original or not.
22 What can we get into the record at this point so that
23 we all are looking at the same thing with the
24 understanding of the detail of this appeal?

25 MR. HARGROVE: Well, Mr. Chairman, we

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1 were prepared to proceed on the basis of the material

2 --

3 CHAIRMAN GRIFFIS: Okay. Well, don't
4 give it up so easily.

5 Ms. Gilbert, what's on record with this
6 application. You have documents that revise the
7 permit that were issued on October 2003 and you have
8 the full permit set that was issued for 11 March
9 2003? Essentially looks like it's -- oh, there it is.

10 MS. GISOLFI GILBERT: I can't say what's
11 been submitted to the BZA.

12 CHAIRMAN GRIFFIS: I don't care what's
13 submitted. What do you have?

14 MS. GISOLFI GILBERT: Okay. What we
15 have? I believe we have a full set of plans of the
16 original --

17 CHAIRMAN GRIFFIS: So you have a full set
18 of the March 11th?

19 MS. GISOLFI GILBERT: Yes.

20 CHAIRMAN GRIFFIS: And you obviously have
21 the documents that were needed to revise the permit
22 for the October?

23 MS. HARGROVE: There are still two things
24 missing that would be very useful. I don't know
25 whether the applicant ever submitted them, although

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1 they should have. We do not east and west
2 elevations, and they are crucial to prove a point of
3 light and air, although I realize we can't take that
4 up now on the effects of people who live nearby. And
5 without those elevations, you can see fully how the
6 whole scheme is laid out.

7 We have no elevations. Exterior
8 elevations for east and west. It is relevant to the
9 exterior wall issue.

10 CHAIRMAN GRIFFIS: I see.

11 MS. HARGROVE: So if they're available,
12 we want them. And if they're not, we need to ask why
13 we don't have them.

14 CHAIRMAN GRIFFIS: Okay. Ms. Ogunneye,
15 did you have something to say? I just need you to
16 first of all, you just need to grab a mike and then
17 you're going to have to give me your name for the
18 record.

19 MS. OGUNNEYE: I'm Faye Ogunneye, the
20 Chief Zoning Review Branch DCRA.

21 My question to you was are these the
22 elevations on the party wall side?

23 MS. HARGROVE: Yes. Both sides.

24 MS. OGUNNEYE: Right. Usually that's not
25 required, because it's not exposed wall. If it was

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1 external, then it would be required.

2 CHAIRMAN GRIFFIS: Okay. But part of the
3 documentation is the roof plan, is that correct?

4 MS. OGUNNEYE: Correct.

5 CHAIRMAN GRIFFIS: Okay. Then why don't
6 we provide into the record the permit sets and the
7 revised permit sets.

8 MS. GISOLFI GILBERT: Of the plans?

9 CHAIRMAN GRIFFIS: That's correct.

10 MS. GISOLFI GILBERT: The entire plans,
11 architectural and mechanical. You don't need
12 plumbing and electrical and all that?

13 CHAIRMAN GRIFFIS: I don't want plumbing
14 and electrical. I don't think we need structural. I
15 don't think we need civil. Well, structural you
16 might need.

17 MS. GISOLFI GILBERT: Structural.

18 MS. HARGROVE: We don't want to belabor
19 this point unduly, but it is our contention that
20 those drawings are required. It is clearly now an
21 exterior wall.

22 CHAIRMAN GRIFFIS: I know, but that's not
23 something that we can argue right now. I imagine it
24 will come up in your case.

25 MS. HARGROVE: Well, if you can possibly

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1 ask them to please get us the drawings, we would be
2 grateful.

3 CHAIRMAN GRIFFIS: Actually, that's what
4 I just did.

5 MS. GISOLFI GILBERT: I think that Ms.
6 Ogunneye just stated that those drawings were not
7 required.

8 CHAIRMAN GRIFFIS: Okay. Cut to the
9 discussion about the specifics. I'm sorry, you were
10 actually talking when I said I want into the record
11 the permit drawings, the architectural, mechanical
12 and structural for the March 11th issue and then the
13 revised documents that were required for the October.
14 That should be well sufficient for this Board to
15 understand the issues that have been raised at this
16 point. Good.

17 Everyone clear?

18 How long do you need get them over to the
19 office?

20 MS. OGUNNEYE: Of all the documents?

21 MS. GISOLFI GILBERT: Do you need them
22 before March 2nd or --

23 CHAIRMAN GRIFFIS: Oh, yes.

24 MS. GISOLFI GILBERT: Okay.

25 CHAIRMAN GRIFFIS: Ms. Bailey, we can

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1 them submitted with the submissions to the motion, is
2 that correct? That's two weeks.

3 MS. BAILEY: Yes, sir.

4 MS. GISOLFI GILBERT: That's what I said,
5 March 2nd.

6 MS. BAILEY: Now, are we talking about
7 being reduced or are we talking about the first set.

8 MS. GISOLFI GILBERT: Let me ask you,
9 which do you want? If we have to do a full sized
10 set, we don't want to do a bunch of -- I mean, we
11 could do one full sized set of plans.

12 CHAIRMAN GRIFFIS: What size piece are
13 they on? 24x36? You know, half sized sets would be
14 perfect.

15 MS. GISOLFI GILBERT: Half sized.

16 CHAIRMAN GRIFFIS: We're going to need to
17 read these things. I can't have 8? by 11s. That's
18 the problem. And we can always copy those by 11 by
19 17s. Okay.

20 MS. GISOLFI GILBERT: Are we saying we
21 need five copies of these?

22 CHAIRMAN GRIFFIS: Yes.

23 MS. GISOLFI GILBERT: Five copies.

24 CHAIRMAN GRIFFIS: At least. Ms. Bailey?

25 MS. BAILEY: No, sir. We would need

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1 about --

2 CHAIRMAN GRIFFIS: Twenty.

3 MS. BAILEY: Well --

4 CHAIRMAN GRIFFIS: That's what we require
5 for submissions. How many do we actually need?

6 MS. BAILEY: Is it possible to get ten?

7 MS. GISOLFI GILBERT: I'll do my best. If
8 not, whatever I can't get in the big sizes, I'll do
9 the 8? by 11.

10 CHAIRMAN GRIFFIS: No.

11 MS. GISOLFI GILBERT: No? 11 by 17?

12 Okay.

13 CHAIRMAN GRIFFIS: Yes. Make sure that
14 half size sets are served on all the participants.

15 MS. GISOLFI GILBERT: Okay.

16 CHAIRMAN GRIFFIS: And then make sure we
17 get at least two sets of half sized into the Office
18 of Zoning.

19 MS. GISOLFI GILBERT: Okay.

20 CHAIRMAN GRIFFIS: And I'll come down and
21 make copies of them. As long as Ms. Bailey lets me
22 in the office after hours.

23 Okay. What else?

24 MS. GISOLFI GILBERT: Now, I had
25 difficulty getting a set for myself because of money

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1 issues within the department as to who -- half sized
2 sets. Okay. At least ten half sized sets. Fine.

3 MS. OGUNNEYE: For the record, I just
4 wanted to note that the east and west elevations we
5 won't be able to make available because those are
6 interior party walls and there's no way you can draw
7 up such elevations unless --

8 CHAIRMAN GRIFFIS: For total clarity, Ms.
9 Ogunneye, you don't have those drawings, is that
10 correct?

11 MS. OGUNNEYE: We don't have them because
12 they cannot be produced.

13 MS. GISOLFI GILBERT: They were not
14 submitted, is that correct? Is that what you're
15 trying to say?

16 CHAIRMAN GRIFFIS: They're not submitted
17 as part of the permit documents?

18 MS. GISOLFI GILBERT: They were not
19 required to be submitted, is that what you're
20 saying?\

21 MS. OGUNNEYE: Right.

22 MR. HARGROVE: Mr. Chairman, I think it's
23 worth pointing out that whether or not they were
24 required to be permitted, these walls are by no means
25 interior party walls.

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1 CHAIRMAN GRIFFIS: I understand that.
2 And the only reason I'm stopping is we're getting
3 into the substance of the case. And, I mean, look,
4 this is not new issues for the Board. So you have to
5 be patient with us and understand why I might be
6 directing us to move somewhere else. Because it's
7 only to create its own efficiency. There's no reason
8 to argue this at this juncture.

9 Yes, Mr. Roth?

10 COMMISSIONER ROTH: Mr. Chairman,
11 accepting as a matter of fact that DCRA does not have
12 those plans, is it appropriate to ask the developer
13 whether they have them, although we're not required
14 to have them submitted. And if they do, can we have
15 a set. We asked once before --

16 CHAIRMAN GRIFFIS: You can take it up
17 outside of the forum. The only reason why I say that
18 is because I'm not sure what the pertinence be. If
19 we're looking at whether the Zoning Administrator
20 made an error in granting a permit, how is it
21 pertinent to this appeal that we have documents into
22 the record that the Zoning Administrator is now
23 saying they didn't look at.

24 COMMISSIONER ROTH: With trying not to
25 get too deep into the facts of the case --

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1 CHAIRMAN GRIFFIS: I can tell you and I
2 can fully understand, I've read all the submissions.
3 I'm prepared to go forward with this case this
4 afternoon. I know that a roof plan will show me what
5 I need.

6 COMMISSIONER ROTH: Are you talking about
7 the exterior wall issue?

8 CHAIRMAN GRIFFIS: That's correct. I
9 understand your issues and I think we can figure it
10 out with the documentation that will be submitted.

11 COMMISSIONER ROTH: Okay.

12 CHAIRMAN GRIFFIS: Okay. Anything else?
13 Okay. Do we need to restate the schedule?
14 Everyone's clear on what's happening? Excellent.

15 Yes.

16 MS. GISOLFI GILBERT: Just one last
17 thing. Then my understanding with respect to the
18 documents that we provided to the appellants in that
19 we will not submit them in advance of the hearing,
20 but we will have copies available on March 9th, is
21 that correct?

22 CHAIRMAN GRIFFIS: Nope. Everything's
23 coming in early.

24 MS. GISOLFI GILBERT: Okay. Everything's
25 coming in by March 2nd.

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1 CHAIRMAN GRIFFIS: Everything. I think
2 we're trying to be nice and we've come --

3 MS. GISOLFI GILBERT: Including the
4 additional documents that we provided --

5 CHAIRMAN GRIFFIS: That's correct.

6 MS. GISOLFI GILBERT: -- in response to
7 appellant's motion.

8 CHAIRMAN GRIFFIS: If they're going to
9 address it, we'd better know it.

10 MS. GISOLFI GILBERT: Okay. Very good.
11 Thank you.

12 CHAIRMAN GRIFFIS: Okay. Good.

13 If there are any other questions or
14 clarifications, of course the Office of Zoning staff
15 is very helpful and they will answer quick questions.

16 If not, then we will see you on the 9th of March,
17 first case in the afternoon. Is that correct?
18 Excellent.

19 Is there any other business for the Board
20 at this time, Ms. Bailey?

21 MS. BAILEY: No, Mr. Chairman.

22 CHAIRMAN GRIFFIS: Very well. Thank you
23 very much. Then I can adjourn the 17th of February
24 2004.

25 (Whereupon, the meeting was adjourned at

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